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COMMON LAW, CIVIL LAW, AND SUPRANATIONAL LAW: CLASHES OF INTERPRETATION

Andrea Pin[*]

* Professor of Comparative Law, University of Padova (Italy). The author wishes to thank Nick Aroney, A.J. Bellia, Oran Doyle, Lisa Burton-Crawford, Jeff Pojanovski, Iddo Porat, Leonid Sirota, and Maxime St.-Hilaire for their comments on earlier drafts of this article. The usual disclaimer applies.

I. INTRODUCTION

In her dissenting opinion to the widely discussed 2023 ruling on racial quotas for university admissions,[1] U.S. Supreme Court Associate Justice Sonia Sotomayor complained that the majority was trying to tame "society's progress toward equality."[2] However, she added, progress could not be "permanently halted . . . [a]s has been the case before in the history of American democracy, 'the arc of the moral universe' will bend toward racial justice despite the Courts effort's today to impede its progress."[3] Associate Justice Ketanji Brown Jackson echoed Sotomayor's feelings with a more sobering note, when she concluded her dissent writing that the Court was "obstruct[ing] our collective progress toward the full realization of the [U.S. Constitution Equal Protection] Clause's promise:" it was "truly a tragedy for us all."[4]

These poignant sentences do more than echo the German-turned American economist Albert Hirschman's quip that "[p]eople enjoy and feel empowered by the confidence, however vague, that they '*have history on their side.'*"[5] They convey the feeling that while history of civilization unfolds progressively, a court is trying to get in its way.

The prevailing European style of adjudication would probably align with Justices Sotomayor and Jackson and their belief that the law should be interpreted progressively. In fact, many scholars and practicing lawyers in Europe would identify the approach of Sotomayor and Jackson as an exemplar of the common law style of adjudication. Continental European judges and theorists have long held the view that common law courts adopt a forward-looking pattern of interpretation, which has often been a source of inspiration for them.

In the early twentieth century, the Austro-Hungarian legal sociologist Ernst Ehrlich complained about the rigidity of continental law.[6] In fact, he criticized it for making sharp distinctions between the

1. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

2. *Id.* at 384 (Sotomayor, J., dissenting).

3. *Id.*

4. *Id.* at 411 (Jackson, J., dissenting).

5. TOMMASO PAVONE, THE GHOSTWRITERS: LAWYERS AND THE POLITICS BEHIND THE JUDICIAL CONSTRUCTION OF EUROPE 319 (2022) (citing ALBERT HIRSCHMAN, THE RHETORIC OF REACTION 158 (1991)).

6. EUGEN EHRLIC, I FONDAMENTI DELLA SOCIOLOGIA DEL DIRITTO 357 (1976).

state, which made the law, and the jurists, who could only find it.[7] Ehrlich praised the "liberty of the English judge," which made the common law style of adjudication so superior.[8]

The reputation of common law as warranting a larger degree of freedom to the judges has survived for most of the twentieth century, although some prominent scholars have questioned this belief. In the 1950s, the great German legal philosopher Gustav Radbruch elucidated the controversial status of the law in England, noting that, while English jurists complained about its rigidity, foreign observers were quick to praise the elasticity of its common law.[9] This was especially true for those who believed that judges should play a creative role in the development of the law.[10]

When Radbruch addressed the contemptuous reputation of English law, many scholars assumed there was a substantial gap between common law and civil law. However, those assumptions have shifted in recent years, as several scholars have tried to bridge that gap. While textbooks, which primarily focus on categorizations and taxonomies,[11] still emphasize the differences between common law and civil law, legal scholarship has focused on showing how similar they have become.[12] This is particularly true in Europe, where scholars have discussed the emergence of a common core among European legal systems, especially in the field of constitutional law.[13]

Admittedly, both common law and civil law regimes must deal with realities that go beyond stark and simplistic distinctions. Academics in common law countries have noted the extent to which common law regimes have incorporated legislation. This shift is so

7. *Id.* at 229.

8. *Id.*

9. *See* GUSTAV RADBRUCH, DER GEIST DES ENGLISCHEN RECHTS 36–37 (1947).

10. *See id.*

11. Adam Shinar, *Deconstructing Mixed Constitutions*, 16 LAW & ETHICS HUM. RTS. 167, 168 (2022).

12. *See* Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1346 (2001)*; see also* MITCHEL DE S.-O.-L'E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 146 (2009) (according to whom the "most visible methodological cleavage in contemporary comparative law" is "the division between the proponents of similarity-oriented, and those of difference-oriented, comparison").

13. Renáta Uitz, *Can You Tell When an Illiberal Democracy is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary*, 13 INT'L. J. CONST. L. 279, 298 (2015).

significant that many have wondered if common law has changed dramatically to fit an "age of statutes":[14] an era in which lawmaking is routinely a parliamentary business, not something that occurs in courts. For instance, in Australia, as Lisa Burton-Crawford points out, "it would be exceedingly rare to find any matter that could be resolved solely by recourse to the common law, unpolluted by legislative interference."[15] On the other hand, continental European scholars have pointed out that case law has never been irrelevant for European countries. Precedents have become particularly important for civil law regimes thanks to the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (ECJ).[16]

The case law of these two courts has undeniably played a prominent role in shaping (or reshaping) European legal culture.[17] It has greatly affected the development of national legal regimes in Europe, strengthening and legitimizing the lawmaking role of their domestic judges.[18] This is especially true with regard to the ECJ, which some commentators consider "the single most important court in all of Europe," [19] and even credit with being at the forefront of European integration, "the French Revolution of our time."[20] Thanks to these two pan-European courts, an evolutionary approach now constitutes a key component of European constitutional and legal culture. This is especially true in western continental Europe, where it has given shape to an expansive theory and practice of judicial review[21] that has largely prevailed with few exceptions.[22]

14. *See generally* GUIDO CALABRESI, COMMON LAW FOR THE AGE OF STATUTES (1982).

15. Lisa Burton-Crawford, *An Institutional Justification for the Principle of Legality*, 45 MELB. U. L. REV. 1, 20 (2022).

16. *See* Paolo Grossi, *Sulla Odierna 'Incertezza' del Diritto*, L'INCERTEZZA DELLE REGOLE 18 (2015).

17. Holger Spamann, *Civil v. Common Law: The Emperor Has no Clothes*, HARVARD PUBLIC LAW WORKING PAPER NO. 24-11 (2024) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4937647 [https://perma.cc/VE9Y-LL3F].

18. *See* ERIN DALY, DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON 158 (2020).

19. *See* LASSER, *supra* note 12, at 6–7.

20. Vlad Perju, *Double Sovereignty in Europe? A Critique of Habermas's Defense of the Nation-State*, 53 TEX. INT'L L.J. 49, 49 (2018).

21. *See* Signe Rehling Larsen, *Varieties of Constitutionalism in the European Union*, 84 The MOD. L. REV. 477, 485 (2021).

22. *See id*. at 492.

Admittedly, the evolutionary reading of statutes and constitutional texts is not unique to continental Europe. Some U.S. scholars have noted that their judges tend "to see their role as less constrained than their predecessor[s]" did,[23] while their Canadian colleagues on the Supreme Court currently seem inclined to include policy consideration in their judgments.[24] In the field of constitutional law, Professors John V. Orth et al. analyzed the case law of several common law countries with a federal structure. They concluded that all their courts have played a significant role in changing the meaning of constitutional texts over time, and in circumstances unsupported by formal amendment. Judges in each jurisdiction clearly make choices that have the effect of informally amending, and so changing the meaning, of each of these constitutions.[25]

However, common law and civil law jurisdictions do not absorb judicial progressivism in the same way or to the same extent. The difference between civil law and common law countries is particularly visible in how their judiciaries and scholarship perceive and react to judicial lawmaking. Academic scholarship and legal culture at large suggest that, although the evolutionary approach has surfaced and sometimes even prevailed in both common and civil law jurisdictions, common law jurisdictions tend to view it as rather controversial and even resist it.[26] Professor Sergio Bartole, a theoretician of supranational legal integration who was involved in the Venice Commission—which promotes democracy and the rule of law globally—has written that a gap still exists between what he calls the English tradition and the continental tradition.[27] Despite being quite sanguine about the possibility of reconciling the English and the continental approaches, he notes that, at least since A.V. Dicey popularized the notion of rule

23. Andrew P. Morriss, *Codification and Right Answers*, 74 CHI.-KENT L. REV. 355, 359 (1999).

24. *See* Dwight Newman, *Judicial Power, Living Tree-ism, and Alterations of Private Rights by Unconstrained Public Law Reasoning*, 36 U. QUEENSLAND L.J. 247, 249 (2017).

25. *See* John V. Orth, John Gava, Arvin P. Bhanu, & Paul T. Babie, *No Amendment? No Problem: Judges, "Informal Amendment," and the Evolution of Constitutional Meaning in the Federal Democracies of Australia, Canada, India, and the United States*, 48 PEPP. L. REV. 341, 356 (2021) [hereinafter Informal Amendment].

26. On the constraining role of precedent, see Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 31 (2012) (stating that the rule-of-law principles "counsel[] against lightly overturning such precedents as we have").

27. SERGIO BARTOLE, THE INTERNATIONALISATION OF CONSTITUTIONAL LAW: A VIEW FROM THE VENICE COMMISSION 60 (2020).

of law in the late nineteenth century, significant institutional and cultural differences have persisted between the two.[28] The English and the continental tradition adhere to different methods of judicial interpretation, as they read written legal texts differently and assign distinct meaning and value to precedent.[29]

The scholarly depiction of common law and civil law as drawing closer looks more *normative* than *descriptive*. The portrayal of common law and civil law systems as becoming more similar resonates with, and even invigorates, judicial developments in several countries, and especially in supranational courts in Europe. But these changes stem from a specific, progressive turn in continental legal philosophy and constitutional culture that is hardly reconcilable with the reality of several common law jurisdictions. Although many academics downplay the differences between the two models, and scholars such as Bartole are optimistic about the possibility of common law and civil law blending in a not-too-distant future, there is evidence that common law jurisdictions, in particular, tend to resist this assimilation.

One of the clearest examples of backlash against a progressive interpretation of legal texts in a common law country can be seen in the legacy of the great Israeli scholar and Supreme Court judge Aharon Barak. In Israel, Barak's influential take on the role of the judiciary played an outsized role in shaping a progressive reading of written laws between the late twentieth and the early twenty-first centuries. With his opinions as well as his scholarship, Barak implemented his belief that judges "are not limited to interpreting and operating the existing laws . . . [they] are the spear's edge of the aspiration to a more desirable and better law . . . [they] are the architects of social change . . . [they] have the abilities to build a better and a more just legal system."[30] In a few decades, the proliferation of Barak's judicial philosophy granted

28. *See id* (where it is said that "the English concept of the rule of law [as encapsulated by A.V. Dicey] was strictly connected with the frame of the common law; therefore, there were differences from its European conception. These differences are partially overcome by recent policies of the European Union. The Venice Commission played an important role in these developments.").

29. *See id*.

30. Aharon Barak, *The Rule of Law*, *in* RECENT DEVELOPMENTS IN ISRAELI CASE LAW AND LEGISLATION, COLLECTION OF LECTURES DELIVERED AT THE SEMINAR FOR JUDGES 1976 (Shimon Shetreet ed., 1977), cited in Iddo Porat, "Towering Judges and Global Constitutionalism," *in* TOWERING JUDGES 1, 31 (Rehan Abeyratne & Iddo Porat eds., 2021).

"courts greater freedom to interpret the law in light of its purposes."[31] Barak's view garnered the controversial reputation of excessively empowering judges. In 2018, the Knesset (Israel's unicameral parliament) passed the *Basic Law–Israel the Nation State of the Jewish people* with the explicit purpose of minimizing the impact of Barak's judicial ideology and protecting its own primary lawmaking function.[32] The government coalition that won the 2022 general elections has similarly set out to "turn on their head almost four decades of Supreme Court jurisprudence and to dismantle the entire edifice associated with Aharon Barak."[33] It has pursued a political agenda that first stripped courts of some of its most effective powers of scrutiny in 2023 through an amendment of the *Basic Law: The Judiciary* that the Israeli Supreme Court soon struck down.[34]

This article argues that a fundamental misunderstanding has led to the perception that the common law and the civil law trend in the same direction, drawing closer together. This understanding is based on a particular notion of the role of the judiciary and of legal sciences more broadly, which entrusts courts with the power to develop the law incrementally and piecemeal, allowing the law evolve outside or beyond the political process. This approach underestimates the differences between adjudication cultures and their understandings of legal interpretation and legal change. European integration has been the main catalyst for that misunderstanding of the common law as an engine of change, since the project of integration tries to amalgamate disparate legal styles and constitutional frameworks within the continent. As Mitchel Lasser once noted when commenting on a controversial ECJ ruling,[35] European integration has "collaps[ed] the structural distinction[s] that traditionally defined most domestic

31. Harel Aron, *Barak's Legal Revolutions and What Remains of Them: Authoritarian Abuse of the Judiciary-Empowerment Revolution in Israel*, *in* TOWERING JUDGES 174, 197 (Rehan Abeyratne & Iddo Porat eds., 2021).

32. *See id.* at 194.

33. Moshe Cohen-Eliya & Iddo Porat, *Red Lines for Israel's Constitutional Reforms*, INT'L. J. CONST. L. BLOG (Jan. 8, 2023), https://www.iconnectblog.com/red-lines-for-israels-constitutional-reforms/ [https://perma.cc/QT9X-VYUP].

34. HCJ 5658/23 Movement for Quality Government in Israel v. The Knesset, (January 1, 2024) (Isr.).

35. *See* Case C-438/05, Int'l Transp. Workers' Fed'n and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti, 2007 E.C.R. I-10779.

European legal orders."[36] While [an] "intentionally undifferentiated approach offers the tremendous advantage of subjecting any and all obstacles to the same set of governing norms, it also deprives most domestic European legal and political orders of one of their traditional defining characteristics: their strongly differentiated internal structures."[37]

The differences between the legal culture of common law and civil law systems are particularly visible in how common law and civil law treat precedent and pursue legal development. Although civil law commentators are often of the view that "the legal practical *effect* of precedents in the codified legal systems of Europe is today quite similar to the effect of precedents in the common law world,"[38] the common law and the civil law systems do not seem to be on the same page.[39] Within the common law tradition, contemporary theorists consider precedent much more than just a factor that judges should consider while adjudicating:[40] they often see it as a constraint on judges.[41] The binding nature of precedent is still alive and maintains an important place in debates concerning the patterns of change in common law jurisdictions. Its binding force reflects the role that courts traditionally play within common law jurisdictions—deciding cases rather than developing the law.[42] Contrastingly, in the civil law tradition, precedent has increasingly been viewed as an engine of change. The precedential value of past decisions is considered a tool that fortifies the creative role of judges and enables them to develop the law.[43]

This Article illustrates the cultural gap between civil law and common law traditions by contrasting how the judiciary and legal

36. Mitchel Lasser, *Fundamentally Flawed: The CJEU's Jurisprudence on Fundamental Rights and Fundamental Freedoms*, 15 THEORETICAL INQUIRIES L. 229, 245 (2014).

37. *Id.* at 245.

38. Nils Jansen, *The Oracles of Codification. Informal Authority in Statutory Interpretation*, *in* PHILOSOPHICAL FOUNDATIONS OF PRECEDENT 431, 434 (Timothy Endicott et al. eds., 2023).

39. *See* NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 12–13 (2008) ("[I]t is fair to say that *stare decisis* is much a common-law – and indeed . . . a modern common law – doctrine and that continental lawyers tend to think of precedent as persuasive argument rather than as legal authority.").

40. *See* Larry Alexander, *Precedent: The What, the Why, and the How*, *in* PHILOSOPHICAL FOUNDATIONS OF PRECEDENT 11, 13 (Timothy Endicott et al. eds., 2023).

41. *Id.* at 18; *see also* DUXBURY, *supra* note 38, at 96.

42. *See* Alexander, *supra* note 39, at 18.

43. Lorena Ramírez Ludeña, *Statutory Interpretation and Binding Precedents in the Civil Law Tradition*, *in* PHILOSOPHICAL FOUNDATIONS OF PRECEDENT 418, 419 (Timothy Endicott et al. eds., 2023); Jansen, *supra* note 37, at 434.

academia understand change, statutory and constitutional interpretation, and precedent in continental Europe and European supranational institutions. First, it surveys the jurisprudence and the scholarship of several common law countries which have dealt with such issues at length. Then, it examines the interpretive patterns and treatment of precedent as a proxy to investigate the proclivity to judicial development and contrasts it with the logic that predicts and even encourages the blending of civil law and common law. Since civil law systems do not recognize precedent as an autonomous legal source, this work largely ignores the lawmaking activity of common law courts when they establish a legal rule by issuing a judicial decision without a basis in a preexisting legal text. Instead, it focuses on the authoritative role of the case law that interprets statutory and constitutional texts in Australia, Canada, England, and the United States, as well as the academic response to it. Although such regimes differ widely in how they balance powers and allocate institutional supremacy,[44] they share longstanding commonalities in how their courts interpret written laws, making them a useful basis for comparison.[45] The Article then considers the transformation of the French legal culture as exemplary of the continental judicial style more broadly and the roles exerted by the ECJ and of the ECtHR on that style. How these two pan-European Courts conceive of their roles and powers is relevant to the topic, as their pattern of interpretation was supposed to accommodate both common law and civil law countries but has often failed to amalgamate them. Finally, it uses the growing British skepticism toward pancontinental jurisdictions—culminating in Brexit and that still questions the British obligation to respect the European Convention of Human Rights (ECHR) and the ECtHR's case law—as an example to reflect on the gap still existing between common law and civil law. The clashes between the British legal culture—the only European member of the four common law jurisdictions considered here—and the two pancontinental legal orders provide good case studies, as they illustrate the different patterns of legal interpretation and their importance for the endurance of legal systems. The Article concludes by suggesting that reading civil law and common law as trending in the same direction

44. STEPHEN GARDBAUM, THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM 34–35 (2013).

45. Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation*, 25 FED. L. REV. 1, 8 (1997); Richard Ekins & Jeffrey Goldsworthy, *The Reality and Indispensability of Legislative Intentions*, 36 SYDNEY L. REV. 39, 40 (2014).

through adjudication downplays a critical difference in how the two traditions understand the role and significance of legal interpretation. This misunderstanding may ultimately prove to be counterproductive to legal integration.

Historically, incidents of societies entrusting courts across jurisdictions to draw closer to each other in terms of rights protection and judicial style—namely through mutual borrowing of legal ideas and solutions[46]—have been well documented. These efforts are explained by historical attempts to generate similar levels and standards of legal protection across borders on a practical level through adjudication.[47] However, this project relies on an inadequate understanding of legal styles and their mechanisms. Western judicial styles are distant enough from each other that trying to amalgamate them cannot succeed. Legal science and the judiciary cannot pragmatically reconcile their differences through judicial interpretation while continuing to overlook the fact that common law and civil law operate under distinct premises and significantly different logic. Civil law and common law, the two prevailing judicial styles globally, may have evolved internally, but not to the extent that they are giving shape to one unified legal style. Overlooking the differences does not do justice to either of them; it can even backfire, as has happened with Brexit.

II. LEGAL DEVELOPMENT THROUGH LEGAL INTERPRETATION

A. Common Law Courts

The late John Gardner acknowledged that "[d]ifferent legal systems may have dramatically different canons of legislative interpretation."[48] He explained that some legal systems "may require or permit a more literal approach, others a more "purposive" approach, to construing the legislative text." Still others "may permit more atomic

46. The literature on this topic is legion. *See generally* Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L. L. J. 191 (2003); David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652 (2005); David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 WASH. L. REV. 524 (2011); JEREMY WALDRON, "PARTLY LAWS COMMON TO ALL MANKIND": FOREIGN LAW IN AMERICAN COURTS 3 (2012).

47. *See* Slaughter, *supra* note 45, at 218.

48. John Gardner, *Some Types of Law*, *in* COMMON LAW THEORY 51, 54 (Douglas E. Edlin ed., 2007).

interpretation of words or sentences or paragraphs in the legislative text." Finally, "others may require or permit greater attention to the wider textual context in which the words or sentences or paragraphs appear." The list does not end there. In general terms, for Gardner, it was beyond doubt that "[o]ne understands legislated law by understanding the legislative text that creates it."[49]

Gardner's opinion is consistent with the English pattern of statutory interpretation, which is also a common law product.[50] Judicial interpreters have been classically and primarily preoccupied with the plain meaning of the text. The focal point of interpreting statutes has overwhelmingly been to respect the text for what it means.[51] It was only in 1993, in *Pepper v. Hart*, that the House of Lords permitted perusing the Hansard (parliamentary proceedings) in order to distill the meaning of a statute.[52] However, *Pepper* was met with a great deal of criticism, and the debate it caused—whether judges should also look at settled extrajudicial practice to interpret ambiguous statutes—remains ongoing. Though the decision was significant, the main interpretive business of courts is still "to determine the intention reasonably to be attributed to Parliament" and intention itself must be drawn from "the wording that [Parliament] has chosen to enact, read in context."[53]

If the expansive interpretation of statutes is generally unwelcome, judicial activism is hardly a replacement for unsatisfactory statutory legislation in English law. In the English tradition, the capacity to expand the parameters of the common law is severely constrained and cannot replace the gaps and flaws in legislation. A telling example of this logic is found in an opinion penned by Lady Hale. While reflecting on the legal grounds for universal suffrage, she stated "[i]t would be wonderful if the common law had recognised a right of universal suffrage. But [. . .] it has never done so." After noting that the extension of suffrage was a product of parliamentary legislation, she concluded that "it makes no more sense to say that sentenced prisoners

49. *Id.* at 4.

50. Burton-Crawford, *supra* note 15, at 2.

51. Sir Philip Sales & Richard Ekins, *Rights-Consistent Interpretation and the Human Rights Act 1998*, 127 LAW Q.R. 217, 221 (2011) ("The object of statutory interpretation . . . is the meaning the legislature intended to convey in enacting the statutory text.").

52. Pepper v. Hart [1992] AC 593 (HL) (appeal taken from Eng.).

53. *See* Diggory Bailey, *Settled Practice in Statutory Interpretation*, 88 CAMBRIDGE L.J. 28, 29 (2022).

have a common law right to vote than it makes to say that women have a common law right to vote, which is clearly absurd."[54] This comparison is a telling one, as Lady Hale's own "feminism shaped and informed [. . .] how she was a judge."[55] Although common law has espoused and protected several rights for centuries—including the presumption of innocence, the right to a fair trial, the *mens rea* requirement, and freedom of expression[56]—evidently it cannot cover all rights, nor can it be expanded to regulate matters not covered by statutes.

The United States' approach to legal interpretation is more diversified. Within the United States' scholarship, living constitutionalists and proponents of evolutionary statutory interpretation abound.[57] However, they have been countered by an increasing number of textualists and originalists.[58] This group's interpretive approach has even become dominant in the U.S. Supreme Court, particularly after President Donald Trump appointed several jurists publicly committed to those philosophies. Originalists warn against an understanding of constitutional texts as "evolving" and adapting "to changing conditions by judicial interpretation."[59] Along the same lines, textualists argue that "nonformal approaches to statutory interpretation rely on a partial, controversial vision of the common law tradition."[60] As a result, when the Supreme Court departs from its precedent, it often states that it does so for the sake of legal stability rather than legal development.[61] It has overruled judgments because it considered them unworkable or inconsistent with earlier

54. Moohan et al. v. The Lord Advocate [2014] UKSC 67, 56 (appeal taken from Scot.).

55. Rosemary Hunter & Erika Rackley, *Lady Hale: A Feminist Towering Judge*, *in* TOWERING JUDGES 78, 79 (Rehan Abeyratne & Iddo Porat eds., 2021).

56. Lord Wilberforce, *The Need for a Constitution in the United Kingdom*, 14 ISR. L. REV. 269, 271 (1979).

57. *See generally* WILLIAM N ESKRIDGE JR., DYNAMIC STATUTORY INTERPRETATION (1994) (where justifications for updating the meaning of statutes by making their interpretations evolved are discussed).

58. David Fontana, *Has Originalism Become Second Nature?*, *Dpceonline* 591, 591 (2017), https://www.dpceonline.it/index.php/dpceonline/article/download/430/419/ [https://perma.cc/PL48-QB7M].

59. Informal Amendment, *supra* note 24, at 370.

60. Jeffrey Pojanovski, *Reading Statutes in the Common Law Tradition*, 101 VA. L. REV. 1357, 1359 (2015).

61. See Justice Kavanaugh describing the list of circumstances under which a precedent should be overruled in light of the U.S. Supreme Court's jurisprudence in Ramos v. Louisiana, 590 U.S. 83, 121 (2020) (Kavanaugh, J., concurring).

rulings,[62] or because they did not reflect the original meaning of the Constitution.[63] It has occasionally overruled a precedent arguing that it *both* clashed with the original meaning of the Constitution *and* did not prove workable, as when *Dobbs* overruled *Roe*.[64] In other words, what often drives the U.S. Supreme Court to overrule a precedent are considerations of time-consistency, practicability, or fidelity to the Constitution, rather than a desire to modernize the legal regime.[65]

The prevailing approach of the U.S. Supreme Court echoes a widespread academic preoccupation with the stability of case law in the fields of constitutional and statutory interpretation in the United States. Years before joining the Supreme Court, Amy Coney Barrett explained that: "[s]tatutory precedents receive 'super-strong' stare decisis effect," as Congress retains the power to amend the legislation at issue. She also noted "constitutional cases are the easiest to overrule," since the Court is aware of the difficulties of amending the Constitution to correct the Supreme Court's interpretation of it.[66] Although judicial and public resistance to changes in interpretation of statutes and the Constitution differ in scale, Barrett noted that the U.S. Supreme Court will always "weigh the benefits of error correction against the costs of overruling," as is natural in a legal regime where stare decisis applies.[67] Because stare decisis protects legal and social reliance, this approach results in "an institutional disadvantage" for parties arguing that the interpretation of a provision should change, as they must provide sufficiently grave reasons to overturn previous rulings.[68]

Similarly, in Australia, judicial developments in constitutional law traditionally needed to overcome considerable respect for precedent and an approach that favored the plain meaning of the text. After breaking away from appeals to the Privy Council between the

62. *See, e.g.*, June Medical Services L.L.C. v. Russo, 591 U.S. 299 (2020).

63. On the tension between *stare decisis* and originalism, see Randy Kozel, *Original Meaning and Precedent Fallback*, 68 VAND. L. REV. 105, 107 (2019).

64. *See* Dobbs v. Jackson, 597 U.S. 215 (2022).

65. *See* Michael Genthites, *Janus-Faced Judging: How the Supreme Court is Radically Weakening Stare Decisis*, 62 W. & M. L. REV. 83, 86-91 (2020-2021) (arguing that in recent years the U.S. Supreme Court has eroded stare decisis by overruling precedents for their "poor reasoning").

66. *See* Barrett, *supra* note 57, at 1713.

67. *See id.* at 1722.

68. *See id.* at 1723.

1960s and the 1980s, Australia's High Court avoided revising its constitutional precedents for several years. It considered overruling as an "exceptional" option—one that the Court should choose only after a careful analysis of both precedent and the consequences of departing from precedent.[69] Only in the late 1980s, under Chief Justice Mason, did the Court take on a "progressive attitude"[70] that Justice Kirby later followed. Kirby proposed that the Australian judiciary take inspiration from its Indian peers, who enjoyed an especially activist reputation within the Commonwealth.[71] However, Kirby's baseline was not an outright repudiation of the original meaning of a constitutional provision. He struggled simply to "have non-originalism take root as the preferred method of the High Court to resolve cases raising novel constitutional questions or involving textual ambiguity or uncertainty."[72] Kirby proposed that judges instead embrace a progressive approach only to fill in legal gaps, not to modernize the legal system.

In statutory fields, Australia's pattern of interpretation has admittedly evolved from strictly enforcing the wording to a more liberal approach—where courts develop the meaning of the statute beyond the legislative intent.[73] It is within this scenario that Australian scholarship has implemented the "principle of legality:" a legal safety-valve that would be rooted in the common law and would justify construing statutes "to protect rights and interests considered fundamental."[74] However, this new standard has been met with skepticism among some academics,[75] who argue that this "new orthodoxy" blurs the line between adjudication and lawmaking.[76]

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69. *See* Queensland v. Commonwealth [1977] HCA 60 (Austl.) (Stephen, J., dissenting).

70. Geoffrey Lindell, *"Judge & Co.": Judicial Lawmaking and the Mason Court*, 4 AGENDA 83, 85 (1988).

71. *See* Michael Kirby, *Judicial Activism*, 27 W. AUSTL. L. REV. 1, 11 (1997).

72. *See* Dan Meagher, *New Day Rising? Non–Originalism, Justice Kirby and Section 80 of the Constitution*, 23 SYDNEY L. REV. 141, 141 (2002).

73. *See* LISA BURTON-CRAWFORD, THE RULE OF LAW AND THE AUSTRALIAN CONSTITUTION 114 (2017).

74. *See* Dan Meagher, *The Common Law Principle of Legality in the Age of Rights*, 35 MELB. L. REV. 449, 452 (2011); *see also* Lisa Burton-Crawford, *An Institutional Justification for the Principle of Legality*, 45 MELB. L. REV. 511, 512 (2022).

75. *See* Ekins & Goldsworthy, *supra* note 44, at 41.

76. *See* Lisa Burton-Crawford & Dan Meagher, *Statutory Precedents Under the "Modern Approach" to Statutory Interpretation*, 42 SYDNEY L. REV. 209, 209–10 (2020).

The Supreme Court of Canada adopted a similar approach in changing its disposition toward legal development. For a while, after leaving the British system of appeals, the Court adhered to the prevailing judicial style,[77] overturning precedent only when especially compelling reasons necessitated it.[78] Subsequently, under pressure from the consolidation of the Supreme Court Act (1985), which granted the Court authority to address issues of public importance, it "became oriented less to error correction and more to [the] development of the [Court's] jurisprudence."[79] Admittedly, the Charter of Rights and Freedom (1982) was a game changer.[80] Since its enactment, the Supreme Court has espoused an especially "generous rather than a legalistic" reading of the sections of the Charter—one that "is not to be determined solely by the degree to which" the rights of the Charter were "enjoyed by Canadians prior to the proclamation of the Charter," as Justice Dickson made clear in *Big M Drug Mart Ltd.*[81] This approach soon became dominant. Shortly after *Big M Drug Mart Ltd.*, Justice Lamer warned that the Charter could not "become frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs."[82] The Court thus quickly espoused a purposive understanding of the Charter: an interpretive pattern that focused on the "interests" that the Charter "was meant to protect."[83]

Despite its expansive and forward-looking approach, the Canadian Supreme Court has not outright abandoned any respect for the political will encapsulated in constitutional and legal texts.[84] As Dickson himself added in *Big M Drug Mart Ltd.*, the wording of the Charter still had to "be placed in its proper linguistic, philosophic and historical context." However, since the Supreme Court downplayed precedent to stir judicial development of the law, the reaction of

77. *See* Paul Daly, *Canada: Legal Coherence Versus Legal Certainty*, *in* 1 CONSTITUTIONALLY CONFORMING INTERPRETATION - COMPARATIVE PERSPECTIVES: NATIONAL REPORTS 248 (Mattias Klatt ed., 2023).

78. *See* Binus v. The Queen, [1967] S.C.R. 594, 601 (Can.) (Cartwright, J., concurring).

79. *See* R. v. Henry, [2005] 3 S.C.R. 609, 639 (Can.).

80. *See* CARISSIMA MATHEN, COURTS WITHOUT CASES: THE LAW AND POLITICS OF ADVISORY OPINIONS 131 (2020).

81. *See* R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 343–44 (Can.).

82. *See Re* B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, 509 (Can.).

83. *See Big M Drug Mart*, 1 S.C.R. at 344.

84. *See* Kate Glover, *The Supreme Court in Canada's Constitutional Order*, 21 REV. CONST. STUD. 143, 159 (2016).

Canadian academia has not been always favorable.[85] Contemporary debates reveal that the Court's evolutionary style of interpretation is not immune from criticism or even deconstruction.[86] Leonid Sirota probably best captured the backlash against the new judicial philosophy of the Canadian Supreme Court. After observing that the Court had embraced living constitutionalism as its preferred method of constitutional interpretation, he criticized that

> living constitutionalism means that the boundaries [of Canadian constitutionalism] are drawn, and re-drawn, and re-drawn again." Sirota adds that courts drawing such boundaries neither have nor are meant to have democratic legitimacy or any particular insight into the beliefs and wishes of the citizenry.[87]

From a broader perspective, judicial and academic supporters of progressive readings of legal texts are certainly vocal in Canada, Australia, and the United States. However, they are countered by judges and scholars who warn about the excesses of manipulating existing written laws and argue that, especially in the field of statutory interpretation, updating legislation should be left to the legislative branch. Different common law regimes thus seem still preoccupied with restraining judicial interpretation and the development of case law.[88] Australian legal philosopher Jeffrey Goldsworthy epitomized this concern when he stated that

> to change the meaning of the law is to change the law. To hold that a law no longer means what it meant when it was first enacted would be to hold that it is no longer the same law—and therefore that it has been changed, without the constitutionally prescribed method of change having been employed."[89]

In general terms, a significant part of the scholarship from those jurisdictions still views a sound "principle of interpretation" as one that

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85. *See* Brian Bird & Michael Bookman, *Stare Decisis and the Charter*, *in* ATTACKS ON THE RULE OF LAW FROM WITHIN 156 (Joanna Baron & Maxime St. Hilaire eds., 2019).

86. *See* Bradley W. Miller, *Beguiled by Metaphors: The 'Living Tree' and Originalist Constitutional Interpretation in Canada*, 22 CAN. J. L. & JURIS. 331, 331 (2009); Newman, *supra* note 23, at 248, 257.

87. Leonid Sirota, *The Rule of Law all the Way Up*, *in* ATTACKS ON THE RULE OF LAW FROM WITHIN 79, 102 (Joanna Baron & Maxime St-Hilaire eds., 2019).

88. *See* Meagher, *supra* note 71, at 153 (addressing the charge that "non-originalism invites massive and unprincipled judicial creativity (as it necessarily involves textual infidelity)").

89. Goldsworthy, *supra* note 44, at 10.

requires that "until they are formally amended, statutory provisions mean what they meant when they were enacted."[90] To a large extent, many academics and even judges still believe that this principle also applies to constitutional texts. Overall, many scholars and judges in common law countries set a high threshold for judicial development of the law; they focus on legal interpretation in the plain meaning of a text, and they hold considerable respect of precedent. This interpretive approach both constrains courts and invigorates the opinion that "[d]ecisions about the pace and direction of social change are, by and large, left to representative politics."[91] Common law countries may differ in how they understand the role of the judiciary, but in none of those scrutinized here does the incremental approach reflect the view of the overwhelming majority of judges and academics.

B. Continental Judicial Philosophy and the Pan-European Courts

1. The Evolution of the Civil Law Tradition

The moderate reliance on the text and on precedent in continental Europe is part of a post-Second World War, widespread anti-positivist consensus and a forward-looking pattern of legal interpretation. This approach has encouraged judges to move beyond considerations about textual constraints, abandon precedents, and instead pursue justice on more substantive grounds, thereby making the judiciary a lawmaking outlet.[92]

The postwar anti-positivist turn in contemporary Europe benefited from a slow development in the legal scholarship, namely, changes in how scholars interpreted codes centuries after they became the well-established backbone of modern continental legal systems.[93] Since its drafting, the structure and logic of the French Civil Code (1804)—which epitomized the notion of legal codes—has been conceived holistically. It is regarded as a network of concepts and prescriptions

90. *Id.* at 9.

91. Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L. J. 1501, 1533 (1989).

92. *See* Aline-Florence Manent, *Democracy and Religion in the Political and Legal Thought of Ernst-Wolfgang Böckenförde*, 7 OXFORD J. L. & REL. 74, 77 (2018); *see also* MICHAEL A. WILKINSON, AUTHORITARIAN LIBERALISM AND THE TRANSFORMATION OF MODERN EUROPE 109 (2021).

93. *See* NATALINO IRTI, CODICE CIVILE E SOCIETÀ POLITICA 37 (1995).

that must be read unitarily to fulfill their goal of providing society with a rule whenever needed.[94] The meaning of each code's provision depends on the context and the relationship that each norm has with what surrounds it, making the interpretive process primarily a matter of respecting the code's internal coherence.[95]

When Jeremy Bentham praised codes and urged common law countries to adopt them, he saw them as a system of laws "in which judicial discretion was minimized."[96] Bentham was right, as he captured the ideology of those who conceived and drafted the French Civil Code.[97] Putting judges under the law and drastically limiting their discretion was in fact one of the main purposes of the Code.[98] The Civil Code was the distillation of legal positivism,[99] and fleshed out the priority that "the judiciary [does not] encroach upon the legislative and executive powers."[100]

The dogmas of self-sufficiency and inner coherence of codes warranted a very long life. Codes framed under this understanding insulated judges from the numerous—and sometimes dramatic — constitutional and institutional changes that civil law systems underwent throughout the nineteenth and early twentieth centuries.[101] Amazingly, such transformations hardly affected their texts or meaning.

A code-centered mentality also perpetuated hostility toward judicial discretion and judicial empowerment.[102] Nineteenth for an extended period.[103] The nineteenth-century French *école de l'exégèse* (School of Exegesis) "were of the view that the text of the Civil Code was generally straightforward and uncontroversial and that, in those instances where interpretation was necessary, answers were to be found in the *travaux préparatoires* [i.e., parliamentary proceedings]."[104]

94. *See* Eugenio Bulygin, *Kelsen on the Completeness and Consistency of Law*, *in* KELSEN REVISITED: NEW ESSAYS ON THE PURE THEORY OF LAW 229 (Luís Duarte d'Almeida et al. eds., 2013).

95. IRTI, *supra* note 92, at 33.

96. Frederick Schauer, *Positivism Before Hart*, 24 CAN. J.L. & JURIS. 455, 466 (2011).

97. *See* Jean Hauser, *Le Juge et la Loi*', 114 POUVOIRS 139, 139 (2005).

98. *See* Philippe Remy, *La Part Faite au Juge*, 107 POUVOIRS 22, 22 (2003).

99. *Id.* at 25.

100. LASSER, *supra* note 12, at 35.

101. Spamann, *supra* note 17.

102. IRTI, *supra* note 92, at 37.

103. IRTI, *supra* note 92, at 37.

104. NEIL DUXBURY, JURISTS AND JUDGES: AN ESSAY ON INFLUENCE 51 (2001).

Judges were expected to behave as apolitical actors who administered justice in a nonpartisan fashion, thanks to the syllogistic method that dominated the legal reasoning.[105] The neutrality of the judicial branch was so widely accepted that academic debates on the nature of the judiciary and whether it could be considered a proper power alongside the legislative and the executive powers still abounded at the end of the nineteenth century.[106] Some suggestions of reforming the law through the mediation of adjudication appeared only in nineteenth-century Germany, where mechanisms of judicial review surfaced absent a written constitution and expanded to include the validation of royal ordinances.[107]

The beliefs in syllogism, the completeness of codes, and judicial minimalism started waning in France at the beginning of the twentieth century, as judges grew increasingly skeptical of the dogma of self-sufficient codes.[108] Among legal academics, François Gény's *Méthode d'Interprétation* (1919) had a powerful impact.[109] Through his book, Gény "presented a scathing, realist-style critique of the mechanical and formalist judicial practice of his day."[110] Thanks to Gény's magnum opus,

> every major twentieth-century French analysis of the civil legal system has worked from the following three assumptions': (1) 'the Codes inevitably contain gaps'; (2) 'the perfectly formalist conception of unproblematic, passive, and grammatical adjudication is therefore no longer tenable;' and (3) 'the judiciary has in fact played—if only by necessity—a fundamental role in the establishment and development of legal norms.'[111]

In the twentieth century, judges gradually adopted the view that their role was to discover the "meaning of the law" beneath the words.[112] These judges further argued that the meaning they needed to

105. Michel Troper, *Fonction Juridictionnelle ou Pouvoir Judiciaire*, 16 POUVOIRS 5, 8 (1981).

106. *Id*. at 5.

107. *See* Werner Heun, *Supremacy of the Constitution, Separation of Powers, and Judicial Review in Nineteenth-Century German Constitutionalism*, 16 RATIO JURIS 195, 199 (2003).

108. *See* Remy, *supra* note 97, at 30.

109. *See generally* FRANÇOIS GENY & RAYMOND SALEILLES, METHODE D'INTERPRETATION ET SOURCES EN DROIT PRIVE POSITIF: ESSAI CRITIQUE, last reprint (2016).

110. LASSER, *supra* note 12, at 45.

111. *Id*.

112. Hauser, *supra* note 96, at 141.

retrieve was the one that "best meets today's social needs."[113] Thus, deference to the language of legal texts came to be perceived as "fetishism," which needed to be purified with what appeared to be true "revolution" in legal interpretation.[114] However, the discretion granted to the judges of twentieth-century France was then confined to addressing gaps and evident defects in the wording of legal texts.[115] Good legal drafting was thus capable of demarcating judicial discretion for several decades.[116]

Around the second half of the twentieth century, with the rise of institutions beyond the state, legal academicians and practitioners increasingly praised the idea of reforming the law through adjudication.[117] In France, the combination of a new institutional framework that connected domestic, supranational, and international legal institutions had a powerful influence on the logic of the code and on the self-understanding of members of the judiciary. Judges now needed to ensure the respect of the European Communities' law and the ECHR, which required them to update and refine the meaning of domestic legal provisions to align with the new international and supranational legal orders that rose in 1950s Europe.[118] They were expected to serve "not one sovereign law anymore, but three unequal laws: in the name of the internal common market [the European Communities] or of human rights [the ECHR]," the judge "can (must) set aside the domestic rules that conflict with these superior laws."[119]

Legal academia was ready for such a revolutionary step in the style of civil law adjudication. After the Second World War, as French judges began embracing this evolutionary logic, they also filled in legal gaps and actively pushed legal development further with their judgments.[120] Academic scholarship backed the cultural shift in the judge's interpretative methodologies. In France, academics posited that the "judiciary . . . must play an important role in the modernization of

113. *Id.* at 145.
114. *Id*.
115. *See id.*
116. *See id.* at 147.
117. *See* Remy, *supra* note 97, at 31.
118. *Id.* at 23.
119. *Id.* at 33 ("After all, by consecrating the superiority of international or European law over domestic laws, we consecrate the judicial control of domestic law in France.").
120. *See* Hauser, *supra* note 96, at 152.

the law."[121] Jean Carbonnier in 1967 probably best captured the zeitgeist of the time when he wrote that "if the preexisting legal order" does not provide a specific rule for the case, the judge can "forge" a rule, as if she were acting "as a legislator."[122] French legal academia thus came to accept "that the civil judge can play an important role in the creation and development of legal norms."[123] As Philippe Remy's observed, the legal journey of modernity that saw the judge as the "mouth of the law" had turned on its head, and the law finally became "the mouth of the judge."[124]

2. The Impact of the Pancontinental Courts on the European Legal Culture

The legal culture that evolved on the continent in the second half of the twentieth and the early twenty-first century is particularly evident in the prevailing approach adopted by the ECtHR and the ECJ, which, thanks to their legal status and global reputation, have played a major role in promoting a progressive legal style within and beyond Europe.

Both the ECtHR and the ECJ treat precedent and interpret written laws differently from legal regimes born out of the English tradition. The roots of the two pancontinental courts are in the tradition of international law tribunals, which consider earlier rulings merely as having the force of *res interpretata*[125]—a notion that allows them to be openly "creative" and engage in "judicial law-making."[126] But these are just the roots of the style of the ECtHR and the ECJ, which have developed specific patterns of legal interpretation with important ramifications for legal development within the continent.

The ECtHR's case law is not inconsistent. In fact, the Court has explicitly criticized and sanctioned domestic case law that is

121. Mitchel de S.-O.-L'E. Lasser, *Judicial (Self-)Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325, 1348 (1995).

122. JEAN CARBONNIER, DROIT CIVIL 33 (1967).

123. LASSER, *supra* note 12, at 46.

124. Remy, *supra* note 97, at 31.

125. JANNEKE GERARDS & JOSEPH FLEUREN, *Introduction, in* IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE JUDGMENTS OF THE ECTHR IN NATIONAL CASE LAW 1, 2 (Janneke Gerards & Joseph Fleuren eds., 2014).

126. *See* Monika Kawczynska, *The Court of Justice of the European Union as a Law-Maker: Enhancing Integration or Acting Ultra Vires?*, *in* JUDICIAL LAW-MAKING IN EUROPEAN CONSTITUTIONAL COURTS 203, 203 (MONICA FLORCZAK-WATOR ed., 2020).

changeable, self-contradicting, or unpredictable, stating that these phenomena are incompatible with the requirements of the law.[127] Nonetheless, at least since 1978, the Court has embraced an evolutionary interpretation of the ECHR—one that views it as a "living instrument," that must adapt to new circumstances and social sensibilities.[128] This interpretive approach has even developed as an alternative to the lengthy diplomatic process through which State parties can negotiate amendments and add protocols to the ECHR,[129] setting up a new avenue for change in the ECHR, as *Öcalan v. Turkey* showcased.[130] The case revolved around the death penalty, which is now prohibited by Additional Protocol No. 13 of the ECHR.[131] In *Öcalan*, the Court contrasted the diplomatic process that led to the introduction of the new Protocol with the progressive reading of the ECHR that the Court embraces. The ECtHR then noted that "[b]y opening for signature Protocol No. 13 the Contracting States have chosen the *traditional* method of amendment of the text of the [ECHR] in pursuit of their policy of abolition."[132] It thus implied the existence of a quasi-amendment process to the ECHR implemented by the ECtHR itself, without the involvement of Member States.

The "living instrument" doctrine avoids the risk of the ECHR becoming outdated due to the slowness of both domestic and diplomatic negotiations to update its text and add more Protocols. However, it also expands the ECHR's scope beyond what was agreed upon by Member States, thus creating new competences for the ECtHR itself.[133] Oddly enough, the ECtHR once "recognize[d that] judicial decisions a[re] a source of law in common-law jurisdictions," seemingly espousing the view that judicial law-making is a distinctive

127. *See* Paduraru v. Romania, App. No. 63252/00, ¶ 98 (Dec. 1, 2005); Beian v. Romania, App. No. 30658/05, ¶ 37 (Dec. 6, 2007).

128. *See* Tyrer v. United Kingdom, App. No. 5856/72, ¶ 31 (Apr. 25, 1978).

129. *See* Andrea Pin, *The Costs and Consequences of Incorrect Citations: European Law in US Supreme Court Decisions*, 42 BROOK. J. INT'L L. 129, 184–85 (2016).

130. *See* Ocalan v. Turkey, App. No. 46221/99, ¶ 186 (May 12, 2005).

131. *See* Protocol No. 13 of the Convention for the Protection of Fundamental Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in all Circumstances, May 3, 2002, E.T.S. No. 187.

132. *Ocalan*, App. No. 46221/99, ¶ 164.

133. *See* Andrea Pin, *The Transnational Drivers of Populist Backlash in Europe: The Role of Courts*, 20 GER. L. J. 225, 230 (2019).

feature only of common law regimes.[134] In reality, by claiming so much leeway in interpreting the ECHR, and shifting its meaning according to changes of time and circumstances, it appears to have also embarked on lawmaking, even if under a different methodological banner.

The ECJ has also embraced the approach taken by the ECtHR. In its 2020 ruling *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering,*[135] the Court explicitly acknowledged the EU Charter of Fundamental Rights and Liberties (2000) as a "living instrument," [136] and quoted the case law of the ECtHR to support its statement. This statement appears much bolder than the doctrine which permits the ECtHR to update the meaning and scope of the ECHR. It also suggests that judicial lawmaking in Europe does not simply counterbalance legislative inaction but actually fleshes out the strongly held belief among academics and judges that courts are expected to regularly participate in lawmaking. On the one hand, the EU Charter cannot be said to require updating, as it came into existence just this century, whereas the ECHR was drafted shortly after the Second World War. On the other hand, while the development of the ECHR is left to the expansive approach of the ECtHR in the absence of an agreement among the state parties, EU institutions include legislative powers that can strengthen the protection of the rights enshrined in the EU Charter of Rights, as well as introduce new rights. The reasons for embracing the doctrine of "living instrument" with respect to the EU Charter are thus much weaker than those of the ECtHR and cannot be justified solely on institutional grounds or with the obsolescence of the Charter.

Although the ECJ embraced the ECtHR's doctrine of "living instrument" only recently, it adopted a progressive interpretation of written rules in its early days. Influenced by the "French model of judicial decision-making" that was then on the rise,[137] the ECJ expounded its distinctive teleological interpretative theory with its

134. Krzystof Wojtyczek, *The European Court of Human Rights and Law-Making, in* JUDICIAL LAW-MAKING IN EUROPEAN CONSTITUTIONAL COURTS 221, 223 (FLORCZAK-WATOR ed., 2020).

135. Case C-336/19, Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering, ECLI:EU:C:2020:1031, ¶¶ 47–48 (Dec. 17, 2020).

136. *Id.* ¶ 77.

137. Mitchel de S.-O.-L'E. Lasser, *The European Pasteurization of French Law*, 90 CORNELL L. REV. 995, 1015 (2005).

seminal *Van Gend en Loos* ruling in 1963.[138] In that decision, the Court stated that it was "necessary to consider the spirit, the general scheme" and not just "the wording" of a provision when deciding how to interpret it.[139] By enlisting the "spirit" and the "general scheme" of the law among other interpretative indicia, the ECJ soon demonstrated its willingness to "set sail from the secure anchorage and protected haven of 'plain words' and to explore the wider seas of purpose and context."[140] Echoing the vast European political and ideological movements that repudiated legal positivism, it set out to pursue the goal of integration through an expansive interpretation of the Treaties and rules of the European Communities, furthering legal and political integration among Member States.[141]

The ECJ shouldered an important part of the task of promoting pan-European integration through incremental case law.[142] Scholarship largely agrees that the evolutionary approach of the ECJ has generally been principled and consistent over the decades.[143] However, there is no doubt that the ECJ's case law has pursued legal development at least as much as it has prioritized legal stability.[144] One of the main goals has been the pursuit of legal integration and deepen cooperation among the Member States within the framework of the pan-European institution.

138. *See* Case C-26/62, Van Gend en Loos v. Nederlandse Tariefcommissie, ECLI:EU:C:1963:1 (Feb. 5, 1963).

139. *See id.* at 12.

140. Nial Fennelly, *Legal Interpretation at the European Court of Justice*, 20 FORDHAM INT'L L.J. 656, 657 (1996).

141. *See* Koen Lenaerts & José A Gutiérrez-Fons, *To Say What the Law of the EU is: Methods of Interpretation and the European Court of Justice*, 20 COLUM. J. EUR. L. 1, 36 (2014).

142. *See* Maurizio Arcari & Stefania Ninatti, *Narratives of Constitutionalization in the European Union Court of Justice and in the European Court of Human Rights' Case Law*, 11 VIENNA J. INT'L CONST. L. 11, 29 (2017). *See also* Anthony Arnull, *Judicial Dialogue in the European Union*, *in* PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW 109, 118 (Julie Dickson & Pavlos Eleftheriadis eds., 2012).

143. *See* Joseph H.H. Weiler, *The Court of Justice on Trial*, 24 COMMON MKT. L. REV. 555, 571–73 (1987); Andreas Grimmel, *"This is not Life as it is Lived Here": The Court of Justice of the EU and the Myth of Judicial Activism in the Foundational Period of Integration Through Law*, 7 EUR. J. LEGAL STUD. 61, 73 (2014).

144. *See* ANDREA PIN, PRECEDENTE E MUTAMENTO GIURISPRUDENZIALE 194 (2017).

3. The Philosophy and the Mechanisms of European Integration

There are strong historical and philosophical grounds that provide important context and explanation for the judicial approaches of the two pan-European courts and their influential role in domestic legal systems. Their pursuit of the development of supranational orders as an end in itself broadly reflects the prevailing cultural outlook on the continent.[145] Their efforts to "create mutual trust and reciprocal recognition" between themselves and their national counterparts are deeply rooted in European history.[146] As Martti Koskenniemi has pointed out, the close alignment among European states has long been perceived as a response to the wars that disrupted European unity since the end of the Middle Ages. Writing between the seventeenth and eighteenth centuries, the great French thinker Abbé of Saint Pierre noted that there was already hope that, through a federation, European states would "protect themselves permanently against all civil wars so as to enjoy the immense advantages of their permanent and universal exchange."[147] The trust that Europeans have placed in European integration is therefore a contemporary incarnation of a long-standing perception, and even hope, which the two pan-European Courts have incorporated into their doctrines, generating a "symbiotic relationship" between the national, the supranational, and international levels.[148]

The interpretive patterns of the two Courts have thus relied on a deeply rooted legal and political philosophy, which rendered judges the moral interpreters of the integration process that Europe had coveted for centuries.[149] The late Mauro Cappelletti, one of the most prominent comparativists of the second half of the twentieth century and among the strongest advocates for European integration, captured the quintessence of this ideological wave in what he called a "repudiation

145. *See* Tim Clark, *The Teleological Turn in the Law of International Organizations*, 70 INT'L & COMP. L.Q. 533, 535 (2021).

146. Anne Orford, *A Global Rule of Law*, in JENS MEIERHENRICH & MARTIN LOUGHLIN eds. THE CAMBRIDGE COMPANION TO THE RULE OF LAW (2021), 538-556: 538 and 551; NIGEL BIGGAR, *What's Wrong with Rights?* 309 (2020).

147. MARTTI KOSKENNIEMI, TO THE UTTERMOST PARTS OF THE EARTH: LEGAL IMAGINATION AND INTERNATIONAL POWER 1300-1870, at 428 (2021).

148. Jan Komarek, *National Constitutional Courts in the European Constitutional Democracy*, 12 INT'L J. CONST. L. 525, 526 (2014).

149. *See* Itzcovich, *supra* note 144, at 378.

of Montesquieu."[150] He observed that the multilayered edifice beyond the state, constructed by European nations, is built around international, supranational, and national courts. These courts have worked together to synthesize shared legal values and foster legal coordination and homogenization among states, effectively creating a modern interpretation of "natural law."[151] Cappelletti captured the post-Second World War legal landscape, encompassing constitutional law, judicial review of legislation, and the role of the judiciary in vivid terms:

> [M]odern constitutionalism is the attempt to overcome the plurimillenary contrast between natural and positive law, the contrast, that is, between an immutable, unwritten higher law rooted in nature or reason, and a passing law written by a particular legislator of a given place and time. Modern constitutions, their bills of rights, and judicial review are the elements of a 'positive higher law' made binding and enforceable: they represent a synthesis of a sort—a Hegelian synthesis as it were—of legal positivism and natural law.[152]

This understanding of constitutionalism put the two pancontinental courts at the center of the integration process in Europe and boosted the lawmaking role of domestic judges. Legal development became an avenue of political development and fostered an incremental pattern of judicial interpretation.[153] In turn, such a court-centered evolutionary pattern of interpretation developed an incremental theory of the rule of law that has been endorsed by prominent constitutional law scholars in continental Europe. Dieter Grimm, for example, once stated that the rule of law "is not a matter of all or nothing, but of more or less . . . [e]ach new step means a step forward compared to the previous level."[154] In more emphatic terms, Armin von Bogdandy noted that for many years, every judgment of the

150. Mauro Cappelletti, *Repudiating Montesquieu? The Expansion and Legitimacy of "Constitutional Justice,"* 35 CATH. U.L. REV. 1, 1 (1985).

151. *Id.* at 31.

152. *Id*.

153. WILKINSON, *supra* note 91, at 115–16.

154. Dieter Grimm, *Levels of the Rule of Law: On the Possibility of Exporting a Western Achievement*, 1 EUR.-ASIAN J.L. & GOVERNANCE 5, 8 (2011).

ECJ—the most powerful and effective of the two pancontinental tribunals—was "celebrated as a civilizing and progressive step."[155]

Reading written provisions in light of their spirit and the general scheme of the law as the ECJ has done since *Van Gend en Loos* draws on familiar paradigms of legal interpretation of international law texts.[156] But the Court has gone further in recent years, reinforcing the normative impact of ECJ's rulings. As Article 31 of the 1969 Vienna Convention on the Law of Treaties states as a general rule,"[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." *Van Gend en Loos* used this general rule to create the cornerstone of the edifice of the entire European Community and, later, the European Union, taking them well beyond the chartered territories of international law.[157] The Court drew on the spirit of the founding Treaties of the European Communities to argue that European Community law had direct effect.[158] In so doing, it pierced the boundary between the domestic and international layers that is traditionally maintained by international law.[159] By adopting the direct effect approach, the ECJ created a process that ensured state compliance through the preliminary ruling mechanism. This mechanism permits state judges to submit issues of interpretation of European Community law to the ECJ and then implement the Court's ruling directly in the case under scrutiny.[160]

Costa v. ENEL soon added the notion of supremacy of European Community law to the direct effect approach.[161] This ECJ ruling "altered the understanding of what membership of the EEC required of Members vis-à-vis the relationship between the internal and supranational legal orders."[162] Even more importantly for the purposes

155. Armin von Bogdandy, *Ways to Frame the European Rule of Law:* Rechstgemeinschaft, *Trust, Revolution, and Kantian Peace*, EUR. CONST. L. REV. 675, 685 (2018).

156. *See* Case C-26/82, Van Gend en Loos v. Nederlandse Administratie der Belastingen Tariefcommissie, ECLI:EU:C:1963:1 (Feb. 5, 1963).

157. *See* WILKINSON, *supra* note 91, at 89.

158. *See* Clark, *supra* note 143, at 551.

159. *See* André Nollkaemper, *The Duality of Direct Effect in International Law*, 25 EUR. J. INT'L. L. 108 (105-125).

160. Anthony Arnull, *Judicial Dialogue in the European Union*, in JULIE DICKSON & PAULOS Z. ELEUTHERIADĒS eds. *Philosophical Foundations of European Union Law* (2012).

161. Case C-6/64, Flaminio Costa v. ENEL, ECLI:EU:C:1964:66, at 585 (July 15, 1964).

162. Itzcovich, *supra* note 144, at 24; WILKINSON, *supra* note 91, at 93.

of this article, it tilted the balance of power between the judiciary and the legislature at the Member State level by enabling national judges to develop domestic law without legislative input.[163] Through the preliminary ruling mechanism, domestic judges could petition the ECJ to deliver judgments that they would later enforce domestically instead of national laws, thus further advancing the integration process.[164] The idea of the supremacy of European law did not empower the ECJ alone to evolve the law. Rather, it also gave domestic courts an equivalent power to trigger legal developments through a triangulation with the ECJ that bypassed Parliaments.[165]

Contrary to the ECJ, the ECtHR oversees the ECHR through hearing cases only after the exhaustion of domestic remedies, and the domestic status of its judgments varies from one Member State to another. Its impact is therefore often much more limited than that of the ECJ. However, similarities exist between the two Courts' case law. Since the interpretation of the ECHR evolves through the rulings of the ECtHR, and States are expected to abide by the ECHR and the ECtHR's rulings, domestic judges must also adjudicate domestic laws to align them with the ECtHR's interpretation.[166] While this evolutionary pattern may not go so far as to ignore domestic law, it may still alter precedents and replace existing national practices in the absence of any political intervention.

The idea of overcoming the separation between the legislative and judicial branches by empowering the latter to evolve the law has seldom been considered controversial within the continent. Legal scholarship has even theorized that the general principles of EU law should allow courts to fill in the gaps of existing legislation —or even correct it—when necessary.[167]

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163. N.W. Barber, *The Afterlife of Parliamentary Sovereignty*, 9 INT'L. J. CONST. L. 145, 149 (2011).

164. Consolidated version of the Treaty on European Union art. 19, Dec. 12, 2007, O.J. (C 202); Consolidated version of the Treaty on the Functioning of the European Union art. 267, Dec. 12, 2007, O.J. (C 202).

165. N.W. Barber, *supra* note 163 (discussing how the accession to the then European Communities curtailed Parliamentary power in the U.K. in pursuance of the CJEU's recommendations).

166. Wojtyczek, *supra* note 132, at 227.

167. Arthur S. Hartkamp, *The General Principles of EU Law and Private Law*, 75 RABEL J. COMPAR. & INT'L PRIV. L. 241, 242 (2011).

Michel Rosenfeld has noted that the Critical Legal Studies movement criticizes common law judges because they would be "ultimately unconstrained by the legal materials that they must interpret, and therefore their decisions are political."[168] Under the judicial philosophy of Cappelletti and many others, this would likely be viewed not as a critique, but as praise. The European integration process has largely been driven by judicial direction and the input of a continental community of judges and jurists, rather than through the democratic process.[169] All in all, continental scholars and judges may have found inspiration in the common law style of reasoning. However, their understanding of common law does not really seem to reflect the common law tradition; it instead mirrors the prevailing scholarship and judicial culture on the Continent and the jurisprudence of the two pan-European Courts.

A new mentality rose from the ashes of the Second World War on the Continent. The European jurists who witnessed the horrific experiences of totalitarian regimes and the hostilities that ensued repudiated the mindset that disempowered judges and entrusted only political institutions with normative competences.[170] Legal provisions penned decades earlier needed to conform to the changing circumstances and new social demands in the post-Second World War era, and European judges were now up to task.[171] Existing written provisions had to be updated to reflect and enforce social and political developments. Instead of adjudicating solely based on wording of legal provisions, European judges became more inclined to directly assess the interests at stake and balance them in light of overarching principles drawn from constitutional texts and unenumerated principles of justice.[172] In this sense, post-war European jurists appeared to embrace the Dworkinian approach that a body of law should be read in light of its overarching moral principles—one of which is the evolutionary understanding of law itself.[173] It is no surprise that Miguel Poiares

168. *See* Rosenfeld, *supra* note 12, at 1343.

169. WILKINSON, *supra* note 91, at 89–90.

170. *See* Giuseppe Vettori, *La Funzione del Diritto Privato in Europa*, 2 PERSONA E MERCATO 143, 148–49 (2018).

171. Nicolò Lipari, *I civilisti e la certezza del diritto*, 2 ARS INTERPRETANDI 55, 59 (2015).

172. *Id.* at 62.

173. *See* RONALD DWORKIN, LAW'S EMPIRE 184–85, 219 (1986); *see also* Lisa Burton-Crawford, *An Institutional Justification for the Principle of Legality*, 45 MELB. L. REV. 511, 535 (2022).

Maduro, an influential legal scholar from Portugal, publicly endorsed Dworkin's theories while serving as the ECJ's Advocate General.[174]

To a large extent, Oxford Professor Richard Ekins is correct that the EU's "intellectual foundation is skepticism about state sovereignty and the democratic self-government of peoples."[175] The interpretive pattern of the ECJ undervalues legislative intentions, primes judicial creativity, and expands the scope of European integration. However, this phenomenon is not the offspring of a power grab—it developed earlier in civil law countries such as France before finding its way into the European Communities and the European Union.[176]

European jurists were ready to accept that the national and supranational judiciaries play a decisive role in developing the law and making legal integration a reality. Their deference to the lawmaking role of the judiciary decreased their intellectual power and influence, as the "great influence" that they "traditionally exerted on the continental judiciary by legal doctrine [had] been somewhat overshadowed by the growing impact of, and respect for, the case law."[177] When the judiciary reached the center-stage of lawmaking in Europe, "the judges and the Advocates General of the [ECJ] assume[d] the role of scholarly writers,"[178] thus fulfilling the multiple roles of law enforcers, lawmakers, and even legal theoreticians with ramifications at the domestic level.

The evolutionary approach to legal and constitutional interpretation pervasive in continental Europe parallels the types of evolutionary interpretation found in common law regimes, where courts also play a lawmaking role to varying degrees, depending on the jurisdiction.[179] However, the predominant role of the judiciary in legal development, which continental Europe and several civil law systems have readily accepted, hardly exists in common law jurisdictions. Ironically, as seen in Part II.A., these jurisdictions have often shown

174. Case C-303/06, S. Coleman v. Attridge Law and Steve Law, ECLI:EU:C:2008:61, 5608 (Jan. 31, 2008).

175. Richard Ekins, *The State and Its People*, 66 AM. J. JURIS. 49, 65 (2021).

176. LASSER, *supra* note 12, at 45.

177. Eric Stein, Lawyers, Judges, and the Making of a Transnational Constitution, 75 AM. J. INT'L L. 1, 2 (1981).

178. *Id.*

179. Lorena Ramirez-Ludena, *Statutory Interpretation and Binding Precedents in the Civil Law Tradition*, in Timothy Endicott, Dan Kristjánsson Hafsteinn, and Sebastian Lewis, eds. PHILOSOPHICAL FOUNDATIONS OF PRECEDENT (2023): 419.

greater resistance to interpreting written texts in an evolutionary fashion. Continental scholars who see the European legal culture reflected in common law patterns of interpretation actually adopt the judicial philosophy that most suits their view. The continental academy often views the common law tradition as an incarnation of its own values. They praise an evolutionary pattern of interpretation, an anti-positivist legal culture,[180] a Hegelian belief in change over stability,[181] and a conviction that, in a globalized world, the judiciary offers a more reliable legal compass. They argue that judges can synthesize diverse legal materials in light of changing circumstances more efficiently than the slow legislative process and the even more time-consuming constitutional amendment procedures.[182] But this view tends to overlook the fact that such ideals often spark controversy in common law jurisdictions.

III.THE EUROPEAN COURT OF HUMAN RIGHTS, THE BRITISH REACTION, AND THE RESILIENCE OF CONSTITUTIONAL SETTINGS

The most apparent clash between the proclivity to interpret written provisions progressively, which has dominated civil law systems and European integration in the twentieth and twenty-first centuries, and the common law judicial style is found in the increasing uneasiness of the United Kingdom with pan-European courts.

British constitutionalism has often sought to reconcile respect for the protection of human rights and the rule of law with its traditional notion of parliamentary sovereignty.[183] In his *Introduction to the Study of the Law of the Constitution*, A.V. Dicey called this notion "the dominant characteristic of our political institutions."[184] Through the "presumption of legality," courts assume that Parliament would override constitutional principles or fundamental rights only through

180. *See, e.g.*, Grossi, *supra* note 16, at 24.

181. GEORG W.F. HEGEL, LECTURES ON THE PHILOSOPHY OF WORLD HISTORY 125 (1975).

182. GIUSEPPE ZACCARIA, LA GIURISPRUDENZA COME FONTE DI DIRITTO. UN'EVOLUZIONE STORICA E TEORICA 36, 47 (2007).

183. *See, e.g.*, Mark Elliott, *Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention*, 22 LEGAL STUD. 340, 346 (2002).

184. Albert V. Dicey, *Introduction to the Study of the Law of the Constitution: Introduction to the Eighth Edition (1915)*, 13 GIORNALE DI STORIA COSTITUZIONALE 171, 172 (2007).

expressing that intention "with irresistible clearness,"[185] has developed to ensure that, although Parliament is superior to the common law, it does "not contravene fundamental rights or the rule of law by implication, or through abstract or ambiguous statutory language."[186]

This approach has induced "courts to approach legislation that seems to conflict with English constitutional principles." In fact, it has urged them to interpret domestic "legislation in a way that will uphold the legislative provision and the rule of law, if possible."[187] This doctrinal effort has formally preserved parliamentary sovereignty as "the bedrock of the constitutional order,"[188] while still protecting fundamental rights.[189] Another move has been the introduction of the concept of "constitutional statutes," which also seems to have distanced the contemporary idea of parliamentary sovereignty "from the Diceyan conception of parliamentary sovereignty."[190] In fact, the notion of "constitutional statutes" has elevated the "hierarchy of some statutes over others [. . .] to circumvent the legal difficulties that would arise should standard principles of legal interpretation, such as *lex posterior derogat priori*, prevail."[191]

In the same vein, Parliament introduced the Human Rights Act 1998 (HRA) to ensure respect of the ECHR while preserving Parliament's sovereignty. The HRA empowered domestic courts through to interpret domestic laws in a manner consistent with the jurisprudence of the ECtHR, unless there is an irreconcilable conflict, in which case the courts must alert Parliament.[192] This choice "encourages people to accept Parliament's authority, since they can

185. Douglas E. Edlin, *The Sovereignty of Positivism*, 12 JURIS. 347, 353 (2021) (internal citation omitted).

186. *Id*.

187. *Id.*

188. Philip Sales, *The Separation of Powers in* The Principles of Constitutionalism, 66 AM. J. JURIS. 97, 112 (2021).

189. *See* Edlin, *supra* note 185, at 354.

190. Alan Greene, *Parliamentary Sovereignty and the Locus of Constituent Power in the United Kingdom*, 18 INT'L J. CONST. L. 1166, 1175 (2020).

191. *Id.* at 1175. Canadian jurisprudence has similarly developed the notion of 'quasi-constitutional' statutes. *See* Maxime St. Hilaire, *"Quasi Constitutional" Status as *Not* Implying a Form Requirement*, BLOGUE À QUI DE DROIT (Aug. 9, 2017), https://blogueaquidedroit.ca/2017/08/09/quasi-constitutional-status-as-not-implying-a-form-requirement/ [https://perma.cc/9XLL-B97V].

192. Human Rights Act 1998, c. 42 (UK).

have some assurance that their individual rights will be taken into account in the legislative process."[193]

The ECHR has never been a bed of roses for British institutions: the United Kingdom "openly considered quitting" the ECHR as early as 1956.[194] The HRA, in particular, has sparked controversy since its adoption because it pushes British institutions to align with the evolutionary judicial style of an international court and thus has been increasingly seen as poisoning the judicial style of British courts.[195]

The aspects of the HRA that allow it to function as a mechanism empowering courts to massage domestic law to remain consistent with the evolving case law of the ECtHR have particularly garnered criticism.[196] Many believe that the HRA "has caused British courts to abandon their wooden, highly textualist approach to statutory interpretation when that approach produces an outcome that the UK courts believe is inconsistent with the ECHR."[197] The HRA was intended to domesticate respect for the ECHR. Instead, according to several scholars, it changed "the nature of the interpretative process, and fundamentally alter[ed] the environment within which legislation is given concrete meaning."[198] It is no surprise that British Parliament has discussed the idea of repealing and replacing the HRA time and

193. Sales, *supra* note 180, at 112.

194. Jannika Jahn, *The UK's Potential Withdrawal from the European Convention on Human Rights–Just a Flash in the Pan or a Real Threat?*, *VERFASSUNGSBLOG* (Dec. 17, 2014), https://verfassungsblog.de/uks-potential-withdrawal-european-convention-human-rights-just-flash-pan-real-threat-2/ [https://perma.cc/V4LN-525D].

195. *See* Richard Ekins, *Rights, Interpretation and the Rule of Law*, *in* MODERN CHALLENGES TO THE RULE OF LAW, 165 (Richard Ekins ed., 2011); Vernon Bogdanor, Professor of Government, Oxford University, The Sovereignty of Parliament or the Rule of Law?, Magna Carta Lecture (June 15, 2006), *in* MAGNA CARTA TRUST, October 2011, https://magnacarta800th.com/wp-content/uploads/2011/10/Sovereignty_Parliament_or_the_Rule_Law.pdf [https://perma.cc/DY4H-PMJE]; John Finnis, *Judicial Usurpation and Human Tights*, JUDICIAL POWER PROJECT (Mar. 8, 2018), https://judicialpowerproject.org.uk/john-finnis-judicial-usurpation-and-human-rights/ [https://perma.cc/8ZTK-Q3AW].

196. 1 STEVEN G. CALABRESI, THE HISTORY AND GROWTH OF JUDICIAL REVIEW: THE G-20 COMMON LAW COUNTRIES AND ISRAEL 379 (2021); John Finnis, "Judicial Power: Past, Present, and Future," *Policy Exchange*, 21 October, 2015, https://policyexchange.org.uk/blogs/john-finnis-judicial-power-past-present-and-future/ [https://perma.cc/X8S8-TARX].

197. *1 STEVEN G. CALABRESI, THE HISTORY AND GROWTH OF JUDICIAL REVIEW: THE G-20 COMMON LAW COUNTRIES AND ISRAEL 379 (2021).*

198. *See* Elliott, *supra* note 176, at 347.

again.[199] The issue subsided (although probably just temporarily) in late 2022, when then-UK Prime Minister Liz Truss set aside the latest proposal to replace the HRA with legislation that would dissociate domestic interpretation of the ECHR from that of the ECtHR.[200]

Expecting British courts to seamlessly update the meaning of legislation in light of the evolutionary pattern of interpretation of the ECtHR was probably too optimistic. Even John Gardner, a positivist who dismissed the opinion of common law as "law that rises up from the general population" as a "ridiculous" "founding myth" concealing the lawmaking authority of judges,[201] still drew a sharp line between legislation and case law. "Legislated law is intentionally made," Gardner wrote.[202] It is "enacted with the intention of changing the law by the very act of enacting it."[203] Of course, common law jurisdictions have "a great deal of case law concerned with the interpretation of legislation," Gardner acknowledged.[204] But within that province, the interpretive task of the British judiciary has steadfastly been to detect the meaning within a provision, not updating it.

The HRA aimed to domesticate the protection of human rights enshrined in the ECHR. However, the doctrine of the "living instrument," through which the ECtHR has expanded the scope and meaning of the ECHR, has acted more as an irritant than as a complement to British legal culture. And, if the ECtHR adheres to the bold statement of its judges Pinto de Albuquerque and Dedov that the ECHR is "subordinated neither to domestic constitutional rules, nor to

199. Ben Wild, *Yeah Rights! — The Legal Impact of Repealing the Human Rights Act*, EUROPEAN CRIMINAL BAR ASSOCIATION (Mar. 2016), https://www.ecba.org/content/index.php/publications/statements-and-press-releases/794-yea-rights-the-legal-impact-of-repealing-the-human-rights-act [https://perma.cc/G34X-JUD3]; Mark Elliott, *The UK's (New) Bill of Rights*, PUBLIC LAW FOR EVERYONE (June 2, 2022), https://publiclawforeveryone.com/2022/06/22/the-uks-new-bill-of-rights/ [https://perma.cc/HBE3-VK6Y].

200. Sebastian Payne & Jane Croft, *Liz Truss Scraps Proposed British Bill of Rights*, FINANCIAL TIMES (Sep. 7, 2022), https://www.ft.com/content/9b0a32fc-980b-4f00-9cf5-6c3f29756800. As to the proposed reform, see Ministry of Justice of the 2019-2022 Johnson Conservative Government, *Human Rights Act Reform: A Modern Bill of Rights – Consultation*, U.K. MINISTRY OF JUSTICE, https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights/human-rights-act-reform-a-modern-bill-of-rights-consultation [https://perma.cc/S2G6-L2YY] (last updated July 12, 2022).

201. *See* Gardner, *supra* note 47, at 34.

202. *Id.* at 7.

203. *Id.*

204. *Id.* at 36.

allegedly higher rules of international law, since it is the supreme law of the European continent,"[205] then it is unlikely that the ECtHR will reconsider its evolutionary pattern to avoid unsettling state constitutional norms. Expectations that common law and civil law will converge, especially through institutions such as the ECtHR, appear misplaced from an empirical standpoint.

IV. CLASHES OF INTERPRETATION AND BREXIT

The Brexit saga is probably the best example of how legal orders may be so different that they cause misunderstanding regarding the ramifications of mutual integration. The United Kingdom has struggled to reconcile its structure and common law culture with the input of the ECtHR. The clashes of legal cultures that erupted with Brexit best exemplify the gap between the reality of a common law system and the reputation that common law has gained among civil law scholars in Europe.[206]

For many Brexiters, one of the benefits of leaving the European Union was escaping the jurisdiction of the ECJ and thus restoring parliamentary sovereignty.[207] Richard Ekins has explained that the United Kingdom's act of joining the European Communities in 1972 was never intended to surrender any part of its sovereignty.[208] According to his theory, it was a matter of savvy *calculation*: Britons expected benefits from participating in the European integration, not the loss of their distinct parliamentary supremacy.[209] Since participation in the European Union actually displaced that supremacy by subordinating British Parliament to the European Union and the ECJ, Brexit was the necessary means to restore traditional domestic sovereignty. In Ekins's view, Brexit was not a betrayal of the pan-European project; it was simply consistent with the original *calculation*

205. Baka v. Hungary, App. No. 20261/12, ¶ 23 (June 23, 2016).

206. On the shift in British statutory interpretation's pattern, see Philip A. Joseph, *The Rule of Law: Foundational Norm*, *in* MODERN CHALLENGES TO THE RULE OF LAW 53–54 (Richard Ekins ed., 2011).

207. *See* Markus G. Puder, *Brexit - Disentangling the Quantum in Law and Politics*, 52 GEO. WASH INT'L L. REV. 101, 114–17 (2020).

208. *See* Richard Ekins, *Restoring Parliamentary Democracy*, 39 CARDOZO L. REV. 997, 997, 1002–03 (2018).

209. *See id.* at 998.

that the United Kingdom made when it joined the European Communities.[210]

The British uneasiness with the judicial doctrines of the ECJ is quite understandable. But membership in the European Communities in 1972 *was*, to some extent, already a limitation on UK sovereignty. The impact of pivotal doctrines of the ECJ was plainly observable when the United Kingdom joined the European Communities.[211] As discussed above, the first key doctrine of "direct effect" appeared in 1963 with *Van Gend en Loos*, which established that the regulations of the European Community create rights directly enforceable by domestic courts without requiring states to execute them.[212] The second doctrine arose in 1964 with *Costa v. ENEL*, whose notion of "European Community Law supremacy" required domestic judges to enforce European Community law over domestic law whenever the two conflicted.[213] Coupled with the developmental style of the ECJ, these doctrines forced British law to evolve and adapt without parliamentary input.

In 1972, the United Kingdom may have *mis*calculated the consequences of its accession. By joining the European Communities, the United Kingdom subjected itself to a package of constitutional doctrines from the ECJ that would have powerful consequences on its domestic constitutional structure. More precisely, the United Kingdom underestimated the ramifications of joining a legal order in which the judicial interpretation of written laws was much broader and more developmental than what was acceptable within its own legal system. From the perspective of the European Communities, the doctrines of the ECJ were not only justified but also rooted in an emerging continental judicial philosophy considered indispensable for the development of European integration. The United Kingdom should have been aware that such doctrines would likely clash with the well-established understanding of the judiciary's role.

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210. *See id.* at 1012.

211. *See* N.W. BARBER, *THE UNITED KINGDOM CONSTITUTION: AN INTRODUCTION* 68 (2021).

212. *See* Case C-26/82, Van Gend en Loos v. Nederlandse Tariefcommissie, ECLI:EU:C:1963:1, at 13 (Feb. 5, 1963) ("The treaty establishing the European Economic Community produces direct effects and creates individual rights which national courts must protect.").

213. *See* Case C-6/64, Flaminio Costa v. ENEL, ECLI:EU:C:1964:66 (July 15, 1964).

The British disappointment with the judicial style of the ECtHR seems more justified than its disappointment with the ECJ. The United Kingdom was among the promoters of the ECHR in the aftermath of the Second World War.[214] Many of the problems that the United Kingdom has experienced with the ECHR stem from its evolutionary pattern of interpretation, a judicial style the ECtHR articulated in the late 1970s, well after the ECHR was established and operational. In the early 1960s, by entering the European Communities, the United Kingdom joined a legal system that was already openly premised on an incremental, purposivist pattern of legal interpretation. The doctrines of direct effect and supremacy of European law had already made its impact on domestic legal systems explicit. [215] The paths of the European Communities and of British legal culture were probably bound to collide, and the United Kingdom should have anticipated it.

V. CONCLUSION

Many believe that, thanks to the scholarly and judicial efforts within the Continent, the pan-European approach has "created a new European law, binding together not just the laws of each European country, but also the principles and values that have given life to European culture for centuries."[216] This new product of European legal culture has garnered the reputation of being a sort of "new common law," [217] which heavily relies on the activism of the ECJ and the ECtHR and on their interpretation of written laws. Sadly, this is a selective, one-sided approach to the much more complex issue of compatibility between common law and civil law systems nowadays. The differences between the two may have become narrower, but they have not disappeared altogether.

Such a European-driven approach is not unknown in common law jurisdictions. For example, the new "orthodoxy" of statutory interpretation in Australia sees "the judicial treatment of statutory and common law precedents" converging, as judges take "a more 'activist' approach to overruling statutory precedents."[218] In Canada, judicial

214. *See* C.A. Gearty, ON FANTASY ISLAND: BRITAIN, EUROPE AND HUMAN RIGHTS 175 (2016).

215. *See* Hartkamp, *supra* note 163, at 243.

216. FABRIZIO MARINELLI, CULTURA GIURIDICA E IDENTITÀ EUROPEA 299 (2020).

217. *Id*.

218. Burton-Crawford & Meagher, *supra* note 75, at 211.

interpretation has also sometimes become close to policymaking, as discussed above. However, in several common law jurisdictions, such judicial approaches are subject to intense scrutiny and even criticism,[219] to the extent they are perceived as undermining the political process and empowering courts to make arbitrary judgments.[220]

Such concern about judicial overreach has few equivalents in civil law countries and the two pan-European jurisdictions. With few exceptions,[221] today's continental scholarship still seems largely concerned with the perils of legal positivism and has promoted a style of adjudication that primes policy considerations rather than the mere interpretation and application of legal rules.[222] In contrast, the voices that favor a judicial approach "in tune with moral development and change" in common law countries are part of a much more diverse cultural environment, where the judicial approach is subject to much more intense debate.[223]

One of the key features distinguishing the common law from the civil law intellectual framework is the common law's emphasis on legal stability, efforts to put boundaries on the judicial branch, and its dedication to carving out a specific, supreme role for political institutions. Within common law countries, judicial interpretation is often expected to generate reliance rather than evolution. Many scholars and judges in common law jurisdictions are still of the view that only legislation is "the catalyst of change."[224] Borrowing from Michael Sandel, common law regimes appear to particularly value a certain kind of politics, one that provides venues and occasions for public deliberation.[225]

In his first volume on judicial review, Steven Calabresi differentiates between common law and civil law jurisdictions. In the former, Calabresi states,

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219. *Id*. at 211.

220. *See* Ekins & Goldsworthy, *supra* note 44, at 67.

221. MASSIMO LUCIANI, OGNI COSA AL SUO POSTO: RESTAURARE L'ORDINE COSTITUZIONALE DEI POTERI 150 (2023).

222. MAXIME ST-HILAIRE, LES POSITIVISMES JURIDIQUES AU XXE SIECLE 90 (2020).

223. *See* Aileen Kavanagh, *The Idea of a Living Constitution*, 16 CAN. J.L. & JURIS. 55, 83 (2003).

224. Steven Smith, *The Role of Democratic Polities in Transforming Moral Convictions into Law*, Y.L.J. 1501, 1532 (1986).

225. MICHAEL J. SANDEL, THE TYRANNY OF MERIT 209 (2020).

> courts exercising the power of judicial review of the constitutionality of legislation or of presidential actions think they are interpreting and applying the text of the Constitution as if it were an ordinary, albeit superior statute." "In contrast," Calabresi continues, "in civil law countries, the underlying theory of judicial review of the constitutionality of legislation is that a Constitutional Court actually 'makes' law when it decides a constitutional case. Constitutional Courts are therefore seen as being lawmaking bodies and are viewed as a kind of fourth branch of the government.[226]

Calabresi seems to have captured an important difference between common law and civil law regimes—one that extends beyond judicial review and is not limited to Constitutional Courts in civil law countries. In continental countries, the importance of taming the legislature's overreach has translated to an expansive approach to judicial interpretation. These features pervade and characterize the judicial styles of several legal systems across Europe.

The saga of British discontent with pan-European judicial institutions is telling of the dramatic divide between common law and civil law cultures. The British reforms of the late twentieth and early twenty-first centuries introduced the Supreme Court and disconnected the judiciary from the political branches. They were also a "response to what was perceived as growing pressure from a new constitutional model derived from the developing jurisprudence of the [ECtHR], which gave great emphasis to formal adherence to a strict division between . . . the legislative on one side and the judiciary on the other."[227] What did not surface at the time was that distancing the legislative from the judicial power does not necessarily imply a sharp distinction between lawmaking and adjudication on the continent. Despite its historical ties with the legislative and executive branches, the judiciary in the United Kingdom, as well as in several other common law jurisdictions, has played a smaller lawmaking role than courts in civil law jurisdictions, the ECJ, or the ECtHR. When courts in common law jurisdictions have embraced a stronger activist judicial pattern, they have encountered more resistance from within the academic community, the public, and the judiciary itself.

Martin Loughlin's assessment of contemporary constitutionalism showcases the common law's rejection of judicial activism, especially

226. CALABRESI, *supra* note 188, at 23.
227. Sales, *supra* note 180, at 105.

within judicial review of legislation. Loughlin concedes that in the early twentieth century, Austrian Professor Hans Kelsen's theories, which advocated for a judicial protector of the constitution, triumphed over German Professor Carl Schmitt's advocacy for a political protector. This victory secured the success of the judicial review of legislation in continental Europe. However, in his words, Kelsen succeeded "alongside Schmitt's claim that this must lead to a politicised judiciary exercising a politically contentious constitutional jurisdiction. The result is that the guardian of the constitution becomes in effect its master, and arguably undermines rather than safeguards the democratic foundation of constitutional democracy."[228]

In sum, how courts interpret written laws reflects their broader, deeply seated legal culture. Common law judges often enjoy the reputation of being activist and creative in several civil law countries because local academia selectively emphasizes the malleability of the common law while overlooking its sense of self-restraint and respect for legislative intention. To a large extent, scholars and judges in continental Europe sought and found in the common law the doctrinal and academic partners and supports that mostly resonated with their priorities and mindset. The two judicial styles of common law and civil law can hardly assimilate and generate a cross-jurisdictional set of rights, duties, and mechanisms.

228. MARTIN LOUGHLIN, AGAINST CONSTITUTIONALISM 129 (2022).