

Why Legal Flexibility is not a Threat to either the Common Law System of England and Australia or the Civil Law System of France in the Twenty-first Century

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1. Introduction

The eighteenth-century social theorist Charles de Secondat Montesquieu once noted in regard to the mission of the comparatist that „it is not the body of the laws that I am looking for, but their soul“.¹ The same can be said for the comparatist in the twenty-first century. This is particularly so in relation to the long-standing criticism of the fact that the requirement for legal certainty, as evidenced either a body of authoritative case law and statute as in the Common Law system of England and Australia or in a body of codified law as in the Civil Law system of France, often conflicts with the reality that flexibility is also required in judicial interpretation of the law in light of the contemporary socio-legal climate and the demands of general public that up-to-date social attitudes be reflected in the law. To better understand that conflict the following discussion searches for the „soul“ of each system, that is, what exactly it is, apart from substantive law, that makes the Common Law and the Civil Law what they are.

In Section 2-5 of this paper, the theoretical structure of the body of laws within each system is examined with a view to pin-pointing just what it is that most characterises the substantive laws of the Common Law and the Civil Law. In addition, the actual working of each system is analysed in order to identify some of the areas where theoretical structure and legal practice diverge from each other and create a degree of flexibility which embraces both the socio-cultural and legal worlds. In Section 6 the discussion turns to the impact of this divergence on the integrity of the Common Law and Civil Law as legal systems. Finally, in Section 7, suggestions as to how the conflict between legal certainty and legal flexibility can be viewed in a constructive way shall be made.

In this comparative study of the ideology of legal certainty and the reality of flexibility in the Common Law system of England/Australia and the Civil Law system of France focusing on the *droit civil* has been chosen as a point of comparison for the primary reason that the codified legal system, in particular the *Code civil*, prima facie stands in stark contrast to the Common Law focus on the importance of case law. Although, this paper focuses on these two specific legal systems, generally speaking, the principles examined and the suggestions made regarding legal certainty and flexibility can be applied more broadly.

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¹ Montesquieu, Charles, 'De L'esprit des lois' in Caillois, Roger ed, *Oeuvres complètes*, Vol II, (1951), p.1025.

2. Precedent and *Stare decisis* as Instruments of Legal Certainty in the Common Law System of Australia

In Australia in recent years there has been a stream of criticism about what has been called „judicial activism“, namely that judges are tending to *make* the law rather than simply *apply* it in accordance with precedents established in case law and the doctrine of *stare decisis*.² In an article on the use and abuse of precedent, former Chief Justice of the High Court of Australia, Sir Anthony Mason, noted that among the detriments of precedent are a preoccupation with past decisions and an inability to respond to the need for change, and that as a result the impression is conveyed that „the law superimposes its own standards on the processes of reason“. ³ Clearly, the rigidity of the doctrines of precedent and *stare decisis* can and have resulted in the creation of a sense of legal certainty through the consistent and continuous application of the principles of law. For instance, in Contract Law the focus on consideration as the most fundamental element of a legal contract is evident from the 1915 English case *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd*⁴ through to the landmark Australian case *Australian Woollen Mills v The Commonwealth*⁵ in 1954. As a result a legal certainty has emerged that without consideration there is no contract. Such certainty appears guaranteed by the doctrine of precedent which demands that *stare decisis* be applied in all but the most exceptional cases.

The very creators of the common law, however, can also change it. Through the role of the judiciary the doctrines of precedent and *stare decisis* can be made to accommodate changing socio-cultural values. In *Dietrich v R*, Justice Brennan noted:

The common law has been created by the courts and the genius of the common law system consists in the ability of the courts to mould the law to correspond with contemporary values of society.⁶

Take, for example, the much-discussed Australian case of *Mabo v Queensland (No 2)*.⁷ The case concerned the annexation of the Murray Islands to the State of Queensland on Australia's north-eastern coast. The question was whether on annexation the Crown had acquired absolute ownership of the land such that the Meriam people, who had occupied the Island before European contact, were no longer entitled to occupy the land. The Court found that the Meriam people were entitled to possession despite the fact that there was no English or Australian precedent in the case law nor statutory authority to support such a finding. Justice Dawson held that it is the role of parliament, not the courts, to make such changes and that the doctrine of precedent must stand intact no matter how unsuited its legal results are to contemporary thought and attitudes. On the other hand, the majority saw

² See for instance Heydon, Dyson, 'Judicial Activism and the Death of the Rule of Law' [2003] Jan-Feb *Quadrant* 9-22.

³ Manson, Anthony, 'The Use and Abuse of Precedent' [1988] 4 *Australian Bar Review* 93.

⁴ [1915] AC 847.

⁵ (1954) 92 CLR 424.

⁶ (1992) 109 ALR 385 at 402-3.

⁷ (1992) 175 CLR 1.

the court as being under a duty to re-examine the past and modify the legal system according to current notions of justice and human rights.

It is arguable that whatever certainty the doctrines of precedent and *stare decisis* create can be undone by the very system which purports to hold these doctrines as both central and sacred. Consequently, it appears that the substantive law is not substantive at all in the sense of being obligatory or indispensable. Clearly, rules are not just rules, but are socio-legal constructs which are destined to change by the very socio-legal system which created them. As Pierre Legrand has put it, „there is more to rules than it appears: there exists a socio-cultural dimension which, although it is largely concealed, remains inherent to rules“.⁸

3. The *Code civil* as an Instrument of Legal Certainty in the Civil Law System of France

Article 7 of the *Code civil* sets the premise of certainty, or at least the ideal of legal certainty, which is to be gained from the *Code civil* itself and not from judicial statements:

L'exercice des droits est indépendant de l'exercice des droits politiques, lesquels s'acquièrent et se conservent conformément aux lois constitutionnelles et électorales.⁹

Indeed, arts. 4 and 5 stipulate that the courts must base their decisions on legislative provisions and must not use past decisions as the sole authority for such decisions. The *Code civil* is set up not only as the foundation of the „law“ but also as representing a closed system of law. Yet it seems unavoidable that at some point judicial interpretation of the *Code* will lead to legal rules which necessarily exist outside the ambit of the *Code*.

For example, the legal certainty of the law of *délits et quasi-délits* is provided by art. 1382-86 of the *Code civil*, which form the foundation of the law in this area. However, such certainty is easily undermined by the fact that the whole of the law of *délits et quasi-délits* is contained in only five articles and those articles are expressed in broad language which allows room for a level of judicial interpretation which is more akin to the role of the judiciary in the law-making process in the Common Law system. In particular, art. 1384 appears to have been intended by the codifiers to be applied to custody/care situations involving animals and buildings. Yet the broad language of sub-s. 1 allows ample room for interpretation. In the *Jand'heur* case¹⁰ the *Cour de cassation* was able to broaden this provision to apply to other custody/care held that the presumption of liability imposed by art. 1384 for damage caused by objects in one's care was not limited to dangerous things or substances.

In contrast, the courts have also shown an unwillingness to accommodate changing socio-cultural needs in the area of *force majeure* as it applies in *droit civil*. The judicial message seems to be that art. 1148 is to be followed regardless of how harsh or unjust the results

⁸ Legrand, Pierre, 'European Legal Systems are Not Converging' [1996] 45 *International and Comparative Law Quarterly* 57.

⁹ www.legifrance.gouv.fr/WAspad/RechercheSimplePartieCode?commun=&code=CCIVILLO.rcv accessed on 29 July 2005.

¹⁰ *Jand'heur v Les galeries belfortaises* [1930] D 1.57.

may seem. As noted by René David, in the famous *Canal de Craponne* case the *Cour de cassation* was adamant that the contracting parties themselves must provide for the possibility of a change in circumstances which might frustrate the contract.¹¹ This is similar to the old Common Law rule in *Paradine v Jane*¹² that a party to a contract was bound to make good that contract regardless of a frustrating event, which rule prevailed until *Taylor v Caldwell* in 1863.¹³ In the latter case it was held that the destruction of the subject matter of the contract discharged the parties provided there was no fault.

Despite the assertions of the *Code civil* that only the *Code* itself is to be seen as „law“, there are avenues built into the Civil Law system which allow for a degree of judicial interpretation aimed at responding to the changing socio-cultural needs of the community. On the whole, certainty is achieved through the existence of the *Code*, though flexibility is clearly possible.

4. Equity as a Judicial Response to the Need for Flexibility in the Common Law System of Australia

Clearly the Common Law courts are capable and willing on occasion not only to mould the substantive law to address new situations and attitudes to the community, but also to recognise that the courts have in certain circumstances a duty to do so. This aspect of the Common Law system is perhaps nowhere more evident than in equity. With its history of providing a just remedy in response to the rigidity of the common law, equity has what might be described as an in-built element of fusion between law and socio-cultural concerns with such concepts of justness and conscionability.

Take, for example, the Australian High Court's response to the problematic area of privity of contract and the contemporary criticism of the absence of third party rights in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*.¹⁴ Since the English case of *Tweedle v Atkinson*¹⁵ in 1861 the doctrine of privity of contract has been that a third party cannot sue on a contract for her/his benefit. In *Trident*, Justice Brennan noted that third party rights to sue on a contract are nowhere to be found in Anglo-Australian common law and that to admit such rights into the common law would require a new source of legal rights which would arise independently of both contract and equity.¹⁶ Accordingly, it seems that this is not an area of law where equity alone can function as to bridge the gap between law and socio-cultural needs for flexibility. Justice Deane commented that if third party rights are to be recognised at law, they must be based either on statute or some other common law principle beyond contract, such as estoppel and unjust enrichment.¹⁷

¹¹ David, René, *English Law and French Law: A Comparison in Substance* (Stevens & Sons, London, 1980), 121.

¹² (1647) *Alley* 26; 82 ER 897.

¹³ (1863) 3 B & S 826; 122 ER 309.

¹⁴ (1988) 165 CLR 107.

¹⁵ (1861) 1 B & S 393; 121 ER 762.

¹⁶ Above n 15 at 134.

¹⁷ Above n 15 at 142 and 145.

Yet equity can and has intervened where the operation of the privity of contract principle resulted in an unjust outcome. In such cases the court may find a trust with the promisee of the contract being treated as a trustee of a promise made for the benefit of the third party. This point was made by Justice Fullager in *Wilson v Darling Island Stevedoring & Lighterage Co Ltd*¹⁸ and later in *Trident* by Justice Deane who did in fact find a trust in that case. It appears that the usefulness of equity has been overlooked, or undervalued, and instead judicial opinion has tended towards solutions in other areas while waiting, perhaps, for the appropriate legislative provisions to come into existence.

In contrast, in the French Civil Law system a moral interest, akin to the focus on fairness and justness in equity, is assumed to exist in all third party beneficiary contracts to that a third party derives a direct right to enforce the contract. This is despite the fact that arts. 1121 and 1165 of the *Code civil* make it clear that third parties have no such rights. Similarly, arts. 1371-81 fail to cover adequately all types of cases of unjust enrichment and the *Cour de cassation* has broadened the ambit of the *Code civil* accordingly. As noted by Konrad Zweigert and Hein Kötz,¹⁹ in the Boudier case the Court, using the scholarly work of Aubry and Rau as a basis, made use of a general enrichment claim under the name of *actio de in rem verso* which rests directly on considerations of equity, in particular the principle of equity that one must not enrich oneself at the expense of another, rather than on any provisions in the *Code civil*.

In more general terms, in the law of *délits* the emphasis is placed on morality and propriety. According to art. 1382:

Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer. (Emphasis added).²⁰

To put it crudely, where there is no fault there is no liability. In this sense, the existence of a duty of care is irrelevant. This is in stark contrast to the foundation English case of *Donoghue v Stevenson*²¹ in the Common Law system in which it has long been established that duty of care lies at the heart of the tort of negligence. Conduct which is morally reprehensible is not enough if there is no duty of care owed by the defendant to the plaintiff in the first place.

On the one hand, these are curious developments given that the concept of equity is unknown in the Civil Law system. On the other hand, it is perfectly conceivable that a system which bases itself on principles of *ordre public* and *bonnes mœurs* would respond to the need for flexibility in this way. For instance, underlying the Law of Obligations is the principle of *fides est servanda* by which a person is bound in conscience to keep her/his word.²² The focus is on morality and as Barry Nicholas noted, it derives from the Canon

¹⁸ (1956) 95 CLR 43

¹⁹ Zweigert, Konrad, Kötz, Hein, *Introduction to Comparative Law* 3rd ed, (Clarendon Press, Oxford, 1998), 547-48.

²⁰ Above n 10.

²¹ [1932] AC 562.

²² Above n 12, 102.

Law principle that agreements should be carried out.²³ It is not dissimilar to the notions of fairness, justness and conscience found in equity.

Equity as understood in the Common Law system, that is, as a means of providing a just remedy where the common law fails to do so, may be a foreign concept to the Civil Law system, but it is not required in the latter which functions on the premise of a built-in equity. It seems there is no need to resort to equity since it is, or at least should be, built into the system in the first place. Because of the general lack of a foundation of morality in the Common Law system, at least one that is comparable to the Civil Law system, however, equity is crucial. Admittedly, the concept of *ordre public*, embracing general considerations of public order, public morality and public interest, underlies the *Code civil* in a way that the concept of „public policy“ does not underlie the common law. Public policy can hardly be described as a founding principle of the common law. Yet, generally speaking, the Common Law and Civil Law concepts of fairness, justness and conscience are essentially the same and perform similar roles. Equity forms the „soul“ of the Common Law just as *ordre public* and *bonnes mœurs* form the „soul“ of the Civil Law. The *Code civil* and the common law play important roles, but so too does the judiciary despite rhetoric to the contrary that judges are not law-makers.

5. Judicial Flexibility as a „Threat“ to the Certainty of the *Code civil*

Arguably the *Code civil* can no more exist in a vacuum than can the common law. Interactions between what is terms substantive law and judicial interpretation are as inevitable as interactions between the law and the scholarly community via legal treatises, or the law and the broader community via calls for legal flexibility. The stipulation of arts. 4, 5 and 7 that the law is to be found in legislative provisions and that judges are not law-makers creates a legal fiction. The *Code* is part of the social fabric of historic and contemporary France. It is also part of the legal fabric of the Civil Law system which encompasses the judiciary and academe.

The cases examined in this discussion illustrate the need for both certainty and flexibility in the social and legal fabric. While the *Code* provides the certainty, *prima facie* at least, the judiciary, via the guidance of academe, provides the flexibility and the two are not necessarily incompatible. On the official website of the *Cour de cassation*, although the role of the judiciary is certainly not described as one of „law-making“, it does include the application of the rules of law, the unification of the case law, and the edification of the academic writings and case law:

[L]a Cour de cassation a pour mission de contrôler *l'application des règles de droit* par les juridictions judiciaires et d'assurer *l'unité de la jurisprudence*. Elle a ainsi le pouvoir, quand le dossier l'impose, de „casser“ les décisions irrégulières qui lui sont déférées. Des générations de magistrats ont *édifié et édifient encore le doctrine et al jurisprudence*, cette œuvre en perpétuelle évolution. (Emphasis added).²⁴

²³ Nicholas, Barry, *An Introduction to Roman Law* (Clarendon Press, Oxford, 1962), 206.

²⁴ 'Introduction', www.courdecassation.fr/COUR/visite.htm accessed on 29 July 2005.

Although the old *Tribunal de Cassation* established during the Revolution was based on the fundamental principle of a uniform interpretation of the „law“,²⁵ and the current *Cour de cassation* follows suit, the cases analysed above suggest that there has been, and probably will continue to be, room for judicial „law-making“ which extends beyond mere interpretation, application, unification and edification. This is despite the dogma that the opinion of the *Cour* was never meant to be and is still not a source of law.²⁶ Clearly the Civil Law system as a whole can and has allowed for the existence and use of judge-made law in other areas such as the *droit administratif*. Judicial flexibility is perhaps best seen not as a threat to the *Code*, but rather as an assurance of its continuity through growth and, consequently, of its certainty.

6. The Impact of Legal Flexibility

Arguably, a degree of legal flexibility is a necessary element in a system like the Common Law that allows modification through the judiciary while simultaneously requiring certainty. The organic nature of the law is what permits and fosters the co-existence of this flexibility and certainty. This is the „soul“ of the Common Law system. Australian High Court Justice Michael Kirby recently described that system in terms of „its marvellous creativity“ and its „tendency ... to grow and develop in a pragmatic rather than a strictly logical way“.²⁷ In fact according to Justice Kirby, and in stark contrast to the official opinion of many members of the judiciary, „contrary to myth, judges do more than simply *apply* law. They have a role in *making* it and always have“.²⁸ Similarly, the Civil Law system is in a position to acknowledge openly that the judiciary does in fact „make“ the law and that in many instances judicial interpretation of the *Code civil* has in the past formed, and more than likely will continue to form, a source of law alongside the *Code*. According to Glendon et al,²⁹ this acknowledgment of „the inescapable dependence of legislation on the judges and administrators who interpret and apply it“ is already taking place in contemporary civil law systems. It would be a legal fiction to maintain, as traditional Civil Law dogma has done, that this is not occurring and must not occur.

For the most part, the integrity of each system, in the sense of its honesty or truthfulness to its historical and contemporary purpose and its completeness or wholeness as a system, remains intact despite the existence of and dependence on flexibility. The practicality and procedural focus as well as the need for reasoning by analogy within the context of the doctrine of precedent and *stare decisis* of the Common Law system remain unchanged. Likewise, the continuity of the *Code civil* and the fundamental role of unifying the „law“ within the context of the Civil Law system remain essentially intact. Although historically

²⁵ Dadomo, Christian, Farran, Susan, *The French Legal System*, (Sweet & Maxwell, London, 1993), 83.

²⁶ Merryman, John, *The Civil Law Tradition. An Introduction to the Legal Systems of Western Europe and Latin America* 2nd ed, (Stanford University Press, Stanford, 1985), 41.

²⁷ Kirby, Michael, 'Beyond the Judicial Fairy Tales' [2004] Jan-Feb *Quadrant* 28.

²⁸ Above, 28.

²⁹ Glendon, Mary Ann, Gordon, Michael Wallace, Osakwe, Christopher, *Comparative Legal Traditions* 2nd ed, (West Publishing Co, Minn., 1994), 63.

the *Code* was meant to incorporate the conquests of the Revolution, including the removal of powers of judges, arguably the role of the contemporary judiciary is perfectly apt for the current state of the Civil Law system and the socio-cultural context in which it exists.

7. Concluding Remarks

Although the substantive laws of the Common Law system and Civil Law system differ in varying degrees, as does the development of notions of equity and morality, the two systems are not so different at heart. As Lawson has noted „the more one studies French law, the more one realizes that in many ways it greatly resembles the Common Law“.³⁰ Both systems have legal gaps and both recognise the need for a balance between certainty and flexibility, in other words, the necessity of flexibility to help close those gaps and make the systems work.

Why such flexibility exists is essentially because it is necessary from a practical viewpoint. It is a pragmatic requirement. The two systems may have different historical developments, but the need for legal flexibility is the same. The Civil Law system grew out of academic theorising and deductive reasoning. The Common Law, on the other hand, grew out of an almost obsession with matters of procedure, remedies and inductive reasoning focusing on the case law. Yet in world where there is an ever-increasing awareness among the general public of issues of ethics, neither system has proven that it can work without the flexibility provided by the judiciary and associated notions of equity and morality. The ability to change is an essential element of successful and long-lasting „law“. The „soul“ of the Civil Law and the Common Law systems is this very ability to grow, this reliance on flexibility, which is just as much a feature of each system as case law and statute.

³⁰ Lawson, F. H., *A Common Lawyer Looks at the Civil Law* (William S Hein & Co, New York, 1988), 55.