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**POST-BREXIT EUROPEAN UNION: FUTURE OF  
THE ENGLISH COMMON LAW INFLUENCE**

Richard Mantosh

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# POST-BREXIT EUROPEAN UNION: FUTURE OF THE ENGLISH COMMON LAW INFLUENCE

Richard Mantosh\*

## Abstract

The summary of my Master Thesis is one that aims to analyze the legal impacts that arise out of the United Kingdom (UK) seceding from the European Union (EU), with particular reference to the future status and role of English Common Law's influence in post-Brexit EU.

The first part of the thesis comprises of my introductory statements. In the second part, I have delved into the historical underpinnings that gave rise to these legal systems. In the third part, I have analysed the main features, similarities and differences of these two legal systems. In the fourth part, I have analysed how the EU and CJEU, at present, is a fusion of common and civil law elements. In the fifth part, I have analysed the ramifications of the exit of English Common Law's influence, after Brexit. In the sixth part, I have analysed the future status of English Common Law in the EU, with its remaining member states. In the seventh part, I have analysed the economic effects of Brexit, particularly in reference to EU actor's usage to adjudicate on commercial disputes drawn up on English Common law. The eighth part of the thesis comprises of my concluding remarks & summary.

**Key words:** Brexit, Constitutional Law, Common Law, Civil Law, Trade Law, European Union Law, International Law, Court of Justice of the European Union, European Parliament, Dispute Resolution, Commerce, United Kingdom, World Trade Organization, European Commission, United Nations, Treaty/Functioning of the European Union.

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**LIST OF ABBREVIATION**

For the purpose of simplification:

- 1) European Union will be known as EU.
- 2) United Kingdom will be known as UK.
- 3) Court of Justice of the European Union will be known as CJEU.
- 4) Treaty of the Functioning of the European Union will be known as TFEU.
- 5) Treaty of the European Union will be known as TEU.
- 6) Member of European Parliament will be known as MEP.
- 7) United Nations will be known as UN.
- 8) World Trade Organization will be known as WTO.
- 9) English Common Law and Common Law are interchangeable terms.
- 10) Roman Civil Law, Continental Civil Law and Civil Law are interchangeable terms.

## **PART 1: INTRODUCTION**

My motivation to write this Master Thesis is two-fold. Firstly, on a personal level, I have always been interested in how the legal systems outside the common law countries function. Secondly, on a professional level, as a Lawyer coming from a Common law country (India) and studying in a Civil law country/continent (Germany/Europe), has indeed allowed me to analyze this unique and relevant Master Thesis topic, from a bird's eye view. It has further deepened my knowledge on the Common law and taught me fundamental aspects underpinning the Civil law.

Before I define the problem, I would like to provide some relevant preface. The national legal systems of countries around the world are mainly divided into one of the two main 'train of thought' jurisprudence systems: Common law (also known as English Common law) and Civil law (also known as Roman Civil law). Out of all these countries, Common Law, is at present one of the most adopted legal systems, covering about 30% of the world's population {including countries like England, India, Australia, United States of America (except Louisiana), Canada (except Quebec), etc.}. Whereas, Civil Law, covers about 23% of the world's population (including countries like Germany, France, Italy, China, etc.).<sup>1</sup>

The United Kingdom (UK) has been part of the European Economic Community (as it then was) since 1st January 1973. With UK's 2016 European Union (EU) Membership referendum, 51.9% of its population had voted to secede or exit from the EU. The UK government had thereafter triggered Article 50 of the Treaty of the Functioning of the European Union (TFEU) and is now set to secede from the EU on 29th March 2019. This exit has been popularly

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<sup>1</sup> <https://www.sweetandmaxwell.co.uk/about-us/press-releases/061108.pdf> - Page 1.

characterized by the media as "Brexit" (British Exit).<sup>2</sup> The UK, based on the legal principles of English Common Law, has influenced, inter-alia, the European institutions such as the European Parliament and Court of Justice, since its accession.

The problem arises when the UK exits the EU in 2019 and by this unprecedented demerger, there is bound to be many legal impacts on the EU, its institutions and the various substantive-cum-procedural laws that govern the EU citizens.

Hence, my structure of analysis includes analysing those legal impacts which arises out of Brexit, in particular reference to the future status and role of English Common Law's influence in post-Brexit EU. Whilst analysing the future status and role of English Common Law's influence, I have aimed to also examine various facets and aspects surrounding this relevant issue, including the exit of English Common Law influence from the European Union, the future status of English Common Law in the European Union, and the European Union actor's usage of English Common Law.

In each part of the main text of this thesis, I have made every endeavour to provide my findings in a concise yet complete structure. In addition to that, I have also provided my analysis towards the same. I am hopeful that my research will add to the knowledge data-base of this very relevant 'hot potato' legal topic.

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<sup>2</sup> <https://www.bbc.com/news/uk-politics-32810887>

## **PART 2: HISTORICAL BACKGROUND OF**

### **COMMON AND CIVIL LAW**

Before I delve into a comparative analysis between the two legal systems (Common Law & Civil Law), it is imperative to first understand their respective historical underpinnings, which gave rise to these legal systems.

Common law: The term common law derives its name from the rationale that the law was 'common' to the courts spread over England, in the many years subsequent to the Norman conquest (by William I), which took place around the 10th Century.<sup>3</sup> Common law has its foundation there and hence began its gradual development from the Battle of Hastings, which took place around the 10th century. In the centuries preceding the Battle of Hastings, there existed a decentralized Anglo-Saxon system of law, whereby each country would adjudicate its own respective disputes, in line with the customary law existing then.<sup>4</sup> It must be noted that this community law was well received by the people it intended to deliver justice to, and it could also be said that it created a considerable check-and-control of its citizens/inhabitants.<sup>5</sup>

William I with his conquest took over the entire kingdom of the then entity known as 'England'. The Normans were well acquainted with the successful day to day administration of land; this experience can be attributed to the fact that they already had in place a working system of co-ordination over the areas already controlled by the Franks. This would allow William 1 to successfully adopt an updated version to the old era of feudalism, by adding the already in place

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<sup>3</sup> History of the Common Law (2009), Page 4: Langbein, Lerner & Smith

<sup>4</sup> C Cooke, R Creyke, R Geddes, D Hamer with T Taylor, Laying Down the Law (8th edition, LexisNexis, 2011), Page 546.

<sup>5</sup> P Parkinson, Tradition and Change in Australian Law (4th edition, Law book Company, 2008) 66, 84.

Baronial and Manorial Courts.<sup>6</sup> It is important to understand the concept of prima-facie concept of Feudalism. Feudalism can be defined as:

*"The economic, political, and social system in medieval Europe, in which land, worked by serfs who were bound to it, was held by vassals in exchange for military and other services given to overlords".<sup>7</sup>*

The feudal system structure in England then consisted of the King at the top of the hierarchy, then came the elite nobles who were the landed gentry, and finally under them were the respective tenants of the land, which was owned by the said nobles. All of them plead allegiance to the king.<sup>8</sup> The hierarchical structure in place kept power concentrated in the hands of the kind, and stabilized peace, prosperity and a common law throughout England.

When one talks about Curia Regis or otherwise known as the King's Court, one can trace the origins of the same to William I, who was instrumental in setting them up. They were adjudicating on disputes side by side to that of the Feudal Courts. In the centuries that followed after, particularly in the 12th and 13th century, a lot of the subjects of the King, sought the King's direct intervention in matters pertaining to law and order, as there was a growing resentment with the local laws in place. The King upon taking notice of justice not being efficiently met, started to grant greater powers to his court (King's Court) to administer effective justice under the existing law, through 'Justiciars' or Judges - who were acting in official duty of him directly.<sup>9</sup>

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<sup>6</sup> C Cooke, R Creyke, R Geddes, D Hamer with T Taylor, Laying Down the Law (8th edition, LexisNexis, 2011), Page 16.

<sup>7</sup> <https://www.collinsdictionary.com/de/worterbuch/englisch/feudalism> - Collins Dictionary

<sup>8</sup> C Cooke, R Creyke, R Geddes, D Hamer with T Taylor, Laying Down the Law (8th edition, LexisNexis, 2011), Page 16.

<sup>9</sup> C Cooke, R Creyke, R Geddes, D Hamer with T Taylor, Laying Down the Law (8th edition, LexisNexis, 2011), Page 18.

As the years went by, the King's Court or the Curia Regis was bifurcated to hear 'common pleas' and they would be stationed in one location. The other part of the Curia Regis would travel to the far-flung corners of the country to administer justice. This was very effective as it ultimately substituted the local feudal courts with the King's Court. It must be mentioned that the decisions arrived to, was recorded over time by these courts and this acted as the corner-stone for the formation of the Common Law as we know today.<sup>10</sup>

Further, there were two more courts incorporated under the Curia Regis. The First was the Court of Exchequer - which dealt with mercantile and commercial law-based disputes. The Second was the Coram Raje who acted as the legal advisors to the King.<sup>11</sup>

The common law had thereby developed over the many years and it came to be known as a legal procedure that was predictable and stable. Many years later around the 17th century, is when power was transferred from the English Monarchs to the British Parliament. The Parliament had instated the crown by consent, following the change in political circumstances which had removed Charles II and put William of Orange.<sup>12</sup> The initial British Parliament included the House of Lords which consisted of the landed gentry class and the House of Commons which included the popular candidates from the counties. The Indian Parliament two-chamber structure today mirrors that of the British Parliament, which includes a senate and House of Commons. Although this two-chamber structure has gone through many

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<sup>10</sup> R C van Caenegem, *The Birth of the English Common Law* (2nd ed, Cambridge University Press, 1992), Page 22

<sup>11</sup> R C van Caenegem, *The Birth of the English Common Law* (2nd ed, Cambridge University Press, 1992), Page 19, 21.

<sup>12</sup> C Cooke, R Creyke, R Geddes, D Hamer with T Taylor, *Laying Down the Law* (8th edition, LexisNexis, 2011), Page 26 & 27.

modifications over the years, it still remains today as the blue print for parliaments in countries like India.<sup>13</sup>

Fast forward to the 18th century, the British parliament had altered the hierarchy of the courts and through the Judicature Act 1873, removed and replaced certain courts by adding the High Court and Court of Appeal.<sup>14</sup> Through colonization, Australia inherited the English Law and their court hierarchical structure became similar to that of the English system.<sup>15</sup> As far as the writ system is concerned, the concept of writ at the time of the 12th century was already existing and the concept was not conceptualized by the Normans; it helped in addition to the other justice delivery mechanisms.<sup>16</sup> Amongst the writs was a notable one, called the writ of certiorari whereby an aggrieved party can appeal to a higher court if he or she believes that the subordinate court had erred in its judgment.<sup>17</sup>

This common law system conceptualized the concept of 'stare decisis' or precedent - whereby each subsequent case should be treated alike, if the facts and circumstances are similar, and hence this becomes a binding factor for a court to decide a case.<sup>18</sup> It is further said that the common law system can find its source dating all the way back to the English monarchy. The respective Monarchy, to make sure Justice prevailed, used to pass a unique type(s) of order called a 'writ'.<sup>19</sup> A 'writ' can be defined as a:

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<sup>13</sup> <https://archive.india.gov.in/govt/parliament.php>

<sup>14</sup> C Cooke, R Creyke, R Geddes, D Hamer with T Taylor, *Laying Down the Law* (8th edition, LexisNexis, 2011), Page 30.

<sup>15</sup> P Parkinson, *Tradition and Change in Australian Law* (4th edition, Law book Company, 2008), Page 3.

<sup>16</sup> R C van Caenegem, *The Birth of the English Common Law* (2nd ed, Cambridge University Press, 1992), Page 30, 31.

<sup>17</sup> R C van Caenegem, *Judges, Legislators and Professors: Chapters in European Legal History* (Cambridge University Press, 1987), Page 5.

<sup>18</sup> M Kirby, 'Precedent Law: Practice and Trends in Australia' (2007) 28 *Australian Bar Review* 243, 245

<sup>19</sup> <https://onlinelaw.wustl.edu/blog/common-law-vs-civil-law/> - Washington University Law - as on 11th August, 2018.

*"Courts written order, in the name of the state or other competent legal authority, commanding the addressee to do or refrain from doing some specified act."*<sup>20</sup>

It can thereby be said that writs are very unique and historic to the English Jurisprudence. However, in spite of writs being issued, they were not able to deliver justice to all circumstances. Therefore, formal courts were established to hear grievances & adjudicate on the same. The judicial decisions of these courts over the many years had been kept in a record, and subsequently the English Courts could refer to any such 'precedent-case' that they feel fit would fit the facts and circumstances of the respective current case. It is from this train of thought, that Common law is said to have developed over many centuries.<sup>21</sup>

With the common law system developing over the many centuries, there came to be known two distinct legal professionals, known as Barristers and Solicitors. The Barristers had more specialist advocacy skills.<sup>22</sup> The very top Barristers would be called to the Bench to join the Roster of Judges.<sup>23</sup> Solicitors have a more generalist field of operation and brief-cum-assist Barristers.<sup>24</sup>

As time went by these legal professionals taking into consideration various facets of the 'stare decisis', started recording judge's decisions' in their private records. One of the most famous Jurists then is known

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<sup>20</sup> Black's Law Dictionary (Ninth Edition): Bryan A. Garner

<sup>21</sup> <https://onlinelaw.wustl.edu/blog/common-law-vs-civil-law/> - Washington University Law - as on 11th August, 2018.

<sup>22</sup> C Cooke, R Creyke, R Geddes, D Hamer with T Taylor, Laying Down the Law (8th edition, LexisNexis, 2011), Page 31.

<sup>23</sup> R C van Caenegem, Judges, Legislators and Professors: Chapters in European Legal History (Cambridge University Press, 1987), Page 48, 60

<sup>24</sup> C Cooke, R Creyke, R Geddes, D Hamer with T Taylor, Laying Down the Law (8th edition, LexisNexis, 2011), Page 31.

as Sir William Blackstone whose opinions on the laws are used even till today.<sup>25</sup>

All in all, the legal profession has been in the fore-front of preserving and developing the concept of 'stare decisis' in Common Law.

Civil Law: The term Civil Law is also known as Roman law, as it's mainly influenced from the substantive law and procedural institutions of Rome. There came to be known a collection of people who had high legal acumen, they were called 'Jurists' who provided their legal insight to the advancement of the Roman legal system.<sup>26</sup> Jurists doesn't necessarily mean only a judge, but also means a legal expert, in this regard. The Jurists were noble men from the upper strata of the Roman sociological hierarchy. Their duties included providing counsel to parties at dispute and to help assist the court to arrive at its decisions. These jurists came into being as the Roman Empire expanded and traded with conquered territories, and this also brought traders into Rome.<sup>27</sup>

Roman Civil Law spanned over a century across the legal system of its Empire, starting from 753 BC, till around the death of Emperor Justinian in 565 AD.<sup>28</sup> It is also noted that Civil law, in addition to Roman Law, is also influenced by Justinian Law (around 6th Century AD) and Canon Law (during the Middle Ages).<sup>29</sup> The Justinian code, also known as the Corpus Juris, was ordered by Justinian I when he became emperor as he realized that the then current legal system needed revamping. King Justinian formed a 10-man commission to review the existing laws, amend the irrelevant laws and create one

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<sup>25</sup> J P Dawson, The Oracles of the Law (University of Michigan Law School, Ann Arbor, 1968) 80, 81-83.

<sup>26</sup> <https://www.fjc.gov/sites/default/files/2012/CivilLaw.pdf>, Page 3.

<sup>27</sup> <https://www.fjc.gov/sites/default/files/2012/CivilLaw.pdf>, Page 9 & 10.

<sup>28</sup> <https://www.notaries.bc.ca/resources/scrivener/spring2009/PDF/spring2009-History-48.pdf>

<sup>29</sup> <https://www.infoplease.com/encyclopedia/social-sciences-and-the-law/law/law-divisions-and-codes/law/roman-law-and-its-influence>

singular legal structure that would be fitting to the then juncture.<sup>30</sup> After 14 months, the commission came to their results and the updated laws consisted of relating to contracts, wills, family, crime, etc.<sup>31</sup>

The Code of Justinian was adapted by many subsequent generations of legal scholars across Western Europe (except U.K. & Ireland). The Church through its Canon Law was also strongly influenced by this Code. The Justinian Code & the Canon Code became the two most widely taught subjects at universities. The code contained legal doctrines that stood the test of time developed by jurists, provided substantive and procedural law covering almost all possible facts and circumstances. Throughout Europe, local custom laws were brought in harmony with that of civil law. Examples are that of Introduction to Dutch Jurisprudence, written by Dutch jurist Hugo Grotius in 1631; Austria's 1786 Code of Joseph II, France's Civil Napoleonic Code of 1804. All these codes, which forms the bed-rock of today's civil law systems, are strongly influenced by the Roman law tradition.<sup>32</sup>

Through the European colonial rule all over the world, the empires of the British, French, Dutch, etc. had taken the law of their respective countries to the native people of the Americas, Asia & Africa, where they had their own local laws. Colonialism merged the local existing laws of Common & Civil law with the respective local law of those countries, hence creating a fusion of laws in occupied countries.<sup>33 34</sup>

Hence, considering the above information, I am of the opinion that the Common Law and Civil Law systems we know of today, does indeed have strong historical underpinnings.

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<sup>30</sup> A Historical Introduction to the Study of Roman law, Jolowicz, 1972, Page-479.

<sup>31</sup> Kenneth Pennington, "Roman and Secular Law in the Middle Ages", (Washington, D.C.: Catholic University Press of America, 1996), 254–266;

<sup>32</sup><https://www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html>

<sup>33</sup> Werner Menski, COMPARATIVE LAW IN A GLOBAL CONTEXT 116 (2006).

<sup>34</sup> M.B. Hooker, LEGAL PLURALISM-AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS 58 - 62 (1975)

### **PART 3: CHIEF FEATURES OF**

#### **COMMON AND CIVIL LAW**

Exiting from the historical background, I would now like to analyze the chief features, along with the similarities and differences between these two legal systems that currently exist in most countries. In doing so, I aim to analyze these legal systems and their operation/relevance in major countries of the world.

Common Law: Common law is a segment of law which is obtained and developed from case law or judge made law. This case-law holds primary importance and is binding for all future identical facts of a case, within the courts of that country.<sup>35</sup> Common law has also been defined as an area of law which is solely derived from judicial decisions, instead of from legislative statutes.<sup>36</sup> The concept of 'Stare Decisis' is also a noteworthy doctrine that is characteristic to that of common law. It is a Latin term which means "to stand by things decided" - which essentially means that a court is bound by a previous judgment, where the same points of law and/or facts have already been adjudicated by a superior court.<sup>37</sup>

There are also circumstances when the court in coming to its conclusion also finds that the instant case forms no precedent and whereby there is no corresponding legislation to the same, the adjudicating body can then decide on the case and form a new precedent all together. The same was highlighted in the famous *Marbury v. Madison* case<sup>38</sup>, whereby the United States of America Supreme Court held, inter-alia, that it was the prerogative of the judiciary to interpret the law and decide between conflicting laws. It must be noted that a precedent is binding mainly through the decisions that the Judges have arrived to. Precedent in general has an overall

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<sup>35</sup> <http://www.duhaime.org/LegalDictionary/C/CommonLaw.aspx>

<sup>36</sup> Black's Law Dictionary - Page 252.

<sup>37</sup> Black's Law Dictionary - Page 1207.

<sup>38</sup> *Marbury v. Madison*, 5 U.S. 137 (1803)

meaning to that of the doctrine of "Stare Decisis". Therefore, it can be said that the main cornerstone of common law is the doctrine of Stare Decisis.

Therefore, common law has the following chief-features:

Un-codified laws: In common law systems, especially in England, the laws are developed by case law. It is not true that the legislature plays a secondary role in creating statutes; the Legislature does indeed play an as-important role as the judiciary in developing the law of the land. In a common law system, statutes do very much exist and these statutes have over time been amended by the law maker.<sup>39 40</sup> The UK does not indeed have a constitution, but the essence of the same is derived from statute laws (laws that are passed by parliament) and common law (laws that are developed through judges of the court).<sup>41</sup>

Stare Decisis/Precedent: Within the common law countries, the most important characteristic is that of Stare-Decisis or also known as judicial precedent. A precedent when formed by a judge creates a landmark judgment in which future judges when dealing with cases having the same facts and circumstances have to concur with past judgments and cannot deviate from the rationale which led to that past judgment.<sup>42</sup> Also, Stare-Decisis can be further divided into Horizontal and vertical in its nature of binding.

An evolving law for society & business: From the social point of view, the common law is said to be an evolving law which has evolved over the many decades and centuries. This evolution takes place over time gradually through judge made law and as such does

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<sup>39</sup> <http://www.dwc.knaw.nl/DL/publications/PU00009908.pdf>, page 95

<sup>40</sup> <https://ppp.worldbank.org/public-private-partnership/legislation-regulation/framework-assessment/legal-systems/common-vs-civil-law#civil>

<sup>41</sup> Blick, Andrew; Blackburn, Robert (2012), *Mapping the Path to Codifying - or not Codifying - the UK's Constitution*, Series paper 2.

<sup>42</sup>The Human Rights Act and the doctrine of precedent - Shaun D Pattinson

not cause any sudden knee jerk reaction. One of the famous cases<sup>43</sup> in English case-law, which is based on the law of oaths/giving evidence, reaffirms the predominance of Common law, in which the Solicitor General Murray in the aforementioned case stated:

*"A statute very seldom can take in all cases; therefore the common law, that works itself pure by rules drawn from the fountain of justice, is for that reason superior to an act of parliament."*

Incidentally, the back-drop of the facts of this case took place in my home city, Kolkata (Calcutta), during the year 1745.

From the business point of view, the common law is also said to be an evolving law which has evolved over the many decades. This has indirectly boosted business activities within particular jurisdictions such as New York and London. The reason is that common law covers issues on almost every fact and the parties thereof can ascertain whether their commercial action(s) would be lawful or not. Also, parties in a litigation can with most certainty rely on judicial precedents to support their case. This ease of doing business, supplemented by predictability in the eventuality of a trial is highly sought after by corporations. An example would be that of London and New York, whereby none of the parties have their seat of incorporation or have any business ties to those cities but still choose those places as a place of dispute resolution.<sup>44 45 46</sup>

Law Journals: To keep a track of the precedent developments in a particular field of law, lawyers are required to rely on Law journals or published case-laws that could strengthen their case before the respective court. Subsequent to the American Revolution, the State of

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<sup>43</sup> Omychund v Barker (1745)

<sup>44</sup> Theodore Eisenberg & Geoffrey P. Miller, The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts (2008) - Paper 124.

<sup>45</sup> Yeo Tiong Min, "A Note on Some Differences in English Law, New York Law, and Singapore Law

<sup>46</sup> <https://www.qlts.com/blog/why-english-law-governs-most-international-commercial-contracts>

Massachusetts became the foremost to incorporate a journal of case decisions. This acted as a cornerstone for other American states to refer to the State of Massachusetts for the laws of precedence.<sup>47</sup>

Statutory-cum-common law complementing each other: There is an overlap of statutory-cum-common law, within the legal systems of Common law. Take the case of England: In the English jurisprudence the concept of 'Tort' does not exist in statute, but rather finds its concept embedded in the common law. Tort can be defined as a civil wrong for which damages can be claimed by the plaintiff from the defendant.<sup>48</sup> The Judges in common law courts act as interpreters of statutes and hence the respective statutes will be interpreted in light of the common law in force at that time. In a United States Supreme Court case<sup>49</sup> the court held the following:

*"Just as longstanding is the principle that statutes which invade the common law ... are to be read with a presumption favouring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."*

Hence, one finds that the statutory and common law, both complement each other.

Style of Judgment: The style of Judgment is another distinctive characteristic in Common law decisions. When one goes through the judgments of common law courts (including in England & India), one finds that Common law judgments are written in a less formalistic way and are much longer. When one further delves into common law judgments, one finds that the Judges goes deep into the facts with his/her own remarks, and provides a comparative analysis from

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<sup>47</sup> Social Law Library, Common Law or Civil Code? Boston Mass.

<sup>48</sup> Black's Law Dictionary - Page 1280.

<sup>49</sup> United States v Texas, 507 U.S. 529 (1993).

previous cases to show similarity or to distinguish the same, thereby making new precedent.<sup>50</sup>

Civil Law: Civil law, along with its counterpart Common Law, has also originated in Europe, and has come to be known as continental civil law. Civil law that stands today claims its roots to the Roman Law.<sup>51</sup> The Civil law which we know today derives its core train of thought from the Corpus Juris Civilis, which is book of statutes issued by Emperor Justinian I (it is also known as the Code of Justinian) during the 5th century. This Code of Justinian has through the many centuries been developed by, inter-alia, the Napoleonic and Germanic versions.<sup>52</sup> One of the cornerstones of civil law is that it is heavily codified and that the doctrine of Stare Decisis has limited or no applicability in Civil Courts. That being said, these are the chief features of Civil Law:

Codified laws: In the Civil law countries, one would find their laws to be codified or prescriptive in nature. The same is based on specific legal codes covering a wide range of topics such corporate law, tax law, etc.<sup>53</sup> Therefore, in civil law systems, the laws that have value are that of legislative acts which are continuously updated through legal codes and these codes are only relied upon before a court. The same contains in details what is the substantive & procedural aspects.<sup>54</sup>

No applicability of Stare Decisis/Precedent: As stated above, only legislative statutes are considered binding for the courts. With this being in place, there is hardly any scope for judge-made laws. It

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<sup>50</sup> <https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=5822&context=lalr> ev - Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified) William Tetley

<sup>51</sup> Black's Law Dictionary - Page 224.

<sup>52</sup> Charles Arnold Baker, *The Companion to British History*, Page 308.

<sup>53</sup> <https://ppp.worldbank.org/public-private-partnership/legislation-regulation/framework-assessment/legal-systems/common-vs-civil-law#civil>

<sup>54</sup> <https://www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html>

must be added in Civil Law countries, such as Germany, the writings and opinions of legal professors/scholars does indeed play a large importance on the courts.<sup>55</sup>

A not so rapidly evolving law: There is limited freedom of contract as there is only a set number of ways to form a contract. Also, corporations are deterred of keeping civil law countries as their hub for dispute resolution because the outcome of future judgements is not dependent on previous judgments, and this creates uncertainty in business.<sup>56</sup>

Style of Judgment: It is found that Civil law judgments are written in a more concise and formal way. It is essentially separated into two parts - the reason and the order. One could say that the reason behind this is that civil law judges go through specialized judicial training at an institute, whereas common law judges are 'called to the bench' or appointed from amongst Attorneys, who have high legal acumen through years of legal practice.<sup>57</sup>

Therefore, although Civil Law & Common Law have both originated from Western Europe, one finds that they have taken divergent train of thoughts and applicability.

Hence, considering the above information, I would now like to provide a brief overview in the form of a table, to further clarify my findings, using various additional headings:

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<sup>55</sup> <https://ppp.worldbank.org/public-private-partnership/legislation-regulation/framework-assessment/legal-systems/common-vs-civil-law#civil>

<sup>56</sup> Theodore Eisenberg & Geoffrey P. Miller, 'The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts (2008) - Paper 124.

<sup>57</sup> <https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=5822&context=lalrev> - Page 702

<b><u>Subject</u></b>	<b><u>Common Law</u></b>	<b><u>Civil Law</u></b>
1. <i>Codification</i>	Not wide-spread.	Always.
2. <i>Precedent</i>	Binding.	Not Binding.
3. <i>Amicus Curiae</i>	Their opinions have strong influence.	Their opinions have little to meagre influence.
4. <i>Role of Judges &amp; Lawyers.</i>	Judges act as a referee / Lawyers have a central role in court.	Judges take a pro-active role / Lawyers have a less central role in court.
5. <i>Country Examples</i>	England, India, Australia, etc.	Germany, France, Italy, etc.
6. <i>Evolution of law</i>	Rapidly evolving to social/business needs.	Not rapidly evolving to social/business needs.
7. <i>Case-Law Journals</i>	Yes.	No.
8. <i>Judgments</i>	Elaborate & Informal.	Concise & Formal.
9. <i>Style of drafting of laws</i>	Statutes are precise and contain lengthy definitions, as each act has rules & exceptions.	Statutes are concise and is stated in broad general phrases, as there is limited room for exceptions.
10. <i>Interpretation of Laws</i>	To fully interpret a law, one has to read the law in conjunction with any rule or exception, including any relevant case law or precedent, having the identical facts and circumstances.	To fully interpret a law, one has to unravel the motive of the legislators, plus read the provisions that surround that provision, as civil law statutes are the only source of primary law.

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<sup>58</sup> <https://ppp.worldbank.org/public-private-partnership/legislation-regulation/framework-assessment/legal-systems/common-vs-civil-law#civil>

## **PART 4 (STATUS QUO: EUROPEAN UNION AS A**

### **COMMON-CUM-CIVIL LAW SYSTEM**

Since the EU consists of many member states, having different social, economic & legal backgrounds, it can be said that the EU converges civil and common law traditions. Prima facie - the EU has a large body of treaties and regulations that may be seen as codes. E.U. law is also further shaped via case law by the CJEU. Thus, one could say that the EU merges civil and common law elements. I would also go on to analyze how even the CJEU is a fusion of the common and civil law legal system.

Upon reading judgments of the CJEU, one finds that the decision arrived to by the Judges are more explanatory rather than being creative in nature. It is found that Common law and Civil law can create internal cross-currents at times. It is stated in English Common law that whatever is not illegal, is legal; whereas in Civil Law if something is not categorically permitted, then it can be treated as illegal. One can thus say that this is the reason why there are so many directives and regulations set up by the EU, which has to be implemented throughout the member states.<sup>62</sup>

It also maybe said that the CJEU judgments play a vital role in EU's legislation and further in explaining and applying the said legislation, which can be said to mirror some of the qualities of common law.<sup>63</sup> Thus one can say there is a slight overlap between the two legal systems within the CJEU. However, the two legal systems are steadily converging in the International and European Arena. Within t h e

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<sup>59</sup><https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=5822&context=lalrev>

<sup>60</sup><https://www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html>

<sup>61</sup> <https://onlinelaw.wustl.edu/blog/common-law-vs-civil-law/>

<sup>62</sup> [http://www.ocnus.net/artman2/publish/Editorial\\_10/The-European-Union-And-The-Common-Law.shtml](http://www.ocnus.net/artman2/publish/Editorial_10/The-European-Union-And-The-Common-Law.shtml)

<sup>63</sup> <https://www.qlts.com/blog/career-development/eu-can-benefit-from-understanding-a-common-law-system>

International Arena, there are certain conventions that have unified Common & Civil law such as Convention on International Sales of Goods, the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, the Model Law on Commercial International Arbitration, inter-alia. It is also said that institutions like Factoring, Franchising, Forfeiting & 'Trust' (which are brain-child institution of common law countries) has also been accepted and implemented by civil law countries, to foster trade. Further, there is also an increase in the number of legislative statutes being passed in common law countries.<sup>64</sup>

Within the EU level, there are directives passed encompassing subjects like Company law, which have been strongly influenced by EU civil law countries such as Germany & France and also by EU common law countries such as UK & Ireland. EU Civil law countries waived their understanding of the fact that for a 'Societas' to be implemented, there needs to be two parties. Whereas now, they have acknowledged that corporations with a limited liability partnership (LLP), can be instituted by a single person.<sup>65</sup>

Regarding the development of European private law, there will eventually be unification of common and civil law. Buyers in the market will eventually opt for one rule that suits their commercial need the best. There should be a natural path towards this and actors shaping private law, will through a try-and-test process, come towards the best form of rule of law. Through this eventual process, European Private Law will inevitably turn into a mixed legal system consisting of Civil law and Common law.<sup>66</sup> Apart from the EU, other notable jurisdictions that share mixed legal systems, having common and civil

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<sup>64</sup> [http://aei.pitt.edu/8220/1/MulleratEU\\_USlawLong08edi.pdf](http://aei.pitt.edu/8220/1/MulleratEU_USlawLong08edi.pdf) - The University of Miami.

<sup>65</sup> [http://aei.pitt.edu/8220/1/MulleratEU\\_USlawLong08edi.pdf](http://aei.pitt.edu/8220/1/MulleratEU_USlawLong08edi.pdf) - The University of Miami.

<sup>66</sup> <http://digitalarchive.maastrichtuniversity.nl/fedora/get/guid:2dbcbdeb-d489-40df-bb0a-e4c32a467a9e/ASSET1>

law systems, are Louisiana (the only mixed law state in the United States of America), Quebec (the only mixed state in Canada) and South Africa.

According to an Author<sup>67</sup>, the definition of a mixed legal system is:

*"Legal pluralism refers to the situation in which two or more laws interact".*

I would personally concur with this definition as it clear and concise and meets my idea of understanding of a mixed legal system. Since most of the countries in Europe have their origins in Civil law traditions (Germany, France, Italy, etc.), Common law traditions (U.K., Ireland) & Mixed Law traditions (Scotland, Malta & Cyprus), it can be said that the European Union has already moved in the direction of a fused/mixed law system. One can say to a large extent, that even the national legal systems of member states in EU, are to a large extent influenced by this 'mixed legal tradition'. This happens through the various directives and regulations which are passed by the EU, which is indirectly passed by representatives of those mixed legal-tradition member states, and now have to be transposed into national law. Hence national laws are no more pure and have unified strongly, since World War II.

Relating to the CJEU, the CJEU's main role is to provide clarity on EU laws when they are in conflict with a national law. This judicial power of a preliminary reference can be found through Article 267 of TFEU. Amongst the sources of EU law, decisions of the CJEU plays a crucial role, as those decisions and jurisprudence can are used as a yardstick for future legislation by the European Parliament. Beyond just the CJEU decisions, are the legal principles/doctrines which arise from them, that are of importance to the EU Legislators. It is also found that the jurisprudence of the CJEU is thought to be creative.<sup>68</sup>

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<sup>67</sup> M.B. Hooker, LEGAL PLURALISM-AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS, 6 (1975).

<sup>68</sup> Law of the European Union - John Fairhurst, Page 68.

This mirrors concepts of the common law. A distinction should be drawn in this regard between the CJEU and European Court of Human Rights, as the latter cannot adjudicate on matters of Union Law but rather on matters relating to the European Convention on Human Rights.

Another feature that mirrors common law systems is that of publication of judgments. This is prevalent in the CJEU as there is a data-base of the same. Prior to 2004, the respective judgments passed by the Judges, would be updated to the European Court Reports (ECR) in each of the official languages of the European Union. Judgments are available at the site: <http://curia.europa.eu/en/content/juris/index.htm> and also in printed volumes.<sup>69</sup>

As regards to the doctrine of precedent/stare-decisis (which forms the bedrock of Common Law), the same does not strictly apply to the CJEU. At the same time, the CJEU to provide legal certainty to litigators, generally does not deviate from its previous judgments, unless it is strongly stated otherwise by an Advocate General, who guides the Judges in arriving to their decision(s). It is on this occasion that CJEU forms a new legal principle which will be the guiding factor for future judgments and legislation. Hence, it is common for European Attorneys to cite precedent/case-laws that fit the facts and circumstances of their case, before the CJEU.<sup>70</sup>

In the cases<sup>71</sup>, the CJEU deviated from its own case-precedent and stated that:

*"14. ...where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter."*

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<sup>69</sup> Law of the European Union - John Fairhurst, Page 166.

<sup>70</sup> Law of the European Union - John Fairhurst, Page 167.

<sup>71</sup> C-267 and C-268/91

*"16. By contrast, contrary to what has previously been decided, the application to products from other Member States..."*

This goes to show that the CJEU is not in any bound by its previous case-law, the concept of stare-decisis is merely a guiding factor, not a binding one when it comes to deciding a case. It can also be said that the method of interpretation when compared to that of CJEU and the English Courts differ yet overlap at the same time. In the case<sup>72</sup>, Lord Denning stated the following:

*"The (EC) Treaty... lays down general principles. It expresses its aims and purposes. All in sentences of moderate length and commendable style. But it lacks precision. It uses words and phrases without defining what they mean. An English Lawyer would look for an interpretation clause. All the way through the Treaty are gaps and lacunae. They have to be filled by the Judges, or by Regulations or Directives."*

However, the CJEU now uses 4 methods to interpret EU statutes. They are Literal, Historical, Contextual and Teleological. Literal interpretation is widely used by the English Judges. It simply gives the text of the statute its plain, simple and naturally occurring meaning. Historical interpretation encompasses going through the relevant debates that occurred before enacting the law, so as to feel the pulse of the legislator then. Literal & Historical interpretation is rarely used by the CJEU. Contextual interpretation involves placing the respective statute in its context of entirety and comparing it with the immediately preceding or subsequent provisions. Teleological interpretation involves interpreting the relevant law while taking into consideration the broad aims and objectives of the relevant treaty, which can be found in, inter-alia, the preamble of the treaty. It is found that the CJEU most commonly uses Contextual and Teleological interpretations of the EU law. There is hence an overlap in interpretations followed by the CJEU.<sup>73</sup> It must be noted however that

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<sup>72</sup> Bulmer v. Bollinger (1974) 3 WLR 202

<sup>73</sup> Law of the European Union - John Fairhurst, Page 171.

there is no mention in any of the EU documents whether the CJEU should follow the concept of Stare Decisis; but decisions that are arrived to by the CJEU have effects/ramifications not only for the parties involved but the effects go on to effect the rights and obligations of EU citizens. The same was confirmed by the CJEU that this determination procedure mirrored that of common law jurisdictions, as civil law courts are more restricted in its determination power.<sup>74</sup>

I would now like to go into a brief analysis verifying whether the European Union meets the check-box criteria, as a common-cum-civil law system (mixed legal system) or is it predominantly a civil law system. I will use the table of contents (from my previous chapter) as a measuring tool for the same.

Codified law: Codification can be defined as collecting and organizing the law under a particular field or area, thereby amalgamating it into a book or a legal code. The same can be enacted through a legislative act, and consolidates the law under one subject, thereby repealing the other related subjects.<sup>75</sup> Having codified laws is a hallmark of a civil law system, whereas the same is not so widespread in a common law system. Hence, I have come to the understanding that the EU laws (relating to matters of competence) are extensively codified through its relevant statutes, regulations and directives. Although the EU does not have a codified constitution, it does have a de-facto constitution (which is the TFEU). As one does not find any un-codified laws within the EU; hence, it is my opinion that the EU can be considered a predominantly civil law system in this regard.

Precedent: Stare decisis, also known as Precedent or Case-law, is a classic hallmark of the Common law system. Through the concept of

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<sup>74</sup><http://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/5228/paper.pdf?sequence=1> - Page 15

<sup>75</sup>[http://ec.europa.eu/dgs/legal\\_service/codifica\\_en.htm](http://ec.europa.eu/dgs/legal_service/codifica_en.htm)

Precedent, the future courts are bound by the decisions of the past court, if the same facts and circumstances exist in that particular case. They cannot deviate from the logic of the past judges on the similar issue and hence cannot treat the similar facts of two cases differently on two occasions. Stare decisis can have both or either - horizontal and vertical effect. It is said to have horizontal effect when the judgments have binding effect on the same court in future events. It is also said to have vertical effect when the judgments have binding effect on subordinate courts in future events. The latter distinction (vertical effect) falls within the four corners of the CJEU, as its judgments have a binding effect (to the law in question) on all National, State and Local Courts of the EU Member States.

As I have already discussed above, the doctrine of stare-decisis, in regards to the CJEU, is not explicitly mentioned in any legal document. However, the CJEU for the sake of legal certainty usually follows its previous judgments, unless there is a strong persuasiveness from that of the Advocate General, then the CJEU deviates from its past judgments. There is no absolute rule as regards to CJEU and Stare decisis. It is found that the CJEU in its judgments, usually makes statements that would remind one of the way Judges in Common law countries write their judgments. Phrases such as “It’s well established case law” or “as the court has consistently held” are known to be quite regular in the decisions/judgments of the CJEU. It must be added, however, that the CJEU does not elaborately explain as to why it is following a previous case-law. Further, it does not draw any difference between the ratio decidendi and obiter dictum, maybe because of the fact it is not possible to know the dissenting Judge's opinion, as the Judgments show only one collective opinion.<sup>76</sup> As precedence plays a de-facto role in the CJEU's judgments; it is hence my opinion that the EU can be considered a mixed legal system in this regard.

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<sup>76</sup> <https://www.grin.com/document/96633>

Amicus Curiae: Opinions through the process of Amicus Curiae is relevant in both Common and Civil Law traditions. Amicus curiae can be defined as someone who is not directly party to a litigation case, but who extends his view to the court either through self-initiative or through invitation, as that person has a strong interest in that subject matter which either affects him or her indirectly or because he is a notable expert on that particular subject.<sup>77</sup> In-fact, the CJEU officially invites Amicus Curiae briefs, through its website.<sup>78</sup> Amicus Curiae or 'The friend of the court' can be said to have Roman law roots and subsequently set its place within the common law courts.

The concept of Amicus Curiae is now used in all over the common law countries of the world, including India, England and the United States of America. It is also found to have taken a prominent role in International Courts, such as the World Trade Organization as well.<sup>79</sup> It is found that civil law courts have historically not accepted amicus curiae briefs, but that with recent times have changed. Further, non-governmental organizations, are quite active in providing petitions to various civil law countries but the same is not always accepted as there could be a conflict of interest or influence. At the same time, Amicus Curiae can be compared to, but does not officially include, those of Advocate General's in the CJEU, Rapporteurs Public in French courts, or Vertreter des öffentlichen interesses in the German Courts.<sup>80</sup>

It must also be noted that the shift to Amicus Curiae in Civil law countries of the European Union happened much later when compared to that of Common law countries. With European Council regulations, Competition authorities at the European level and Member State level can now submit their observations to the National courts, on request or on self-initiative, to throw light on ongoing litigation cases relating to

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<sup>77</sup> Black's law dictionary - Page 77.

<sup>78</sup> <https://www.amicus-ecj.eu/foundationamicuscuriae/>

<sup>79</sup> [https://www.yalelawjournal.org/pdf/1158\\_hvj33ruz.pdf](https://www.yalelawjournal.org/pdf/1158_hvj33ruz.pdf) - Page 1653.

<sup>80</sup> [https://www.yalelawjournal.org/pdf/1158\\_hvj33ruz.pdf](https://www.yalelawjournal.org/pdf/1158_hvj33ruz.pdf) - Page 1654.

Competition infringement. It was found that Netherlands had brought these Council regulations into their national legislation, as the same under its civil law, never allowed *amicus Curiae*.<sup>81</sup> This concept of *Amicus Curiae* through the Common law & International law, coupled with globalization, has slowly harmonized this concept into the Civil law arena, including at the Continental European countries and at the EU level. As the concept of *Amicus Curiae* plays an official role in the EU level; it is hence my opinion that the EU can be considered a mixed legal system in this regard.

Role of Judges & Lawyers: One finds that the role of Lawyers in that of Common law court-rooms are quite pro-active and they are allowed extensive oral submissions, in addition to written arguments. Whereas in the Civil law court-rooms, the lawyers have less of a pro-active role. Further, the role of Judges within the Common law court rooms is to act as a referee and the Judges do not take a pro-active role in proceedings. Whereas in Civil law courts, Judges take a central role in the proceedings. Further, Judges in common law courts are conventionally appointed from practicing lawyers, and Judges in civil law courts are conventionally appointed fresh from specialist judicial training schools.<sup>82</sup> When we take this data and compare it with that of the CJEU, one finds that Lawyers do indeed have a central role in the proceedings but do not generally have the right to an oral hearing. If a lawyer, in the CJEU, wishes to have an oral hearing, he or she must file a reasoned request with the Registry in advance, and is thereby granted 15 minutes.<sup>83</sup> This is not common in Common law jurisdictions as Lawyers are by default allowed oral submissions, which are crucial to a case as much as the written arguments.

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<sup>81</sup> [https://www.yalelawjournal.org/pdf/1158\\_hvj33ruz.pdf](https://www.yalelawjournal.org/pdf/1158_hvj33ruz.pdf) - Page 1660.

<sup>82</sup> <https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=5822&context=lalrev> - Page 705.

<sup>83</sup> [https://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/PD\\_LUX/PDL\\_Guides\\_recommendations/EN\\_PDL\\_20161124\\_Practical-Guidance-for-Advocates-before-the-Court-of-Justice-in-appeal-proceedings.pdf](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/PD_LUX/PDL_Guides_recommendations/EN_PDL_20161124_Practical-Guidance-for-Advocates-before-the-Court-of-Justice-in-appeal-proceedings.pdf) - Page 7.

From my personal experience as a visitor at the CJEU, I found that the Judges in the CJEU have a neutral stance in the proceedings and do not take a pro-active role; this would mirror that of English Common Law court-rooms. Hence, I am of the opinion that the CJEU/EU can be considered a mixed legal system in this regard, although this tips slightly towards the side of a Civil Law system, which is quite natural as the majority of Judges are from Civil Law countries.

Country Examples: One finds that the EU contains predominantly Civil Law countries, and rightfully so, as it was the brain-child of these Civil law countries to form this community after World War II. It was only later that the pure Common law countries (UK & Ireland) had joined this community. One can also find mixed jurisdictions with the EU, such as Scotland, Cyprus & Malta. That being said, the contribution English Common law has had on the EU, over the past decades, has been quite considerable.

Evolution of law: It is found that the overall evolution of the law in Common and Civil Law jurisdictions takes place at different paces and as such results in different needs, from the society and business standpoint. Civil law doctrines which are tabulated into codes are often rigid and cannot be changed without legislation. Whereas Common law, guided by the principle of stare decisis, is flexible and moves according to society and business needs. Civil law systems very often take the assistance of authors to help draft model legislation. An example of this is when the French Government employed the services of the late Dean Rend Roditre, who was an authority and professor of Maritime law, to draft statutes on Maritime law.<sup>84</sup> The same would not be necessary in a common law jurisdiction as Judges have to develop and expand the law in given areas themselves. All in all, when I analyze the same at the EU level, I find that the evolution of law to be not moving at such a quick pace. The

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<sup>84</sup><https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=5822&context=lalrev> - Page 705.

reason being that although EU's regulations has binding effect on all member states, directives are open to be transposed by member states, in their own timely fashion and manner. Further, the laws are prepared and proposed by the Commission which then passes it to Parliament for debate and approval.<sup>85</sup>

This can be seen as a back and forth process which consumes a lot of time, as there is a major involvement of bureaucrats at many levels, both at the EU and Member state. Although, it is noted that the legislation is to a large extent influenced by court decisions. Hence, I am of the opinion that the EU can be considered as a quasi-civil law system in this regard, as the laws do not evolve as quickly as common law countries.

Case-Law Journals: Case-law journals are the cornerstone for any litigation lawyer in a common law jurisdiction. The lawyer tries to find a case, in case-law journals, that fits the facts and circumstances of his or her client's case, and present the case using the backdrop of the past case-law precedent. This creates a binding effect on the common law Judge as he cannot generally deviate from a precedent. Case-law journals, under different subject areas, keep getting updated over the many years. Hence, this is very characteristic to common law jurisdictions. In my above paragraph (no. 2) relating to Precedent, I had mentioned regarding the Horizontal and Vertical stare-decisis. It is said that the CJEU provides a vertical stare-decisis on National, Regional & Local Courts in matters relating to EU Law. The CJEU thereby provides harmonization of EU Law, through its case-law, including interpretation and application of the same, in a uniform way throughout the Member States.<sup>86</sup> National, Regional & Local Courts are thereby bound by the concept of Vertical Stare-decisis. This unique characteristic is even studied by many law schools in the

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<sup>85</sup> European Union Law - Catherine Barnard & Steve Peers. (Second Edition) - Page 40.

<sup>86</sup> [https://e-justice.europa.eu/content\\_eu\\_case\\_law-12-en.do](https://e-justice.europa.eu/content_eu_case_law-12-en.do)

United States of America. It is found in the website of one of America's elite law school (Duke Law School)<sup>87</sup>, that the EU's official website contains legislation, case-law and official records. Further, on that law school website one finds that there are many law review journals which help develop the concept of case-law and provide a cross-reference to the case-law journals.

In fact, when one goes to the official website of the CJEU<sup>88</sup>, one can find a complete search engine database to find case-laws. Hence, I am of the opinion that the EU (including the CJEU) can be considered as a mixed legal system in this regard, having strong characteristics that of common law jurisdictions.

Judgments: Common law Judges tend to draft more elaborate and informal judgments. Whereas Civil law Judges tend to draft more concise and formal judgments. It is also found that the judgment decisions arrived to by the CJEU are 'cryptic' in nature, as they tend to be summarized in a short way; this causes great confusion within lawyers. This also causes confusion at the National Courts, which on few occasions referred the same case back to the CJEU to provide clarity on its judgment.<sup>89</sup> It is also noteworthy to mention that dissenting opinions (from judgments) are not allowed/published in the CJEU. One of the primary reasons is because Judges may face government retaliation (from the aggrieved Member State) which may harm the independence of the judiciary. The CJEU thereby follows the French tradition of not publishing dissenting opinions, and all judges appear to concur with the judgment. However, among the EU civil law countries, Germany is one of the few which allows constitutional judges to provide different opinions, if required. Therefore, Decisions

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<sup>87</sup> <https://law.duke.edu/lib/researchguides/europe/> - Duke University, School of Law.

<sup>88</sup> <https://eur-lex.europa.eu/advanced-search-form.html?qid=1535321457951&action=update>

<sup>89</sup> <http://www.europarl.europa.eu/document/activities/cont/201304/20130423ATT64963/20130423ATT64963EN.pdf>

of the Court of Justice are taken by majority and no record is made public of any dissenting opinions.<sup>90</sup>

The dissenting opinion plays a crucial role in future jurisprudence, where the court, if required, can re-evaluate its stance based on that dissent. Hence, I am of the opinion that the EU (including the CJEU) in this regard, can be considered as a civil law system.

Style of drafting of laws: In common law countries, statutes are precise and contain lengthy definitions, as each corresponding act has rules and/or exceptions. Whereas in civil law countries, statutes are concise and is stated in broad general phrases, as there is limited room for exceptions. At the EU level, the EU can only legislate on issues where it has exclusive competence. One of the areas that the EU legislates is that of Competition Law, and the same is obtained from Articles 101 to 109 of the TFEU. It further has a list of Regulations & Directives which are updated from time to time. Therefore, the competition legislation at the EU level is quite precise and also includes a certain list of rules and exceptions. Hence, I am of the opinion that the EU in this regard, can be considered as a mixed legal system, having strong characteristics that of a common law system.

Interpretation of laws: Interpretation of laws or statutes varies in common law & civil law jurisdictions. This is the task of the respective court to provide clarity and meaning of the legislation. There are four ways to interpret a statute. They are Literal, Historical, Contextual and Teleological. Literal interpretation is widely used by the English Judges. It simply gives the text of the statute its plain, simple and naturally occurring meaning. Historical interpretation encompasses going through the relevant debates that occurred before enacting the law, so as to feel the pulse of the legislator then. Literal & Historical interpretation is rarely used by the CJEU.

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<sup>90</sup> [https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-05/cjue\\_en.pdf](https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-05/cjue_en.pdf)

Contextual interpretation involves placing the respective statute in its context of entirety and comparing it with the immediately preceding or subsequent provisions. Teleological interpretation involves interpreting the relevant law while taking into consideration the broad aims and objectives of the relevant treaty, which can be found in, inter-alia, the preamble of the treaty. It is found that the CJEU most commonly uses Contextual and Teleological interpretations of the EU law. There is hence an overlap in interpretations followed by the CJEU.<sup>91</sup>

Decisions that are arrived to by the CJEU have effects/ramifications not only for the parties involved but the effects go on to effect the rights and obligations of EU citizens. The same mirrors that of common law jurisdictions, as civil law courts are more restricted in its determination/interpretation power.

In a landmark case<sup>92</sup> of the CJEU, the court held that the TFEU was capable of empowering certain rights to the citizens of the EU, which they can enforce before their respective member state courts. This was a creative development in the interpretation and expansion of EU Law, mirroring strong characteristics that of Common law Judges. The instant case created the doctrine of “Direct Effect”, which states that EU law can create certain rights and obligations for its citizens, provided certain conditions are met (also known as the 'Van Gend' criteria). In short, the EU statute article must not be ambiguous, negative and conditional. It must be mentioned that the doctrine of Direct effect is not articulated anywhere in the Treaty, as it is a concept developed by the CJEU.

Further, it is found that the English law has inherited close to twenty European Community Directives and inter-alia, the continental/civil

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<sup>91</sup> Law of the European Union - John Fairhurst, Page 171.

<sup>92</sup> *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963) Case 26/62

ideas of proportionality, legitimate expectation and teleological reasoning.<sup>93</sup>

Hence, after considering the above information, I am of the opinion that the CJEU/EU in this regard, can be considered as a mixed legal system, having attributes that of common and civil law systems.

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<sup>93</sup><https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=6210&context=lalrev> - Page 7.

**PART 5 (POST-BREXIT: EXIT OF ENGLISH COMMON LAW  
INFLUENCE FROM THE EUROPEAN UNION)**

From the preceding part, I made an analysis to see whether the EU and its institutions falls under the category of a mixed legal system (i.e. having joint characteristics that of a common-cum-civil law system). This was important so as to understand the relevance of English Common law within the EU, and what would be the ramification(s) when English Common law took an exit, after Brexit.

I would briefly review the above ten parameters so as to decipher the ultimate outcome of Brexit, in its relation to the exit of English Common law.

Codified law: As mentioned in part 3 of my thesis, codified laws is the chief characteristic of a civil law system, which in turn is not so prevalent in common law countries, as the same is developed through the judiciary. On the other hand, EU laws (in accordance with its corresponding competencies) are heavily codified via its respective statutes, regulations and directives. Further, the EU does not have a codified constitution (which through a referendum never saw the light of day), it does however have the TFEU, which serves as its de-facto constitution.

As EU, prima facie, does not have any un-codified laws within its legislation; one can argue from this stand point that EU can be considered a predominantly civil law system, having little or no trace of common law influence. That being said, when Brexit does take place in 2019 (including the exit of British MEP's), it is my opinion that the exit of English Common Law will not have any ramification on the EU, in this regard.

Precedent: As mentioned in part 3 of my thesis, the concept of Precedent or also known as the doctrine of stare decisis, is a classic characteristic of the Common law system. In the CJEU, the doctrine

of Stare decisis has taken a modification, whereby horizontal Stare decisis is not binding on the CJEU, yet vertical Stare decisis is binding on the subordinate Member State courts. However, as also mentioned before, the CJEU does not usually deviate from its past judgments unless there is a strong reasoning provided by the Advocate General.

As CJEU, prima facie, follows the doctrine of Stare Decisis to a limited extent (as it is an unwritten rule) within its court systems; one can argue from this stand point that the EU can be considered a mixed legal system, having both civil and common law features. That being said, when Brexit does take place in 2019, it is my opinion that the exit of English Common Law will have a ramification on the EU, in this regard.

The exit of UK from the EU, will also eventually lead to the exit of British Judges from the CJEU. These British Judges bring with them, inter-alia, the common law principles to the court rooms of the CJEU. With Brexit, there will be a massive decrease in the application of common law principles, such as the doctrine of Stare Decisis or Precedent within the CJEU & EU. These doctrines stand a chance to face oblivion within the EU/CJEU, thereby strictly heading towards a Civil Law System.

Amicus Curiae: As mentioned in part 3 of my thesis, the concept of Amicus Curiae is widespread in both common & civil law countries, and also at the International courts. The concept of Amicus Curiae or 'friend of the court' has its original roots in Roman law, but began its major role within the courts of the common law countries, namely England. It must be noted that the civil law courts (including continental European countries) have not been very receptive to the concept of Amicus Curiae initially, but it steadily has found a role in civil law courts.

As the EU/CJEU, follows the concept of Amicus Curiae; one can argue from this stand point that the EU can be considered a mixed

legal system, having both civil and common law features. That being said, when Brexit does take place in 2019, it is my opinion that the exit of English Common Law will have a ramification (although a not so harsh one) on the EU, in this regard. It is true that the British Judges bring with them, inter-alia, the principle of Amicus Curiae to the court rooms of the CJEU. But at the same time the concept of Amicus Curiae, after Brexit, will still exist at the EU level (via some of its member states), albeit this concept may be slightly less intense.

Role of Judges & Lawyers: As already mentioned in Part 3 of my thesis, the role of Judges & Lawyers is quite unique within Civil law court rooms & Common law court rooms. In addition, Judges from common law courts are conventionally called 'to the bench' from 'the bar'. The Bench refers to the panel of Judges, whereas the Bar refers to an association of a group of Lawyers. Likewise, EU Common law Barristers, who have had long standing practical experience as Lawyers, become Judges in their respective common law EU countries, and then further get elevated to the CJEU. However, the system in Civil law countries are conventionally appointed fresh from specialist judicial training schools. But at the CJEU level, it is somewhat a grey area, with slightly heavier shades of Civil law influence. As regards to the appointment of Judges in the CJEU, Article 253 of the TFEU states that:

*"The Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are juris consults of recognised competence "*

The CJEU does indeed share common characteristics to that of common-cum-civil countries, it can hence be termed as a mixed legal system. Although, this tips slightly towards the side of a Civil Law system, because of the higher presence of Judges from Civil Law countries.

That being said, when Brexit does take place in 2019 and with the eventual exit of British Judges from the CJEU, it is my opinion that this coupled with the exit of English Common Law, will have a slight ramification on the CJEU. It has been my personal experience to find that the Judges in the CJEU have a neutral stance in the proceedings and do not take a pro-active role; this would mirror that of English Common Law court-rooms.

After Brexit, there is a possibility of the CJEU Judges taking a pro-active role in proceedings, and the Lawyers role may take a back-seat during the said proceedings. Currently, Lawyers do not have the right to an oral hearing, unless a reasonable request is made to the Registry, which then has to be granted by the CJEU. This is not prevalent in Common law jurisdictions as Lawyers are by default allowed oral submissions, which are crucial to a case as much as the written arguments. Hence, this could be a possible (yet minor) effect of the exit of English Common Law from the CJEU, via the exit of British Judges, Advocate-Generals and Barristers.

Country Examples: As already mentioned in part 3 of my thesis, the EU contains predominantly Civil Law member states. It was these Civil Law countries that originally gave rise to the European Coal & Steel Community (later the EU). Today out of the 28 member states, only 3 pure common law countries exist, namely - England, Wales & Ireland. Further, there are also mixed jurisdiction member states within the EU such as Scotland, Malta & Cyprus (Cyprus being slightly more common law-based than Malta), which contain joint characteristics of Common law & Civil law systems. The UK, even though being merely 4 countries, has had a major effect on the EU & its institutions through the English Common Law. After Brexit, there will only be one 'pure' common law country with the EU left, namely Ireland. It is left to be seen how much Ireland could possibly influence the EU through the common law. All in all, there could be an eventual

possibility that the EU will go back to its pure Civil law roots, as the majority of Civil law member states are bound to fill up the Brexit vacuum, within the EU and its institutions.

Evolution of law: As mentioned in part 3 of my thesis, the pace at which the law develops within Common law & Civil law countries, differs. This creates a quasi-loophole and void, from the aspect of commerce and society, as the evolution of law takes place quite slowly in Civil law jurisdictions, compared to Common law jurisdictions. This is because in Civil law countries, the laws are heavily codified and needs constant intervention of the legislators. Whereas in Common law countries, the law is not that heavily codified as the same is constantly developed by Judges.

At present, the laws at the EU level, seem to be not evolving at such a rapid pace compared to common law countries. The deliberation of legislation that takes place between bureaucrats in the EU Commission, can sometimes take a back and forth process which consumes a lot of time. At the same time, the legislation is to a large extent influenced by decisions of the CJEU, via concepts such as Quantitative restriction and Direct Effect. This mirrors characteristics that of a quasi-civil law system. After Brexit and with the exit of British MEP's and Judges from the CJEU, this could make EU legislation slightly more rigid and hence not that evolving in its substance and procedure. The British Judges bring with them the Common law experience that is crucial to help develop the legislation, via doctrines. Without these evolving doctrines (which is based on the principles of English common law), the needs of society and business will not be entirely met. The reason being that society and business is constantly going through transformation, and therefore has different needs at various points of time. When disputes arise out of the same, these cases go up for adjudication to the Member state courts and under Article 267 of TFEU, the same can be referred to the CJEU, for

a preliminary reference. It is here that laws are shaped in the EU level which reflects the ever-evolving needs of society and business. It is my opinion that with the exit of English Common law, the CJEU's power to form new legal concepts or doctrines, may be streamlined, leading to a more rigid and less evolving EU legal structure.

Case-law journals: As mentioned in part 3 of my thesis, case-law journals, which are formed through precedent, is the most essential requirement for any litigation lawyer who pleads a case, for his or her client, in a common law court room. The said lawyer tries to persuade the Judges and/or Jury of the court-room that the facts of his/her client's case falls within the four corners of a case-precedent which has already been decided by the instant or superior court. This is the basis of the common law doctrine of Stare Decisis. In the EU/CJEU's official websites one finds mention of a case-law search engine, under various headings.

After Brexit, including the exit of British Judges in the CJEU (which bring with them the Common law concepts), there is a high possibility for the eventual decline of the concept of Precedent. It is true that the CJEU is not bound by case-law horizontally, but in de-facto sense the CJEU does not usually deviate from its similar past judgments, so as to provide legal certainty. After the eventual decline of Precedent, there will be less reference to case-law journals as lawyers who litigate in the CJEU will know that the same would not hold any water for Judges. It is my opinion that with the exit of English Common Law, the CJEU will steadily shift to a Civil Law court-room, which would even in the de-facto sense not give much regard to its similar previous judgments. Hence, there will be an eventual decline of case-law journals.

Judgments: As mentioned in Part 3 of my Thesis, that there is a difference in the judgments of Common law and Civil law court rooms. Common law judgements have the tendency to be more

elaborate, informal and creative in nature; whereas Civil Law judgments have the tendency to be more concise, formal and less-creative in nature. That being said, it must be mentioned that the CJEU, follows the French tradition, of not publishing dissenting opinion(s); this is done to protect the independency of the Judges. Within a common law judgment, there are two operative portions. The first is Ratio Decidendi and the second is Obiter Dictum. Ratio Decidendi can be defined as the concept on which the court has come to its decision.<sup>94</sup>

The Ratio Decidendi of a judgment is binding on all future similar cases before its courts.<sup>95</sup> Obiter Dictum can be defined as a comment that a Judge makes while writing the Judgment, and the same does not form precedent but is in most situations persuasive in nature.<sup>96</sup> It can also be therefore said that dissenting opinions of Judges constitute an Obiter Dictum. Obiter Dictum can be seen as a constructive criticism, which being persuasive in nature, can have an influence on future Judges when re-approaching a similar case.

An example would be that of a case in the English High Court<sup>97</sup>, whereby the Judge in addition to permitting the landlord's prayer for claim, also stated that if the landlord sought compensation for backlog of rent in the war years, there would have been an estoppel. Considering the landlord did not make the latter prayer for claim, the Judges' second observation became an obiter dictum. This judgment forms a landmark judgment in the English Contract law, as it gave a sense of revival to the doctrine of promissory estoppel. Thus, it is found that the dissenting opinion plays a vital role in future jurisprudence.

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<sup>94</sup> Blacks Law Dictionary - Page 1077

<sup>95</sup>[http://nuweb2.northumbria.ac.uk/bedemo/sources\\_of\\_english\\_law/page\\_10.htm](http://nuweb2.northumbria.ac.uk/bedemo/sources_of_english_law/page_10.htm)

<sup>96</sup> Blacks Law Dictionary - Page 923

<sup>97</sup> Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130

After Brexit, including the exit of British Judges in the CJEU (which bring with them the Common law concepts), there is a high possibility that the Judgments would remain even more formal and concise. Further, the future possibility of having judicial dissent within the CJEU, would be diminished after Brexit.

Style of drafting of laws: As mentioned in Part 3 of my Thesis, statutes are drafted in different ways within the Common and Civil Law countries. In common law countries, statutes are detailed as the same contains rules and exceptions; whereas in civil law countries, statutes are concise and are mentioned in broad general phrases. When I see things at the EU level, I have taken the example of Competition law (in which the EU has exclusive competence). Upon a perusal of the EU laws pertaining to Competition, from Articles 101 to 109 of the TFEU and the relevant Regulations & Directives, I find that the laws are exhaustive and comprehensive. This mirrors that of Common law style of drafting. After Brexit, including with the exit of British MEP's (which bring with them the Common Law style of Drafting), this may change the style of drafting, within the EU, to mirror that of Civil law jurisdictions.

I would like to provide an example of the same in international laws. The UN Convention on the Carriage of Goods by Sea, adopted at Hamburg (popularly known as the Hamburg Rules) was drafted in a civilian-law fashion with the rules pertaining to responsibility in just one article. Art 5 (I) of the Hamburg Rules states the following:

*"The carrier is liable for loss resulting from loss or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in Art. 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences."*

Whereas the International Convention for the Unification of Certain Rules relating to Bills of Lading, adopted in Brussels (popularly known as the Hague Rules) was drafted in a common law fashion, with the rules of responsibility in three exhaustive articles. The Articles on seaworthiness was contained in Article 3 (1), Article 3 (2) on care of cargo, and Article 4 (2) (A to Q) was based on exceptions.<sup>98</sup>

I would like to state that no particular style of drafting is right or wrong, each possess its own pros and cons. However, with the exit of English Common Law from the EU, there would be indeed be a missing 'x-factor' from the Statutes.

Interpretation of laws: As mentioned in Part 3 of my Thesis, the interpretation of laws or statutes does indeed differ in common law and civil law countries. Whereas in the EU/CJEU level, this takes a convergence, as a mixed legal system. It is indeed the primary duty of the CJEU, to provide clarity and interpretation on EU law.

When we see the different interpretation methods, namely Literal, Historical, Contextual & Teleological; we find that the first two (Literal & Historical) are rarely used by the CJEU but mainly by the English Judges, whereas the last two (Contextual & Teleological) are more commonly used by the CJEU. This would in a sense cause an overlap in the interpretation style used by the Judges of the CJEU. I have also mentioned that the judgments of the CJEU have effects that extend beyond the parties to a case concerned, such as “Direct-Effect”, which is extended to EU Citizens. This mirrors a characteristic that of common law jurisdictions as opposed to that of civil law courts, which are more restrictive in their creative/interpretation power.

After Brexit, including the exit of British Judges and Advocate Generals of the CJEU (which bring with them the English Common

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<sup>98</sup><https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=5822&context=lalrev> - Page 29.

Law jurisprudence), this may result in the CJEU using only the third and fourth interpretation methodology, and side-lining the first two interpretations. Further, the creative/interpretation power of the CJEU in its judgments may be drastically reduced, as there will be a dominance of EU Civil Law (Member State) Judges.

This interpretation power has a strong influence on every EU citizen, providing enforceable rights and obligations. Further, this interpretation power also stands as a bench-mark for future legislation, which is prepared by the EU Commission and debated in EU Parliament.

Like before, I would like to state that no particular style of interpretation is right or wrong, each possess its own pros and cons. However, with Brexit, including the exit of English Common Law from the EU, the new CJEU (without the British Judges & Advocate General), would miss out two crucial perspectives of interpretation, namely Literal & Historical. This may act as a hurdle for the CJEU in providing the widest possible interpretation to a statute, hence not reaching its full potential as a court.

Hence, after considering the above information, I am of the opinion that after Brexit, there will likely be imminent effects of the English Common Law's exit from the EU, particularly with its decreased influence in the EU Parliament and CJEU.

**PART 6 (POST-BREXIT: FUTURE STATUS OF  
ENGLISH COMMON LAW IN THE EUROPEAN  
UNION)**

In my previous chapter, I have analysed the various ramifications of the exit of English Common law from the EU. With the exit of the UK from the EU, that leaves just Ireland as the pure common law country within the EU. The EU would then be comprised of mainly civil (rule of law) countries. However, there are other quasi-common law countries, which are essentially mixed jurisdictions of common-cum-civil law, namely Malta & Cyprus.

Therefore, it is but natural to analyze the future of the Common law or English Common Law within the EU, after Brexit. Mr. Paul Gallagher, a former Attorney General of Ireland, had stated that common and civil law has created certain bottle-neck issues, when it came to EU regulations involving contract procedures. Further Mr. Gallagher also stated that the UK's exit from the EU, may eventually lead to EU legislation being drafted or interpreted in a style that may turn out to be opposing to the principles enshrined in the common law, leaving Ireland isolated.<sup>99</sup>

To further understand the future role of English Common Law within the EU after Brexit, one must analyze the future role of pure common law and mixed law member states, within the EU.

Ireland: As stated, after Brexit, Ireland will be the only pure common law country within the EU. Due to England's influence in the world, Ireland was the first country outside England to have adopted the English Common Law, which eventually replaced the Irish Customary law.<sup>100 101</sup> In Ireland, the doctrine of stare-decisis applies

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<sup>99</sup> <https://www.irishlegal.com/article/legal-experts-say-common-law-ireland-to-be-isolated-within-eu-after-brexit>

<sup>100</sup> Baker, John (2003). *The Oxford History of the Laws of England, Volume VI: 1483-1558*. Oxford: Oxford University Press. p. 108.

within its country's courts, however the exception being that of its Supreme Court, which through a case has come to the conclusion that it shall not be bound by its own judgments.<sup>102</sup> The Irish system is hence based on the Common law in which precedent or case-law is a major source of the country's law. When two judgments are conflicting with each other, the court which has the higher ranking that issued the respective judgment, is considered by the subordinate courts in Ireland.<sup>103</sup>

Ireland being the lone pure common law country within the EU, after Brexit, will now have to solely defend those features of its common law when it comes into conflict with the Civil law (which comprises the vast majority of EU member states). Prior to this, Ireland used to depend on the UK as its 'natural ally' to defend it when legal issues of the Common Law would come in conflict with the Civil Law.<sup>104</sup> Ireland is also the only EU member state in which the court of first appeal, namely the High Court, can make void any act of the legislature and/or executive; this power of the Judiciary being so great is also mentioned in the Irish Constitution at Article 45. It must be mentioned that, prima-facie, no other EU member states allows its judiciary so much power.<sup>105</sup>

It was also found that various "continental" civil law concepts have made in-roads into both UK & Ireland's legislation, such as "legitimate expectation" and "duty of good faith". The UK judicial and political actors are bound to take a diverging view after Brexit, but the Irish judicial and political actors will continue to inherit and transpose

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<sup>101</sup> Hand, Geoffrey Joseph (1967). *English law in Ireland, 1290–1324*. Dublin: Cambridge University Press. p. 1.

<sup>102</sup> Attorney General v Ryan's Car Hire Ltd. [1965] IR 642.

<sup>103</sup> [https://uk.practicallaw.thomsonreuters.com/w-009-0803?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/w-009-0803?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1)

<sup>104</sup> [http://www.lawreform.ie/\\_fileupload/Annual%20Conference%202017/Senator%20Michael%20McDowell%20speech.pdf](http://www.lawreform.ie/_fileupload/Annual%20Conference%202017/Senator%20Michael%20McDowell%20speech.pdf) - Page 1

<sup>105</sup> [http://www.lawreform.ie/\\_fileupload/Annual%20Conference%202017/Senator%20Michael%20McDowell%20speech.pdf](http://www.lawreform.ie/_fileupload/Annual%20Conference%202017/Senator%20Michael%20McDowell%20speech.pdf) - Page 2

EU law into its system.<sup>106</sup> EU law is interpreted or developed through Article 267 of the TFEU, and it was also found that Irish courts have been more than willing to refer EU related-cases to the CJEU for preliminary rulings. Further, Irish lawyers have also been known to be quite receptive to EU Law, as opposed to a section of UK Lawyers.<sup>107</sup>

In fact, it is the top brass judiciary of Ireland that has partaken in dozens of legal conferences (aimed at soft diplomacy), both in UK and Europe, ahead of the 2019 Brexit. Post-Brexit, Ireland will be the only pure common law system left in the EU. This is reflected by its Judges who feel it is highly imperative to communicate their 'common law' opinion at European level judicial events more frequently, particularly in areas as Asylum and Extradition law.<sup>108</sup>

It is also estimated that the Irish Government's yearly legal bills could go well into the millions. The reason being that after Brexit, the UK (being the biggest common law player in EU) will no longer be negotiating for Ireland (which is also a common law player in EU, albeit smaller). Further, the UK would transpose EU legislation into its common law, which would then act as a blue-print for Ireland, who follows the same system. Additionally, Ireland having a small diplomatic mission in Brussels, would require a lot of logistics and further costs to make their 'common law' voice heard, thereby making it difficult to fill the void which UK creates after Brexit.<sup>109</sup>

All in all, it is my opinion that Ireland, due to its small geographical and population size, may face a great hurdle to have its 'common law' voice heard in the EU, after Brexit. This could signal the beginning of the end for the further development of Common Law in the EU.

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<sup>106</sup> <https://www.irishlegal.com/article/legal-experts-say-common-law-ireland-to-be-isolated-within-eu-after-brexit>

<sup>107</sup> [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596825/IPOL\\_STU\(2017\)596825\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596825/IPOL_STU(2017)596825_EN.pdf) - Page 13.

<sup>108</sup> <https://www.irishtimes.com/news/ireland/irish-news/judges-ramp-up-diplomatic-efforts-ahead-of-brexit-1.3306118>

<sup>109</sup> <https://www.irishlegal.com/article/irish-governments-legal-bill-to-go-up-after-brexit>

Malta: Malta has a unique law system within the EU. It has a mixed legal system within the EU, having attributes that of common and civil law. It is found that Common law made its way to the Maltese jurisprudence in the 1800's, as it came under the British rule. Prior to that it was a civil law system and naturally this led to some conflict.

A classic feature of the Common law system is that of Stare Decisis or Precedent. This feature, however, is not followed in Malta.<sup>110 111</sup> The judgments therefore merely act in a persuasive fashion to help guide the Maltese Judges arrive to their decision, but are not binding on them. Further, the Maltese Judges also do not recognize judgments passed by the Constitutional Court as binding erga omnes but rather these judgments are only binding to the plaintiff and defendant in the case.<sup>112</sup>

Malta can trace its legal history to Roman law (by Emperor Justinian), which was subsequently spread throughout many countries. The Maltese had asked the British for their help against the French, and the British thereafter stayed on and introduced the Maltese to the Common law legal system, including laws on evidence, jury trials, etc. A classic example of the Maltese mixed legal system can be further explained by using as an illustration the Maltese Criminal Code which has its roots in the Civil law and the jury system which has its roots in the English Common law.<sup>113</sup>

It is but natural for there to be a Common law influence as the British remained in Malta for more than 150 years. This common law influence can be further found in Maltese procedural and

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<sup>110</sup><http://lawjournal.ghsl.org/viewer/170/download.pdf> - Page 2

<sup>111</sup><http://www.comparativelawreview.unipg.it/index.php/comparative/article/view/76/72> - Page 7

<sup>112</sup><http://www.comparativelawreview.unipg.it/index.php/comparative/article/view/76/72> - Page 8 & 9

<sup>113</sup><http://www.independent.com.mt/articles/2015-04-13/books/The-basics-of-the-Maltese-legal-system-6736133706>

administrative law. It must be mentioned that even though these principles are based on the Common law, it is still codified. Another example is the Maltese Trusts Act, which by its nature is a common law concept.<sup>114</sup>

All in all, Malta's legal system is to a large extent civil in nature. Common law has gradually developed into its legal architecture, to co-exist side by side in harmony with Civil Law. It is my opinion that Malta, due to its small geographical and population size, would indeed face a greater hurdle than Ireland to have its 'common law' voice heard in the EU, after Brexit. That being said, Malta together with Ireland, stands a better chance to develop the common law in EU.

Cyprus: Like Malta, Cyprus too has a unique law system within the EU. Cyprus being a British colony from 1878 till 1960 was strongly influenced by the English Common law legal system. Post-independence the English jurisprudence was maintained, with the caveat of the administrative law (which is inspired by the French system) and the family law (which is inspired by the Greek system).<sup>115</sup> Cyprus public law is inspired by the Civil law, whereas the procedural and criminal law is inspired by the Common law.<sup>116</sup>

Hence, the law of Cyprus can be considered a mixed legal system, with an interplay of the Common and Civil law. It is said that the British took possession of this island to take advantage of a maritime route to India.<sup>117</sup>

Cyprus, unlike Malta, follows the doctrine of Stare Decisis. The Supreme Court in a case has stated that the doctrine of Stare Decisis

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<sup>114</sup> [https://www.um.edu.mt/europeanstudies/books/CD\\_CSP5/pdf/isammut.pdf](https://www.um.edu.mt/europeanstudies/books/CD_CSP5/pdf/isammut.pdf) - Page 9.

<sup>115</sup> <http://www.studiofinpro.it/wp-content/uploads/INTRODUCTION-TO-CYPRUS-LEGAL-SYSTEM.pdf> - Page 1.

<sup>116</sup> <https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=1087&context=jcls> - Page 38

<sup>117</sup> WILLIAM MALLINSON, *CYPRUS: A MODERN HISTORY* 10 (IB Tauris 2009).

extends to administrative law cases, based on the logic of "predictability" and "judicial hierarchy".<sup>118</sup> Hence, Cyprus follows the doctrine of Stare Decisis or case-law precedent.<sup>119</sup> Cyprus can hence play a strong role with Ireland (and Malta) to push for the continuous involvement and development of the Common law within EU, as Cyprus resembles very closely to a common law system.

It is my opinion that a country's influence on global affairs and international policy-shaping, is primarily determined by its economic (Gross domestic product) strength. A secondary determining factor is its population number. The population numbers <sup>120</sup> of the current common law countries within the EU, in descending order, are as follows:

UK: 65.64 Million, Ireland: 4.77 Million, Cyprus: 1.17 Million, Malta: 436,947.

Compared to EU's total population number of 508 million<sup>121</sup>, the EU common law countries form around only 14% of the EU population strength. With UK's exit from the EU, the EU common law countries would now only represent around 1.3% of the EU population. This creates a huge vacuum in the common law arena within the EU.

Hence, after considering the above information, I am of the opinion that after Brexit, Common Law would likely lose 'wind in its sail' within the EU and its institutions. However, common law can keep developing within the aforementioned member states and those countries should now begin to take a pro-active role within, inter-alia, the EU Parliament and CJEU. This will keep a minimum pace for the involvement, development and safe-guard of common law principles.

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<sup>118</sup> Demetriades v. The Republic, (1977) 3 C.L.R. 213,

<sup>119</sup> <http://csi.com.cy/business-cyprus/cyprus-legal-system/>

<sup>120</sup> <https://data.worldbank.org/indicator/SP.POP.TOTL>

<sup>121</sup> [https://europa.eu/european-union/about-eu/figures/living\\_en](https://europa.eu/european-union/about-eu/figures/living_en)

**PART 7 (POST-BREXIT: EUROPEAN UNION ACTORS  
USAGE OF ENGLISH COMMON LAW)**

I would now like to analyze the economic effects of Brexit, particularly in reference to the EU actor's usage of English Common law. It was found that English Common Law is the most common choice for commercial contracts. This preference also includes parties coming from EU Civil Law countries, and even outside Europe. London, thereby, has developed into an international hub for dispute resolution.<sup>122</sup>

By statistics published by the London Court of International Arbitration, it was revealed that between 2012 to 2013, around 81% involved one foreign party and 49% of cases were completely between foreign parties, having no seat of incorporation in England.<sup>123</sup>

The reason for this is mainly two-fold. Firstly, the substantive and procedural aspects of the English Common Law is clear, certain and predictable; thereby providing freedom and independence to draft a commercial contract to each parties own will, as opposed to civil law legal systems which apply more rigid laws derived from codified statutes.<sup>124</sup> <sup>125</sup> Secondly, in the hypothetical situation the contract ends up being disputed, the same when heard in an English court is assessed on the principle of judicial precedents, which provides legal certainty and fairness.<sup>126</sup>

At present, UK court judgments can be executed across the EU member states, through Recast Brussels I or the Brussels Regime, via

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<sup>122</sup> <http://blogs.lse.ac.uk/brexit/2017/07/14/can-eu-actors-keep-using-common-law-after-brexit/>

<sup>123</sup> <https://www.qilts.com/blog/why-english-law-governs-most-international-commercial-contracts>

<sup>124</sup> <https://www.qilts.com/blog/why-english-law-governs-most-international-commercial-contracts>

<sup>125</sup> <https://www.cogencyglobal.com/blog/the-benefits-of-choosing-english-law-in-cross-border-financial-transactions>

<sup>126</sup> <https://www.cogencyglobal.com/blog/the-benefits-of-choosing-english-law-in-cross-border-financial-transactions>

Regulation (EU) No. 1215/2012. The said regulation, in a nutshell, creates a common legal or judicial area and spells out rules on which courts have jurisdiction in civil and commercial matters within the EU; this creates a mutual recognition of court decisions within the EU.<sup>127</sup>

Incidentally, through this regulation, parties now widely enforce or execute judgments of the English Courts, across the member states of the EU. However, post-Brexit, the UK's legal position within the EU will change, and quite naturally executing UK's court judgments in EU member states will no more be possible.

This is because when the UK exits the EU, the aforementioned regulation will no more be applicable to the UK, hence making UK's courts decisions no more enforceable in the EU. There is another regulation called Regulation (EC) No 593/2008 or also known as Rome I. In a nutshell, this regulation allows the parties to choose the law to govern their contract.<sup>128</sup>

One of the things that distinguishes these two regulations is that entry in Rome I is not exclusively for EU members, whereas entry in Recast Brussels I is exclusively for EU members. When Brexit does take place, the UK through an act of parliament, can implement Rome I back into its domestic law. This will allow the continued dominance of English Common Law within the EU, as commercial entities can still form agreements or contracts under the English Common law.

Although the same cannot be adjudicated in an English Court room as those judgments will still not be enforceable in the EU. It is now widely being considered that, post-Brexit, the parties to a contract can choose to have a case adjudicated in a German or French Court (which comes within the purview of Recast Brussels I). For argument sake, considering the UK enters the Rome I, this will bind the German or

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<sup>127</sup> <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32012R1215>

<sup>128</sup> <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32008R0593>

French courts to adjudicate on a commercial dispute which is based on a Common law contract.<sup>129 130</sup>

This dispute resolution mechanism of common law cases in civil law courts is bound to be a judicial nightmare as civil law judges are not versed in common law principles. Notwithstanding that, there are attempts being made by certain EU member states to pick up post-Brexit legal business. They include the following:

Ireland: Ireland's geographical location within Europe, is quite distant from the centre of financial/economic activity. To further elaborate, I would like to show a picture below from which one can understand an important theory, which is known as the 'Blue Banana' (also known as the Manchester - Milan axis) of Europe. It was a concept developed by a French geographer Roger Brunet, who wanted to distinguish between the "active" and "passive" commercial areas of Europe.<sup>131</sup>



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To make up for this deficit, Ireland, in particular Dublin, is endeavouring to pick up post-Brexit legal business, as it will be the only remaining pure common law country within the EU and follows

<sup>129</sup> <http://blogs.lse.ac.uk/brexit/2017/07/14/can-eu-actors-keep-using-common-law-after-brexit/>

<sup>130</sup> <https://www.risk.net/regulation/5341101/a-common-interest-in-common-law>

<sup>131</sup> Roger Brunet (1989) "Les villes européennes", RECLUS-DATAR.

<sup>132</sup> [https://www.reddit.com/r/MapPorn/comments/47s7x6/europes\\_blue\\_banana\\_an\\_a\\_rea\\_of\\_high\\_population/](https://www.reddit.com/r/MapPorn/comments/47s7x6/europes_blue_banana_an_a_rea_of_high_population/)

the lingua franca of the Common law - English.<sup>133</sup> The Law Society of Ireland has already communicated to the Irish Government "to adopt a strategic approach to court resourcing" and to "place the development of the legal and judicial regime at the core of its Brexit response."<sup>134</sup>

In my opinion, Ireland is by far, the strongest contender of the nation's competing for post-Brexit legal business, as it offers London's culture, language and the common law frame-work.

Germany: Germany's financial capital, Frankfurt, is endeavouring to pick up the post-Brexit legal business. It has done so by establishing an English-speaking court at the Frankfurt High Court (Landgericht Frankfurt am Main).<sup>135</sup> Since January 2018, this court is equipped with a dedicated chamber for commercial disputes.

The unique thing about this court is that it allows parties to try their case in English, as it creates an exception to Section 184 of German Code on Court Organisation (GVG - Gerichtsverfassungsgesetz) which states the court language should be in German.<sup>136</sup> Further, Frankfurt being home to the European Central Bank and also located in Europe's largest economy (Germany), is also an added plus point.

France: France's capital, Paris, also has its eye on the post-Brexit legal business and as such is mulling to establish a special court that would adjudicate on contract disputes drawn up in the English common law and English language. This would hence require its new judges to have thorough experience in the common law arena.<sup>137 138</sup>

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<sup>133</sup> <https://www.irishtimes.com/business/retail-and-services/ireland-angles-to-pick-up-post-brexit-legal-business-1.3352983>

<sup>134</sup> <https://www.lawsociety.ie/News/Media/Press-Releases/four-ways-for-ireland-to-become-a-centre-for-international-dispute-resolution-post-brexit/>

<sup>135</sup> <https://www.bbc.com/news/uk-politics-42979920>

<sup>136</sup> <https://www.schulte-lawyers.com/schulteblog/2882017-6y2e6>

<sup>137</sup> <https://www.reuters.com/article/britain-eu-france-law/france-eyes-court-to-deal-with-post-brexit-financial-contract-issues-idUSL8N1JA3ZO>

<sup>138</sup> <https://www.ft.com/content/113f6c78-3bdd-11e7-821a-6027b8a20f23>

In my opinion, Paris would be in a tie with Frankfurt to attract business, as Paris itself hosts the International Court of Arbitration and European Securities Markets Authority.

The British legal sector (international) services is valued at around 4 Billion Pounds (net-value) per year.<sup>139</sup> Hence, there is a strong competition from primarily the above-mentioned member states, to woo corporations to relocate their seat of business and at the same time create an effective dispute resolution platform, which can adjudicate on commercial contracts based on the English Common Law.

Hence, after considering the above information, I am of the opinion that after Brexit, there will likely be large scale usage-cum-application of the English Common Law within the EU, by commercial undertakings and dispute settlement (arbitration/court) bodies. This rise in demand, post-Brexit, will likely add to the development and increased influence of the English Common Law in various sectors (EU actors such as special court rooms and arbitration tribunals). This will indeed create a common interest in common law.

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<sup>139</sup> <https://www.ft.com/content/4b6768ba-f6e5-11e7-88f7-5465a6ce1a00>

## **PART 8 (CONCLUSION)**

The dream of a 'United States of Europe' has come a long way since the end of World War II. Since 1952, the original community which consisted of the original six (West Germany, France, Belgium, Netherlands, Luxembourg and Italy), has indeed evolved from an economic "community" into a political/economic/legal "union", being different from what its founding fathers had dreamed of. This union today encompasses a dynamic legal system, rooted in values of natural justice, and is influenced strongly by the legal system of member states, and vice-versa.<sup>140</sup> Never before, has such an unprecedented event like Brexit, taken place in the history of the EU and it is truly the largest political/legal/economic de-merger set to take place.

Given the fact that the original six Member States were civil law jurisdictions, it is but natural for the EU to be based on Civil law jurisprudence. Common law principles only started leaving their mark following the UK's accession to the EU.<sup>141</sup>

To fast-forward in time, the UK's (including the Common Law) post-Brexit role within the EU, would also depend on whether there will be a "Hard Brexit" or "Soft Brexit". These terms are commonly used to describe the prospective terms and conditions between the UK & EU, post-Brexit. Hard Brexit involves UK trading with the EU under WTO rules, having no obligation for the free movement of people. Whereas Soft Brexit, involves UK keeping membership of the EU single market, including the "four freedoms".<sup>142</sup>

I am of the opinion that in a world of ever evolving globalization and interaction, there is bound to be a convergence or fusion of legal cultures and ideas. The Common and Civil Law system,

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<sup>140</sup> European Union Law, Margot Horspool, Matthew Humphreys and Michael Wells-Greco, Page 1.

<sup>141</sup> [https://www.um.edu.mt/europeanstudies/books/CD\\_CSP5/pdf/isammut.pdf](https://www.um.edu.mt/europeanstudies/books/CD_CSP5/pdf/isammut.pdf) - Page 1

<sup>142</sup> EU Law, Paul Craig and Grainne de Burca, Oxford University Press, Page 582.

independently and together, brings with it its own pros and cons, and the EU currently reaps the benefits of having the best of 'both worlds'. Further, I am of the opinion that in the foreseeable future, the EU will have a greater fusion of the Common and Civil Law systems, although the 'scale' is more likely to tip more in favour of the Civil Law system.

However, there is one caveat to this. I recall your kind attention to Part 5 of this Thesis, where I analysed that post-Brexit, there will be a likely decrease in the influence of the Common Law in one core set of sectors (EU Parliament and CJEU). Conversely, in Part 7 of this Thesis, I also analysed that post-Brexit, there will surprisingly be a likely increase in the influence of the Common Law in another set of various sectors (EU actors such as special court rooms and arbitration tribunals). Thereby, this allows one with high certainty to foresee a return of the 'scale' balance which favours both systems, after Brexit.

Within mixed jurisdictions, I believe in a de-facto quasi-competition between legal systems, whereby each system influences the other by constantly striving to evolve to the needs of society/commerce. It is true that both these systems at the EU and member state level, have for the most part evolved-cum-influenced each other in harmony. This in itself could be a model/blue-print for other mixed law jurisdictions.

To conclude my thesis with some food for thought, I would like to quote Sir Geoffrey Vos, Chancellor of the High Court (England and Wales):

*"What I always say is that common law and civil law judges have much more in common than there are differences between them. They are both dedicated to achieving a just outcome in a reasonable timescale at a proportionate cost, for the dispute between the parties."*<sup>143</sup>

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<sup>143</sup> <http://9bri.com/wp-content/uploads/2017/12/Sir-Geoffrey-Vos-Frankfurt-presentation-nov2017.pdf>

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