CODIFICATION, CONSOLIDATION, RESTATEMENT? HOW BEST TO SYSTEMISE THE MODERN LAW OF TORT

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Abstract The law of tort (or extra or non-contractual liability) has been criticised for being imprecise and lacking coherence. Legal systems have sought to systemise its rules in a number of ways. While civil law systems generally place tort law in a civil code, common law systems have favoured case-law development supported by limited statutory intervention consolidating existing legal rules. In both systems, case law plays a significant role in maintaining the flexibility and adaptability of the law. This article will examine, comparatively, different means of systemising the law of tort, contrasting civil law codification (taking the example of recent French proposals to update the tort provisions of the *Code civil*) with common law statutory consolidation and case-law intervention (using examples taken from English and Australian law). In examining the degree to which these formal means of systemisation are capable of improving the accessibility, intelligibility, clarity and predictability of the law of tort, it will also address the role played by informal sources, be they ambitious restatements of law or other means. It will be argued that given the nature of tort law, at best, any form of systemisation (be it formal or informal) can only seek to minimise any lack of precision and coherence. However, as this comparative study shows, further steps are needed, both in updating outdated codal provisions and rethinking the type of legal scholarship that might best assist the courts.

Keywords: codification, tort law, reform of the French Civil Code, legal reasoning, legal scholarship.

I. INTRODUCTION

The distinction between civil and common law systems has often been characterised as the distinction between codified and non-codified systems. De Cruz, for example, in his student textbook advises that 'it is still true to say that … the primary source of law in civil law countries … is still predominantly codified or enacted law, whereas in common law countries it

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[*ICLQ* vol 70, April 2021 pp 271–305] doi:10.1017/S0020589321000087

is still predominantly case law'.[1] As comparative lawyers know, this statement is a simplification,[2] based on a private law perspective with limited relevance to public and criminal law, but one that remains fundamentally true for the law of tort/extra-contractual liability.[3] Lord Hodge, for example, in 2019 described the common law of obligations as 'essentially judge-made'.[4] In contrast, it is the Civil Code that takes centre stage in civil law jurisdictions such as France, where it retains '*une forte charge symbolique*':[5] the rules applicable to *la responsabilité extracontractuelle* set out in articles 1240–1252.[6]

This article will examine how common and civil law systems have responded to claims that the law of tort lacks precision and coherence using as examples English and French law. Both legal systems have manifested concerns at the lack of systemisation of contemporary tort law. Oliphant argues that this has serious implications: 'incoherence … in large parts of our law of tort is a major barrier to our communication of its key tenets and our engagement in debates about its future'.[7] This article will therefore examine, from a comparative perspective, the means by which the law of tort can be rendered more accessible, intelligible and coherent.[8] It will first examine codification: the methodology favoured by the civil law legal tradition. Codification of tort law will be examined in the light of recent proposals by the French Ministry of Justice to update the codification of the French law of tort.[9] While not yet enacted due to a change of government in May 2017, these proposals remain under active consideration and cast fresh light on the potential benefits of a modern codification of tort law. Codification here permits not only a period

[1] P de Cruz, *Comparative Law in a Changing World* (3rd edn, Routledge-Cavendish 2007) 42. See also K Zweigert and H Kőtz, *An Introduction to Comparative Law* (3rd edn, Oxford University Press 1998) 181.

[2] Albeit one helpful for those learning about comparative law or attempting to engage with civilian or common law legal systems for the first time.

[3] For reasons of convenience and accessibility, this article will use the common law term 'tort law' to signify both common and civil law. This should not be taken to indicate that these areas of law are identical.

[4] Lord Hodge, 'The Scope of Judicial Law-making in the Common Law Tradition', Lecture to the Max Planck Institute of Comparative and International Private Law, Hamburg (28 October 2019) para 3.

[5] A strong symbolic meaning: J-L Halpérin, *The French Civil Code* (Routledge-Cavendish 2006). See also G Canivet *et al.*, *Les Français et leur Code civil* (Journal Officiel 2004).

[6] The provisions of the *Code civil* were renumbered following reforms in 2016. Statutory additions include arts 1245–1245-17 implementing the Product Liability Directive 85/374/EEC on defective products and arts 1246–1252 implementing the loi n° 2016-1087 on compensation for ecological harm.

[7] K Oliphant, 'Rationalising Tort Law for the 21st Century' in K Barker *et al.* (eds), *Private Law in the 21st Century* (Hart 2017) 66.

[8] 'The law must be accessible and, so far as possible, intelligible, clear and predictable': Lord Bingham, *The Rule of Law* (Penguin Books 2011) 37.

[9] *Projet de réforme du droit de la responsabilité civile* (Ministry of Justice 2017). These followed earlier reforms to the contract law section of the Civil Code: Ordonnance n° 2016-131 of 10 February 2016 (ratified by loi n°2018-287 of 20 April 2018). See, in English, S Rowan, 'The New French Law of Contract' (2017) 66 ICLQ 805; J Cartwright and S Whittaker (eds), *The Code Napoléon Rewritten: French Contract Law after the 2016 Reforms* (Hart 2017).

of reflection on the role of tort law in twenty-first century society, but also gives the drafters the opportunity to remove dead wood, rationalise case-law developments and clarify any misunderstandings arising in the law. Codification of private law is not, however, a purely civilian idea. Weiss points out that English lawyers have been engaged in thought about codification for over 200 years with a list of failed code projects including contract, criminal and commercial law.[10] Bentham, perhaps its most well-known advocate, saw codification as a vital means to make the law accessible and predictable to the layperson.[11] Further, the Law Commission Act 1965 expressly requires the Commission to contemplate codification as a means to systemise, modernise and simplify the law.[12] Steiner has been forthright: 'As a consequence of the failure to conclude any codification project, important areas of English law have been left in a critical condition and in real need of some form of systematisation and clarification.'[13]

However, codification is not the sole option available. In rejecting codification, as we will see, the common law has developed its own methodology, with statute playing an important role in consolidating case-law development. While confused, at times, with codification, it is a distinct methodology providing a means of bringing greater certainty to the common law. More informal options also exist: legal scholarship and, notably in the United States and at a European level, restatements in which a particular organisation seeks to restate core principles of private law. These projects have different goals—at US level to assist courts in a federal system by providing clearer formulations of the common law and its statutory elements[14] and in Europe to identify a common core of European tort law principle.[15] While not intended to serve as a model code,[16] these provide

[10] GA Weiss, 'The Enchantment of Codification in the Common Law World' (2000) 25 YaleJIntlL 435. See also SJ Stoljar, 'Codification in the Common Law' in SJ Stoljar (ed), *Problems of Codification* (ANU Press 1977).

[11] P Schofield and J Harr (eds), *Jeremy Bentham, 'Legislator of the World' Writings on Codification, Law and Education* (Oxford University Press 1998).

[12] Section 3(1) Law Commissions Act 1965.

[13] E Steiner, 'Challenging (again) the undemocratic Form of the Common Law: Codification as a Method of Making the Law Accessible to Citizens' (2020) 31 KLJ 27, 36.

[14] See J Stapleton, 'Controlling the Future of the Common Law by Restatement' in M Stuart Madden (ed), *Exploring Tort Law* (Cambridge University Press 2005) 263–5 and, classically, L Green, 'The Torts Restatement' (1934-1935) 29 IllLRev 582.

[15] See M Bussani and M Infantino, 'Harmonisation of Tort Law in Europe' in A Marciano and GB Ramello (eds), *Encyclopaedia of Law and Economics* (Springer 2014); M Infantino, 'Making European Tort Law: The Game and Its Players' (2010) 18 CardozoJIntL&CompL 45.

[16] Although some doubts have been expressed on this at European level, see N Jansen and R Zimmermann, 'A European Civil Code in All but Name' (2010) 69 CLJ 98, commenting on the European Commission's Draft Common Frame of Reference Project: C von Bar and E Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Oxford University Press 2010), Book VI of which covered non-contractual liability arising out of damage caused to another. More generally, see M Hesselink (ed), *The Politics of a European Civil Code* (Kluwer Law International 2006).

more informal methods of rationalising the law supported by commentary and model rules.

If we seek to improve the accessibility, intelligibility and coherence of tort law, it is important to examine critically the modes of systemisation used by common and civil law systems. Should common lawyers reconsider codification as a means to improve existing law or is the current resistance to such ideas justified? To what extent can common law consolidation provide a mechanism to clarify principles of tort law? While much has been written about contract law, both in terms of European harmonisation and projects for codification,[17] tort law has so far received limited attention, despite concerns as to its coherence and accessibility. In this article, I will examine *why* tort law has proven particularly difficult to systemise, before examining codification, consolidation and restatements as techniques to bring greater coherence to the law. It will be shown that in both common and civil law systems, there is room for improvement. The very nature of tort law requires a response that accepts the need for both formal and informal modes of systemisation. More needs to be done.

II. TORT LAW AND UNCERTAINTY: A PROBLEM?

Before examining the mechanisms used by common and civil law to systemise private law, it is helpful to identify first why the accessibility, intelligibility and coherence of the law of tort are regarded as such a problem. One factor all systems of tort law have to face is that parts of tort law are inherently indeterminate. Tort law, as a law of civil wrongs, must adapt to changing circumstances and reflect the values and norms of a particular society. Too rigid a system would not be able to respond to contemporary needs and economic, social and technological change. Many tort law concepts such as 'fault', 'reasonableness', even 'causation' or 'harm' are therefore relative—relative to the standards set by a particular society, judicial determination of the scope of liability and to the facts of the particular case. Liability for negligence, for example, requires proof of behaviour that falls below the standard expected of a 'reasonable' person. Ultimately, if we are trying to assess how the reasonable person would behave,[18] this will be context dependent and subject to a finding how subjective/objective such a test

[17] The literature is voluminous: in 2020 alone, on European harmonisation see eg M Hesselink, *An Introduction to European Contract Law* (Hart 2020); R Zimmermann, 'The Significance of the Principles of European Contract Law' (2020) 28 ERPL 487. On codification of common law contract and commercial law, see A Tettenborn, 'Codifying Contracts—An Idea Whose Time has Come?' (2014) 67 CLP 273; W Swain, 'Contract Codification in Australia: Is It Necessary, Desirable and Possible?' (2014) 36 SydLR 131; M Arden, 'Time for an English Commercial Code?' (1997) 56 CLJ 516; R Goode, 'The Codification of Commercial Law' (1986)14 MonLR 135.

[18] This is a term that crosses legal systems; French law now adopts this term in preference to '*bon père de famille*' which is regarded as inegalitarian: loi n°2014-873 of 4 August 2014.

https://doi.org/10.1017/S0020589321000087 Published online by Cambridge University Press

should be. Wagner, for example, describes the concept of fault as a 'battleground' where rival theories of tort law are fought out.[19] Cane argues that:

> … making and developing tort law involves striking a balance between the interests we all share in personal and financial security on the one hand, and freedom of action on the other. In this way, tort law establishes a particular pattern of distribution of the risks and costs of the types of harm against which it provides protection.[20]

The problem is that this pattern is not self-evident. It will vary from one jurisdiction to another (and over time). In particular, the balance between strict and fault-based liability rests not simply with black letter rules, but with the values the State espouses.[21] Stability, as Cane argues, can only be one factor that is taken into account when establishing the law of tort. Flexibility is both desirable and necessary.

One way in which this flexibility is achieved is by judicial intervention. In both common and civil law systems judges play a significant role in developing the law. For common lawyers, the need for judicial intervention is self-evident: 'For centuries judges have been charged with the responsibility of keeping this law abreast of current social conditions and expectations. That is still the position.'[22] Although legislation covers some elements of tort law, for example, statutes that provide tortious remedies for issues such as discrimination, data misuse or financial misconduct,[23] the general principles of tort law are largely constructed from case law, with some statutory assistance.[24] Even in civil law systems, while codification provides the primary source, judges are not merely '*la bouche de la loi*', to quote Montesquieu, but play a creative role in keeping the provisions of any code alive and relevant to contemporary social experience. As Griss has remarked, '[i]t is not only judges in common law countries who develop the law: developing the law is also an important task of judges in civil law countries'.[25] Portalis, one of the four drafters of the French Civil Code, saw

[19] G Wagner, 'Comparative Tort Law' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press 2019) 1013.

[20] P Cane, 'Taking Disagreement Seriously: Courts, Legislatures and the Reform of Tort Law' (2005) 25 OJLS 393, 414.

[21] Magnus comments that the precise scope of tort law 'depends on the general attitude of the respective legal system towards the aims and functions of tort law': U Magnus, 'Tort Law in General' in JM Smits (ed), *Elgar Encyclopedia of Comparative Law* (2nd edn, Edward Elgar 2012) 878.

[22] See *Re Spectrum Plus Ltd* [2005] 2 AC 680, para 32 per Lord Nicholls.

[23] For the influence of EU law in creating such liability see P Giliker (ed), *Research Handbook on EU Tort Law* (Edward Elgar 2017), notably K Stanton, 'Financial Services and Regulation' and M Stauch, 'Data Protection Law'.

[24] For example, the Occupiers' Liability Acts of 1957 and 1984 and Defamation Acts of 1996 and 2013 of England and Wales.

[25] I Griss, 'How Judges Think: Judicial Reasoning in Tort Cases from a Comparative Perspective' (2013) 4 JETL 247, 258. See also R Zimmermann, 'Codification: History and Present Significance of an Idea' (1995) 3 ERPL 95, 114: 'a code has to be brought to life, and to

his role as to fix, in broad perspective, the general maxims of the law and conceded that judges and legal scholars 'imbued with the general spirit of the law' would at some point need to assist in the application of the law.[26] Case law in both systems then seeks to ensure tort law remains flexible and responsive to social change. The price to be paid for such an approach is a need to systemise the decisions in question. Mechanisms do indeed exist to rationalise judicial decision-making. In common law systems, *stare decisis* relies on the senior courts setting precedents that will guide the lower courts and litigants alike. In the absence of a doctrine of *stare decisis*, civil law systems have developed informal practices (which the French term *jurisprudence constante* and the German *ständige Rechtsprechung*) by which the courts are expected to take past decisions into account when there is a sufficient level of consistency in case law.[27] Despite these mechanisms, in both systems, uncertainties do nevertheless arise, for example, where inconsistencies are not resolved, or authorities clash.

One further difficulty is specific to the common law: the structure of the common law of tort itself. In adopting a nominate system of torts, derived from the writ system, each individual tort has its own requirements for liability. This caused Rudden to comment that 'the alphabet is virtually the only instrument of intellectual order of which the common law [of tort] makes use'.[28] The fragmentation of English tort law contrasts with the nineteenth-century generalisation of tort law in continental Europe.[29] Rather than establishing common rules of fault or intentional harm, then, the common law focuses on causes of action, be they negligence, nuisance or defamation. While common law academics such as Pollock sought to offer some rationalisation of tort law as a discipline, rather than a collection of instances,[30] as Murphy observes, the common law of the twenty-first century continues to lack structural and juridical unity: 'there is no universal form of liability that unites this diverse "family" of wrongs'.[31] The law of tort is for the common lawyer a law of torts and the law continues to resist arguments in favour of one overwhelming theory.[32] This does not mean, of course, that there

be kept in tune with the changing demands of time by active and imaginative judicial interpretation and doctrinal elaboration'.

[26] J-E-M. Portalis, 'Discours préliminaire' in PA Fenet, *Recueil complet des travaux préparatoires du Code civil* (t1, Videcoq 1830) 464ff. This is despite the fact art 5, *Code civil* forbids judges (in the cases that are referred to them) to make general and regulatory dispositions.

[27] V Fon and F Parisi, 'Judicial Precedents in Civil Law Systems: A dynamic analysis' (2006) 26 International Review of Law and Economics 519.

[28] B Rudden, 'Torticles' (1991–1992) 6-7 Tulane Civil Law Forum 105, 110.

[29] D Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press 1999) 178.

[30] F Pollock, *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* (Stevens & Sons 1887).

[31] J Murphy, 'The Heterogeneity of Tort Law' (2019) 39 OJLS 455, 482.

[32] This does not mean that attempts are not made to provide theories of common law tort, see, for example, R Stevens, *Torts and Rights* (Oxford University Press 2007); E Weinrib, *The Idea of*

cannot be coherence within each individual tort, but simply that systemisation of 'tort law' per se is not regarded as a priority for the common law. As Rudden commented, the common lawyer's preference is for the particular, rather than higher-level generality.[33]

Once we accept that tort law needs flexibility to survive and that open-textured rules by their very nature open themselves up to uncertainty,[34] then this will have important repercussions on how we approach tort law. The question, therefore, for any system of law is not how to remove imprecision, but how best to *minimise* this inherent uncertainty and render the law more coherent. Codification is obviously one means by which a legal system can systemise legal rules to render them more accessible, clear and coherent. In examining codification, however, it is important first to examine what we mean by 'codification' before evaluating its potential benefits for civil and common law systems.

III. CODIFICATION AND CONSOLIDATION: COMMON AND CIVIL LAW APPROACHES TO THE SYSTEMISATION OF PRIVATE LAW

A. Codification

While the term 'codification' is attributed to Englishman, Jeremy Bentham, codes are seen as part of the civil law legal tradition, traceable back to Roman law.[35] Varga argues that codification is one of the most powerful techniques humanity has ever developed in order to objectify its law.[36] The French Civil Code of 1804 is commonly regarded as the leading prototype of a civil law codification. A product of the rational and scientific thinking of the Enlightenment, it brought together the customary and written law of the *ancien régime* and replaced it with a text that sought to present private law in a coherent, clear and comprehensive manner. Certain key characteristics of a civilian code may be identified. It is a self-contained text enacted by the legislature that seeks to formulate systematically a set of abstract general principles that bring the law together in a coherent form.[37] It replaces earlier

Private Law (Harvard University Press 1995), but these remain at the theory stage: for criticism, see: J Goudkamp and J Murphy, 'The Failure of Universal Theories of Tort Law' (2016) 22 Legal Theory 1. Weir's memorable critique therefore remains: 'Tort is what is in the tort books, and the only thing holding it together is their binding': T Weir, *An Introduction to Tort Law* (2nd edn, Clarendon Press 2006) ix.

[33] Rudden (n 28) 127–9.

[34] A D'Amato, 'Legal Uncertainty' (1983) 71 CLR 1, 38.

[35] M Siems, *Comparative Law* (2nd edn, Cambridge University Press 2018) 51. The term 'codification' represents the methodology; 'code' the graphic expression of the written law: E Steiner, *French Law: A Comparative Approach* (2nd edn, Oxford University Press 2018) 27. The term 'code' can be traced back to the Latin *codex* meaning a compilation of statutory law. Codification as we know it today, however, originated in late 17th and 18th century legal science: Zimmermann (n 25) 98.

[36] C Varga, *Codification as a Socio-Historical Phenomenon* (2nd edn, Szent István Társulat 2011) 27.

[37] A Tunc, 'The Grand Outlines of the Code' (1955) 29 TulLRev 431, 435–41.

law and becomes the primary source of law.[38] It may also seek to establish a particular ideological framework: in the case of the French Civil Code one that is revolutionary, rationalistic and non-technical in character, in the case of the 1900 German Civil Code, one that is historically orientated, scientific and professional.[39] Rivera notes also the symbolic force of a code, often given a value equivalent to that of the Constitution.[40]

Codification appears at first glance the obvious response to legal uncertainty. By reasoning deductively from legal rules set out in a civil code, the law, it is argued, is more likely to be applied in a rational and predictable manner.[41] Granted an elevated status as the primary source of private law, this does not mean, however, that judges have no role in legal development in civil law systems.[42] What it signifies is that while judges will interpret the law to keep it up to date, they must work within the conceptual structure of the code.[43] As Steiner explains:

> … [codes] are still regarded [by civil law systems] as the primary source of private law and they serve as essential day-to-day working instruments for French lawyers. In law schools as well, students are encouraged to become familiar, as early as possible, with the layout and component parts of the codes.[44]

Codes, therefore, impact not only as sources of law, but on how lawyers think.[45] Codification influences their education, legal training and the form private law judgments take.[46]

Yet it should not be thought that all codes represent full civilian style codification. In reality, 'codification' has a variety of meanings and civil law systems recognise a variety of intermediary categories ranging from mere compilations of statutory material to full-fledged codifications.[47] This diversity, for Tallon, is perhaps the major feature of codification today.[48] As

[38] See FF Stone, 'A Primer on Codification' (1955) 29 TulLRev 303, 305–6.

[39] JH Merryman and R Pérez-Perdomo, *The Civil Law Tradition* (4th edn, Stanford University Press 2019) 28–31. For ideological and intellectual differences between the French and Germanic legal traditions, see RC Van Caenegem, *Judges, Legislators and Professors* (rev edn, Cambridge University Press 2006).

[40] JC Rivera, 'The Scope and Structure of Civil Codes' in JC Rivera (ed), *The Scope and Structure of Civil Codes* (Springer 2013) 8.

[41] This is, as Siems notes, a generalisation and codes as old as the French Civil Code of 1804 will inevitably lose their deductive 'power' unless updated: M Siems, 'Comparative Legal Certainty: Legal Families and Forms of Measurement' in M Fenwick, M Siems and S Wrbka, *The Shifting Meaning of Legal Certainty in Comparative and Transnational Law* (Hart 2017) 115, 121.

[42] See CM Germain, 'Approaches to Statutory Interpretation and Legislative History in France' (2003) 13 DukeJComp&IntlL 195.

[43] See J Bell, *Judiciaries Within Europe* (Cambridge University Press 2006) 69.

[44] Steiner (n 35) 25.

[45] J Bell, *French Legal Cultures* (Butterworths 2001) 56.

[46] Bell (n 43) 73.

[47] Consider, for example, the French *Code de commerce* that has been described as a compilation of statutes on different subjects including insolvency and company law: J-S Borghetti, 'French Law' in Rivera (n 40).

[48] D Tallon, 'Codification and Consolidation of the Law at the Present time' (1979) 14 IsraelLRev 1, 3. One can contrast, therefore, substantive codifications with 'administrative' codifications that bear a closer resemblance to common law consolidation.

Steiner has noted, while French law has grand projects such as its Civil and Criminal Code, more frequently it engages in a process known as *codification à droit constant* where the aim is simply to gather together and list existing law to render it more accessible and remove any obsolete provisions.[49] Codifications may thus be large-scale or minor, each bringing different challenges to the drafters and the legal community who apply the rules.[50]

Codes are not, however, confined to civil law systems. The term 'codification' has been used to describe nineteenth-century common law statutes such as the Sale of Goods Act 1893 and Bills of Exchange Act 1882. The United States has many codes even in its common law states (eg the California Civil Code) and the Uniform Commercial Code (UCC) operates at a national level. However, despite the use of the term 'codification', it is widely acknowledged that these instruments are not in the same style as civilian codes. The California Civil Code, for example, while organised in the manner of many civil law codes, is largely a consolidation of well-established common law principles. The UCC is exceptional in being influenced by the civilian drafting style,[51] but has been described by civil lawyers as 'a collection of private solutions'.[52] Equally, while the Sale of Goods Act 1893 (or indeed the Bills of Exchange Act 1882) have been described by some judges as a code,[53] in reality, they represent a collection of legal rules, drawn together as a point of reference for those engaged in this specific field. McKendrick, with typical clarity, highlights why such legislation is not a code in the civilian sense:

> Statements that the 1893 Act is a 'Code' or that the [Sale of Goods Act] 1979 is a 'single code' are apt to mislead. They give the impression that the legislation is the sole repository of the law relating to the sale of goods when this is far from the case. The Act is built upon common law foundations and the common law … The Sale of Goods Act 1979 may be the first port of call for the lawyer seeking to advise on a sale of goods problem but it is not necessarily the last nor the most important.[54]

[49] E Steiner, 'Codification in England: The Need to Move from an Ideological to a Functional Approach—A Bridge Too Far' (2004) 25 StatLR 209, 212. Note, in particular, the work of the *Commission Supérieure de Codification* established by Décret n°89-647 of 12 September 1989: <https://www.gouvernement.fr/commission-superieure-de-codification>.

[50] Note a different meaning again at EU level: Council of EU, 'Concept of Codification and Consolidation at the EU Level – Explanatory Note' (23 June 2014): see <https://ec.europa.eu/dgs/legal_service/recasting_en.htm>.

[51] Siems (n 35) 53. On the influence of Karl Llewellyn in the drafting of the UCC, see S Herman, 'The Fate and Future of Codification in America' 40 AmJLegalHist (1996) 407, 427–32, who notes, nonetheless, differences from continental civil codes.

[52] A Diamond, 'Codification of the Law of Contract' (1968) 31 MLR 361, reporting a private conversation at 379 with Denis Tallon.

[53] See eg *Re Wait* [1927] 1 Ch 606, 616–617 and 630–631, CA; *Stevenson v Rogers* [1999] QB 1028, 1040, CA.

[54] E McKendrick, 'Sale of Goods' in AS Burrows (ed), *Principles of English Commercial Law* (Oxford University Press 2015) para 2.02.

https://doi.org/10.1017/S0020589321000087 Published online by Cambridge University Press

The closest English example to a code may be found in relation to legislation designed to transplant English law to parts of the British Empire. Legislation such as the Indian Contract Act 1872 transported the common law of contract to India. (Pollock's 1886 draft bill to codify the law of civil wrongs, commissioned by Government of India, never eventuated.)[55] While far from the style of a continental civil code, this legislation included explanations and illustrations to assist those implementing the law overseas.[56] The reason for this form of legislation, however, was largely pragmatic; Diamond arguing that the format was a response to an undermanned legal profession where books were hard to get.[57]

B. Consolidation

In general, what common lawyers regard as 'codes' are statutory attempts to *consolidate* existing law, building on the principles stated in case law, which, under the doctrine of precedent, remain binding until overturned. There is no attempt to provide a comprehensive statement of the law. Despite, then, the advocacy of writers such as Bentham of French-style codification in the nineteenth century,[58] codification to an English lawyer is synonymous with legislation consolidating existing laws. The value of this exercise should not, however, be underestimated. Gathering the relevant law in one place renders it more accessible and enables the legislator to resolve inconsistencies and/or gaps rendering the law more coherent. Importantly, with a system of *stare decisis*, such legislation, unlike a code, has no need to set out the basic structure of the law—this has been established by earlier case-law precedents. A key distinguishing factor, therefore, is that any common law version of 'codification' *retains* existing case law; full-scale civil law codifications replace. The style of Parliamentary drafting in the UK further renders common law 'codes' very different to the principled and abstract style of the continental codes. There is no 'omni-comprehensive' statute law culture in the UK;[59] the preference is for statutes on specific topics, be it sale of goods, occupiers' liability or defamation rather than entire fields of law.

[55] Although, along with commentary, it was included as an appendix to early editions of his textbook: Pollock's *The Law of Torts*. See N Duxbury, *Frederick Pollock and the English Juristic Tradition* (Oxford University Press 2004) 25.

[56] See W Swain, 'Contract Codification and the English: Some Observations from the Indian Contract Act 1872' in J Devenney and M Kenny (eds), *The Transformation of European Private Law* (Cambridge University Press 2013) 172, who notes that attempts to extend Indian codification to England were unsuccessful: 191.

[57] Diamond (n 52) 362.

[58] Note also the strong debate in the nineteenth-century United States and, in particular, the work of David Dudley Field, outlined in AP Morriss, 'Codification and Right Answers' (1999) 74 Chic-KentLRev 355.

[59] Z Bankowski and DN MacCormick, 'Statutory Interpretation in the United Kingdom' in DN MacCormick and RS Summers (eds), *Interpreting Statutes: A Comparative Study* (Dartmouth Publishing 1991) 362.

What we see, therefore, is a different systemisation of law with a preference for the piecemeal rather than the absolute. Statutes, in private law, generally *supplement* the common law. While technically a superior source, they exist alongside judicial precedents that have force of law thanks to the doctrine of *stare decisis*.

It is interesting that the Law Commission of England and Wales has distanced itself from what it terms 'continental style' codification despite the fact that the Law Commissions Act 1965 requires the Commission to review the law 'including in particular the codification of such law'.[60] This mission statement led to several proposals for codification. In its First Programme of Law Reform in 1965, the Commission pledged to examine the possibility of the codification of contract and landlord and tenant law, adding in 1968 the possibility of codifying criminal law.[61] A code of contract was indeed drafted for the Law Commission by McGregor in 1971.[62] Yet all such projects have been abandoned (the McGregor Code only reaching the public eye when published in Italy in 1993). A number of reasons may be found; some practical (cost in terms of time and resources to draft and implement a code) and some political (lack of government support; opposition from various interest groups).[63] While the Law Commission's proposal for a Sentencing Code was recently enacted in the Sentencing Act 2020,[64] this is not a code recognisable to a civilian. It is in fact a consolidation of the existing legislation governing sentencing procedure, bringing together provisions from the Powers of Criminal Courts (Sentencing) Act 2000 and parts of the Criminal Justice Act 2003, amongst others. The aim is to provide the first port of call for legislation concerning sentencing procedure. Its selling point (and the reason it received government support)[65] is its utility to practitioners. It is not, and does not aim to be, a general statement of principle. Ormerod, who pushed strongly for the Code as a Law Commissioner, has described the process behind the Code as 'consolidation

[60] Section 3(1). See PM North, 'Problems of Codification in a Common Law System' (1982) 46 RabelsZ 490.

[61] Family law has also been contemplated: see S Cretney, 'The Codification of Family Law' (1981) 44 MLR 1.

[62] H McGregor, *Contract Code: Drawn up on behalf of the English Law Commission* (Guiffré 1993). In 1972 the Commission suspended work on the code and decided to adopt a topic-by-topic approach.

[63] See S Wilson Stark, *The Work of the British Law Commissions: Law Reform … Now?* (Hart 2017) 166–9. The failure of the McGregor Code is chronicled in JH Farrar, 'Law Reform Now: A Comparative View' (1976) 25 ICLQ 214 which included opposition from the Scottish Law Commission (which withdrew from the project in 1971).

[64] The Act is based on Law Com Report n°382, *The Sentencing Code: A Report* (2018).

[65] The government envisages that the Sentencing Code will 'provide much needed clarity, reducing errors and restoring faith that the law is being applied correctly': Press release, 'Sentencing Code Granted Royal Assent' 22 October 2020 per Lord Chancellor and Secretary of State for Justice, Robert Buckland QC.

plus'—consolidation of the existing law with the inclusion of policy refinement when necessary.[66]

C. Codification v. Consolidation

We need therefore to distinguish 'codification' from 'consolidation'. What common lawyers engage in is not codification but consolidation (collating existing law) or 'consolidation plus' (collating existing law plus policy initiatives). For common lawyers to engage in civilian-style full codification would require a massive shift of practice, both in terms of legal reasoning and the treatment of legal sources. Adapting to the abstract principled style of the civilian code for lawyers steeped in detailed rules of statutory interpretation and *stare decisis* would, in the words of Hogg, be a 'fiendishly hard exercise',[67] requiring 'an enormous cultural shift before a legal profession brought up in the common law tradition would embrace it'.[68] It is unsurprising, therefore, that common lawyers prefer to adhere to their own method of systemisation that reflects how they treat sources of law and engage in legal reasoning. Each system, as Kötz once commented, must find its own solution to find order, form and structure shaped to its own needs.[69]

In systemising tort law, therefore, we can see two different styles of systemisation. I will first examine codification and draw insights from a recent attempt to codify tort law, found in the French proposals to reform the tort provisions of its Civil Code. This will be followed by an examination of common law attempts to consolidate tort law. In critically appraising both methodologies, this article will consider how each methodology responds to the need for greater clarity and accessibility in the law of tort. Are changes needed? Improvements required?

IV. CIVIL LAW CODIFICATION: THE 2017 PROPOSALS TO MODERNISE AND UPDATE THE TORT PROVISIONS OF THE CODE CIVIL

The French 2017 *Projet de réforme du droit de la responsabilité civile* provides a contemporary illustration of tort law reform by means of a large-scale civilian-

[66] H O'Sullivan and D Ormerod, 'Time for a Code: Reform of Sentencing Law in England and Wales' (2017) 19 EJLR 285, 304.

[67] M Hogg, 'Codification of Private Law: Scots Law at the Crossroads of Common and Civil Law' in Barker (n 7) 113. See also FH Lawson, *A Common Lawyer Looks at the Civil Law* (Oxford University Press 1953) 66–9. For an overview of the difference styles of statutory interpretation, see RS Summers and M Taruffo, 'Interpretation and Comparative Analysis' in MacCormick and Summers, *Interpreting Statutes* (n 59).

[68] W Swain, 'Predicting the Direction of Australian Contract Law in the Next 25 years' in Barker (n 7) 94. See also R Goff, 'The Future of the Common Law' (1997) 46 ICLQ 745, 753 who observed that common lawyers tend to avoid large, abstract, statutory generalisations of private law in favour of principles gradually emerging from concrete cases as they are decided.

[69] H Kötz, 'Taking Civil Codes Less Seriously' (1987) 50 MLR 1, 15.

style codification. That this is much needed is not in doubt. While the 1804 Code has been revised many times, for example, to introduce measures to deal with bioethics and protect privacy and against defective products,[70] the tort section of the Code still largely resembles its original version of 1804. As an early nineteenth-century code, the tort provisions, responding to the needs of a pre-industrialisation largely agrarian society, were limited, famously encapsulated, until 1998, in a mere five articles. These focussed on issues arising in early nineteenth-century life (two out of the original five articles deal with civil liability for damage caused by animals and dilapidated buildings).[71] At its core is liability for fault. Article 1240 (previously 1382) provides that any human action whatsoever which causes harm to another creates an obligation in the person by whose fault it occurred to make reparation for it. Such limited provision rapidly became inadequate in the face of industrialisation, social and economic change and the occurrence of new and unanticipated forms of harm. It was left to the courts to intervene and, from the late nineteenth century, they adopted a liberal interpretation of the Code. As Whittaker noted:

> These provisions on [tort] in the Civil Code are indeed a triumph of generalization … However, if the generality of these provisions themselves is considerable, the generalizing interpretation of them by the courts has been extraordinary.[72]

Notable judicial developments include creating rules of strict liability for motor accidents[73] and defective products,[74] an objective notion of fault,[75] and a broad notion of strict liability for the torts of others (*fait d'autrui*) and for harm caused by objects under your control (*fait de choses*) extending beyond the specific instances listed under article 1242 of the Code. While framed as interpretations of existing codal provisions, the French Supreme Court, in reality, was elaborating new principles of tort law. In the *Jand'heur* case of 1930,[76] for example, the court relied on article 1242(1) of the Civil Code[77] to hold the driver of a motor vehicle strictly liable to a victim in a road accident. The fact that article 1242(1) was an introductory provision and tort liability had traditionally rested primarily on proof of fault did not prevent the court from developing a rule of strict liability when faced with a rising number of motor

[70] Rivera (n 40) 16.

[71] See arts 1385 and 1386 of the 1804 Code (now arts 1243 and 1244). Arts 1382–1386 of the 1804 *Code civil* were renumbered 1240–1244 in 2016.

[72] J Bell, S Boyron and S Whittaker, *Principles of French Law* (2nd edn, Oxford University Press 2008) 361–2.

[73] Ch réun 13 February 1930 (*Jand'heur*) DP 1930.1.57 note G Ripert, rapport Le Marc'hadour; S 1930.1.121 note P Esmein.

[74] Cass. Civ. 16 June 1896 (*Teffaine*) S 1897.1.17 note A Esmein; D 1897.1.433 note R Saleilles.

[75] See eg Ass plén 9 May 1984 (*Fullenwarth*) D 1984.533, JCP 1984 II 20255.

[76] See (n 73).

[77] Then art 1384(1) which introduces a number of specific strict liability provisions. A Code of 1804 unsurprisingly made no provision for motor vehicle accidents.

accident claims. In so doing, in the words of Whittaker, it gave expression to 'a juristic concern for the victims of the machine age, it being thought unjust that they should be left without compensation owing to an inability to identify and prove fault'.[78] More recently, in the 1990s, the French courts extended strict liability under article 1242(1) to include the liability of institutions for the torts of third parties where they were found to be responsible for organising and controlling their actions.[79] This included, in the *Blieck* case, privately-run care centres which were held strictly liable for the harmful acts of mentally handicapped individuals under their care[80] and even extended to sports clubs which were held strictly liable for the negligence of their members when injuring a fellow competitor during a sporting event.[81]

Yet, in developing principles of French tort law in this way, the courts have inevitably diminished the explanatory power of the Code as a primary source of law.[82] Lawyers today can only gain an accurate understanding of the modern principles of French tort law by reading not only the Code, but related case law and legal commentary. In this sense the French law of tort bears a resemblance to the common law—case law supplementing limited statutory sources. Both systems share the same difficulties, therefore, in systemising and rationalising case-law developments.

The 2017 *projet* seeks to resolve this uncertainty and reassert the status of the *Code civil* as the primary source of tort law by integrating key case-law developments into the Code. Its aims are threefold—to consolidate and clarify existing law, to improve the position of personal injury victims and to modernise and enrich the law to create a twenty-first century law of tort.[83]

A. Making Existing Law Clearer, More Accessible and Predictable

The proposals would increase the tort articles of the Civil Code from five (in 1804) to 83, and, in so doing, provide a far more detailed exposition of the rules relating to: loss (articles 1235–1238); causation (articles 1239–1240); fault-based liability (articles 1241–1242-1); strict liability (articles 1243–1249); defences (articles 1253–1257-1); remedies (articles 1258–1266-1) and the assessment of losses (articles 1267–1280). The EU Product Liability

[78] *Principles of French Law* (n 72) 382. The concept of strict liability for damage caused by objects under your use, direction and control (*fait des choses*) has survived despite subsequent legislation introducing a strict liability statutory regime for motor vehicle accidents.

[79] See M Josselin-Gall, 'La responsabilité du fait d'autrui sur le fondement de l'article 1384(1): Une théorie génèrale est-elle possible ?' JCP 2000.I.268.

[80] Ass plén 29 March 1991 D 1991.324 note C. Larroumet, somm. 324 obs. J-L Aubert.

[81] See, for example, Civ. 2e, 22 May 1995 JCP 1995, II, 22550, note C Mouly.

[82] Note also special tort regimes created by statute (see below). See F Leduc, 'Le droit de la responsabilité civile hors le code civil' LPA 6 July 2005; Ministry of Justice, *Projet de réforme du droit de la responsabilité civile* (Dossier de Presse 2017) 1.

[83] It is not, therefore, simply a *codification à droit constant* but one which seeks to innovate: F Terré, P Simler, Y Lequette and F Chénedé, *Droit Civil: Les Obligations* (12th edn, Dalloz 2019) n° 1030.

https://doi.org/10.1017/S0020589321000087 Published online by Cambridge University Press

Directive would continue to be implemented by the Civil Code (article 1289–1299-3). For added clarity, nuisance would now be expressly mentioned in the tort section (article 1244).[84] The nineteenth-century decision to have specific articles imposing liability for animals and dilapidated buildings is overturned in favour of inclusion within the general provisions of the Code.

The treatment of 'fault' provides a good example of the new approach. As stated earlier, this concept was central to the 1804 Code and yet not defined. Article 1241 of the *réforme* repeats in clearer terms the wording of the current article 1240—a person is liable for the harm caused by his fault—but article 1242 now adds a definition of fault as a 'violation of a legislative requirement or a failure in the general duty of care or diligence'.[85] Existing provisions are also set out in more detail. For example, the 1804 article on strict liability for the torts of others (article 1384)[86] is redrafted as five separate articles (1245–1249) and incorporates case-law developments from the nineteenth-century onwards eg the 1991 *Blieck* decision on *fait d'autrui* is restated at articles 1246–1247.[87] Consolidation, however, is not simply a mechanical exercise, particularly in a system without a doctrine of *stare decisis*. Choices had to be made determining *which* judicial decisions to incorporate as 'the law'. Where decisions are regarded as *arrêts de principe* (cases expressing rules of general importance), the decision is made easier, but it is not decisive. Some *arrêts de principe* were found to be too controversial to be retained, eg the Supreme Court decision that parents would be held strictly liable for the harmful acts of their children even where the child was not proven to be at fault.[88] Article 1245(2) of the reforms would provide that liability for the acts of another depends on proof of an action of a nature to engage the liability of the direct author of the harm.

The abstract style of a Code does, however, limit the level of detail permissible to drafters. Long and detailed definitions (and tests) are not the province of a code. It is helpful here to review the three key elements of fault-based liability: fault, causation and harm. Fault is for the first time defined in the proposals, but

[84] As Kennefick ably describes, the French equivalent of the English tort of nuisance (*troubles de voisinage*) is a judicial, not codal, creation: C Kennefick, 'Nuisance and Coming to the Nuisance' in J-S Borghetti and S Whittaker (eds), *French Civil Liability in Comparative Perspective* (Hart 2019) 224.

[85] The translations used in this article are taken from the excellent translation of Simon Whittaker and Jean-Sébastien Borghetti: see <http://www.textes.justice.gouv.fr/textes-soumis-a-concertation-10179/projet-de-reforme-de-la-responsabilite-civile-traduit-en-anglais-30553.html>.

[86] Renumbered art 1242 in 2016. This imposes strict liability on parents for their children (1242(4)) and employers for their employees (1242(5)).

[87] Physical or legal persons are to be held strictly liable if charged by judicial or administrative decision with organising and controlling (i) the minor's way of life on a permanent basis or (ii) the adult's way of life on a permanent basis. This is noticeably a far more precise test than that stated in *Blieck*. Contrast art 1248 (dealing with persons who, by contract and by way of business or profession, undertake supervision or organisation and control of another person) which is less than clear; Häcker arguing that in trying to cover too much in one article, coherence is lost: B Häcker, '*Fait d'autrui* in Comparative Perspective' in Borghetti and Whittaker (n 84) 157–9.

[88] Ass plén 13 December 2002 D.2003.231 note P Jourdain. Parental liability for their children is set out in art 1242(4) of the *Code civil* and art 1246 of the reforms.

https://doi.org/10.1017/S0020589321000087 Published online by Cambridge University Press

article 1242, in reality, does little more than give an overview of ideas found in case law. The nature of the 'general duty of care or diligence' remains as much a matter for court development as is the case in the common law. 'Causation' (article 1239), while stated as a condition of liability, oddly remains undefined. We are simply told that causation can be established by any means of proof. Was the task too difficult within the restraints of a code or simply too controversial? This is particularly unfortunate given the tendency of the French courts to vacillate between two main tests of causation[89] (entirely permissible in a system without *stare decisis*). In contrast, while harm (*dommage*—a condition of both fault-based[90] and strict[91] liability) is not defined, loss (*prejudice*)[92] resulting from harm is dealt with in considerable detail. There is a general section covering key principles for the compensation of loss arising from contractual and tortious liability,[93] and special rules govern the reparation of losses resulting from personal injury, physical damage to property, environmental harm and delays in payment of money.[94] Such measures are intended to diminish the power of the French Supreme Court to control the actionability of harm, but do raise a number of unanswered questions, not least the relationship between *dommage* and *préjudice*.[95] The debate as to the division between these two terms is therefore likely to continue.[96] Greater detail does not, therefore, necessarily correlate with greater clarity. In particular, in choosing to adopt a particular conceptual framework in which to consolidate existing law, it is not clear whether the aim is purely consolidation or whether some degree of change is intended. Despite, therefore, increased detail and length, uncertainties remain.

One further dilemma faced the drafters. While product liability was added to the *Code civil* in 1998,[97] to what extent should a codification of tort include other special regimes providing compensation for victims of tortious actions? Should it include all regimes giving compensation for personal injuries? Or insurance measures designed to assist tort claims? Or even social security measures that provide alternative forms of compensation for victims?[98]

[89] See Steiner (n 35) 266–8; Terré *et al.* (n 83) n°s1089–1091.

[90] Art 1241 states in French, '*On est responsible du dommage causé par sa faute*'.

[91] See arts 1243–1249.

[92] Art 1235: 'Any certain loss is reparable where it results from harm and consists of an injury to a lawful interest, whether patrimonial or extra-patrimonial.'

[93] Arts 1235–1238.

[94] Arts 1267–1280.

[95] See D Leczykiewicz, 'Loss and Its Compensation in the Proposed New French Regime' and P Sirena, 'The Concepts of "Harm" in the French and Italian Laws of Civil Liability' in Borghetti and Whittaker (n 84).

[96] See F Leduc, 'Faut-il distinguer le dommage et le préjudice?: point de vue privatiste' RCA 2010, 3, dossier no 3. One might also flag use of the term 'lawful interest' (*intérêt licite*) in art 1235 which is not used by the majority of legal commentators.

[97] To implement the Product Liability Directive 85/374/EEC. See arts 1245–1245-17 *Code civil*, although these provisions would be expanded under the reform.

[98] For a brief overview of the interplay among social security, direct private insurance, the tort system, and compensation funds in France, see G Viney, *Traité de droit civil. L'introduction à la responsabilité* (3rd edn, LGDJ 2008) n°s 27–32.

The decision was taken to integrate legislation on motor vehicle accidents,[99] but go no further. On this basis, the measures do not include special compensation funds, established, for example, in the wake of the contaminated blood scandal,[100] for victims of injuries following compulsory vaccinations[101] and for those suffering a medical accident or infection as a result of urgent measures taken to combat serious health risks.[102] These remain in other Codes,[103] such as the Public Health Code or, in the case of nuclear accidents, the Environmental Code.[104] Codification, especially in tort, is rarely comprehensive given the many ways victims of personal injury can receive compensation.

This leads to a number of conclusions. First that codification may be regarded as helpful in assisting in the consolidation of existing law, but it is not a straightforward exercise.[105] In choosing which sources to consolidate, decisions of policy must be taken.[106] These are not necessarily uncontroversial, as seen above. Secondly, as Borghetti and Whittaker identify, the drafting of the provisions reflects a particular style, notably one that seeks to state legal rules broadly, bringing together different things under a single concept or idea, rather than emphasising their differences.[107] This will impact on the level of detail permissible. Thirdly, while the proposals do seek to resolve certain conceptual conflicts and provide more information for litigants, such detail comes at a price, notably that it is likely to give rise to a fresh set of interpretative challenges for the courts. Finally, it is not clear to what extent, despite the efforts of the drafters, a reformed code will constrain judicial expansionism. Attempts have been made to limit judicial intervention but inevitably in an area of law that seeks to respond to social change, some flexibility must be permitted. A more serious concern is whether judges, used to developing this area of law, will accept this limit on their interpretative powers.

[99] Arts 1285–1288 but extended to trams and railways. It is currently found in a separate statute: *loi* Badinter n° 85-677 of 5 July 1985. See, generally, A Tunc, 'La loi française du 5 juillet 1985 sur l'indemnisation des victimes d'accidents de la circulation' (1985) 37 RIDC 1019.

[100] See art L.3122-1 Public Health Code (victims of HIV) and art L.1221-14 Public Health Code, introduced by loi n° 2008-1330 of 17 December 2008 (victims of Hepatitis C).

[101] Art L.3111-9 Public Health Code.

[102] Art L 3131-4 Public Health Code. Nor is any attempt made to include the reforms to medical liability introduced by loi n° 2002-303 of 4 March 2002 which remain in the Public Health Code.

[103] See, generally, J Knetsch, *Le droit de la responsabilité et les fonds d'indemnisation* (LGDJ 2013).

[104] Art L597-1ff *Code de l'environnement*.

[105] For unanswered questions and uncertainties created by the 2016 reforms to the contract provisions of the *Code civil*: see S Rowan, 'The New French Law of Contract' (2017) 66 ICLQ 805.

[106] Or even sentiment: consider strict liability for the acts of things (art 1243) which retains a place in the *projet* despite being largely overtaken by other strict liability measures and not being adopted by other civil law systems.

[107] See J-S Borghetti and S Whittaker, 'Principles of Liability or a Law of Torts?' in Borghetti and Whittaker (n 84) 459–60.

https://doi.org/10.1017/S0020589321000087 Published online by Cambridge University Press

B. Protecting Personal Injury Victims and Modernising and Enriching Tort Law

The French proposals also exemplify a second potential benefit of codification —a means by which the legislator can reflect on and set out the goals and objectives of law, responding to the needs of contemporary society. Which victims, asked the drafters, should a twenty-first century law of tort seek to protect? What are its goals? Should it be responding to new forms of harm?[108] Consistent with the victim-centred tradition of French tort law,[109] the proposals make clear that priority should be given to the protection of personal injury victims. This is achieved in two ways. First, the proposals advocate improved legal protection for victims. These include the prohibition of agreements that exclude or limit damages for personal injury (article 1281), confining the reduction of any award of compensation to gross contributory negligence (*faute lourde*) by the victim (article 1254(2)), and removing any duty on the victim to minimise his or her loss (article 1263).[110] Secondly, the proposals seek to make the law clearer and more accessible. The principle of full compensation (*réparation intégrale*) is expressly affirmed at article 1235, with a later section dedicated to the rules governing the assessment of personal injury damages.[111] For Laithier, 'the ranking of protected interests plays an unheralded role in the draft law by way of its favourable treatment of the victim of personal injury'.[112]

However, the drafters go further and propose that, in addition to the overall goal of victim protection, the code should acknowledge that tort law, as a matter of policy, should seek to prevent harm and, on occasion, punish. Here the French Ministry of Justice accepted the view of a number of influential academic writers that the preventative function of civil liability should be inscribed in the Civil Code.[113] Article 1266 would extend existing provisions that permit interlocutory injunctive relief to prevent harm[114] to all tort claims.[115]

[108] eg ecological/environmental damage was inserted into the *Code civil* in 2016 (arts 1246–1252 following the Biodiversity Law n°2016-1087 of 8 August 2016).

[109] See J-S Borghetti, 'The Culture of Tort Law in France' (2012) 3 JETL 158.

[110] Art 1233-1 also removes the principle of non-accumulation of actions (*non-cumul*) for personal injury victims. The principle of non-accumulation of actions in French law has led to distinctions which are difficult to justify eg the victim of medical negligence is compensated differently depending on whether she had been a private patient (contract) or in a public hospital (tort).

[111] Arts 1267–1277.

[112] Y-M Laithier, 'The Relationship between Contractual and Extra-Contractual Liability' in Borghetti and Whittaker (n 84) 52.

[113] See, notably, C Bloch, *La cessation de l'illicite – Recherche sur une fonction méconnue de la responsabilité civile extracontractuelle* (thèse Aix-Marseille III 2008). It was also part of earlier reform proposals, see F Terré, *Pour une réforme du droit de la responsabilité civile* (Dalloz 2011) which gave it considerable prominence, placing prevention of harm at art 2 of the proposals.

[114] See eg art 835(1), Code of Civil Procedure (modified in 2019) on the *référé* procedure.

[115] 'In extra-contractual matters, independently of any reparation of loss which may have been suffered, a court may prescribe reasonable measures appropriate to prevent harm or to see that an unlawful nuisance to which a claimant is exposed is stopped.' See also art 1244(2) [abnormal

Judges would be able to grant injunctive relief to prevent harm or see that unlawful misconduct is stopped (*cessation de l'illicite*). In terms of punishment, the reforms reject the idea of punitive damages, but propose instead to extend existing legislative provision for civil *penalties* which sanction breaches of public or civil duties. Article 1266-1 provides that *faute lucrative* (torts committed for profit) should be punished by a civil penalty (*l'amende civile*) payable to the Treasury or relevant compensation fund.[116] Such a sum would be uninsurable,[117] with guidance given to the level of the penalty.[118] Here codification engages with fundamental questions of tort law and provides a framework for future development of the law.

These latter reforms, while innovative,[119] have given rise to controversy. For example, while prevention of harm may be a laudable goal of private law, the wording of article 1266 grants judges a potentially wide discretion to intervene in tort cases. In particular, by permitting intervention *prior* to the harm taking place, it raises clear issues of undue interference with the rights of innocent third parties, and defendants whose wrongdoing has yet to be proven.[120] For this very reason, English law adopts a cautious approach that seeks to confine injunctive relief to situations where there is clear evidence of potential wrongdoing and the high possibility of substantial damage occurring if an injunction is not awarded.[121] Here the nature of the codal provision—an abstract statement of principle, without guidance—has raised concern. There is no formal indication how the courts will interpret this provision.

Similar concerns have been raised in terms of punishment. Traditionally, French law has opposed the award of punitive damages on the basis that they provide claimants with a windfall and conflict with the goal of full compensation.[122] While the civil penalty avoids such criticism, it has been challenged as an illegitimate move towards a more normative and repressive

nuisance between neighbours] which permits the court to order reasonable measures which require a nuisance between neighbours to be stopped.

[116] Art 1266-1: '… in extra-contractual matters, where the author of the harm has deliberately committed a fault with the view to making a gain or to saving money, a court may, at the request of the victim or the *ministère public* and by specially justified decision, condemn him to the payment of a civil penalty'. See also art 1266-1(5).

[117] Art 1266-1(6).

[118] Art 1266-1(2): Such a penalty is proportionate to the seriousness of the fault committed, to the ability to pay of the author of the harm, and to any profits which he may have made from it.

[119] A further goal of the reforms was to try when possible to establish rules of *responsabilité civile* (civil liability) removing the need to distinguish between contractual and tortious remedies. This had mixed success eg arts 1266 and 1266-1 apply to tort only.

[120] See P Giliker, 'Injunctions Requiring the Cessation of Unlawful Action' in Borghetti and Whittaker (n 84); Lord Sumption in *Coventry v Lawrence* [2014] UKSC 13; [2014] AC 822, para 161.

[121] *Morris v Redland Bricks Ltd* [1970] AC 652.

[122] See, for example, Y Lambert-Faivre, (1998) 'L'éthique de la responsabilité' RTDciv 1, 19 and J-S Borghetti, 'Punitive Damages in France' in H Koziol and V Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer 2009). However, this position has been subject to debate since the mid-1990s, see, for example, S Carval, 'Vers l'introduction en droit français de dommages-intérêts punitifs?' RDC 2006.822.

role for civil law.[123] Further its lack of precision has given rise to concerns as to its constitutionality. This is unsurprising given that challenges have been made to similar legislative provisions.[124] The reaction of the business community has also been critical, both of its uncertain procedure and the potentially high fines which article 1266-1(4) indicates to be as high as 5 per cent of the highest amount of the business' revenue in the course of one of the fiscal years.[125] A review in July 2020 recommended that the reforms be slimmed down and less ambitious.[126] In particular, it recommended that *l'amende civile* should be deleted from the reforms in that it was likely to encourage opposition to the proposals.

C. Codification and the Law of Tort

The 2017 French tort law *projet* highlights many of the benefits and disbenefits of civilian-style codification. On a positive level the *projet* permits modernisation, new initiatives to protect personal injury victims and more detailed provisions that incorporate case law and statutory developments in tort law since 1804. It provides a framework for lawyers and a clearer starting point for litigants pursuing a claim in tort. It also promotes a broader discussion as to the aims and objectives of tort and its relationship with contract. Significant steps are proposed to improve the position of personal injury victims both substantively in terms of more favourable rules, but also in terms of accessibility, setting out the rules governing reparation of losses resulting from personal injury and integrating into the Code the law relating to motor vehicle accidents (a major source of personal injury liability).[127] Significant case-law developments, notably in relation to strict liability, are brought into the Code. However, not all provisions have been welcomed with open arms. Measures that are overambitious or do not represent settled law (or political consensus) may prove disruptive. It would be very surprising, for example, if the final version of the reforms contains *l'amende civile* which many regard as a step too far. Not all policy initiatives represent the views of the legal community as a whole. More fundamentally, the drafting of the proposals is likely to give rise to a number of problems with interpretation.

[123] F Rousseau, 'Projet de réforme de la responsabilité civile: L'amende civile face aux principes directeurs du droit pénal' (2018) JCP doctrine 686.

[124] M-A Chardeaux, 'L'amende civile' LPA 30 January 2018 No 132 (does the provision satisfy the *principe de légalité* under art. 8 of the Declaration of the Rights of Man?). See, for example, Cons. const., 13 January 2011, n° 2010-85 QPC, JCP G 2011, 274, note D Mainguy concerning the award of *l'amende civile* for anti-competitive practices under art L.442-6 III, Commercial Code.

[125] See comments of L'Association Française des Juristes d'Entreprise (31 May 2018): <https://www.lemondedudroit.fr/institutions/58508-afje-contribue-reforme-droit-responsabilite-civile.html>. See S Carval, 'L'amende civile', JCP G supplément n°30-35 25 July 2016, 42, para 4.

[126] Commission des Lois, 'Responsabilité civile: 23 propositions pour faire aboutir une réforme anoncée' Rapport No 663 (2019-2020), 22 July 2020.

[127] In 2016, traffic accidents were the fifth cause of death in the EU: Statista <https://www.statista.com/statistics/722823/mortality-rate-in-the-eu-from-various-causes/>.

Certain key terms are either not defined or described with such a degree of generality that reference to case law will still be needed. Nevertheless, it is very much hoped that the *projet* will be implemented in some form. At present, the tort provisions of the code provide limited assistance for litigants and, as a form of systemisation, they therefore fail to provide citizens with the benefits that codification can potentially provide. Change is needed and while it has not proven a straightforward process, progress is being made.

It is important at this stage to appraise the French tort law proposals on their own terms, that is, as a full civilian-style codification. Common lawyers advocating codification need to be wary of idealising codes as a one-stop-shop in which one may find in a single legislative source the whole of tort law. Codes represent not a comprehensive compendium of the law, but rather a starting point for travellers. They provide 'the bedrock of principles that shape the nation's jurisprudence'.[128] This does not mean that doctrinal debates will cease, nor that litigants will obtain clear guidance on all points of law. It is, as Bell and Ibbetson state, a reference point for legal debate rather than a prescription of what citizens must do.[129] In triggering a legal debate, assistance will be derived from two sources. First, as stated in Section II above, judges will play an important role in interpreting and applying codal provisions. Secondly, legal scholarship will also play a significant part in civil law systems in elaborating the meaning of codal provisions and systemising case law.[130] Jestaz and Jamin in their leading work outline the great benefits to any legal system of scholarship that is systematic, aims at clarity, avoids abstract concepts and includes work from law professors, judges and practitioners.[131] For Sacco, legal scholarship represents an important legal formant in civil law systems.[132] A simple example may be found in the development of strict liability rules for things under one's control (*fait de choses*). Ostensibly based on article 1242(1) of the Civil Code, the doctrine was developed by the courts under the inspiration of scholars such as Josserand who sought to respond to social concerns that fault-based liability was proving an inadequate response to personal injury cases in the late nineteenth century.[133] Jobin is amongst many who have remarked on the richness and abundance of scholarly writing on private

[128] J Teasdale, 'Codification: A Civil Law Solution to a Common Law Conundrum' (2017) 19 EJLR 247, 247.

[129] J Bell and D Ibbetson, *European Legal Development: The Case of Tort* (Cambridge University Press 2012) 5.

[130] See, for example, P Jestaz and C Jamin, *La Doctrine* (*Legal Scholarship*) (Dalloz 2004); and 'The Entity of French *Doctrine*: Some Thoughts on the Community of French Legal Writers' (1998) 18 LS 415.

[131] ibid 9, 173.

[132] R Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' (1991) 39 AmJCompL 343, 346–7.

[133] L Josserand, *De la responsabilité du fait des choses inanimées* (Librairie nouvelle de droit et de jurisprudence 1897). For a more contemporary take, see J-S Borghetti, 'La responsabilité du fait des choses, un régime qui a fait son temps' RTD Civ 2010.1.

law.[134] For Helleringer, legal scholarship reveals through articles and studies the logic behind the structure of the law (or serves indeed to construct such a logic).[135] Fundamentally, 'legal scholarship keeps the codes alive'.[136] Systemisation via codification must therefore be examined in context, reviewing not just the codal provisions themselves, but case law and legal scholarship. While a code will not have the precision of a common law statute fundamentally, it does not set out to do so.

In the next section, I will contrast codification with common law consolidation. As will be seen, both systems utilise a combination of judicial intervention and legislation, although differences exist as to the use of informal sources of systemisation.

V. COMMON LAW CONSOLIDATION AND THE LAW OF TORT

In this section, I will examine the ways in which common lawyers have embraced alternative ways of systemising private law and consider their application to the law of tort. Two main mechanisms have been utilised: formal means (legislation; judicial precedent) and informal means (restatements, scholarly treatises and textbooks). While these may at times be loosely labelled 'codes', I would strongly argue that such a description is unhelpful and misleading. What they represent are alternatives to civilian-style codification and their existence, according to legal historians, provides an explanation why England and Wales continued in the nineteenth century to resist calls for codification.[137] It is these sources that 'contributed to the reduction of the law into a more orderly and systemic shape'.[138]

A. Formal Means: Legislation and Case Law

1. A partnership

The 'common law way'[139] towards systemisation has been to embrace a partnership of case law and statute. While the most authoritative partner is

[134] P-G Jobin, 'L'influence de la doctrine française sur le droit civil québécois' (1992) 44 RIDC 381. See also G Helleringer, 'Judicial Melodies and Scholarly Harmonies – The Music of French Legal Interpretation' (2013) 77 RabelsZ 345 who describes scholars and judges as a 'cantankerous couple' interpreting legal rules together. For German law, see S Vogenauer, 'An Empire of Light? II: Learning and Law-making in Germany Today' (2006) 26 OJLS 627.

[135] (n 134) 354.

[136] M Billiau, 'La doctrine et les codes – Quelques réflexions d'un civiliste français' (2005) 46 Les Cahiers de droit 445, 460 (my translation).

[137] See A Braun, 'The English Codification Debate and the Role of Jurists in the Development of Legal Doctrines' in M Lobban and J Moses (eds), *The Impact of Ideas on Legal Development* (Cambridge University Press 2012) highlighting the impact of informal, in addition to formal, sources. Braun adds, however, that the late development of negligence law may also be a reason why codification was never seriously contemplated in this field: 224.

[138] ibid 204.

[139] See Lord Wright, 'The Study of Law' (1938) 54 LQR 185, 186.

https://doi.org/10.1017/S0020589321000087 Published online by Cambridge University Press

that of legislation, case law has its own systematic force, deriving general principle from specific instances.[140] While case law will, based on the doctrine of *stare decisis*, provide an initial form of judicial systemisation, it is supported by piecemeal statutes that consolidate and refine specific areas of law. Such statutes do not engage in comprehensive legislation on the whole of private or tort law. Legislation will not generally seek to be all-embracing nor revisit well-established fundamental principles. A notable example of this methodology can be found in the Occupiers' Liability Acts 1957/1984 of England and Wales. Here the key question—who is an 'occupier'?— is not defined. This is because it has been determined satisfactorily by case law and so in no need of change.[141] Equally, while the Defamation Act 2013 does seek to replace certain common law defences with statutory versions, in many cases these changes merely consolidate existing law[142] and the courts continue to rely on principles set out by case law prior to the Act.[143] Defamation itself is not defined.[144] Similarly, the recent Consumer Rights Act 2015 (which consolidated and refined not only UK law, but also selected EU consumer directives) does not attempt to legislate on *all* consumer rights. Nor does it address established matters such as contract formation or breach. Remedies provided by the statute supplement those already existing at common law.[145] What is clear about these examples is that they represent a partnership between the legislator and the courts. As Lord Burrows has remarked, 'it is the case law that provides the basic legal framework onto which statutes have to be fitted'.[146]

Legislation will therefore generally supplement and refine existing case-law. It can provide structure, clarify uncertainty arising from conflicting case law (and undo case-law mistakes), and render the law more accessible to its users. The success of legislation in meeting the above goals does, however, vary. The Defamation Act 2013, for example, seeks to modernise the law and respond to concerns that the law had an unduly chilling effect on freedom of expression. However, its consolidation of the 'serious harm' test[147] and indeed the public interest defence based on the earlier *Reynolds*[148] litigation

[140] *Donoghue v Stevenson* [1932] AC 560 being the classic example. 'That courts make law is nowhere more obvious than tort law in common law systems, especially in that most open-textured and therefore voracious tort: negligence': Stapleton (n 14**)** 263.

[141] See *Wheat v Lacon* [1966] AC 552.

[142] See eg section 2: Justification and, to a large extent, section 3: Honest Opinion.

[143] For a recent example, see *Serafin v Malkiewicz* [2020] UKSC 23; [2020] 1 WLR 2455 on section 4.

[144] See *Sim v Stretch* [1936] 2 All ER 1237, although modified by section 1.

[145] See sections 19, 42 and 54, Here the minimum harmonisation nature of the relevant EU directives facilitated the 'common law way'.

[146] AS Burrows, 'The Relationship between Common Law and Statute in the Law of Obligations' (2012) 128 LQR 232, 233.

[147] Building on *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB).

[148] *Reynolds v Times Newspapers plc* [2001] 2 AC 127.

has required clarification by case law at the highest level some five years after the introduction of the Act.[149] Equally, case-law clarification of key sections of the Occupiers' Liability Acts 1957 and 1984 was needed.[150] Case law therefore supports and ensures the successful operation of the statute: a partnership indeed.

2. *Recent attempts to 'codify' breach of duty*

In contrast, initiatives for more 'code-like' intervention, limiting the role of the courts, have not generally worked well in tort. In two recent examples, English and Australian legislators sought to legislate on the test for breach of duty in negligence to bring greater certainty and predictability to the law. The motivation in both cases was overtly political: in providing legislative guidance, the courts would be prevented from applying the test too generously, giving rise to too many successful negligence claims. Legislative intervention thus responded to fears that defendants were being overburdened with claims placing an undue burden on their insurers,[151] and that the courts were creating a 'compensation culture' whereby citizens would be discouraged from engaging in socially beneficial behaviour due to the threat of litigation.[152] Here, what Lunney has termed 'small-scale codification'[153] is being used by the legislator to limit the discretion of the courts.

In England and Wales, the Social Action, Responsibility and Heroism Act 2015 (SARAH) identified factors to which the court *must* have regard in applying the test of breach, namely, when relevant, that the person:

- was acting for the benefit of society or any of its members (section 2);
- had demonstrated a predominantly responsible approach towards protecting the safety or other interests of others (section 3); or
- had acted heroically by intervening in an emergency to assist an individual in danger (section 4).

No mention is made as to how these factors are to be weighed, but we do know from existing tort law that social utility is regarded as a factor in the defendant's favour in determining the question of breach.[154] As is acting heroically in an emergency.[155] In essence, then, the Act restates existing law, albeit

[149] *Lachaux v Independent Print Ltd* [2019] UKSC 27; [2020] AC 612 (section 1 serious harm test); *Serafin v Malkiewicz* [2020] UKSC 23 (s.4). For a critical overview, see A Mullis and A Scott, 'Tilting at Windmills: The Defamation Act 2013' (2014) 77 MLR 87.

[150] See, for example, *Tomlinson v Congleton BC* [2003] UKHL 47; [2004] 1 AC 46.

[151] P Cane, 'Reforming Tort Law in Australia: A Personal Perspective' (2003) 27 MULR 649.

[152] See Explanatory Notes to the Social Action, Responsibility and Heroism Act 2015, para 6, citing a 2007 survey and political commitments following the 2010 general election. Morris argues, however, that such fears are exaggerated; A Morris, 'Spiralling or Stabilising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury' (2007) 70 MLR 349.

[153] M Lunney, 'Common Law Codification: Lessons and Warnings from Twenty-First Century Australia' (2019) 10 JETL 183, 206.

[154] *Watt v Hertfordshire CC* [1954] 1 WLR 835.

[155] *Baker v* T E *Hopkins* & Son Ltd [1959] 1 WLR 966.

underlining certain issues that the courts *must* address, one must presume, expressly rather than implicitly. Hindsight has not been kind to SARAH. It has been dismissed by a leading practitioners' text as having a 'merely symbolic function'[156] and there has yet to be a single reported case under the statute. Mulheron, in a devastating critique, has suggested that SARAH cannot even be dismissed as relatively harmless in that it leaves it to the courts to define key terms such as 'predominantly responsible', 'acting heroically' and 'for the benefit of society', creating uncertainty. Indeed, she speculates, is there not a danger that in restating established common law tests one might unwittingly change the law?[157]

The breach provisions of the Australian Civil Liability Acts equally seek to provide greater certainty by setting out in detail the test for breach of duty in negligence. The Acts are the result of a general overhaul of negligence law which followed an insurance crisis in Australia in the early 2000s. The Federal Government responded by commissioning a report that made 61 recommendations for legislative reform to the tort of negligence (the Ipp Report).[158] In reformulating the breach of duty test, the Ipp Report had expressed concern that the traditional test set out by Mason J in *Wyong Shire Council v Shirt*[159] had been interpreted in a way that allowed the courts to place too much emphasis on foreseeability of risk at the expense of the other factors.[160] It concluded that it would be helpful 'to embody the negligence calculus in a statutory provision. This might encourage judges to address their minds more directly to the issue of whether it would be reasonable to require precautions to be taken against a particular risk.'[161] Section 5B of the Civil Liability Act 2002 (NSW) provides that:

> (1) A person is not negligent in failing to take precautions against a risk of harm unless—(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and (b) the risk was not insignificant, and (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.
> (2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other

[156] M Jones (ed), *Clerk and Lindsell on Torts* (23rd edn, Sweet and Maxwell 2020) para 8-184.

[157] R Mulheron, 'Legislating Dangerously: Bad Samaritans, Good Society and the Heroism Act 2015' (2017) 80 MLR 88. See also J Goudkamp, 'Restating the Common Law? The Social Action, Responsibility and Heroism Act 2015' (2017) 37 LS 577.

[158] See Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (Canberra 2002). See R Davis, 'The Tort Reform Crisis' (2002) 25 UNSWLJ 865. In New South Wales, for example, the Civil Liability Act 2002 (NSW) introduced significant changes to negligence liability, regulating matters such as personal injury damages, mental harm, public authority liability and the civil liability of good Samaritans and volunteers.

[159] (1980) 146 CLR 40, 47–48.

[160] Ipp Report (n 158) [7.14]. See also B McGivern and P Handford, 'Two Problems of Occupiers' Liability' (2015) 39 MULR 507, 514: 'One of the most stringent criticisms made of the law of negligence (as it had come to be applied) was in relation to the approach to standard of care and breach of duty determinations.'

[161] Ipp Report (n 158) [7.17].

https://doi.org/10.1017/S0020589321000087 Published online by Cambridge University Press

> relevant things)—(a) the probability that the harm would occur if care were not taken, (b) the likely seriousness of the harm, (c) the burden of taking precautions to avoid the risk of harm, (d) the social utility of the activity that creates the risk of harm.

This provision (and its equivalent in other Australian jurisdictions) have raised issues similar to those identified in relation to SARAH above. Critics have questioned whether restating an established common law test in legislation gives rise to greater certainty or rather might trigger unintentional legal change in subsequent court decisions.[162] So far it seems that changing the risk factor to 'not insignificant' (as opposed to 'not far-fetched or fanciful' in *Shirt*) has made little impression on the courts.[163] This suggests that, like SARAH, section 5B has had no more than a symbolic impact on the law. Even 20 years on, the Australian attempts to 'codify' the tort of negligence are still 'bedding in', with courts, lawyers (and law teachers)[164] struggling to adapt to the statutory framework. McDonald, a leading Australian critic, has expressed concern that the reforms have brought not certainty, but rather incoherence to the law; a difficulty exacerbated by the facts that distinct civil liability legislation now exists across the States and Territories of Australia[165] and that the provisions do not cover the whole of the tort of negligence.[166]

3. Legislation and case law: a successful partnership in tort?

Legislation in tort can be helpful but given the importance of case law, a piecemeal approach, that seeks to consolidate the law on a specific issue in one place, seems to play more to the strengths of the common law system. More ambitious legislation, as indicated above, faces a number of obstacles, not least attracting legislative support and Parliamentary time. Even where this is not a problem, limited Parliamentary perusal and political compromises will often need to be addressed subsequently by the courts. Political imperatives may also result in legislation that is poorly drafted (SARAH) or rushed (Australian Civil Liability statutes).[167] There is also concern that too much legislation will 'freeze' the law and render it unable to respond to

[162] Commentators have also suggested a correct reading of *Shirt* should not, in any event, have given rise to excessive liability: B McDonald, 'The Impact of the Civil Liability Legislation on Fundamental Principles and Policies of the Common Law of Negligence' (2006) 14 TLJ 268, 272–5.

[163] See *Shaw v Thomas* [2010] NSWCA 169; *Meandarra Aerial Spraying Pty Ltd v GEJ & MA Geldard Pty Ltd* [2013] 1 Qd R 319 (CA).

[164] B McDonald, 'Teaching Torts: Where to Start in an Age of Statutes?' (2010) 18 TLJ 173.

[165] This is contrary to the strong recommendation of the Ipp Report that uniform civil liability legislation be introduced across the different Australian jurisdictions.

[166] The 'duty of care' concept being an obvious omission which remains subject to the general common law of Australia.

[167] See Cane (n 151) 665–7. The Ipp Panel was given two months to conduct a review of the entire tort of negligence which gave it very limited opportunity for wider consultation.

societal change; a real issue as we have seen with the law of tort.[168] Piecemeal legislation that consolidates existing law is less likely to do so, permitting incremental case-law development refining the law on a case-by-case basis.

This places the baton, however, firmly back with the courts. In the face of limited statutory intervention in tort, it is for the courts to provide general principles of tort law and, at apex level, guidance to lower courts via *stare decisis*. The problem is that this is not at times a role with which the courts feel comfortable. Numerous examples may be found across private law of senior courts resisting calls for systemisation, preferring to defer to Parliament (despite the knowledge that Parliament is rarely willing to intervene in tort law). One notable example may be found in relation to negligently incurred psychiatric injury. Here, despite a critical Law Commission report,[169] the House of Lords refused to intervene to rationalise the law.[170] For every *Robinson* (where the UK Supreme Court clarified the duty of care test in negligence),[171] there is a *Darnley* creating uncertainty as to the scope of a hospital's duty of care to patients.[172] While the courts at times will step in and resolve a doctrinal dilemma (eg clarifying the limitation period for intentional torts causing personal injury;[173] providing protection against misuse of private information[174]), this is often a sign of frustration at the unwillingness of Parliament to intervene and certainly not always the case.[175] A reluctance to intervene in certain cases combined with limited statutory intervention and, as seen in Section II above, the inherent indeterminacy of many aspects of tort law has led to uncertainty and, in some areas of tort law, incoherence. As two former Supreme Court Justices have openly acknowledged, '[m]any aspects of the [common] law of torts are inherently imprecise'.[176]

In seeking to minimise such uncertainty in tort law, other sources become important. While *stare decisis*/precedent gives the courts the opportunity to systemise the law, reasoning incrementally and by analogy, where the partnership of legislation and case law fails to provide sufficient legal clarity and precision, attention must be turned to alternative ways of achieving these goals.

[168] Lady Hale, 'Legislation or Judicial Law Reform: Where Should Judges Fear to Tread?' Lecture at the 2016 Society of Legal Scholars conference (7 September 2016) 14.

[169] Law Commission of England and Wales, Report n°249, *Liability for Psychiatric Illness* (1998).

[170] See *White v Chief Constable of South Yorkshire* [1999] 2 AC 455, *Taylor v A Novo (UK) Ltd* [2013] EWCA Civ 194, [2014] QB 15, para 24. Note similar issues in vicarious liability where, despite six Supreme Court decisions since 2012, uncertainty continues to exist: see J Lee, 'The Supreme Court, Vicarious Liability and the Grand Old Duke of York' (2020) 136 LQR 553.

[171] *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736.

[172] *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50, [2019] AC 831.

[173] *A v Hoare* [2008] UKHL 6.

[174] *Campbell v MGN Ltd* [2004] UKHL 22.

[175] Mental harm being the classic example.

[176] *Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677, para 54 (Lord Dyson). See also Lord Neuberger, 'Some Thoughts on Principles Governing the Law of Torts' (2016) 23 TLJ 89.

B. Informal Means: Treatises, Textbooks, Restatements

If we go back to the nineteenth century, one reason why codification was not adopted in England and Wales (in contrast to the rest of Europe) was the fact that the systematic explanation of the common law was being undertaken, not by codifiers, but by the writers of treatises.[177] Braun, for example, argues that England during this period developed a type of legal literature that sought to make the common law more coherent and ultimately functioned as a substitute for a Code,[178] described by Varga as 'doctrinal codification'.[179] For Lord Rodger, the existence of excellent textbooks, supported by statutory intervention, offers a convincing explanation why codification was deemed unnecessary in common law systems at this time.[180] Goudkamp and Nolan see an evolution—the pioneer treatises of the nineteenth century followed by twentieth-century consolidators.[181] Modern private law consolidators include *Chitty on Contracts*[182] and *Clerk and Lindsell on Torts*.[183] We should also not ignore scholarly textbooks such as *Winfield and Jolowicz on Torts*[184] that reach an audience beyond their primary target of students to influence the work of practitioners and judges. These works are cited in court and their *raison d'être* is to bring together case law and legislation to establish a framework of reference for those using and applying the law. Further, the Law Commission of England and Wales (established in 1965) represents a body whose work, albeit subject to financial constraints, seeks to rationalise, clarify and modernise the law. Even when its recommendations are not implemented, they provide a source for reformers and an *aide-mémoire* for those seeking to understand debates in the law.[185]

Yet, the logical question is why these resources have to date had limited impact on the common law courts. This contrasts with the position in civil law identified above where codification is supported by judicial interpretation

[177] See AWB Simpson, 'The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature' (1981) 48 UChiLRev 632. Simpson notes that some attempts were made to adopt a style similar to codification, but these were soon abandoned: 666–7. For early examples of treatises, see F Hilliard, *The Law of Tort or Private Wrongs* (Little, Brown & Co 1859) and T Addison, *A Treatise on the Law of Torts or Wrongs and their Remedies* (Stevens & Sons 1860).

[178] Braun (n 137) 219.

[179] Varga (n 36) 161.

[180] A Rodger, 'The Codification of Commercial Law in Victorian England' (1992) 108 LQR 570, 589.

[181] J Goudkamp and D Nolan, 'Pioneers, Consolidators and Iconoclasts: The Story of Tort Scholarship' in J Goudkamp and D Nolan (eds), *Scholars of Tort Law* (Hart 2019). They acknowledge that this division is not watertight eg Fleming's nine editions of *The Law of Torts* have been described as a short treatise: 19.

[182] H Beale (ed), *Chitty on Contracts* (33rd edn, Sweet and Maxwell 2019).

[183] *Clerk and Lindsell on Torts* (n 156).

[184] J Goudkamp and D Nolan, *Winfield and Jolowicz on Torts* (20th edn, Sweet and Maxwell 2020). Note also R Mulheron, *Principles of Tort Law* (2nd edn, Cambridge University Press 2020) whose ambitious textbook seeks to tease out general principles of tort law.

[185] The Commission also benefits from membership drawn from academia and practice. The Chair of the Commission is either a High Court or an Appeal Court judge, appointed by the Lord Chancellor and Secretary of State for Justice for up to three years.

and scholarly commentary. It is trite simply to respond that the practice of the common law courts is make limited reference to academic authority. Law Commission reports and practitioners' texts are frequently cited and at times used as a framing device. Equally, senior judges have increasingly been willing to acknowledge the utility of academic articles.[186] The issue appears to be one of legitimacy. Courts remain wary of intervention on the basis of informal initiatives lacking the status of legislative intervention. Even Law Commission proposals recommending much needed reform to areas of tort law such as psychiatric injury[187] and limitation[188] have been left to Parliament to consider. The question, therefore, is how to persuade the courts that certain informal sources of systemisation *are* worthy of consideration. The success of even the best projects lies with the willingness of courts and legislators to respond to recommendations that will systemise and clarify the law.

One possible response is to provide a restatement of the key principles of tort law. Andrews argues that a succinct restatement of law can have three benefits: accessibility (making the law easier to discover and communicate), making the law more susceptible to rational discussion and consistency (rendering the law more likely to be applied reliably by lawyers).[189] Restatements represent an attempt by scholars and practitioners to systemise the law in a new, more accessible form, concentrating on its most important principles, supported by commentary and evidence of State practice. Like a code, restatements address broad areas of law (contract, tort, restitution).[190] They are not subject to the constraints of parliamentary time that render statutory intervention into private law relatively rare. Here the influence of the American Law Institute (ALI) is pivotal.[191] Founded as a private institution in 1923 in response to the perceived uncertainty and complexity of American law, its members include judges, practitioners and academics of international renown. One of the ALI's first projects was to restate the law of torts in 1934, with the second full restatement in 1965. More recently, areas of tort law that have undergone considerable change since 1965 have been subject to a third restatement.[192] While non-binding and purely advisory, in the US they are consulted by both judges and attorneys and provide a very useful overview in

[186] See, for example, Lord Neuberger in *Patel v Mirza* [2016] UKSC 42; [2017] AC 467, para 170; Australian Chief Justice, S Kiefel, 'The Academy and the Courts: What Do They Mean to Each Other Today?' Australian Academy of Law Patron's Address, Brisbane (31 October 2019).

[187] Law Commission Report n°249, *Liability for Psychiatric Illness* (1998).

[188] Law Commission Report n°270, *Limitation of Actions* (2001).

[189] N Andrews, *Contract Rules: Decoding English Law* (Intersentia 2016) vii.

[190] J Gordley, 'European Codes and American Restatements; Some Difficulties' (1981) 81 ColumLRev 140, 142.

[191] <https://www.ali.org/about-ali/>. The ALI also collaborates with the Uniform Law Commission to develop and monitor the Uniform Commercial Code, which addresses most aspects of commercial law.

[192] eg *Restatement (Third) of Torts: Products Liability* (1998).

https://doi.org/10.1017/S0020589321000087 Published online by Cambridge University Press

a federal system with different state laws. They also provide a source of inspiration for state legislators.

Lord Burrows in 2016 sought to transplant the restatement into English contract law. In his *A Restatement of the English Law of Contract*,[193] supported by an advisory group of 20 including 10 judges and practitioners and 10 scholars,[194] Burrows endeavoured to set out the law 'in as clear and accessible a form as possible' and provide the 'best interpretation of the present English law of contract'.[195] In adopting the US Restatement style—stating legal principles, followed by a full commentary explaining the Restatement's provisions and allowing readers to see its application in real and hypothetical cases—his work represents an informal attempt to consolidate existing law. The style is notably closer to that of a common law statute rather than a civilian code.[196] Cambridge professor Neil Andrews published a similar project that same year, albeit acting alone, based on, in his words, a decade trying to explain English law to civil lawyers.[197] Andrews' model provides 198 Rules in 24 Parts (including five General Principles),[198] each article supported by Comment and Further Reading with references to leading cases, statutes and specialist literature. It is, as one commentator remarked,[199] an ambitious undertaking, seeking to encourage the adoption of English common law as the law of choice in the world of economic business. Both address the same audience of practitioners, the judiciary, academics and students.

Albeit focused on contract law, such projects throw light on the potential utility of restatements of private law, but also some of the difficulties. Burrows noted several issues in undertaking his project. First, how to deal with gaps or uncertainty in the law. While seeking merely to explain current law, he found it hard to avoid taking a policy position in such instances and noted that they often gave rise to strong differences of opinion between members of the advisory group. It is difficult to 'restate' unsettled law. All one can give is an overview of different views and a suggestion for a way forward. Second, how to determine the degree to which a restatement should include statutory provisions and deal with general matters of principle as opposed to specific issues relating to different types of contract. Andrews (understandably) also flagged the challenges of undertaking such an

[193] (Oxford University Press 1st edn, 2016, 2nd edn, 2020). See also A Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford University Press 2012).

[194] Contrast with the ALI that has a membership of up to 4,000.

[195] Burrows (n 193)., ix.

[196] Part 1, 2, for example, defines 'contract' as: 'an agreement that is legally binding because – (a) it is supported by consideration or made by deed (see s. 8); (b) it is certain and complete (see section 9); (c) it is made with the intention to create legal relations (see s. 10); and (d) it complies with any formal requirement needed for the agreement to be legally binding (see s. 11(2)(a)).'

[197] Andrews (n 189). The style is noticeably more civilian in nature.

[198] Freedom of Contract; Objectivity; pacta sunt servanda; Estoppel; Good Faith and Fair Dealing: arts 1–5.

[199] K Kühnel-Fitchen, 'Review' (2018) 22 EdinLR 176.

https://doi.org/10.1017/S0020589321000087 Published online by Cambridge University Press

endeavour alone even for a very experienced and eminent scholar. Their aim is to provide a useful additional tool for those seeking to understand the shape and form of private law, albeit, in terms of legitimacy, a restatement produced by a team of experts is likely to have more force than that of a single scholar and statements of policy will depend on the expertise and eminence of the authors.[200]

Lord Leggatt in his review of Burrows' work contrasted restatements (such as those discussed above) that are largely descriptive and seek to make existing law more accessible, with restatements that set out a model law stating best practice and seeking to influence lawmakers.[201] While seeking inspiration from the US Restatements, restatements at a European level have tended to reflect this latter approach.[202] For example, the *Principles of European Tort Law (PETL)*[203] were drafted by academics from across the EU with the goal of providing greater coherence to private law by drafting a set of unifying principles. These principles represent the 'best' solutions for a European law of torts rather than a restatement of existing legal practice.[204] While such principles, drafted in the civil law style, have inevitably found greater favour with civil, rather than common, law jurisdictions,[205] they (in common with other attempts, such as the Draft Common Frame of Reference (DCFR)[206] and work of the Study Group on a European Civil Code (SGECC)[207]) are collaborative works that combine draft model rules with comments and references to case law, legislation and literature and have received funding at a national and European level. They mirror attempts to produce harmonised principles of European contract law.[208] The aim here is to identify a 'soft'

[200] Note also the work in commercial law by McMeel who is currently seeking to draft a restatement of commercial law by 2025 with feedback sought from judges, practitioners and academics. See G McMeel, 'Are There Any General Principles of Commercial Law?' in C Mitchell and S Watterson (eds), *The World of Maritime and Commercial Law* (Hart 2020).

[201] G Leggatt, 'Review' (2017) 133 LQR 521.

[202] See R Zimmermann, 'The Present State of European Private Law' (2009) 57 AmJCompL 479, 480–4; L Liebman, 'The American Law Institute: A Model for the New Europe?' in F Cafaggi and H Muir-Watt (eds), *Making European Private Law: Governance Design* (Edward Elgar 2008) 209ff.

[203] European Group on Tort Law, *Principles of European Tort Law* (Springer 2005).

[204] J Spier, 'Introduction' ibid, 15. See, generally, BA Koch, 'The "European Group on Tort Law" and Its "Principles of European Tort Law"' (2005) 53 AmJCompL 189.

[205] The PETL have been cited by courts in Spain, Italy, Lithuania and Portugal: <http://www.egtl.org/materials.html>.

[206] (n 16).

[207] C von Bar (ed), *Principles of European Law: Non-Contractual Liability Arising out of Damage Caused to Another* (Oxford University Press 2009). Consider also the foundational work of C von Bar, *The Common European Law of Torts I and II* (Oxford University Press 1998 and 2000) which sought to discover common elements of the law of torts of all EU Member States founded on the belief that the approximation of European laws should not be left to the directives and regulations of Brussels alone.

[208] See O Lando and H Beale (eds), *Principles of European Contract Law* (Kluwer Law International 2000) and R Zimmermann, 'Principles of European Contract Law and Principles of European Tort Law: Comparison and Points of Contact' in H Koziol and B Steininger (eds), *European Tort Law Yearbook 2002* (Springer 2003).

European tort law, rather than simply making existing law more accessible. As such, such examples play a more overtly political role in harmonising tort principle across the EU, providing material as the work of the SGECC indicates, potentially of use in any future European Civil Code.[209]

Examining the models above, it is clear that a restatement that is descriptive rather than setting out model rules will have more utility for a common law system. The issue here is not a political one of bridging national laws encompassing distinct legal cultures, languages and socio-economic structures, but rather one that seeks to systemise existing law in a more accessible and coherent way. Nevertheless, it must be conceded that the reason why restatements have proven popular in the US is that they (as in Europe) have responded to divergence within a federal structure between the private laws of individual states. This gives rise to an institutional need for such instruments. This is not, however, regarded as an issue in most common law jurisdictions which serves to explain the lack of interest (notably in terms of financing) for such initiatives. Given (as stated in Section II) the evolving nature of tort law, the need for flexibility to respond to societal change and the input of the courts, it becomes understandable why, to date, there has been no English attempt at a restatement of tort law. Even the contract law initiatives outlined above have had limited impact. Any restatement of torts would need both to be regularly updated and highlight active doctrinal debates. One might wonder, for example, about the longevity of a restatement of the principles of vicarious liability given the rapidity of recent case-law developments, unless it was stated in a very general way.[210] Further, as Burrows discovered, even explanatory summaries of the law cannot avoid matters of policy and decisions as to scope. This is particularly true of the law of tort.

One is left with the conclusion that despite the initial attractiveness of the restatement project, it would require investment, a mixture (as in the Burrows' project) of legal personnel and regular updating. This author is not surprised therefore that efforts have primarily been directed to less controversial and more predictable areas of law such as contract law. It would also be an immense endeavour—any restatement would have to include not only rules but commentary and relevant literature.

This takes us back, then, to the start of this section. Just as civilian codification is supplemented by case law and scholarship, the common law partnership (case law plus legislation) would benefit from assistance to improve systemisation. At present, legal scholarship does supplement to a certain extent formal sources of law, but, in the absence of any viable restatement project, it is worth considering why such informal sources have failed to have the influence seen in civil law systems. The answer, as will be

[209] See J Blackie, 'Tort/Delict in the Work of the European Civil Code Project of the Study Group on a European Civil Code' in R Zimmermann (ed), *Grundstrukturen des Europäischen Deliktsrechts*. (Nomos 2003).

[210] See (n 170) above.

https://doi.org/10.1017/S0020589321000087 Published online by Cambridge University Press

seen in the next section, lies in the nature of the scholarship concerned. As Stapleton has commented, scholarship that is sensitive to the nature of judicial decision-making and the constitutional restraints within which the judiciary operate will be best placed to influence the courts.[211]

VI. SYSTEMISATION AND THE LAW OF TORT

Tort law is prone to uncertainty.[212] As Lord Neuberger commented recently, 'tort law reflects most aspects of human life … consequently no set of principles can satisfactorily cover every situation in which a claim in tort, even in a particular tort, is brought'.[213] The question is how to *minimise* such uncertainty and render tort law more accessible, intelligible, clear and predictable. This article has discussed civilian-style codification and common law consolidation as means of systemisation. Examination of the French proposals to recodify tort law reveals what codification can achieve, but also what it cannot. Codification permits updating and consolidation of material previously outside the Code which aids accessibility. It facilitates new initiatives reflecting changing priorities in the law of tort. It also allows a discussion of tort law as a whole—its aims, objectives, its role in society. What it does not provide is a one-stop-shop nor a detailed exposition of the law. While the 2017 *Projet de réforme* has flaws—it is overambitious at times, introducing concepts such as *l'amende civile* for which there is no general support, and it would have been helpful to clarify the meaning of disputed terms such as '*causation*' or '*dommage*'—at heart, it seeks to clarify and systemise tort law principle and bring back into the civil code 200 years of case law which arose as a result of the very limited provision made for tort law in the *Code civil* of 1804. This is to be welcomed. It is important, however, to flag that systemisation by codification is only the start. Case law and legal commentary will explore further the meaning of the revised Civil Code.

In foregoing codification and adopting consolidation by legislation supplementing judicial development via *stare decisis*, the common law has similar goals. As this article has shown, attempts to limit judicial legal development by 'codifying' elements of the common law have not proven particularly successful in tort. Problems arise, however, where judges are unwilling to systemise the law and Parliament refuses to intervene. Such reluctance may be understandable in terms of the separation of powers, with judges unwilling openly to engage with matters of policy they believe best

[211] J Stapleton, Lecture 1 of the 2018 Clarendon Lectures, 'Taking the Judges Seriously', now published as *Three Essays on Torts* (OUP 2021); D McKee, 'The Responsibility of Common Law Scholarship: A Case Study' (2016) 118 RevNotariat 283, 286.

[212] See, for example, Mulheron (n 184) xxvi, who, in the Preface to her textbook, identifies as key characteristics of tort law: pockets of uncertainty, unsettled law and appellate judgments that differ.

[213] Neuberger (n 176) 90.

addressed by the legislature, but this has contributed to the lack of precision and coherence found in many areas of common law tort law.

This leads to three conclusions. First, common lawyers are correct to reject codification as a means of resolving tort law uncertainty. It does not reflect current common law practice and, as the French example has shown, at best, a code can establish a framework—a focus—bringing key rules together. A better approach would be to improve the existing system. Second, neither codification nor consolidation are sole actors but operate with the support of case law. This form of intervention is vital to ensure that the particular needs of tort law—in terms of flexibility and receptiveness to social and political change—are achieved. Thirdly, one issue highlighted in this article is the different influence of legal scholarship in civil and common law jurisdictions. In France, *la doctrine* is regarded as having a status almost equivalent to a source of law. There is also a long-standing tradition of civil law commentaries on codified private law (eg Palandt, *Bürgerliches Gesetzbuch Kommentar* for Germany;[214] Tramontano, *Codice civile* for Italy)[215] which bear some resemblance to the restatement projects. In contrast, restatements, as we have seen, have not found favour in common law systems bar the US (provoked, as we have stated, by a federal system of state private law) and a few academic initiatives. In the absence of a need to harmonise (or achieve an overview) of competing state laws, this is unlikely to change.

What does this mean for tort law systemisation? Codification can improve the accessibility, intelligibility, clarity and predictability of tort law, but its generality will require support from case law and legal commentary to ensure its longevity and adaptability to changing social and political climates. Consolidating statutes play a similar role, albeit different in style, and the detail and complexity of common law statutory drafting can often prove a barrier to flexibility and adaptability. This may explain why such statutes are relatively rare in the law of torts and that case law is regarded as better serving the need for flexibility and adaptability. This does, however, present a problem. Parliamentary Sovereignty dictates that legislative intervention will be the 'best' solution, having the benefit of legitimacy and democratic choice. As Cane argues, if done properly, legislation acts as a more pluralistic and open agent of norm-legalisation than case law.[216] However, democratic concern must accept that, in a common-law system, courts are expected to develop the law and, in the view of Priel, those that fail to do so may be seen as abdicating responsibilities allotted to them.[217] Here, assistance may be gained from informal sources. While traditionally the common law has been wary of relying on scholarship, it is submitted that informal sources may

[214] (80th edn, CH Beck 2021).
[215] (6th edn, Casa Editrice La Tribuna 2020).
[216] Cane (n 20).
[217] D Priel, '"That Is Not How the Common Law Works": Paths to Tort Liability for Harassment' (2021) 52 Ottawa L Rev 87, 131.

https://doi.org/10.1017/S0020589321000087 Published online by Cambridge University Press

provide an intellectual framework that can help systemise and clarify the law and their utility needs to be recognised. This requires, however, a particular *kind* of legal scholarship. I have mentioned treatises and textbooks above, but to this may be added any form of scholarship that is directed, not in the abstract, but as to how courts decide cases and which is sensitive to the nature of judicial decision-making. An interesting comparison may be made with civil law systems where *notes d'arrêt*[218] and *Kommentare* written by professors and practitioners provide exactly this kind of practical scholarship.[219] As Burrows' interesting project highlights, work based on collaborative exercises, bringing together the expertise of lawyer, judge and the academic, appears most likely to provide material useful to a court.[220] This will require rethinking, not solely by the judiciary, but also by academics in considering how they orientate their work. While common law research funding has tended to draw academics away from such scholarship,[221] it remains the case that courts are most likely to respond to work directed at a judicial audience which assists them in the systematic development of the law. While greater recognition of the value of such work is needed, far more support is needed for those undertaking such work than exists at present.

Common and civil law systems employ different means to systemise the modern law of tort. This comparative study has highlighted the role that can be played by both formal and informal mechanisms in improving the accessibility, clarity and coherence of tort law. No system is perfect. Tort law continues to defy any attempt to confine it to a single code or consolidating statute. Yet this article argues that mechanisms do exist to enhance the systemisation of tort law and minimise uncertainty—be it improving an existing codification or recognising to a greater extent the utility of legal scholarship attuned to judicial needs. These mechanisms need to be considered seriously. Complacency should not be an option.

[218] These are case commentaries that follow reported cases that not only explain the decision, but its significance more generally within the legal system. Given the brevity of many French decisions, these play a vital role in French law in explaining the reasoning underlying the court's decision. Consider, for example, the notes by leading French scholars Esmein and Saleilles in the *Teffaine* case: Cass. Civ. 16 June 1896 S 1897.1.17 note A Esmein ; D 1897.1.433 note R Saleilles.

[219] One might usefully compare the *Recueil Dalloz* with, for example, the *Oxford Journal of Legal Studies*. Both are excellent but engaged with different types of legal scholarship.

[220] See also A Burrows, 'Challenges for Private Law in the Twenty-First Century' in Barker (n 7) 40 and P Birks, 'The Academic and the Practitioner' (1998) 18 LS 397, 399–400.

[221] For example, the UK Research Excellence Framework (REF) ranks work which is outstandingly novel and game-changing above work that contributes to incremental and cumulative advances in knowledge.