THE INFLUENCE OF EU AND EUROPEAN HUMAN RIGHTS LAW ON ENGLISH PRIVATE LAW

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Abstract This article examines the extent to which EU and European human rights law, following the enactment of the European Communities Act 1972 and the Human Rights Act 1998, have changed the manner in which English courts use comparative law in the private law field. Despite legislative intervention rendering EU law part of the national legal system and requiring the courts 'to take into account' the jurisprudence of the European Court of Human Rights, there remains evidence that private law courts retain a preference for comparisons within the common law world. This article will examine, with reference to a number of recent empirical studies, the reasons for this position and what this signifies in terms of future comparative law reasoning.

Keywords: comparative law, EU law, European human rights law, private law.

I. INTRODUCTION

The common law legal tradition, as Simpson succinctly defines it, is the name given to the one of the major world legal traditions which evolved in England after the Norman Conquest.[1] It represents, therefore, 'a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught'.[2] It is also one which unites countries as diverse as Australia, England and Wales, Ghana, India, Jamaica, Malaysia, New Zealand, Nigeria, Singapore and the United States. For leading comparative lawyers Zweigert and Kötz, the factors of a shared history, common mode of thought in legal matters, similar institutions and use of legal sources, and a shared ideology serve to identify a distinct legal tradition which distinguish it from 'rival' legal families such as those based on the civil

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[1] AWB Simpson, 'Common Law' in P Cane and J Conaghan (eds), *New Oxford Companion to Law* (OUP 2008) 164. See also G Samuel, 'Common Law' in JM Smits (ed), *Elgar Encyclopedia of Comparative Law* (2nd edn, Edward Elgar 2012).

[2] JH Merryman and R Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (3rd edn, Stanford University Press 2007) 2.

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law, Islamic, Hindu or indigenous legal traditions.[3] Commentators equally note that the part of the strength of the common law tradition rests on its hostility to 'foreign civil law', which can be traced back to the early rejection of the continental reception of Roman law in favour of a highly developed domestic system of law.[4] Zweigert and Kötz, for example, juxtapose the common law with its focus on case law and preference for experience over theory with the systematic approach of the civil law marked by a tendency to use abstract legal norms.[5] Private law in common law systems may thus be characterized as a law of practice, not theory, with the judge playing a particularly significant role.[6] Holmes famously stated that the logic of the common law is not necessarily logic but experience, adding that, as a result, the necessities of the time, the prevalent moral and political theories and intuitions of public policy play a greater role than purely deductive reasoning.[7]

However, this straightforward common law/civil law divide has become increasingly blurred in recent years. English judges have, since 1973, been obliged to accept the supremacy of EU law and, since 2000, have been required by statute to 'take into account', *inter alia*, decisions of the European Court of Human Rights. While it arguably took a direct clash of European and national policy in the *Factortame* litigation in the 1990s[8] for the English courts to accept fully the supremacy of EU law, it is now widely acknowledged to impact on all areas of UK law, including, of course, private law. Indeed, proposals by the European Parliament and European Commission to harmonize all (or part) of European private law threaten to take this a step further, creating a new European private law, albeit confined until recently to a proposal for an (optional) common European sales law.[9] European human rights law also provides a distinct source of law, both in terms of judgments against the UK from the European Court of Human Rights,[10] but, more significantly, with the enactment of the Human Rights Act 1998 which, at section 6, requires public authorities (including the

[3] K Zweigert and H Kötz, *An Introduction to Comparative Law* (3rd edn, Clarendon Press 1998) 68.

[4] RC Van Caenegem, *The Birth of the English Common Law* (2nd edn, CUP 1988) 89–92; T Lundmark, *Charting the Divide between Common and Civil Law* (OUP 2012) 35.

[5] See (n 3) 69–70.

[6] See also RC Van Caenegem, *Judges, Legislators and Professors* (CUP 1987) and D Howarth, *Law As Engineering: Thinking about What Lawyers Do* (Edward Elgar 2014) 148: 'The world of the law, especially in common law countries, is … self-consciously practical, [it] disdains the merely theoretical and cares less about whether lawyers have well-stocked minds than about whether they know what they are doing'.

[7] OW Holmes, *The Common Law* (Little, Brown 1881) 1.

[8] The *Factortame* litigation, in particular, highlighted that the principle of effectiveness requires that it should not be practically impossible to exercise EU rights in the national law: see Case C-213/89 *R v Secretary of State for Transport, ex parte Factortame Ltd* [1990] ECR I-2433 (full effectiveness of EU law impaired if rule of national law prevented court from granting interim relief against the Crown). See eg P Craig, 'Sovereignty of the United Kingdom Parliament after *Factortame*' (1991) 11 YEL 221.

[9] Proposal for a regulation on a Common European Sales Law COM (2011) 635 final.

[10] Art 46, ECHR: Binding force and execution of judgments.

courts) to act in a manner compatible with the European Convention on Human Rights.

Increased European influence on English law may be contrasted with a parallel reduction of contact with other common law jurisdictions. The end of colonialism, the demise of the Privy Council's role in 'unifying' the laws of the Commonwealth and the enactment of legislation at a national level following independence have led increasingly to differences in the laws of common law States. It is inevitable that States will develop their own laws and that new alliances will occur. Merryman and Pérez-Perdomo expressly recognize that it would now be inaccurate to suggest that all common law jurisdictions have identical legal institutions, processes and rules.[11]

In the light of these developments, this article will seek to examine to what extent Europeanization, in the broad sense of EU and European human rights law, has changed how English courts[12] use comparative law. My focus will be on private law, here the law of contract and tort.[13] While a number of studies have focused on constitutional law (and public law more generally),[14] few commentators have considered the interrelationship of European and English *private* law at a domestic level. And yet contract and tort law represent areas of law which are seen as exemplars of common law reasoning in which judges continue to play a significant role despite increasing legislative intervention. It is also an area where there is a well-established history of cross-citation across the common law world. This study, therefore, addresses a distinct topic: to what extent has greater exposure to European sources, in circumstances where the UK legislature has required the courts to a greater or

[11] See (n 2) 1.

[12] By which I mean the courts of England and Wales and the UK Supreme Court. It should noted that the Supreme Court does cite Scottish case law, but that this can be attributed to domestic constitutional arrangements and does not reflect on matters discussed in this article.

[13] The influence of EU law on other areas of private law may be noted, but is beyond the scope of this article: see, for example, the law of unjust enrichment where the impact of the *San Giorgio* principle for illegally levied taxes has long been acknowledged: see Case 199/82 *Amministrazione delle Finanze dello Stato v SpA San Giorgio* [1983] ECR 3595 and the key English case of *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70, recently discussed in S Elliott, B Häcker and C Mitchell (eds), *Restitution of Overpaid Tax* (Hart Publishing 2013) ch 1. In areas where harmonization is desirable in terms of legal security for the persons involved, such as conflicts of laws and commercial law, the impact of EU law has also been particularly significant, see P Stone, *EU Private International Law* (3rd edn, Edward Elgar 2014) and L Gullifer and S Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law* (Hart Publishing 2014). Briggs has recently argued that European regulation now provides the framework for private international law, which bears the influence of over 40 years of European legislation: A Briggs, *Private International Law in the English Courts* (OUP 2014).

[14] See eg B Flanagan and S Ahern, 'Judicial Decision-Making and Transnational Law: A Survey of Common Law Supreme Court Judges' (2011) 60 ICLQ 1, which surveys 43 judges from the UK House of Lords, the Caribbean Court of Justice, the High Court of Australia, the Constitutional Court of South Africa, and the Supreme Courts of Ireland, India, Israel, Canada, New Zealand and the US on the use of foreign law in constitutional rights cases. See, more generally, M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012).

lesser extent to defer to non-common law sources, led to a greater willingness to rely on EU and European human rights sources in developing English private law? In so doing, I will examine case-law development in private law, but also support my analysis with reference to a number of recent empirical studies, which have examined the practice of the UK Supreme Court and English Court of Appeal by means of quantitative and qualitative data. Have, therefore, these European sources led to a reconfiguration of the common law legal family, as the parent legal system enters a second 'marriage', giving rise to new progeny: a private law of contract and tort containing rights based on breach of EU and (European) human rights law or even a newly formulated European private law? If so, where does this leave the traditional relationship between common law courts in which the courts have long found inspiration, support and guidance through citation of case law from other common law jurisdictions? Jaremba has argued that 'all European national judges, regardless of their specialization and position in the national judicial architecture, are EU law judges',[15] but, in this article, I will seek to identify how the courts *in reality* have responded to such changes and what insight this may give us into the nature of judicial reasoning and the English courts' treatment of comparative law.

II. THE EUROPEAN DIVIDE: EU AND EUROPEAN HUMAN RIGHTS LAW AS INSTRUMENTS FOR CHANGE

It is undeniable that the ties which bind the common law legal family[16] have changed over time. The abolition by many States of the right of appeal to the Judicial Committee of the Privy Council in London has led to the organic development of law at a local level. While, in the 1930s, the Judicial Committee of the Privy Council was said to be the final court of appeal for more than a quarter of the world, today a total of only 27 Commonwealth countries, UK overseas territories and crown dependencies use the JCPC as their final court of appeal. Canada abolished rights of appeal to the Privy Council in London in 1949,[17] followed by many other common law countries, including Australia in 1986[18] and New Zealand in

[15] U Jaremba, 'At the Crossroads of National and European Union Law. Experiences of National Judges in a Multi-Level Legal Order' (2013) 6 Erasmus Law Review 190, 196.

[16] There is a wealth of literature discussing the meaning of 'legal family' and whether it is better described as a 'legal tradition' or 'culture' or even '*mentalité*' to use the phrase of Pierre Legrand (see eg 'European Legal Systems Are Not Converging' (1996) 45 ICLQ 52). This article will not explore this debate, save to recognize the limitations of taxonomy in providing a definitive determinative link between any grouping of States.

[17] Criminal appeals to the Privy Council were ended in 1933. Civil appeals ended in 1949, when an amendment to the Supreme Court Act transferred ultimate appellant jurisdiction to Canada.

[18] Culminating in the Australia Act 1986 (Cth). Appeals to the Privy Council from decisions of the High Court of Australia were effectively ended by the combined effects of the Privy Council (Limitation of Appeals) Act 1968 and the Privy Council (Appeals from the High Court) Act

2003.[19] Such developments encouraged the growth of 'local' versions of the common law, adapted to that country's own characteristics and the customs of its people.[20] National supreme courts no longer feel obliged to follow authority simply on the basis that it originated in the highest UK court.[21] This does not signify a failure to consider other common law jurisdictions, but that such authority is only 'persuasive' and will be considered on its merits.[22] In the words of a leading Australian judge, 'There is … every reason why we should fashion a common law for Australia that is best suited to our conditions and circumstances … The value of English judgments, like Canadian, New Zealand and for that matter United States judgments, depends on the persuasive force of their reasoning.'[23] It is also clear that a stage has been reached whereby the UK Supreme Court is prepared to be 'persuaded' by other common law courts in framing legal principle rather than expecting other Commonwealth courts to follow its lead.[24]

Patrick Glenn has attributed the survival of the common law tradition to its 'looseness'. He argues that its very amorphous nature has allowed it to adapt and accept diversity, having long worked with different legal orders.[25] As Lord Lloyd commented in *Invercargill v Hamlin*,[26] '[t]he ability of the common law to adapt itself to the differing circumstances of the countries in which it

1975. However, a right of appeal to the Privy Council remained from state courts, in matters governed by state law, until the passage of the Australia Acts, both state and Federal, in the 1980s.

[19] Supreme Court Act 2003. The Act came into force on 1 January 2004, officially establishing the New Zealand Supreme Court, and at the same time ending appeals to the Privy Council in relation to all decisions of New Zealand courts made after 31 December 2003. This New Zealand legislation does not, however, affect rights of appeal from the Cook Islands and Niue.

[20] See eg M Vranken, 'Australia' in Smits (n 1), J Toohey, 'Towards an Australian Common Law' (1990) 6 AustBarRev 185; R Cooke, 'The New Zealand National Legal Identity' (1987) 3 CantaLRev 171; K Glover, 'Severing the Ties That Bind? The Development of a Distinctive New Zealand Jurisprudence' (2000) 8 WaikatoLRev 25.

[21] The Supreme Court of Canada in *Canadian National Railway Co v Norsk Pacific Steamship Co* [1992] 1 SCR 1021, (1992) 91 DLR (4th) 289, for example, was quite willing to declare that '*Murphy v Brentwood District Council* [1991] 1 AC 398 does not represent the law in Canada.'

[22] See HP Glenn, 'Persuasive Authority' (1987) 32 McGillLJ 261 and Justices Kirby (High Court of Australia) and Sharpe (Court of Appeal for Ontario) in ch 19: 'The Old Commonwealth' in L Blom-Cooper QC, B Dickson and G Drewry (eds), *The Judicial House of Lords 1876–2009* (OUP 2009).

[23] A Mason, 'Future Directions in Australian Law' (1987) 13 MonLR 149, 154. See also P Finn, 'Common Law Divergences' (2013) 37 MULR 511, 511, who states that 'Today, it is abundantly clear that there are separate bodies of English and Australian common law.'

[24] For example, in relation to the doctrine of vicarious liability in tort, see *Lister v Hesley Hall Limited* [2001] UKHL 22, [2002] 1 AC 215, para 27 per Lord Steyn: 'I have been greatly assisted by the luminous and illuminating judgments of the Canadian Supreme Court in *Bazley v Curry*, 174 DLR (4th) 45 and *Jacobi v Griffiths*, 174 DLR (4th) 71. Wherever such problems are considered in future in the common law world these judgments will be the starting point.'

[25] 'The common law, though identifiable, is a weak identifier. It can float around the world, but in so doing it provides little reinforcement for national identities, and leaves much room for accommodation with other (personal) laws': HP Glenn, *Legal Traditions of the World* (5th edn, OUP 2014) 260–1. Harris also comments that the 'very idea of 'the common law' is notoriously elusive': JW Harris, 'The Privy Council and the Common Law' (1990) 106 LQR 574.

[26] [1996] AC 624.

has taken root, is not a weakness, but one of its great strengths. Were it not so, the common law would not have flourished as it has, with all the common law countries learning from each other.'[27]

The rise of statute law has also served to accentuate divisions at a national level. Major statutory initiatives such as the New Zealand Accident Compensation Scheme, which, for over 40 years, has replaced tort provisions relating to personal injury and death with a no-fault compensation scheme,[28] and legislative reform of civil liability in all Australian jurisdictions following the Ipp Report on the Law of Negligence,[29] have rendered it more difficult to reason by analogy. Statutes, as Lord Bingham has observed, in the absence of similarity, render comparison of limited utility.[30] Private law will, therefore, as in all areas of law, have to respond to the 'higher level' policy choices of the legislator; the shaping of which are not within the power of the judiciary. Yet, while statutory intervention and judicial activism at a domestic level have led to fragmentation, a core of judge-made law does remain. This continues—albeit loosely—to bind the jurisdictions together.

It is European law which disturbs this gradual restructuring of the common law and possesses the greatest potential for the creation of division within the common law family. EU law derives primarily from the civil law tradition and the decisions of its court (the Court of Justice of the European Union (CJEU)) are binding on UK courts. As supranational law, EU law challenges the traditional groupings of legal families and introduces a new alliance of States based on common European social, political and economic goals. Combined with that other great European influence—the European Convention on Human Rights whose case law is also closer in style to civil rather than common law—it becomes clear that the UK common law is now subject to influences which do not affect the majority of the common law world and which affect not only public law, but the law of contract and tort as well. The nature of these influences will be examined below.

A. Europe and the Common Law: Directives, Regulations and Beyond

Despite the absence of any formal basis in the Treaty of Rome, the EU Treaties have been found to create a distinct legal order and one which, importantly, gives rights to individual citizens which they can pursue in the courts of

[27] ibid 640.

[28] See K Oliphant, 'Beyond Misadventure: Compensation for Medical Injuries in New Zealand' (2007) 15 MedLRev 357 and S Todd, 'Forty Years of Accident Compensation in New Zealand' (2012) 28 TMCooleyLRev 190.

[29] Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (Canprint Communications Pty Ltd 2002).

[30] TH Bingham, *Widening Horizons: The Influence of Comparative Law and International Law* (CUP 2010) 2.

Member States.[31] In 1973, the United Kingdom joined the European Union (then the European Economic Community) and, by virtue of the European Communities Act 1972, European Union law is given legal effect within the national legal system.[32] On this basis, national courts are required to apply EU law, subject to review by the CJEU itself.[33] Provisions of EU law that are directly applicable or have direct effect are automatically enforceable in the UK without the need for any further enactment.[34] The doctrine of indirect effect further requires that national courts should interpret existing legislation in line with EU law.[35]

Article 288 TFEU further provides for EU legislation: to exercise the Union's competences, EU institutions may adopt regulations, directives, decisions, recommendations and opinions. In private law, intervention has primarily been by way of directives and, noticeably, more focussed on contract law than the law of tort. A number of reasons may be identified for this policy. First, the European Commission's objective of boosting the internal market and removing barriers to cross-border trade has led to a number of initiatives which have as their goal economic growth by means of improvement to existing modes of contracting.[36] Soft law initiatives have also shown a preference for contract law models, including the well-known Principles of European Contract Law (PECL).[37] Equally, concern to improve consumer protection across the EU has led to directives which seek to protect the consumer as the weaker party to the contract and, in particular, to enable consumers to make informed decisions as to when it is in their interests to contract.[38]

From the perspective of English contract law, perhaps the best known directives are Directive 93/13/EEC on unfair terms in consumer contracts[39] and Directive 1999/44/EC on the sale of consumer goods and associated

[31] Case 6/64 *Costa v ENEL* [1964] ECR 585, 593. See, generally, P Craig and G de Búrca, *EU Law: Text, Cases and Materials* (5th edn, OUP 2011) ch 9. See also art 19 TEU: 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.'

[32] Section 2(1), European Communities Act 1972.

[33] See art 258 TFEU, art 259 TFEU and the preliminary reference procedure under art 267 TFEU.

[34] Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastungen* [1963] ECR 1, [1964] CMLR 105 and Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337. See, generally, Craig and de Búrca (n 31) ch 7.

[35] Case 14/83 *Von Colson v Land Nordrhein-Westfalen* [1984] ECR 1891; Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135; Cases C-397-403/01 *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [2004] ECR I-8835.

[36] As discussed by D Staudenmayer, 'The Way Forward in European Contract Law' (2005) 13 ERPL 95.

[37] See generally O Lando and H Beale (eds), *Principles of European Contract Law Parts I and II* (Kluwer 2000); O Lando, E Clive, A Prüm and R Zimmermann (eds), *Principles of European Contract Law Part III* (Kluwer 2003).

[38] See S Weatherill, *EU Consumer Law and Policy* (2nd edn, Edward Elgar 2013).

[39] Council Directive 93/13/EEC of 5 April 1993 OJ L 95, 21 April 1993, 29–34.

guarantees,[40] although contract textbooks may also briefly refer to the Package Travel, Package Holidays and Package Tours Directive[41] or the Unfair Commercial Practices Directive.[42] Most recently, the 2011 Consumer Rights Directive has, as of 13 June 2014, been implemented in Member States, replacing Directive 97/7/EC on distance contracts and Directive 85/577/EEC on off-premises contracts.[43] These measures have brought changes to English contract law which go beyond the superficial and technical. For example, the 1993 Directive, transposed into English law by means of the Unfair Terms in Consumer Contracts Regulations 1994 (now 1999),[44] introduced, to the consternation of many English contract lawyers at the time,[45] a test of good faith[46] to determine the enforceability of unfair terms in standard term consumer contracts. While the 1999 Consumer Sales Directive was implemented by a number of amendments to existing statutes,[47] it introduced a range of new consumer-friendly remedies *in addition* to those already existing in UK law.[48] Such directives have brought changes to English contract law based on EU, rather than UK or Commonwealth, legislative policy and are not necessarily consistent with existing common law developments. Inevitably, they serve to divide EU Member States from the rest of the common law world.[49]

In tort law, intervention has been less dramatic. Core tort law principle remains primarily for the domestic courts and only a limited number of directives have brought changes to national law.[50] The best-known example

[40] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 OJ L 171, 7 July 1999, 12–16.

[41] Council Directive 90/314/EEC of 13 June 1990 OJ L 158, 23 June 1990, 59–64 (soon to be revised).

[42] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 OJ L 149, 11 June 2005, 22–39. Note also Directive 2000/31/EC on electronic commerce OJ L 178, 17 July 2000, 1–16.

[43] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 OJ L 304, 22 November 2011, 64–88.

[44] SI 1994/3159 (replaced by SI 1999/2083 due to problems with transposition).

[45] See H Collins, 'Good Faith in European Contract Law' (1994) 14 OJLS 229.

[46] Reg. 5(1) UTCC Regulations 1999: 'A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.'

[47] Sale and Supply of Goods to Consumers Regulations SI 2002/3045, amending the Sale of Goods Act 1979, the Supply of Goods and Services Act 1982, the Supply of Goods (Implied Terms) Act 1973 and the Unfair Contract Terms Act 1977.

[48] Part 5A, Sale of Goods Act 1979 (additional rights of buyer in consumer cases) and similar provisions under Part 1B of the 1982 Act. See C Willett, M Morgan-Taylor and A Naidoo, 'The Sale and Supply of Goods to Consumers Regulations' [2004] JBL 94; JN Adams and H MacQueen, *Atiyah's Sale of Goods* (12th edn, Pearson 2010) 522–7.

[49] Compare, for example, how the UK and Australian courts dealt with the issue of the enforceability of bank charges in *Office of Fair Trading v Abbey National Plc* [2009] UKSC 6, [2010] 1 AC 696 and *Andrews v ANZ Banking Group Ltd* [2012] HCA 30, (2012) 290 ALR 595 (comment: E Peel, 'The Rule against Penalties' (2013) 129 LQR 15).

[50] See P Giliker, *The Europeanisation of English Tort Law* (Hart Publishing 2014) ch 3.

of change by directive remains that of Council Directive 85/374/EEC, commonly known as the Product Liability Directive,[51] which imposes strict liability on manufacturers for damage caused by their defective products. In *A v National Blood Authority*,[52] the English court recognized that Part 1 of the Consumer Protection Act 1987 must be interpreted in the light of the 1985 Directive, following the guidance of the ECJ in *European Commission v United Kingdom*.[53] The Directive is also a maximum harmonization directive from which no divergence is permitted.[54] The Product Liability Directive may be seen as symbolic in highlighting the potential impact of EU law; in this case, supplementing the classic common law authority of *Donoghue v Stevenson*[55] with EU-sourced strict liability. Further, EU law has shown itself capable of creating new areas of tort law, such as State liability for breach of EU law (*Francovich* liability).[56] While, as yet, few successful claims have been brought under this head of liability,[57] and, as an area of law, it remains under-conceptualized,[58] it strikes at the heart of domestic legal system, holding both the State and its courts[59] subject to EU law and requiring the provision of compensation where a sufficiently serious breach of EU law is shown.

By virtue, therefore, of membership of the European Union, the UK and Ireland now find themselves in the curious position of being minority systems in a Union of States dominated by the civil law legal tradition.[60] More recently, UK and Irish lawyers have found themselves faced with a number of ambitious projects which seek to harmonize some or all aspects of the private law of European Member States.[61] Since 1989, the European

[51] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products: [1985] OJ L 210, 29.

[52] [2001] 3 All ER 289. [53] C-300/95 [1997] ECR I-2649, [1997] All ER (EC) 481.

[54] Case C 52/00 *Commission v France* [2002] ECR I-3827. [55] [1932] AC 562.

[56] So named after the leading case of C-6/90 *Francovich v Italian Republic* [1991] ECR I-5357, [1993] 2 CMLR 66.

[57] Although see, recently, *Delaney v Secretary of State for Transport* [2015] EWCA Civ 172, [2014] RTR 25 (on appeal): exclusion of the MIB's liability to passengers known as the 'crime exception' was in breach of the UK's obligations under the EU Motor Insurance Directives, giving rise to *Francovich* liability.

[58] KM Stanton, 'New Forms of the Tort of Breach of Statutory Duty' (2004) 120 LQR 324; P Giliker, 'English Tort Law and the Challenge of *Francovich* Liability: 20 years on' (2012) 128 LQR 541.

[59] See eg C224/01 *Köbler v Austria* [2003] ECR I-239, [2004] QB 848 which provides that a court of final appeal may be sued for failing to refer a matter to the CJEU or for giving an erroneous ruling where it amounts to a manifest infringement of the applicable law.

[60] See J Beatson, 'Has the Common Law a Future?' (1997) 56 CLJ 291, 292–5, who speculates that England and Wales will become the Québec of Europe!

[61] Provoking, perhaps predictably, a hostile response from some commercial lawyers: see eg G McMeel, 'The Proposal for a Common European Sales Law: Next Stop a European Contract Code?' (2012) 27 BJIB&FL 3; M Kenny, 'The 2004 Communication on European Contract Law: Those Magnificent Men in Their Unifying Machines' (2005) 30 ELRev 724.

Parliament has been calling for a European Code of Private Law[62] and in more recent years, the European Commission has commissioned a number of major research projects which have produced a Draft Common Frame of Reference,[63] which provides a model for a European Civil Code,[64] and led a public consultation on the future of European Contract Law in which one option was again the introduction of a European Civil Code.[65] The latest proposal for a regulation on a Common European Sales Law[66] would have introduced into every Member State an optional common European law governing cross-border contracts for the sale of goods and digital content. While there has been less work in other areas of private law, research groups, such as the European Centre of Tort and Insurance Law[67] in Vienna, continue to engage in studies to identify common principles of tort law across Member States. Books VI and VII of the Draft Common Frame of Reference equally put forward proposed common European rules of tort and unjust enrichment, albeit with the more civilian nomenclature of 'non-contractual liability arising out of damage caused to another' and 'unjustified enrichment'.

Subject to any drastic political decision by the UK to exit the EU, it seems clear that EU law will continue to impact on UK private law, notably (but not solely) in the area of consumer protection. Moreover, the UK courts are required to be conversant with a large (and expanding) body of case law which they must apply when relevant. It is not, therefore, a case of considering whether UK law should evolve in a similar manner to that of Australia or Canada, but of the UK complying with EU law, subject to the supervision of an external court: the CJEU.[68]

B. European Human Rights and the Common Law

From 2000, however, UK private law has faced a further challenge: the enactment of the Human Rights Act 1998 (HRA). European human rights law may be described as having 'supra-national aspects' in that, as a signatory to the Convention, the UK is bound by judgments to which it is a party, but it is the enactment of the HRA which has made a significant difference to UK law and raised difficult questions about the relationship

[62] See eg European Parliament: Resolution of 26 May 1989, OJEC C 158/401 of 26 June 1989; Resolution of 6 May 1994, OJEC C 205/519 of 25 July 1994.

[63] C von Bar and E Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (Sellier 2009 and OUP 2010) vols I–VI.

[64] N Jansen and R Zimmermann, 'A European Civil Code in All but Name' [2010] CLJ 98.

[65] *Green paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses* COM (2010) 348 final.

[66] COM (2011) 635 final.

[67] Website at <http://www.ectil.org>.

[68] As Twigg-Flesner comments: 'Legal reasoning at the national level cannot be purely domestic in areas affected by EU measures, with national courts required to adopt an interpretation which respects the autonomous status of EU law': C Twigg-Flesner, *The Cambridge Companion to European Union Private Law* (CUP 2010) 6.

between the courts, Parliament and the European Court of Human Rights.[69] Section 3(1) provides that 'so far as it is possible to do so', the courts should interpret primary and subordinate legislation in a Convention-compliant way.[70] This will apply to legislation in the area of private law and section 3 has been used by the courts to construe legislation purposively to reach a convention-compliant result.[71] This gives the UK courts a 'constitutional' role in examining the Convention-compatibility of legislation.[72] Further, section 2(1) of the Act requires the court, in determining a question which has arisen in connection with a Convention right, to 'take into account' judgments of the ECtHR. Section 6(1) also provides that it is unlawful for a public authority to act in a non-Convention-compliant way and sections 7 and 8 provide a cause of action by which victims may seek a remedy. Individual litigants may thus bring an action against a public authority which has violated one of the Convention rights contained in Schedule 1 of the Act.

In both contract and tort law, early cases suggested that these measures might lead to changes to existing law, triggered to a large extent by the ECtHR decision in *Osman v UK*.[73] In this case, the Strasbourg court had been prepared to find a breach of Article 6 ECHR (right to a fair trial) where a negligence claim against the police had been struck out for reasons arising from substantive law. While the Strasbourg court subsequently accepted in *Z v UK*[74] that this represented a misunderstanding of English law, the shadow of *Osman* remained. In *Wilson v First County Trust Ltd (No 2)*,[75] for example, the Court of Appeal, influenced by *Osman*, was prepared to make a declaration of incompatibility in relation to section 127(3) of the Consumer Credit Act 1974, which placed an absolute bar on the court from enforcing an agreement which had failed correctly to state the amount of credit, on the basis that this amounted to an infringement of both Article 6 and Article 1 of Protocol 1, ECHR (right to protection of property). While the House of Lords in *Wilson*, giving judgment two years after *Z v UK*, was in no doubt that Article 6 could no longer be said to permit the claimant to challenge the provisions of the Act when the section in question merely restricted the substantive rights of the creditor and did not bar access to the court,[76] their Lordships were divided as to the correct interpretation of Article 1 of Protocol 1, although all agreed that there had in fact been no

[69] An issue brought to a head in the prisoners' rights case of *Hirst v UK* (74025/01) (2006) 42 EHRR 41 (ECHR Grand Chamber), discussed T Lewis, "'Difficult and Slippery Terrain'": Hansard, Human Rights and *Hirst v UK*' [2006] PL 209. Note also the extrajudicial response of Lord Sumption, 'The Limits of Law' 27th Sultan Azlan Shah Lecture, 20 November 2013.

[70] If the court is satisfied that a legislative provision is incompatible with a Convention right, it may make a declaration of incompatibility: section 4 HRA 1998.

[71] See eg *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 concerning a statutory tenancy. See A Kavanagh, 'The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998' 920040 24 OJLS 259.

[72] See, recently, C Crawford, 'Dialogue and Rights-Compatible Interpretations under Section 3 of the Human Rights Act 1998' (2014) 25 KLJ 34.

[73] (23452/94) (2000) 29 EHRR 245.

[74] (29392/95) (2002) 34 EHRR 3.

[75] [2001] EWCA Civ 633, [2002] QB 74.

[76] [2003] UKHL 40, [2004] 1 AC 816, para 33 per Lord Nicholls.

violation in this case.[77] Subsequent case law has yet to resolve this point.[78] McKendrick has commented that: 'Convention rights may yet turn out to be a time bomb ticking away under the law of contract and private law generally.'[79]

In contract at least, the scope of Convention rights is limited in that their primary focus is not the protection of economic rights.[80] In contrast, the very nature of Convention rights—which protect fundamental rights to life, freedom from torture, liberty etc—suggests a potentially greater role in tort law. The challenge for the courts may be seen as twofold. First, public authorities face claims under section 7 of the HRA 1998 for breach of Convention rights (with a potential remedy under section 8 in damages). Secondly, under the much debated doctrine of 'indirect horizontal effect',[81] the courts, as 'public authorities' under section 6(3) of the Act, arguably have an obligation, or at least should attempt,[82] to interpret the common law in a Convention-compliant manner. This has led to decisions in which the courts have reconsidered the rules of standing in private nuisance[83] and the relationship between the tort of defamation and Article 10 ECHR.[84] Following *Osman*, the courts also became more reluctant to strike out claims for negligence against public authorities.[85] *D v East Berkshire Community NHS Trust*[86] demonstrated that even established UK decisions, such as the House of Lords ruling in *X v Bedfordshire CC*[87] (that social services do not owe a duty of care when making a decision about whether or not to take a child into care) could be subject to review post-HRA, despite the overt

[77] A helpful summary of their differences of opinion may be found in *Conister Trust Ltd v John Hardman & Co* [2008] EWCA Civ 841, [2009] CCLR 4, paras 110–111 per Lawrence Collins LJ. See also H Beale (ed), *Chitty on Contracts* (31st edn, Sweet and Maxwell 2012) para 1–065; G McMeel, 'Contract, Restitution and the Human Rights Act 1998′ [2004] LMCLQ 280; *Shanshal v Al-Kishtaini* [2001] EWCA Civ 264; [2001] 2 All ER (Comm) 601 (any breach of art 1 Protocol 1 justified on basis of public interest exception).

[78] *Salat v Barutis* [2013] EWCA Civ 1499, [2014] ECC 2, para 26.

[79] E McKendrick, *Contract Law* (10th edn, Palgrave Macmillan 2013) 14. See also H Collins, 'The impact of Human Rights Law on Contract Law in Europe' [2011] EBLR 425. Indeed, *Chitty on Contracts* (n 77) devotes 33 paras to the topic: 'The Human Rights Act 1998 and Contracts.

[80] As noted, for example, by Lord Hoffmann in *Matthews v Ministry of Defence* [2003] UKHL 4, [2004] 2 AC 368, para 26. An obvious contrast may be made with EU law, as stated above, where the twin goals of improving inter-State trade and consumer protection have led to more intervention in the law of contract than that of tort.

[81] See AL Young, 'Mapping Horizontal Effect' in D Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (CUP 2011).

[82] Depending on whether one favours strong or weak indirect horizontal effect: see M Hunt, 'The Horizontal Effect of the Human Rights Act' [1998] PL 423; G Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law: A Bang or a Whimper?' (1999) 62 MLR 824.

[83] *McKenna v British Aluminium Ltd* [2002] EnvLR 30.

[84] *O'Shea v MGN Ltd* [2001] EMLR 40.

[85] See eg *Barrett v Enfield LBC* [2001] 2 AC 550 (refusal to strike out negligence actions by children in care); *L (A Child) and another v Reading Borough Council* [2001] EWCA Civ 346, [2001] 1 WLR 1575 (refusal to strike out negligence claim against police); *W v Essex County Council* [2001] 2 AC 592 (refusal to strike out parents' claim for psychiatric injury).

[86] [2003] EWCA Civ 1151, [2004] QB 558 (also known as *JD*). The claim for breach of art 6 was rejected, consistent with *Z v United Kingdom*.

[87] [1995] 2 AC 633.

discussion of policy and the roles of public authorities, the State and individual citizens in that case.[88] More recently in *Rabone v Pennine Care NHS Foundation Trust*,[89] the Supreme Court accepted that the inability of parents of an adult voluntary patient under the care of the defendant trust to claim for bereavement damages under the Fatal Accidents Act 1976 would not prevent them from obtaining comparable damages under the Human Rights Act 1998.[90] Equally, in the controversial case of *Smith v Ministry of Defence*,[91] which involved allegations that the Ministry of Defence had failed properly to equip and train soldiers in Iraq, the Supreme Court refused to strike out both the claim in negligence and that under the Human Rights Act 1998 and chose to construe narrowly the concept of combat immunity in negligence.

Indirect horizontal effect presents the English courts, therefore, with an opportunity to utilize Convention rights as a springboard for change. While this would further increase the divide between common law jurisdictions, it would move the English common law closer to a Convention-based framework of rights. It would, however, require the English courts to utilize European, not common law, analogies in the development of domestic private law.

III. EMPIRICAL STUDIES CONCERNING THE USE OF EUROPEAN AND COMMONWEALTH SOURCES BY THE UK COURTS

The above analysis indicates that legislative and political developments have placed the UK courts in a position where there are mandatory requirements to comply with EU law and, at least, to 'take into account' the case law of the European Court of Human Rights. Further, UK judges, such as Lord Steyn, have commented that the integration of the UK into the legal culture of Europe continues to grow year by year.[92] Can we therefore identify a trend in which the English courts are increasingly citing European case law rather than that of other common law jurisdictions in developing national law?

Four recent empirical studies have examined the citation practice of the UK Supreme Court and English Court of Appeal in the period following the Human Rights Act 1998.[93] Despite the fact that these are broad studies which do not focus on the issue of Europeanization as such, they do provide a valuable insight into the practice of the English courts and the extent to which, post-

[88] For criticism, see J Wright, 'Immunity No More' (2004) 20 PN 58.

[89] [2012] UKSC 2, [2012] 2 AC 72.

[90] Only parents of a minor who was never married or a civil partner may claim bereavement damages under the 1976 Act, section 1A(2)(b). For criticism that *Rabone* undermines the legislative intention of the 1976 Act, see A Tettenborn, 'Wrongful Death, Human Rights and the Fatal Accidents Act' (2012) 128 LQR 327.

[91] [2013] UKSC 41, [2014] 1 AC 52.

[92] Lord Steyn, 'The Challenge of Comparative Law' (2006) 8 EJLR 3, 4. See also TH Bingham, '"There Is a World Elsewhere": The Changing Perspectives of English law' (1992) 41 ICLQ 513.

[93] In view of the quality and detail of these studies and their contemporary nature, it would be a pointless exercise for the current author to replicate this work.

2000, it is possible to discern a greater willingness to respond to EU and European human rights source material. Bobek, Gelter and Siems all focus on the citation practice of a number of European courts; for Bobek that of England and Wales, France, Germany, the Czech Republic and Slovakia,[94] while Gelter and Siems address cross-citation in matters of civil and criminal law between the supreme courts of 10 European countries, including the English Court of Appeal.[95] Stanton's study, in contrast, examines the use of comparative law by the House of Lords and Supreme Court in tort cases between 1990 and 2013.[96] The Mak study offers an alternative perspective based on qualitative research,[97] consisting of interviews with members of the UK Supreme Court and the Supreme Court of the Netherlands in 2009.[98]

Despite their breadth, these studies provide a number of revealing insights into the practice of the English courts. First of all, where EU law is supreme or the parties rely on the Convention rights in their claim, the courts inevitably will make reference to EU and European human rights law. Bobek notes that in relation to cases where reference to such sources is mandatory, there is now abundant citation of 'European' material.[99] He observes, however, that this is not always undertaken with enthusiasm.[100] Yet, when the courts have a *choice*, all four studies found that the English courts continue to make reference to common law sources in preference to those of other civil law jurisdictions.[101] For Stanton and Mak, the use of civil law in cases such as *Fairchild v Glenhaven Funeral Services Ltd & Ors*[102] and

[94] M Bobek, *Comparative Reasoning in European Supreme Courts* (OUP, 2013). His study examines secondary sources indicating the use of comparative arguments in the House of Lords and published decisions in 2009.

[95] M Gelter and MM Siems, 'Citations to Foreign Courts—Illegitimate and Superfluous, or Unavoidable? Evidence from Europe' (2014) 62 AmJCompL 35, covering England and Wales, Ireland, Germany, Austria, Switzerland, France, Belgium, Italy, Spain and the Netherlands. See also Gelter and Siems, 'Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations between Ten of Europe's Highest Courts' (2012) 8 UtrechtLRev 88.

[96] K Stanton, 'Comparative Law in the House of Lords and Supreme Court' (2013) 42 CLWR 269.

[97] For the differences between qualitative and quantitative research, see A Bryman, *Social Research Methods* (4th edn, OUP 2012).

[98] E Mak, 'Why Do Dutch and UK Judges Cite Foreign Law?' [2011] CLJ 420. See also E Mak, *Judicial Decision-Making in a Globalised World* (Hart Publishing 2013).

[99] Bobek (n 94) ch 2. See also Gelter and Siems (n 95) Table 3.

[100] Consider, for example, the comments of Baroness Hale in *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2, [2012] 2 AC 72, paras 96–97, '[Strasbourg's] tendency is to state the principle in very broad terms, without defining precisely the circumstances in which it will apply. … Such broad statements of principle are hard to interpret and even harder to apply.'

[101] Stanton (n 96) finds that of the 110 House of Lords/Supreme Court cases surveyed (1990–2013), 73 (66.4 per cent) contain references to the law of other common law jurisdictions, while only 12 (11 per cent) of cases made use of civil law materials. See also Table 10 in Gelter and Siems (n 95) which identifies the low citation rate in core civil law cases (in contrast to commercial law) and Bobek (n 94): in 2009 24 per cent of Supreme Court cases referred to material from outside the UK, but only one reference to legal materials from outside the common law world.

[102] [2002] UKHL 22, [2003] 1 AC 32.

White v Jones,[103] celebrated by comparative lawyers such as Markesinis,[104] owes more to the enthusiasm and linguistic ability of judges such as Lords Bingham and Goff than any sea-change in court practice.[105] In contrast, citation of other common law jurisdictions has continued, with the courts showing a particular preference for jurisdictions such as Australia, Canada, New Zealand and the United States,[106] with more limited reference to South Africa (a mixed jurisdiction but with historic ties to the UK), Ireland, Hong Kong, India and Singapore.[107]

The studies also suggest a number of factors which might explain this continued reliance on common law jurisdictions in private law. Three key issues may be identified: ease of access to resources, prestige/reputation and cultural similarity.[108] These factors will be examined in more detail below.

A. Accessibility of Resources

Due to advances in information technology, the courts now have ready access to a multitude of judgments, legal commentary and academic articles from many jurisdictions, but the obstacle of language remains. For a UK judge, sources in the English language using familiar legal terminology and following similar rules of procedure will be far more accessible and readily understandable than material dependent on the individual judge's linguistic ability or access to a good translator. Use of mainly common law sources may, indeed, be justified as cost-efficient. Stapleton, for example, argues that, given finite resources, a rule of thumb is needed in choosing comparative jurisdictions, and other common law jurisdictions which retain a close affinity, politically and culturally, with the UK seem the logical choices.[109] Practical concerns, therefore, including the case load of the court, the availability of research

[103] [1995] UKHL 5, [1995] 2 AC 207.

[104] See eg BS Markesinis and J Fedtke, *Engaging with Foreign Law* (Hart Publishing 2009).

[105] See Stanton (n 96) 295–6; Mak (n 98) 429. Markesinis himself has noted the extent to which the education and experiences of individual judges influence their willingness to refer to 'foreign' law: BS Markesinis, 'Judicial Mentality: Mental Disposition or Outlook as a Factor Impeding Recourse to Foreign Law' (2006) 80 TulLRev 1325.

[106] Stanton (n 96) 286: Australia (used in 53 of 110 cases), the United States (39), Canada (34) and New Zealand (29). Bobek (n 94) agrees: 85–6. Mak (n 98) 436 again notes a preference for Australia, Canada and New Zealand together with the US legal system. This analysis is supported by the earlier study of E Örücü, 'Comparative Law in British Courts' in U Drobnig and S van Erp (eds), *The Use of Comparative Law by Courts* (Kluwer 1999) which specifically sought to examine whether the entry of the UK to the EU had made any difference to citation patterns and the quantitative study of M Siems, 'Citation Patterns of the German Federal Supreme Court and the Court of Appeal of England and Wales' (2010) 21 KLJ 152.

[107] Stanton (n 96) 286. Gelter and Siems (n 95) 64 identify that a preference for common law sources may also be identified in the Irish High Court with a high level of citation of English law in the field of civil law.

[108] See eg Mak (n 98) 423 and Gelter and Siems (n 95) 57–8.

[109] J Stapleton, 'Benefits of Comparative Tort Reasoning: Lost in Translation' in M Andenas and D Fairgrieve (eds), *Tom Bingham and the Transformation of the Law* (OUP 2009) 784. See also Lady Hale in *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17, para 83.

assistants and matters of time and expense will discourage non-mandatory reference to European sources.[110] While it may be argued that EU and European human rights law, in contrast to the legal systems of continental Europe, is generally accessible in English, the terminology used and style of judgments and legislation remain unfamiliar to an English court. Obstacles, therefore, remain. As Supreme Court justice Lord Mance has observed, using non-common law sources 'requires a level of immersion in, or at least understanding of, foreign law or legal process which is usually difficult to achieve'.[111]

B. Prestige

It would be wrong, however, (and unduly critical of UK judges) simply to attribute the continued reliance on common law sources to one of linguistic limitations and cost. It is clear that the UK courts continue to grant particular respect to the Supreme Courts of certain Commonwealth jurisdictions and the United States. Lord Collins, for example, remarked recently that '[i]t is highly desirable that at this appellate level, in cases where issues of legal policy are concerned, the court should be informed about the position in other common law countries'.[112] The studies provide support for the view that the retention of common law cross-citations owes much to mutual respect between the relevant courts. Bobek sums it up as follows: 'The unity of the common law can thus be perceived as a political dictum concerning the circle of preferred advisable comparisons within a selected group of English-speaking countries.'[113] Courts which are believed to possess high-quality legal reasoning and share common political and ideological goals are therefore perceived as 'safe' and reliable comparators. In particular, factors such as judicial independence and respect for liberal democracy and the rule of law are important.[114] On this basis, when using comparative law to add lustre to their judgments, common law judges will be influenced not only by relevance, but which courts are considered by the legal community to be the best comparators.[115]

[110] Mak terms these 'organisational variables' (n 98). See also E Mak, 'Reference to Foreign Law in the Supreme Courts of Britain and the Netherlands: Explaining the Development of Judicial Practices' (2012) 8 UtrechtLRev 20, 2.3.

[111] Lord Mance, 'Foreign and Comparative Law in the Courts' (2001) 36 TexIntlLJ 415, 420. See also Lord Steyn (n 92) 7: 'in seeking guidance from comparative law materials the court must always be alive to structural differences between legal systems'.

[112] *Jones v Kaney* [2011] UKSC 13, [2011] 2 AC 398, para 76.

[113] See (n 94) 93.

[114] Notably when comparing systems of human rights: C McCrudden, 'A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights' (2000) 20 OJLS 499. Gelter and Siems (n 95) observe that the two countries in their study which performed least well on their corruption index (Italy and Spain) are rarely (if ever) cited: 57–8.

[115] J Bell, 'The Relevance of Foreign Examples to Legal Development' (2011) 21 DukeJComp&IntlL 433.

C. Cultural Similarity

The final factor identified in the studies is that of a common legal culture. Lord Neuberger in a recent speech went so far as to state that '[t]he Commonwealth … provides us with an alternative international organisation or club to the EU … As a UK judge, I can and do sit, and feel at home, in the Hong Kong Court of Final Appeal, that could not be said about any European court, other than Ireland.'[116] Such views are inevitable given the distinct historical backgrounds, training and tasks of the common law and continental European judiciary.[117] Lawyers will have a tendency, which derives in part from the years of training needed to qualify to practice, to favour their own particular legal system and are likely, therefore, to possess a subconscious bias towards systems which are close to their own cultural, social, economic, political and even personal background.[118] In contrast, the challenge of mastering a new legal culture is self-evident: EU and European human rights law confront judges with unfamiliar forms of reasoning and conceptual frameworks which they are forced, to a certain extent, to integrate into their own legal language.[119] It is not, therefore, simply a question of reading new sources of law, but understanding the cultural framework and context from which they derive.

On this basis, the existence of a common language, accessible materials, statutes and cases in a familiar style, together with the perception of a shared culture and ideology, will all encourage judges to remain within the common law family and discourage the courts from engaging to a greater extent with EU and European human rights sources in private law. These factors also explain why, despite clear differences in contract and tort law, the United States remains at the top of the list of useful comparisons due to the high regard with which its courts are held.[120] Nevertheless, such adherence to the common law family does possess disadvantages. It may lead courts to miss possible options for reform developing within the European legal community or possible routes for legal development. Watson has argued that a bias for the familiar and accessible and the dominance of case law over legislation

[116] Lord Neuberger, 'Cambridge Freshfields Annual Law Lecture 2014: The British and Europe' 12 February, 2014, paras 37–38.

[117] Lundmark (n 4), 212–13; Giliker (n 50) ch 2.

[118] Giliker (n 50) 33; G Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26 HarvIntlLJ 411.

[119] M Van Hoecke and M Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' (1998) 47 ICLQ 495, 533.

[120] See eg Lord Neuberger in *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17, [2014] AC 366, para 193: the United States represents 'a highly developed common law country, where the issue has been considered in far greater depth and by almost infinitely more judges than here'. Glenn also notes the importance of esteem based on shared political ideals: HP Glenn, 'Persuasive Authority' (1987) 32 McGillLJ 261, 271. Stapleton (n 109) notes, however, a tendency not to fully engage with US case law and to cite cases selectively: 785.

may lead lawmakers to opt for common law rules regardless of whether the rule in question is the 'best' rule for the society in question.[121] It may also lead to 'ornamental' comparative law, where comparisons are cherry-picked to give weight to judicial argument rather than guidance. Flanagan and Ahern in their study noted a tendency for citation opportunism, finding evidence of use of comparative law to demonstrate membership of an emerging (elite) international judicial 'guild'.[122] Further, at a time when the courts are required to engage with EU and European human rights sources, which form part of the core curriculum for any lawyer's training, one might question whether traditional adherence to common law sources can remain unchallenged.

In the next section, I will examine to what extent the judicial attitudes identified in the empirical studies discussed above map onto recent legal development. Have the courts moved towards greater recognition of European law (notably European human rights law) as a positive force for change or have traditional attitudes prevailed, confining EU and European human rights law to their own particular context?

IV. THE LIMITS OF EUROPEANIZATION

The results of these empirical studies will not surprise anyone who is familiar with UK court judgments, but do raise significant questions as to future practice. Assuming continued membership of the European Union and the existence of some form of human rights legislation requiring the courts to 'take into account' the case law of the European Court of Human Rights, will English private law finally start to diverge from other common law jurisdictions rendering the current adherence to common law referencing defunct? In particular, will projects to harmonize some or all of European private law lead to fundamental changes to the UK's place in the common law family? It is submitted that regardless of the changes introduced as a result of the European Communities Act 1972 and Human Rights Act 1998 and proposals for harmonization being advocated by the European Commission and Parliament, there are three main reasons why this is unlikely to occur. The first is that although harmonization has been much discussed at EU level, measures remain limited in scope and largely sector-specific. Further, the legislative framework within which EU and European human rights law has been introduced and the way in which the courts have interpreted the relevant law have, in practice, operated to minimize the intrusion of these sources of law into core common law reasoning. These three factors will be examined in more detail below.

[121] A Watson, 'Comparative Law and Legal Change' [1978] CLJ 313. [122] See (n 14).

A. Limited EU Harmonization

The European Commission and Parliament continue to support measures to harmonize private law, but obtaining agreement on such measures has proven problematic. Indeed, some commentators have questioned the very competence of the EU to harmonize private law.[123] The 2011 proposed regulation on a Common European Sales Law was, after much debate, finally withdrawn in December 2014. Equally, the failure of the Commission to obtain agreement on a wide-ranging Consumer Rights Directive,[124] which would have harmonized the main directives forming the *acquis communautaire*, indicates again the difficulties of gaining support for such broad initiatives.[125] Further, tort law has yet to receive the attention that contract and consumer private law has received at EU level. The focus of the Commission on improving the internal market lends itself to contract, rather than tort, law reform. While this may change, it again serves to lessen the threat of EU intervention to national tort law norms. Private law harmonization, therefore, at present provides little threat to national contract and tort law autonomy.

B. The Legislative Framework

The nature of the legislation which introduces EU and European human rights law into English law has also served to diminish their impact on national law. Importantly, the provisions in question grant the national courts a considerable degree of discretion. With respect to EU law, in private law, the most frequently used legislative vehicle is that of the directive. Article 288(3) TFEU provides that: 'A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, *but shall leave to the national authorities the choice of form and methods*' (emphasis added).[126] In other words, States are given a discretion how to transpose directives into national law, both in terms of wording and the means by which this is achieved. Practice has shown that the UK legislator has primarily favoured secondary

[123] Discussed in S Weatherill, 'Competence and European Private Law' in C Twigg-Flesner, *The Cambridge Companion to European Union Private Law* (n 68) and also S Vogenauer and S Weatherill, 'The European Community's Competence for a Comprehensive Harmonisation of Contract Law—An Empirical Analysis' (2005) 30 ELRev 821.

[124] *Green Paper on the Review of the Consumer Acquis* COM (2006) 744 final. For a taste of some of the criticism accompanying earlier versions of the Directive, see C Twigg-Flesner, 'No Sense of Purpose or Direction? The Modernisation of European Consumer Law' (2007) 3 ERCL 198; C Twigg-Flesner and D Metcalfe, 'The Proposed Consumer Rights Directive—Less Haste, More Thought?' (2009) 5 ERCL 368; H-W. Micklitz and N Reich, 'Crónica de una muerte anunciada: The Commission Proposal for a 'Directive on Consumer Rights' ' (2009) 46 CMLRev 471.

[125] The resulting 2011 Consumer Rights Directive 2011/83/EU is far narrower, primarily covering only two of the original eight directives, see S Weatherill, 'The Consumer Rights Directive: How and Why a Quest for "Coherence" Has (Largely) Failed' (2012) 49 CML Rev 1279.

[126] Contrast regulations which, under art 288(2) TFEU, have general application. They are binding in their entirety and directly applicable in all Member States.

legislation as a means to implement directives, under the general power granted to ministers under section 2(2) of the European Communities Act 1972,[127] leading either to stand-alone regulations or amendments to existing legislation, for example the addition of Part 5A to the Sale of Goods Act 1979. The Product Liability Directive provides a rare example of a directive being transposed in a statute, albeit in Part 1 of the broad-ranging Consumer Protection Act 1987 whose primary aim is to introduce national consumer regulatory measures. The key issue, however, is that transposition by means of distinct sets of regulations or sections of a statute does not serve to integrate these provisions into national law, but rather treats the new rules as *sui generis*, existing *in addition to* the common law. This reflects government legislative policy which seeks to minimize the impact of EU legislation by favouring a process of copying out directives into specific pieces of legislation. Principle 5(a) of the *Guiding Principles for EU Legislation* provides that: 'When transposing EU law, the Government will ensure that (save in exceptional circumstances) the UK does not go beyond the minimum requirements of the measure which is being transposed.'[128] The policy, therefore, seems one of containment rather than integration.

Further, while it may be argued that the effective transposition of EU law into national law is subject to a system of sanctions provided by Articles 258–260 TFEU and supported by the obligation for courts of final appeal to refer questions of interpretation to the CJEU under Article 267(3) TFEU when the answer is not clear,[129] in reality, this enforcement procedure is less than strict. While the Commission may assess whether the States have breached EU law under Article 258 TFEU and fine for serious and persistent breaches under Article 260 TFEU, relatively few actions are brought. The Commission prefers to resolve such issues by negotiation,[130] with legal proceedings being seen as a matter of last resort. Equally, decisions such as *European Commission v United Kingdom*[131] (concerning the UK transposition of Article 7(e) of the Product Liability Directive) have shown the CJEU willing to adopt a conciliatory approach to any flaws in transposition. Further, the

[127] K Syrett, *The Foundations of Public Law* (2nd edn, Palgrave Macmillan 2014) 255.

[128] (BIS, 2013) BIS/13/774, available at <https://www.gov.uk/government/publications/guiding-principles-for-eu-legislation>. The aim is to avoid 'gold-plating', that is, the extension of consumer protection beyond that required by EU law, on the basis that this would place an extra burden on UK businesses.

[129] 'Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.'

[130] See eg P Wennerås, 'Sanctions against Member States under Art 260 TFEU: Alive but Not Kicking?' (2012) 49 CMLRev 145. As Bieber and Maiani observe, one problem is that all measures and procedures taken vis-à-vis Member States are embedded in a legal system that conceives of State compliance with EU law as a voluntary act, thereby relying on the co-operation of the State and imposing structural limits on any enforcement procedure: R Bieber and F Maiani, 'Enhancing Centralized Enforcement of EU law: Pandora's Toolbox' (2014) 51 CMLRev 1057, 1060–1.

[131] [1997] ECR I-2649, [1997] 3 CMLR 923.

Article 267 TFEU preliminary reference procedure may be (rightly) criticized for failing in many cases to provide clear guidance, and indeed being too willing at times to defer matters to the national court when guidance is needed.[132] Many national courts (including the UK) have also proven somewhat reluctant to refer matters to the CJEU and are able to rely on the '*acte clair*'[133] doctrine even in the face of dissenting judgments.[134] The net result is that national courts are able to keep EU intervention to a minimum.

In terms of human rights, section 2(1) of the HRA 1998 also provides for discretion: the courts must simply 'take into account' decisions of the ECtHR. Inevitably, there has been much discussion as to what this requirement actually means.[135] Case law has indicated that while the Supreme Court reserves the right to refuse to follow Strasbourg jurisprudence and follow its own precedents,[136] the courts, in the absence of special circumstances, should follow any clear and constant jurisprudence of the ECtHR.[137] Lord Bingham in *Ullah* famously remarked that the duty of the national court 'is to keep pace with the Strasbourg jurisprudence as it evolves over time, no more, but certainly no less',[138] but this does not resolve to what extent the English courts may go beyond such case law when there is no clear ECHR guidance and, indeed, the Supreme Court has recently expressly left open the question whether the *Ullah* principle should be modified or reconsidered.[139] While public lawyers (and indeed judges)[140] continue to

[132] See eg Case C-203/99 *Veedfald v Arhus Amtskommune* [2001] ECR 1–3569, [2003] 1 CMLR 1217 (Product Liability Directive) and C237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Hofstetter* [2004] ECR I-3403 (Unfair Terms Directive), although Micklitz and Reich note more recently a more proactive approach by the CJEU to the 1993 Directive: H-W Micklitz and N Reich, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive' (2014) 51 CMLRev 771.

[133] Case 283/81 *CILFIT and Lanificio di Gavardo SPA v Ministry of Health* [1982] ECR 3415: no preliminary reference is needed when the correct application of EU law may be said to be so obvious that there is no scope for any reasonable doubt how the matter in question should be resolved.

[134] See *Office of Fair Trading v Abbey National plc* [2009] UKSC 6, [2010] 1 AC 696, and *Three Rivers District Council v Bank of England (No 3)* [2000] UKHL 33, [2003] AC 1.

[135] See eg J Wright, 'Interpreting Section 2 of the Human Rights Act 1998: Towards an Indigenous Jurisprudence of Human Rights' [2009] PL 595; Lady Hale, '*Argentoratum locutum*: Is Strasbourg or the Supreme Court Supreme?' (2012) 12 HRLRev 65; F Klug and H Wildbore, 'Follow or Lead? The Human Rights Act and the European Court of Human Rights' [2010] EHRLR 621; R Masterman, 'Section 2(1) of the Human Rights Act 1998: Binding Domestic Courts to Strasbourg?' [2004] PL 725.

[136] *R v Spear* [2002] UKHL 31, [2003] 1 AC 734; *R v Horncastle* [2009] UKSC 14, [2010] 2 AC 373.

[137] *R (Alconbury Developments Ltd and Others) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, para 26 per Lord Slynn.

[138] *R (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, para 20, stating the so-called 'mirror principle'.

[139] *R (on the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2014] 3 WLR 200, para 70 per Lord Neuberger.

[140] Consider eg J Laws, 'Lecture III – The Common Law and Europe', *The Hamlyn Lectures 2013: The Common Law Constitution* (CUP 2014) and Lord Judge, 'Constitutional Change: Unfinished Business', University College London, 4 December 2013.

debate the nature of the section 2 obligation, the reality is that ECtHR case law is by its very nature not inclined to provide clear and definitive guidelines for national courts. Decisions are often cast in very broad principles of uncertain application and often factually specific.[141] Further, the nature of the Convention as a 'living instrument', whose meaning evolves in response to changing social conceptions common to the democracies of Europe, signifies that the content of human rights will change over time.[142] This is unproblematic for a court to which the doctrine of precedent does not apply, but perhaps of more concern to a national court attempting to ascertain the exact meaning, and hence application, of Convention rights. Equally, it is important to remember that the Strasbourg court is not a superior court in the manner of the CJEU and indeed, the Court has been careful, through the development of doctrines such as subsidiarity[143] and the margin of appreciation[144] to develop a degree of consensus with national courts. The very nature of the HRA interpretative duties, therefore, give the courts some leeway how (and to what extent) to integrate European human rights into domestic law.

C. The Practice of the English Courts: Separating European Law from Ordinary Private Law Principles

On this basis, the legislative framework and the practice of the CJEU and ECtHR have served to give the national courts a level of discretion in interpreting EU and European human rights law and in determining the extent to which change is necessary to existing national rules. This does not, of course, signify automatically that the courts will use this discretion to minimize the influence of European sources; merely that they *can*. While the courts are obliged to apply legislation which has been approved by Parliament, where there is uncertainty or simply a gap, national courts will find themselves in a position where choices must be made. Whilst in the field of contract law, EU law, in particular, has brought changes to matters as

[141] See Wright (n 135) 616: 'In many claims before English courts, there will be no ECHR case law to guide the way.' See also N Bratza, 'The Relationship between the UK Courts and Strasbourg' [2011] EHRLR 505 in which the former President of the ECtHR concedes that the court should strive for greater clarity in the way it expresses its judgments and avoid the over-frequent use of the terms 'in principle' and 'as a rule'.

[142] See *Tyrer v United Kingdom* (1979–80) 2 EHRR 1; N Bratza, 'Living Instrument or Dead Letter—The Future of the European Convention on Human Rights' [2014] EHRLR 116.

[143] Arts 1 and 13 ECHR respectively make it clear that primary responsibility for securing the rights and freedoms provided by the Convention lies with national authorities. See S Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (CUP 2006) 216.

[144] *Handyside v United Kingdom* (5493/72) (1976) 1 EHRR 737; *A v UK* (3455/05) (2009) 49 EHRR 29, para 184: 'The doctrine of the margin of appreciation has always been meant as a tool to define relations between the domestic authorities and the Court.' See also Lord Bingham in *Kay v Lambeth LBC* [2006] UKHL 10; [2006] 2 AC 465, para 44 and MR Hutchinson, 'The Margin of Appreciation Doctrine in the European Court of Human Rights' (1999) 48 ICLQ 638.

fundamental as implied terms of quality and remedies in consumer sales contracts and the striking out of unfair terms in standard term consumer contracts, it is noticeable that the courts have not generally chosen to apply these legal rules outside these contexts. It is not surprising, therefore, that the Unfair Terms Directive was transposed into UK law as a distinct set of regulations existing in addition to existing case law and legislation or that its test based on 'good faith' has yet to adopted more generally by English contract law.[145] Equally, Part 1 of the Consumer Protection Act 1987 has been treated simply as a specific rule of strict liability applying to manufacturers.[146] Such practice also reflects the deep-rooted predisposition in English law to treat statutory rules as *lex specialis*, rather than a source of general legal principle.[147]

In terms of human rights, however, the doctrine of indirect horizontal effect does give rise to the possibility of greater judicial intervention, reshaping domestic private law in a manner consistent with Convention rights. While the ECHR has had limited impact on contract law, developments in privacy law following the enactment of the HRA 1998[148] indicate the ability of the courts to generate new rights in the law of tort (here the 'tort'[149] of misuse of private information) whose content will be shaped by Convention rights (here Articles 8 and 10, ECHR).[150] Yet, when litigants started bringing claims under section 7 of the HRA, it became clear that privacy law (and to a lesser extent defamation)[151] would be treated as exceptional cases. In contrast to privacy law, where it was commonly accepted that a gap existed in the protection of victims which needed to be filled,[152] and to a lesser extent defamation in

[145] McKendrick (n 79) 219: 'English law recognises no general principle that a party must exercise his contractual rights "reasonably" or "in good faith".'

[146] See eg J Murphy and C Witting, *Street on Torts* (13th edn, OUP 2012) where it is placed in a special section entitled 'Torts involving strict or stricter liability'. It may also be noted that *Francovich* liability receives similar treatment. If mentioned at all in a tort textbook, it will be found in a brief subsection of the chapter on 'breach of statutory duty' or simply labelled 'Euro-torts': see *Street on Torts* 527–8 and M Jones (ed), *Clerk and Lindsell on Torts* (21st edn, Sweet and Maxwell 2014) ch 9, section 3(g).

[147] R Schulze and J Morgan, 'The Right of Withdrawal' in G Dannemann and S Vogenauer (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (OUP 2013) 313. See also RJC Munday, 'The Common Lawyer's Philosophy of Legislation' Rechtstheorie 14 (1983) 191, 199–200.

[148] See *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457; G Phillipson, 'Privacy' in D Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (n 81).

[149] It has long been a point of contention whether this is a distinct tort in its own right or merely a subset of the equitable action for breach of confidence: P Giliker, 'English Tort Law and the ''Tort'' of Breach of Confidence' [2014] Juridical Review 15. The Court of Appeal in *Vidal-Hall v Google Inc* [2015] EWCA Civ 311, [51] confirmed recently that the misuse of private information action should be recognised as a tort, at least for the purposes of the rules of service out of jurisdiction.

[150] *McKennitt v Ash* [2006] EWCA Civ 1714, [2008] QB 73, para 11.

[151] See eg *Clift v Slough BC* [2010] EWCA Civ 1484, [2011] 1 WLR 1774, noted by K Hughes, 'Defamation and the Human Rights Act 1998′ [2011] CLJ 296. More generally, see K Oliphant, 'Defamation' in Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (n 81).

[152] See *Kaye v Robertson* [1991] FSR 62.

which the clash between freedom of expression and the right to protect one's reputation may be seen as inherent to the tort, changes to the well-established principles of domestic tort law would have required the courts to make policy choices as to the very nature of tort law rights. Despite the early cases mentioned in section II(b) above, which had suggested that the courts might be willing to intervene, ultimately the courts opted for a more conservative approach. In terms of claims against public authorities, therefore, claimants may now bring a claim under section 7 HRA and/or the law of tort, but the two claims will be regarded as distinct. This is expressed clearly by the majority of the House of Lords in the leading case of *Van Colle v Chief Constable of Hertfordshire; Smith v Chief Constable of Sussex*:[153]

> the common law, with its own system of limitation periods and remedies, should be allowed to stand on its own feet side by side with the alternative remedy. Indeed the case for preserving it may be thought to be supported by the fact that any perceived shortfall in the way that it deals with cases that fall within the threshold for the application of the *Osman* principle can now be dealt with in domestic law under the 1998 Act.[154]

On this basis, the majority refused to reshape negligence liability in line with Article 2 ECHR and advised litigants to pursue such claims under the HRA 1998.[155]

While cases such as *Rabone v Pennine Care NHS Foundation Trust*[156] and *Smith v Ministry of Defence*[157] indicate that the line between tort and human rights claims may not always be easy to draw and that the English courts may indeed choose to develop ECHR law beyond that already stated by the ECtHR, *Van Colle* does represent a policy choice by the English courts not to distort the character of common law torts by developing them in the light of Convention rights.[158] This approach is supported by Nolan, who argues that convergence of

[153] [2008] UKHL 50, [2009] 1 AC 225.

[154] ibid, para 82 per Lord Hope. See also *Jain v Trent AHA* [2009] UKHL 4, [2009] 1 AC 853 and, more recently, the majority of the Supreme Court in *Michael v The Chief Constable of South Wales Police* [2015] UKSC 2 where Lord Toulson argued that the courts should seek to avoid 'gold-plating' Convention rights by providing compensation on a different basis to that of the HRA 1998: see paras 125–127.

[155] The claim under the HRA 1998 failed in *Van Colle* where the claimant was unable to satisfy the onerous criteria for breach of art 2 ECHR stated in *Osman v UK* (1998) 29 EHRR 245. See, however, *Michael v The Chief Constable of South Wales Police* [2015] UKSC 2 (HRA claim based on art 2 allowed to proceed to trial) and *DSD v Commissioner of Police for the Metropolis* [2014] EWHC 436 (QB) (HRA claim successful against the police for breach of art 3 ECHR due to systematic failings in investigating a series of rapes and sexual assaults).

[156] [2012] UKSC 2 (discussed in section II(b)).

[157] [2013] UKSC 41 (discussed in section II(b)).

[158] This has been followed in relation to other torts eg private nuisance (*Dobson v Thames Water Utilities Ltd* [2009] EWCA Civ 28, [2009] 3 All ER 319), false imprisonment (*Austin v Commissioner of Police of the Metropolis* [2007] EWCA Civ 989, [2008] QB 660—appealed to House of Lords on art 5 only [2009] UKHL 5, [2009] 1 AC 564) and misfeasance in public office (*Watkins v Secretary of State for the Home Department* [2006] UKHL 17, [2006] 2 AC 395, para 26 per Lord Bingham).

the tort of negligence with human rights liability would undermine the former's coherence, weakening its structural underpinnings and would cut across its core principles.[159] Wright notes that the ability of litigants to bring actions under sections 7–9 HRA has taken the pressure off the need to expand the common law and led to a sharper division between public and private law spheres.[160] In other words, the English courts have made the choice that the development of the common law of tort should remain within the remit of the domestic court. HRA claims will produce their own line of jurisprudence, but it will exist alongside, not in conjunction with, the English law of tort.

On this basis, where cases do not involve matters of EU law or a specific claim under the HRA 1998, English judges will continue to treat contract and tort law as products of the common law legal tradition to which, naturally, reference to other common law jurisdictions may be helpful in developing legal policy or finding inspiration for legal development.[161] The Supreme Court decision in *Jones v Kaney* in 2011[162] is a good example of this practice. In this case, the Supreme Court re-examined the immunity in negligence of expert witnesses. Following the *Osman v UK* litigation, the UK courts had started to challenge any perceived 'immunities' in negligence: the case itself being triggered by the allegation that the police had been given immunity from negligence claims arising in the course of its investigations.[163] The Court does not cite a single European case. In contrast, it refers to Australian, US, Canadian, New Zealand and Irish case law: the 'usual suspects' reasserting themselves some 11 years after *Osman*. Faced with a question of legal policy as to the detrimental effect (or otherwise) of rendering expert witnesses liable in an area of law not regulated by EU law, the Supreme Court found it 'more than usually helpful to look at developments in other countries',[164] by which it meant, of course, the countries of the common law world. Despite, therefore, the supremacy of EU law and the legislative direction to 'take into account' European human rights law, the legislative framework permits the UK courts to continue their previous practice of relying upon common law sources as a means of developing core private law principle.[165]

[159] 'Negligence and Human Rights Law: The Case for Separate Development' (2013) 76 MLR 286, distinguishing between public law/human rights norms and those of private law, remarking at 302: 'the process of convergence would serve to distort the law of negligence both by undermining established principles and by introducing alien concepts'.

[160] J Wright, 'A Damp Squib? The Impact of Section 6 HRA on the Common Law: Horizontal Effect and Beyond' [2014] PL 289.

[161] Although section 3 HRA 1998 does permit the courts to review statutes to see if they are convention-compliant, this will have limited impact on areas of private law which remain dominated by case law.

[162] [2011] UKSC 13, [2011] 2 AC 398.

[163] See also *Arthur JS Hall & Co v Simons* [2002] 1 AC 615: review of the immunity of advocates from negligence actions in the wake of *Osman v UK*.

[164] [2011] UKSC 13, para 74.

[165] See J Bell, 'The Argumentative Status of Foreign Legal Arguments' (2012) 8 UtrechtLRev 8, 12. Watson also argues that drastic legislative change would have been necessity to break the ties

V. CONCLUSION

In this article, I have examined the extent to which the introduction of the European Communities Act 1972 and Human Rights Act 1998 has led to changes to the English law of contract and tort. There has, in reality, been remarkably little change to these areas of private law and while this is due in part to limited intervention at EU level and the form in which legislation has been introduced, this article has identified the practice of the courts (and indeed the legislator) as playing a key part in minimizing the impact of 'Europeanization' on the English common law. As a result, when courts decide to use comparative law, their first port of call will still generally be that of other common law jurisdictions. While occasional references to the 'wider jurisprudence' of the civil law world may appear in UK judgments,[166] there remains, as the empirical studies have shown, little evidence in the law of contract and tort of a gradual movement towards acceptance of a European legal culture, as anticipated by a number of commentators and judges.

The approach to date of the English courts has therefore been to interpret legislative intervention restrictively and to minimize any encroachment of European influences. This does depict the common law, however, as a static entity, with its underlying conceptual basis set in stone. This seems at odds with the inherent flexibility found within the common law and, indeed, with the fact that common law jurisdictions now diverge quite considerably in places and it can no longer be assumed that the law stated by the High Court of Australia or the Supreme Court of Canada will mirror that of the UK. As Lord Scarman once commented: '[t]he real risk to the common law is not its movement to cover new situations and new knowledge but lest it should stand still, halted by a conservative judicial approach'.[167] While flexibility must be balanced against the risk of creating uncertainty in the law,[168] it is important that the courts do not neglect the benefits which may be gained from sources beyond the common law legal family. An overly restrictive approach risks overlooking useful sources for legal development and relying on common law sources for little bar ornamental reasons.[169] It also ignores the fact that EU and, to a certain extent, ECHR case law is now part of the UK legal system, dealt with in textbooks written by UK academics and generally accessible in English. The factors highlighted as important in the

of the common law world: A Watson, 'The Future of the Common Law Tradition' [1984] DalhousieLJ 67.

[166] See Lord Bingham in *Fairchild v Glenhaven Funeral Services Ltd & Ors* [2002] UKHL 22, who nevertheless does also spend considerable time considering case law from other common law jurisdictions.

[167] *McLoughlin v O'Brien* [1983] 1 AC 410, 430.

[168] A Gearey, W Morrison and R Jago, *The Politics of the Common Law: Perspectives, Rights, Processes, Institutions* (2nd edn, Routledge 2013) 139.

[169] Consider eg Lord Rodger's comment in *Barker v Corus UK Ltd* [2006] UKHL 20, [2006] 2 AC 572, para 91: 'Nor do I find useful guidance for the position in this country in the examples of several liability from the United States.'

empirical studies do, however, offer a number of reasons why resistance to European influences continues. First, EU and European human rights law often uses unfamiliar ('foreign') terminology and, despite the fact that the judgments of the Luxembourg and Strasbourg courts are generally published in English, the form and legal terminology adopted are unfamiliar. Notably, the English courts have struggled to reconcile vague and fact-specific judgments with the common law doctrine of *stare decisis* and its search for a clear *ratio decidendi*. More fundamentally, there seems to be some evidence that the UK courts have doubts as to the prestige/reputation to be attributed to these courts. Mak, in her study, noted that Supreme Court judges complained that they found judgments of the CJEU are 'delphic', 'flabby' and difficult to read.[170] While she did find more enthusiasm for the ECtHR case law, this was stated to exist despite reservations as to the quality of the judgments.[171] Bobek's impression was that the English courts have treated their relationship with these courts as a 'marriage of convenience'; a relationship of necessity entered into as a result of the decisions of politicians rather than one based on love or affection.[172] This leads to the third issue: cultural similarity. The evidence suggests that courts still regard EU and European human rights law as deriving from a distinct legal culture and one to which the courts have limited familiarity. This continues to be the case despite over 40 years of EU membership and 15 years of the Human Rights Act 1998 being in force.

The question remains whether this is likely to change in future. The courts do not exist in a vacuum and judges are now involved with a number of networks which seek to foster a mutual understanding of common and European law.[173] UK Supreme Court President Lord Neuberger in 2011 welcomed as long overdue the creation of the European Law Institute (ELI), which seeks to bring together European legal traditions and the widest possible range of jurists—whether they be academics, lawyers, judges and legislators.[174] Equally, while the current generation of UK judges is unlikely to have studied EU or human rights law at university,[175] this will change over time and the current generation of student lawyers are taught both these subjects as part of their qualifying law degree. Further, criticisms of vagueness and of failing to give clear guidance may be justified to a certain extent, but do

[170] See (n 98) 434.

[171] She reports that UK judges felt a closer ideological affinity with the ECHR compared to the 'too liberal' human rights jurisprudence of the Canadian Supreme Court: (n 98) 432–3. One might question to what extent the training given to judges prior to the implementation of the HRA 1998 might have encouraged a more positive response.

[172] Bobek (n 94) 41 and 283.

[173] Consider eg the Consultative Council of European Judges (CCJE), the Association of European Administrative Judges (AEAJ) and the Network of the Presidents of the Supreme Judicial Courts of the EU. For a critical appraisal, see M Claes and M De Visser, 'Are You Networked Yet? On Dialogues in European Judicial Networks' (2012) 8 UtrechtLRev 100.

[174] Lord Neuberger, 'Why a European Law Institute?' ELI Conference, 1 June 2011. Lord Mance is also a Founding Member of the European Law Institute and serves on its Arbitral Tribunal.

[175] See Giliker (n 50) ch 1: for judges taking their law degree before 1991, EU law would not have been a compulsory option in their qualifying degree.

derive in part from a lack of understanding of the form and structure of EU and European human rights law. For example, while the Strasbourg court has been challenged for its inconsistency,[176] if understood as a living instrument in a system with no doctrine of strong precedent, this is not necessarily a flaw but may be seen as an attribute which permits valuable flexibility over time.

It is to be hoped that greater familiarity and engagement with EU and European human rights law will serve to overcome doubts as to reputation of these sources of law and that this will give rise to a greater openness to and understanding of these sources, assisted by judicial dialogue between the courts of London, Luxembourg and Strasbourg. One obstacle, however, does remain. It seems clear that the current political uncertainties as to the future of the UK within the EU and the possible repeal of the Human Rights Act 1998 have not passed unobserved by the courts and are likely to have discouraged any change from the status quo.[177] Nevertheless, if we assume that UK membership of the EU is most likely to continue and that some form of human rights legislation will exist, then there is no reason why greater familiarity with European sources should not lead to recognition that they may add value to (rather than detract from) the quality of legal development in private law. It will, however, require the UK legal community to accept that its legal culture is evolving and the common law/European divide is far more blurred than in the past.

On this basis, while common law comparisons have much to offer in terms of insights into distinctive common law concepts,[178] the value of EU and European human rights law as a source for legal development should not be dismissed out of hand. The current practice of 'containment' may provide an impression of safety and security, but path dependency—the appeal of the familiar, leading to an often subconscious preference for working within the existing framework of solutions and practices[179]—does not always lead to best solutions. While, therefore, practical factors will always be relevant, comparisons with other jurisdictions will be most useful when they are able to improve decision-making and ultimately produce judgments of higher quality, giving the judiciary a perspective beyond their own legal system. If the courts are to benefit fully from the insights provided by comparative law

[176] See eg B Pillans, 'Private Lives in St Moritz: *Von Hannover v Germany (No 2)*' [2012] Communications Law 63, discussing *Von Hannover v Germany (No 1) (59320/00)* (2005) 40 EHRR 1 *and Von Hannover v Germany (No 2)* (40660/08) (2012) 55 EHRR 15.

[177] Both are matters of contention in the May 2015 UK general election.

[178] eg the concept of 'duty of care' in tort or 'promissory estoppel' in contract law. For a recent example, see *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17 (to identify the characteristics of the common law tort of malicious prosecution).

[179] See J Bell and D Ibbetson, *European Legal Development: The Case of Tort* (CUP 2012) 24–32, who note that this tendency is increased by the propensity of lawyers to reason by analogy, drawing from established legal rules and principles; M Siems, *Comparative Law* (CUP 2014) 239–40; OA Hathaway, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System' 86 IowaLRev 601 (2001).

and are not to confine themselves to rhetorical flourishes and citation opportunism, then they must not simply turn to 'the usual suspects' identified in section III, but consider *which* legal systems are the most appropriate to the case at hand. At present, there remains a risk that by adopting traditional approaches to comparative law, the English courts are failing to consider relevant sources capable of enriching and enhancing the development of English contract and tort law. Comparative law, as the late Lord Bingham reminded us in *Fairchild*, should not be a question of a headcount of decisions. It should be a means by which the law can be 'developed coherently, in accordance with principle, so as to serve, even-handedly, the ends of justice'.[180]

[180] See (n 102) para 32.

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