Common Law and Civil Law Today

Convergence and Divergence

Editor

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To my wife Jelena.

I will never be able to thank you enough for the time, love and attention you devoted to our family and especially that you accepted, without ever mentioning it, neglecting your amazing artistic career so that I could pursue my professional dreams.

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Introduction

Coming from the continental law system, I was always fascinated with that "other" legal tradition, founded on different pillars and with a somewhat different path to the fairness, justice and order. Elements such as precedents, different - adversarial approach, and other main features were notions that I was familiar with from my bachelor studies. However, it is very hard to present all finesses of the interaction and intersections of two legal systems to the scholar, let alone to the student. Several approaches were on my mind in addressing this subject in this collection. However, I rejected immediately classical approach: Listing first the common law articles, then civil law (or vice-versa) articles, followed by "meeting point" articles. Moreover, I did not want to have a structure where this common law/civil law dichotomy is in the focus *prima facie*. I feel that having different subject from different areas of law in the focus would is the more viable option. Uncovering common law-civil law relation within the frame of different, more concrete issues is the best way to demonstrate its layers and profoundness. And that is the point – although we can scatch some main situations of the common law-civil law elements and their encounters, every case in the vast area of law is case for itself, and it should be observed just like that.

The aim of this collection is to present to the reader every article as a separate legal situation and later to allow the (careful) reader to grasp the "common law and the civil law" picture by putting together dots from each article. Alternatively, I am sure that every article is interesting enough *per se*.

Part 1
International and European Law

Chapter 1

International Law as a Wedge between Legal Systems

Paul B. Stephan[1]

Abstract

The newly emerging field of comparative international law identifies areas of systematic divergence in the determination, interpretation, and application of international law among national legal systems. This field can inform the question of whether international law might serve to mediate between the common law and the civil law. In the abstract, international law, or more precisely international institutions that interpret and apply international law, might bridge divergences between common-law and civil-law legal structure by uncovering general principles that embrace both systems. In practice, international institutions may widen rather than bridge these gaps. The judges who serve on international courts, for example, typically lack a thorough grounding in both legal systems. They thus are vulnerable to confusing the familiar with the universal. Specialists in international law and international human rights may fail to distinguish neutral, fundamental principles particular to one system from pretexts designed the undermine respect for international obligations. The resulting judgment may confound and irritate officials in the legal system concern, undermining respect for international law heightening tensions between domestic legal systems. We can see this dynamic at work in two cases involving criminal justice in the United States and the United Kingdom. With respect to the United States, the International Court of

[1] John C. Jeffries, Jr., Distinguished Professor of Law and John V. Ray Research Professor, University of Virginia. This paper has benefited from comments received at the Conference on the Common Law and the Civil Law Today – Convergence and Divergence, masterfully organized by Dr. Marko Novaković. I am grateful to the participants, and bear sole responsibility for errors, misjudgments, and other blunders.

Justice determined that the United States had violated its obligation to ensure that arrested aliens are informed of their right to contact a consulate to obtain assistance in the criminal proceeding and, because of these violations, had to provide a new hearing for each affected person to determine whether the violation affected the outcome of the proceeding. The United States conceded the treaty violation but maintained that the persons concerned had waived their claim under the generally applicable rules of U.S. criminal procedure. The International Court of Justice failed to understand how a lawyer's failure to make a timely claim could bind a criminal defendant. With respect to the United Kingdom, legislation reformed the rules for introducing hearsay evidence in criminal trials. The British courts applied strict procedural safeguards before allowing a jury to hear such evidence but did not require a separate determination at the 18 end of submission of all evidence to determine if the submission was justified. The Strasbourg Court has ruled that an end-of-trial determination is necessary, overlooking the difficulty of undoing the submission of evidence to a jury, a procedure unique to common-law criminal trials. In both cases, the failure of mostly civilian judges to understand how common law criminal proceedings work may have led to interpretations of international law that the subject states found both incomprehensible and unacceptable.

The big question that this volume addresses is whether international law can bridge gaps between the world's principal legal systems. There are many pathways that such bridging might take, and others explore them in this book. What I want to do is discuss the ways that international law might serve as an obstacle to convergence between the common law and civil law.

This essay draws on a larger scholarly enterprise in which I have played a part, namely the exploration of the concept of comparative international law.[2] International law aspires to universality and uniformity. It applies independently of municipal (domestic) law. Yet in practice states and regions have distinct, and sometimes radically different, approaches to both the process of making international law and the products of that

[2] Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier and Emilia Versteeg, eds. *Comparative International Law,* (Oxford: Oxford University Press 2017); Symposium. 2015. "Exploring Comparative International Law." *Am. J. Int'l L.* 109, No. 3, 467-550. For a related work by a collaborator, see Anthea Roberts,. *Is International Law International?* (Oxford:Oxford University Press 2017)

process. Claims about what international law requires and how one can tell vary a lot, depending on who makes the claim.

Many forces contribute to this variation in international law. One is the background norms and predispositions that particular legal systems create and reinforce. The people who produce international law come out of these systems and carry these traits. Because to some extent background assumption about what law is and does are taken for granted and thus unconscious, these actors produce international law that confirms and extends their local understandings of how law works.

This paper first will outline the general features of comparative international law. It then will discuss the particular features of the international human rights system that can exacerbate the gaps between common-law and civilian jurists. It demonstrates how these features play out through an example, an important human rights dispute that implicates the differences between the common law and civil law. It concludes by showing how these differences bring about discord and block international cooperation to the detriment of the international law project.

1. Comparative International Law

The root of the problem is that international law depends on international lawyers. These people are necessarily products of a specific legal culture. They begin their education and training in particular national institutions, no matter how soon and how deeply they throw themselves into the field of international law. Moreover, most of them function in particular national institutions as either formal or informal advisers to national governments. Almost all international law involves nation states, either as participants in transactions with other states or as subjects of international law charged with certain duties regarding persons, legal and natural. States use international lawyers both to understand their rights and obligations but, perhaps even more importantly, to shape international law to their liking.

The national dimension of international law becomes even starker when one looks at courts as producers of international law. Most judges in domestic courts lack much training or background in international law. A national supreme court might have one or two members who have some professional investment in international law, but few if any have a substantial number of such specialists. The persons who serve on international tribunals tend to have a specific international legal focus, corresponding to the nature of the tribunal involved. Human rights courts in particular tend to fill up with persons with a substantial interest in

human rights law, but not taxation, commercial transactions, or even criminal adjudication.

Moreover, international law lacks a canon, and perhaps even a rule of recognition. One can take the discipline seriously and still admit that a lot of room exists for contentious claims about what counts as international law and what constitutes its hierarchy as well as the existence and content of particular rules or obligations.[3] This flexibility makes it easier to mold claims about international law to reflect the interests of particular states.

I do not mean to make the simplistic observation that individual states will tailor their versions of international law to meet their needs – that should be obvious and not especially interesting – but rather that where a state sits in the complex web of international relations strongly influences its account of international law. A hegemon, for example, makes very different assertions about international law than does a subordinated state.[4] During the period of bipolar superpower competition, the United States and Europe, on the one hand, and the Soviet Union and the People's Republic of China, on the other hand, constructed very different versions of international law, including divergent accounts of state sovereignty, *jus cogens*, treaty interpretation, customary international law, the definition of aggression, and other fundamental matters.[5] In the contemporary world, these patterns of difference endure.

2. Comparative International Human Rights

The centrifugal forces pulling on international law take on added force in the field of international human rights. To begin with, a large number of people – perhaps a majority of those on this planet – live in regimes that believe that sovereign equality and noninterference in domestic affairs are the core values of international law, indeed enjoying the status of *jus*

[3] I explore these issues at greater length in Paul B. Stephan. 2018. "Overlapping Sovereignty and Laws' Domains." *Pepperdine L. Rev.* 45, No. 2 (forthcoming).

[4] Paul B. Stephan.. "Symmetry and Selectivity: What Happens in International Law When the World Changes." *Chi. J. Int'l L.* 10, No. 1 (2009): 91-123.

[5] Paul B. Stephan. "The Impact of the Cold War on Soviet and US Law: Reconsidering the Legacy." In *The Legal Dimension in Cold War Interactions: Some Notes from the Field*, edited by Tatiana Borisova and William B. Simons, (Leiden, Martinus Nijhoff Publishers. 2012), 141-58.

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