

ARTICLES

CHANGE IN THE EUROPEAN CIVIL LAW SYSTEMS: INFILTRATION OF THE ANGLO-AMERICAN CASE LAW SYSTEM OF PRECEDENT INTO THE CIVIL LAW SYSTEM

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In the civil law systems of justice, black letter law states that case law precedents are irrelevant; the text of the codes prevails.¹ No decision by a court is supposed to constitute precedent to which any other court must adhere, except for a lower court in the case on appeal. In the last decades, however, two significant supra-national judicial systems have emerged in Europe. One system is the European Court of Human Rights, and the other is the European Court of Justice.² In both of these systems, decisions are made by judicial determinations, which not only bind the immediate case but also set precedent for other future cases. This development has started to affect the jurisprudence of the civil law systems, for such civil law courts must now pay attention to judicial precedent.

To highlight this trend, this author attended two discussions with significant authorities in Europe that exemplify this development. In one of the discussions with a justice of the Italian Supreme Court,³ the justice stated that if an Italian judge in a lower court ignored a decision of his court without explaining why (or distinguishing it) that judge might be subject to judicial discipline under the Italian system! In another discussion at the European Court of Justice in Luxembourg, an Advocate General for the

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1. "French theory considers the judge bound by the provisions of the written law. It refuses any binding effect of previous judicial interpretations, even one emanating from a hierarchically superior court." VON MEHREN & GORDLEY, *THE CIVIL LAW SYSTEM* 1135 (Little, Brown & Co. 2d ed. 1977) (1957) (citations omitted).

2. See *infra* notes 50-62 and accompanying text.

3. The Court is the Court de Cassazione. The meeting occurred on June 9, 2008 in Rome in the Court's ceremonial courtroom. There was no indication that the Justice's comment was off the record.

Court (a position that corresponds to the Solicitor General of the United States) stated that prior cases decided by the court are not technically precedent; however, the principles within the prior decisions must be followed by national courts (i.e. the courts of the 27 nation states in the European Union).⁴ Although such language accords titular deference to the civil law tradition, when understood in the context of the proper definition of case law precedent, the statement really means that the prior decisions of the European Court of Justice are precedential; for in a system of case law precedent, it is the principles contained within the cases that are the actual precedent.⁵

A decision by the European Court of Human Rights, *United Macedonian Organisation Ilinden v. Bulgaria*,⁶ provides an excellent

4. Discussion with Advocate General Eleanor Sharpston, June 24, 2008, in Luxembourg, France at the court's building.

5. The judges of the ECHR specifically refer to "precedents." See *DH v. Czech Republic*, App. No. 57325/00, dissent at ¶ 2 (Eur. Ct. H.R. 2007), <http://www.echr.coe.int/echr> (Jungwiert, J., dissenting). Judge Jungwiert stated:

However authoritative the *precedents* cited at paras 175 to 181 of the judgment may be, in practice they have very little in common with the instant case other perhaps than the Roma origin of the applicants in most of the cases (for instance in *Nachova v Bulgaria* [2005] ECHR 43577/98 and *Buckley v UK* [1996] ECHR 20348/92).

Id. (Jungwiert, J., dissenting) (emphasis added). See also *Pizzati v. Italy*, App. No. 62361/00, at ¶ 42-43 (Eur. Ct. H.R. 2006), <http://www.echr.coe.int/echr>.

The Court notes that on 26 January 2004 the Court of Cassation, sitting as a full court, quashed four decisions in cases in which the existence or amount of non-pecuniary damage had been disputed. In so doing, it established the principle that "the court of appeal's determination of non-pecuniary damage in accordance with section 2 of Law no 89/2001, although inherently based on equitable principles, must be done in a legally defined framework since reference has to be made to the amounts awarded, in similar cases, by the Strasbourg Court. Some divergence is permissible, within reason"

...

43. The Court takes note of that departure from *precedent* and welcomes the Court of Cassation's efforts to bring its decisions into line with European case law. It reiterates, furthermore, having deemed it reasonable to assume that the departure from *precedent*, in particular judgment no. 1340 of the Court of Cassation, must have been public knowledge from 26 July 2004. It has therefore held that, from that date onwards, applicants should be required to avail themselves of that remedy for the purposes of Art. 35 § 1 de la Convention (see *Di Sante v. Italy* (dec.), [App. N]o. 56079/00 [(Eur. Ct. H.R. 2004), <http://www.echr.coe.int/echr>], and, *mutatis mutandis*, *Broca & Texier-Micault v. France*[, App. No.] 27928/02, [at ¶ 20 (Eur. Ct. H.R. 2003), <http://www.echr.coe.int/echr>].

Id. (emphasis added). *British-Am. Tobacco Co. Ltd v. Netherlands*, 21 Eur. H.R. Rep. 409, ¶ 83 (1996).

Unlike the applicant company, the Court considers its *Oerlemans* judgment as a pertinent *precedent* since, far from being based on the particular circumstances, that judgment was grounded on the finding of "well-established principles of Netherlands law" which were applicable in the specific case. After a comprehensive examination of the pertinent case-law of the Netherlands Supreme Court as well as the opinions of learned legal commentators in the Netherlands, the Court found it established. . . .

Id. (emphasis added).

6. *United Macedonian Org. Ilinden v. Bulgaria*, App. No. 59491/00 (Eur. Ct. H.R. 2006), <http://www.echr.coe.int/echr>.

illustration of this new trend. Unlike an ordinary civil law decision by a high court like that of France, the decision is more than a page or two, instead it is more than 20 pages.⁷ Also unlike traditional civil law decisions—which cite only statutes, regulations, or other text, but no case law—the opinion for the court in *United Macedonian* discusses a dozen prior case decisions, and even includes a dissenting opinion (itself a rarity in civil law jurisprudence)⁸ which cites five prior decisions including two cases not cited by the opinion for the court.⁹

United Macedonian dealt with Bulgaria's refusal to permit registration of an organization whose aim was to unite all Macedonians within Bulgaria on a regional and cultural basis.¹⁰ After several earlier attempts to register had been rejected, the case arose from a rejection based on grounds that the aims of the UMOI were political—an unpermitted basis for a non-profit-making association.¹¹ UMOI complained to the European Court of Human Rights that its right to freedom of association had been arbitrarily

7. VON MEHREN & GORDLEY, *supra* note 1, at 1135.

[T]he traditional form of the French decision, which begins with a recital of the applicable code provisions, does not discuss or analyze previous decisions, and sets forth the court's holding as deductively derived from the cited provisions, usually without indicating such doubts as the court may have had to overcome in reaching this result.

Id.

8. In France and Germany, for example, dissenting opinions are not permitted. *Id.* at 1160. In France, moreover, judges take an oath not to reveal differences in opinion on the bench. *Id.* at 1140 n.53. In the European Court of Justice, no dissents are permitted. In sharp contrast, however, the European Court of Human Rights ("ECHR") permits, and has many dissents.

9. In the section of the opinion entitled "The court's assessment," the court cites: *Partidul Comunistilor (Nepeceristi) & Ungureanu v. Romania*, App. No. 46626/99 (Eur. Ct. H.R. 2005), <http://www.echr.coe.int/echr/>; *United Macedonian Organisation Ilinden & Ivanov v. Bulgaria*, App. No. 44079/98 (Eur. Ct. H.R. 2005), <http://www.echr.coe.int/echr/>; *Gorzelik v. Poland*, App. No. 44158/98 (Eur. Ct. H.R. 2004), <http://www.echr.coe.int/echr/>; *Dogom v. Turkey*, App. No. 8811/02 (Eur. Ct. H.R. 2004), <http://www.echr.coe.int/echr/>; *Ryabyhk v. Russia*, App. No. 52854/99 (Eur. Ct. H.R. 2003), <http://www.echr.coe.int/echr/>; *Yazar v. Turkey*, App. No. 22723/93 (Eur. Ct. H.R. 2002), <http://www.echr.coe.int/echr/>; *Stankov & the United Macedonian Organisation Ilinden v. Bulgaria*, App. No. 29225/95 (Eur. Ct. H.R. 2001), <http://www.echr.coe.int/echr/>; *Metropolitan Church of Bessarabia v. Moldova*, App. No. 45701/99 (Eur. Ct. H.R. 2001), <http://www.echr.coe.int/echr/>; *APEH Uldozotteinek Szovetsege v. Hungary*, App. No. 32367/96 (Eur. Ct. H.R. 1999), <http://www.echr.coe.int/echr/>; *Ceylan v. Turkey*, App. No. 23556/94 (Eur. Ct. H.R. 1999), <http://www.echr.coe.int/echr/>; *Freedom & Democracy Party (OZDEP) v. Turkey*, App. No. 23885/94 (Eur. Ct. H.R. 1999), <http://www.echr.coe.int/echr/>; and *Sidiropoulos v. Greece*, 27 Eur. H.R. Rep. 633, 633 (1998). The dissent by Judge Botoucharova cites both of the *United Macedonian* cases cited previously, decided in 2001 and 2005, but also cites *Ivanov v. Bulgaria*, App. No. 46336/99 (Eur. Ct. H.R. 2005), <http://www.echr.coe.int/echr/>; *Kokkinakis v. Greece*, App. No. 260-A (Eur. Ct. H.R. 1993), <http://www.echr.coe.int/echr/>; and *Mellacher v. Austria*, 12 Eur. H.R. Rep. 391, 391 (1989).

10. *United Macedonian Org. Ilinden v. Bulgaria*, App. No. 59491/00, at ¶¶ 16-17 (Eur. Ct. H.R. 2006), <http://www.echr.coe.int/echr/>.

11. *Id.* at ¶¶ 10-11, 14-17, 22-24.

impaired.¹² The following propositions are among those stated by the court in its assessment and illustrate the court's free use of citations:

The Court considers that the domestic courts' refusal to register Ilinden amounts to an interference by the authorities with the applicants' exercise of their right to freedom of association (see *Sidiropoulos v. Greece*, App. No. 26695/95, at ¶ 31 (Eur. Ct. H.R. 1998), <http://www.echr.coe.int/echr>; *APEH Uldozotteinek Szovetsege v. Hungary* (dec.), no. 32367/96, 31 August 1999; *Gorzelik v. Poland*[, App. No. 44158/98, at ¶ 52 (Eur. Ct. H.R. 2004), <http://www.echr.coe.int/echr>]; and *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania*[, App. No. 46626/99, at ¶ 27 (Eur. Ct. H.R. 2005), <http://www.echr.coe.int/echr>]).¹³

In these circumstances, and recalling that it is primarily for the national courts to interpret and apply domestic law, the Court is prepared to accept that the interference in question was prescribed by law (see *Metropolitan Church of Bessarabia v. Moldova*[, App. No. 45701/99, at ¶¶ 107-10 (Eur. Ct. H.R. 2001), <http://www.echr.coe.int/echr>]; and *mutatis mutandis*, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*[, App. No. 29225/95, at ¶¶ 81-82 (Eur. Ct. H.R. 2001), <http://www.echr.coe.int/echr>]).¹⁴

Insofar as the applicants challenged the soundness of the courts' assessment of the relevant facts and the quality of their reasoning, these issues fall to be examined in the context of the question whether or not the interference with applicants' freedom of association was necessary in a democratic society, which appears to be the central aspect of the case (see, *mutatis mutandis*, *Dogan v. Turkey*[, App. No. 8811/02, at ¶ 149 (Eur. Ct. H.R. 2004), <http://www.echr.coe.int/echr>]; and *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania*[, App. No. 46626/99, at ¶ 34 (Eur. Ct. H.R. 2005), <http://www.echr.coe.int/echr>]).¹⁵

When one considers that only a handful of the judges on the European Court of Human Rights (ECHR) or the European Court of Justice (ECJ) were trained in the common law system, such extensive citations to case precedents by civil law judges are a startling new trend in the civil law

12. *United Macedonian Org. Ilinden v. Bulgaria*, App. No. 59491/00, at ¶ 32 (Eur. Ct. H.R. 2006), <http://www.echr.coe.int/echr>. The European Convention on Human Rights, Article 11, provides, "Everyone has the right to . . . freedom of association."

13. *United Macedonian Org. Ilinden v. Bulgaria*, App. No. 59491/00, at ¶ 53 (Eur. Ct. H.R. 2006), <http://www.echr.coe.int/echr>.

14. *Id.* at ¶ 55.

15. *Id.*

system.¹⁶

The jurisprudence of the ECHR is replete with case law that evolves over time. For example, in a sequence of cases, the ECHR has dealt with issues relating to people undergoing sex change procedures and seeking official recognition of that status. Quite recently, in *Grant v. United Kingdom*,¹⁷ the court found that the failure of the United Kingdom (“U.K.”) subsequent to its decision in *Goodwin v. United Kingdom*¹⁸ to pay a state pension to a person who had undergone a sex change procedure from man to woman (when women were entitled to pensions at an earlier age than men) violated Article 8 of the Convention.¹⁹ The court awarded pecuniary damages from the date of the court’s earlier *Goodwin* decision until the date when the U.K. began payments to the petitioner—three months and seventeen days later.²⁰ Also, in *I v. United Kingdom*,²¹ the ECHR held that it was no longer permissible to refuse to change birth certificates after a sex change operation.

Moreover, the ECHR has, on occasion, even reversed its position on significant issues before the court. For example, the ECHR did not immediately validate or protect transsexuals, but it eventually did so, as it came to appreciate that transsexuals formed de facto families. It took more than two decades, however, to reflect these changes in a sequence of decisions.

In the first transsexual case to come before the court, (a Grand Chamber case), *Van Oosterwijck v. Belgium*, the court refused to reach the merits of the case—a request that a birth certificate be rectified to reflect the new gender identity—for two procedural reasons.²² First, the applicant had not raised the European Convention of Human Rights before Belgian courts; and second, he had failed to exhaust domestic remedies, on the

16. One can see this trend as well in briefs submitted to the European Court of Justice. For example, in the Opinion of Advocate General Ruiz-Jarabo Colomer delivered May 10, 2005 on joined cases C-465/02 and C-466/02 (dealing with the lawfulness of the use of the word “feta”), Colomer included case citations to over fifty cases, including cites in footnotes 2, 3, 46, 57 (AG opinion), 63 (AG opinion), 69, 77-80, 83-87, 89-92, 94-95, 97-98, 100, 115, 119 (AG opinions), 121-25, 128-29 (AG opinions), 131, 132 (AG opinion), 154-55, and 158 (AG opinion).

17. *Grant v. United Kingdom*, App. No. 32570/03, at ¶ 11 (Eur. Ct. H.R. 2006), <http://www.echr.coe.int/echr>.

18. *Goodwin v. United Kingdom*, App. No. 28957/95 (Eur. Ct. H.R. 2002), <http://www.echr.coe.int/echr>.

19. *Grant*, App. No. 32570/03 at ¶ 51.

20. *Id.* at ¶ 56 (awarding 1,700 euros in pecuniary damages).

21. *I v. United Kingdom*, App. No. 25680/94, at ¶ 73 (Eur. Ct. H.R. 2002), <http://www.echr.coe.int/echr>.

22. *Van Oosterwijck v. Belgium*, App. No. 7654/76 (Eur. Ct. H.R. 1980), <http://www.echr.coe.int/echr>.

advice of an attorney that an appeal to the Belgian Court of Cassation had no prospects of success.²³ A dissenting opinion by four judges took serious issue with both points, labeling relief from the Court of Cassation “a remote possibility”²⁴ and pointing out that the applicant did adduce arguments similar to those that could have been made under the Convention in the initial notice of appeal.²⁵

A decade later, the ECHR did reach the merits of a similar issue in *Cossey v. United Kingdom*.²⁶ In *Cossey*, the applicant, a male who had changed to female, requested both a change of his birth certificate and permission to marry a man.²⁷ The court rejected both claims.²⁸

The first claim, requesting alteration of his birth certificate, was seen as a request that a positive obligation existed upon the state to make such a change.²⁹ The ECHR found that the test for whether such a positive obligation existed was whether the state had struck a fair balance between the interests of the community and the interests of the individual.³⁰ The ECHR then determined that a fair balance had in fact been reached and refused to require the state to convert a system designed to record historical fact into one that reflected current civil status.³¹ Revelation of the fact of a sex change could not protect the private life of an individual absent a new system involving secrecy; thus, the potential for harm legitimately concerned third parties.³²

As for the second point raised, the court found that nothing in U.K. law precluded the applicant from marrying a woman,³³ and thus “her” right to marry under Article 12 of the Convention had not been abridged.³⁴ It mattered not that the applicant wanted to marry a man.

23. Van Oosterwijck v. Belgium, App. No. 7654/76 ¶ 14. (Eur. Ct. H.R. 1980), <http://www.echr.coe.int/echr>. The applicant declined to appeal.

24. *Id.* dissenting opinion at ¶ 12.

25. *Id.* dissenting opinion at ¶ 10.

26. *Cossey v. United Kingdom*, 113 Eur. H.R. Rep. 622, ¶ 32 (1991). This was also a Grand Chamber case. The applicant in *Cossey* had a male partner wishing to marry her. *Id.* at ¶ 32.

27. *Id.* at ¶¶ 18-22.

28. *Id.*

29. *Id.*

30. *Id.* at ¶¶ 37-39. In an intervening case—*Rees*, App. No. 106A, at ¶ 31 (Eur. Ct. H.R. 1986), <http://www.echr.coe.int/echr>—the ECHR had rejected a similar request.

31. *Cossey v. United Kingdom*, 113 Eur. H.R. Rep. 622, ¶ 38(a) (1991).

32. *Id.* at ¶ 38(b)-(c).

33. *Id.* at ¶ 45.

34. *Id.* at ¶ 48. Article 12 of the Convention of Human Rights protects the right to marry. Two separate partly dissenting opinions (with two judges each) were also rendered, along with two separate dissenting opinions—one by one judge and another by three judges.

Eight judges dissented (making the vote 10-8) in four separate opinions.³⁵ The lengthy dissent by Judge Martens pointed out that legal recognition of gender reassignment had been accepted in fourteen of the member states of the Council of Europe (up from five states recognized in an intervening decision of the ECHR).³⁶ Another dissenting opinion by three judges recited an extensive list of other cases declared admissible by the European Commission, along with many citations to law journals, including Australian, South African, and American law journals, as well as other judicial and ministerial decisions recognizing changes of gender.³⁷ Moreover, that dissent noted that in 1989 both the Parliamentary Assembly of the Council of Europe and the European Parliament took stands regarding the rights of transsexuals.³⁸ The European Parliament called on member states “to enact provisions on transsexuals’ right to change sex” and requested that “discrimination against them” be banned.³⁹ In sum, the dissenting judges were suggesting that the ECHR should become better reflective of the societal trends in the member states of the European Union and the wider Council of Europe.

After such a narrowly balanced result, it is not surprising that the ECHR soon “adjusted its position,” regarding related claims albeit incrementally, starting with the Grand Chamber decision of *B v. France* in 1992.⁴⁰ In this decision, the court held by fifteen votes to six that Article 8 had been violated by France’s refusal to permit a change of her forename or a change of her birth certificate.⁴¹ However, the ECHR continued to adhere to its earlier position that, although the laws of the member states regarding transsexuals were in flux, there was still no sufficiently broad consensus to justify overruling its earlier *Rees* and *Cossey* decisions.⁴² Moreover, since the commission had not ruled admissible a claim based upon the right to marry, the court did not reach this claim.⁴³ The court ultimately left France to determine what measures to take to comply with the decision.⁴⁴

Several years later, in *X, Y, & Z v. United Kingdom*, the ECHR refused to find a violation of Article 8 regarding a female-to-male transsexual.⁴⁵

35. *Cossey v. United Kingdom*, 113 Eur. H.R. Rep. 622 (1991) (dissenting opinions).

36. *Id.* dissenting opinion of Judge Martens at ¶ 5.5.

37. *Id.* dissenting opinion of Judges Palm, Foighel, and Pekkanen at ¶ 6.

38. *Id.* dissenting opinion of Judges Palm, Foighel, and Pekkanen at ¶ 3.

39. *Id.* dissenting opinion of Judges Palm, Foighel, and Pekkanen at ¶ 3.

40. *B v. France*, App. No. 13343/87 (Eur. Ct. H.R. 1992), <http://www.echr.coe.int/echr>.

41. *Id.* at ¶ 48.

42. *Id.*

43. *Id.* (Matscher, J., dissenting).

44. *Id.* at ¶ 63.

45. *X, Y, & Z v. United Kingdom*, 24 Eur. H.R. Rep. 143 (1997).

That woman gave birth to a child in 1992 by artificial insemination, but the “male” was denied the right to have “himself” registered as the father of the child.⁴⁶ The ECHR did, however, declare that it considered the family of X, Y, and Z a de facto family for purposes of Article 8, which was quite a major development in its own right.⁴⁷ The majority, however, found that no undue hardship would be caused by the failure to list the applicant as the father, even though the court was told that the person had already been forced to refuse employment in Botswana because the mother and child would not be considered his dependents and thus could not receive certain benefits.⁴⁸ The U.K. government pointed out, however, that the three were in no way prohibited from living together as if they were a family, and that birth certificates are not in common use in the U.K. for administrative or identification purposes.⁴⁹

Later, in 2002, the ECHR fundamentally shifted its approach to transgender issues, finding that:

Following its examination of the applicant’s personal circumstances as a transsexual, current medical and scientific considerations, the state of European and international consensus, impact on the birth register and social and domestic law developments, the Court found that the respondent Government could no longer claim that the matter fell within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the Convention.⁵⁰

Recognition of case law, however, is not a trend that is confined to the two major supra-national courts in Europe, the European Court of Human Rights and the European Court of Justice. The trend has spread, if only in modest amounts, to civil law courts themselves. For example, in France, the Conseil d’Etat is the highest court over the administrative court system. Yet in a 1995 decision, *Commune de Morsang-sur-orge- Rec Lebon*, various cases were cited by the court including a constitutional decision by the Conseil Constitutionnel of France.⁵¹ The Constitutional Court of France decides matters only on reference from the Parliament of France and does

46. X, Y, & Z v. United Kingdom, 24 Eur. H.R. Rep. 143 (1997).

47. *Id.* at ¶ 37. By a vote of 14 to 6, the court found no violation of Article 8.

48. *Id.* at ¶ 45.

49. *Id.* at ¶¶ 46, 49.

50. Grant v. United Kingdom, App. No. 32570/03, at ¶ 39 (Eur. Ct. H.R. 2006), <http://www.echr.coe.int/echr> (describing the transformation of ECHR jurisprudence wrought by *Goodwin v. United Kingdom*, App. No. 28975/95, at ¶ 75 (Eur. Ct. H.R. 2002), <http://www.echr.coe.int/echr>).

51. Decision No. 94-343/344 DC, p. 100, 27 Julliet 1994, available at http://www.council-etat.fr/ce/jurisp/index_ju_la47.shtml (providing the fifth paragraph of the opinion).

not make determinations about cases on appeal from the ordinary judicial systems of France, either the Conseil d'Etat (administrative courts involving governmental bodies as parties) or the Cour d'Assasion.

One might ask why more than 200 years of firm judicial practice has changed. The answer is that the new supra-national courts, the European Court of Human Rights and the European Court of Justice, are now deciding so many cases that it is no longer possible for civil law judges to ignore judicial precedents.

First, the body of potential precedential decisions is exploding on a yearly basis, and the total number of such decisions is now quite large. For example, the European Court of Human Rights Annual Report for 2007 reports that it has decided 9,031 cases through 2007.⁵² In the last three years alone, the ECHR decided 1,105 cases in 2005; 1,560 cases in 2006; and 1,503 cases in 2007.⁵³ The European Court of Justice reported in its annual report for 2007, that it entered 7,557 judgments between 1985 and 2007, including 362 judgments in 2005; 351 judgments in 2006; and 379 judgments in 2007.⁵⁴ Moreover, the Court of First Instance of the European Court of Justice reports that it entered 1,596 judgments from 2000 to 2007.⁵⁵

The Court of First Instance recognizes overtly that it makes case law⁵⁶ and is not unique in doing so. The European Court of Justice states the following on its website:

Through its case-law, the Court of Justice has identified an obligation on administrations and national courts to apply Community law in full within their sphere of competence and to protect the rights conferred on citizens by that law (direct application of Community law), and to disapply any conflicting national provision, whether prior or subsequent to the Community provision (primacy of Community law over national law).⁵⁷

52. EUR. CT. H.R., ANNUAL REPORT 2007 149, *available at* <http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Reports/Annual+Reports/> [hereinafter EUR. CT. H.R. 2007 REPORT].

53. *Id.*

54. THE CT. OF JUSTICE OF THE EUR. CMTYS., ANNUAL REPORT 2007, *available at* <http://curia.europa.eu/en/instit/presentationfr/index.htm> (last visited Feb. 27, 2009) [hereinafter CT. OF JUSTICE 2007 REPORT]. On its website, the court describes its actions until 2006. *Id.* In 2006, the court ruled upon more than 5,200 cases, and developed case law in particular “in the fields of intellectual property, competition and State aid.” *Id.*

55. *Id.*

56. *Id.*

57. The Court of Justice of the European Communities, http://curia.europa.eu/en/instit/presentationfr/index_cje.htm (last visited Feb. 27, 2009).

Similarly, the Annual Report of the European Court of Human Rights explicitly discusses its “recent case-law.”⁵⁸ The report states that “experience shows that national courts, and especially supreme and constitutional courts, are increasingly incorporating the European Convention into their domestic law – are in a sense taking ownership of it through their rulings.”⁵⁹ In other words, the court’s decisions have practical impact in the judicial systems of the forty-seven nation states that constitute the Council of Europe. Similarly, the European Court of Justice decisions impact the twenty-seven nation-states that are members of the European Union.⁶⁰

HOW DO CASES REACH THE ECHR AND THE ECJ?

The more familiar of these two courts to the American model is the European Court of Human Rights. Before a case may be taken to that court from any nation-state, it is required by the European Convention on Human Rights that domestic (i.e. national judicial) remedies be exhausted.⁶¹ Such cases must be brought to the ECHR within six months of the date that the final decision was rendered in the nation-state’s courts.⁶² While such cases are not technically appeals from the highest courts of the forty-seven nation-states that make up the membership of the Council of Europe,⁶³ these cases do resemble appeals.

The European Court of Justice and its allied Court of First Instance are quite different, however. Cases reach the ECJ in various manners, most of which do not resemble appeals. One very important category of cases before the ECJ are requests for preliminary rulings from the courts of the twenty-seven member states. The courts of the member states are the ordinary courts charged with applying European Community law.⁶⁴ The court describes this procedure:

58. EUR. CT. H.R. 2007 REPORT, *supra* note 52, at 6.

59. *Id.* at 7.

60. The European Court of Justice not only interprets the various agreements that collectively establish the European Union; it also is assigned responsibility for making certain decisions under other international instruments, such as the Brussels “Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,” which currently has 33 contracting parties, including the United States, Brazil, Jamaica, Israel, and Bahrain. World Intellectual Property Organization, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=19 (last visited Feb. 27, 2009).

61. Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Art. 35, § 1 (Sept. 2003).

62. *Id.*

63. Council of Europe, http://www.coe.int/T/e/Com/about_coe/ (last visited Feb. 27, 2009).

64. The Court of Justice of the European Communities, http://curia.europa.eu/en/instit/presentationfr/index_cje.htm (last visited Feb. 27, 2009).

To ensure the effective and uniform application of Community legislation and to prevent divergent interpretations, the national courts may, and sometimes must, refer to the Court of Justice and ask it to clarify a point concerning the interpretation of Community law, so that they may ascertain, for example, whether their national legislation complies with that law. A reference for a preliminary ruling may also seek the review of the validity of an act of Community law.

The Court of Justice's reply is not merely an opinion, but takes the form of a judgment or reasoned order. The national court to which it is addressed is, in deciding the dispute before it, bound by the interpretation given. The Court of Justice's judgment likewise binds other national courts before which the same problem is raised.

It is thus through references for preliminary rulings that any European citizen can seek clarification of the Community rules which affect him. . . . In that way, several important principles of Community law have been established by preliminary rulings, sometimes in reply to questions referred by national courts of first instance.⁶⁵

A second procedural category of cases before the ECJ are actions complaining that a member state has not fulfilled its obligations under Community law.⁶⁶ Most such actions are brought by the European Commission, or on rare occasions, by a nation-state.⁶⁷

Another category of cases involves suits to annul actions taken by either the European Parliament or the Council of the European Union.⁶⁸ Such actions are exclusively in the ECJ if brought by a Member State or by a Community institution against another Community institution.⁶⁹ The Court of First Instance would have jurisdiction over such actions if brought by individuals.⁷⁰

Yet another category of cases involves complaints that a Community institution has failed to act. Such actions are split between the ECJ and the Court of First Instance in a similar manner as actions to annul.⁷¹

The only appeals available under the jurisdiction of the ECJ involve

65. The Court of Justice of the European Communities, http://curia.europa.eu/en/instit/presentationfr/index_cje.htm (last visited Feb. 27, 2009).

66. *Id.*

67. *Id.*

68. *Id.*

69. The Court of Justice of the European Communities, http://curia.europa.eu/en/instit/presentationfr/index_cje.htm (last visited Feb. 27, 2009).

70. *Id.*

71. *Id.*

appeals against judgments and orders of the Court of First Instance.⁷² In many such cases, after deciding the appeal, the case is remanded to the Court of First Instance for decision; however, that court is bound by the decision that was rendered on appeal.⁷³ With the exception of this last category of cases, the ECJ acts as a court of first instance, not an appellate court; although, on reference requests from national courts, it renders binding decisions on the substance of Community law.⁷⁴ For example, the cases newly brought before the ECJ in 2007 include 265 references for a preliminary ruling, 221 direct actions, 79 appeals, 212 actions for failure to fulfill obligations, and a handful of other cases.⁷⁵

References for a preliminary ruling result in an ECJ decision that is binding in the particular case on the nation-state's courts. Such preliminary reference cases from 1952 to 2007 include 743 cases on reference from France, 939 cases from Italy, and 1,601 cases from Germany.⁷⁶ In contrast, reference requests from jurisdictions typifying case-law precedent jurisprudence are relatively modest by comparison, with 434 from the U.K. and 50 from Ireland.⁷⁷ Thus, the overwhelming bulk of the total 6,030 reported reference cases in the ECJ involve continental civil law states.⁷⁸

The Court of First Instance has jurisdiction to hear the following direct actions: 1) actions brought by natural or legal persons against Community institutions for acts addressed to the person or directly concerning them as individuals, or for the institution's failure to act (for example, a case brought by a company against a Commission decision imposing a fine on that company); 2) actions brought by the Member States against the Commission; 3) actions brought by the Member States against the Council

72. The Court of Justice of the European Communities, http://curia.europa.eu/en/instit/representationfr/index_cje.htm (last visited Feb. 27, 2009).

73. *Id.*

74. *Id.* However, the application of such decisions is largely performed by the courts of the nation states.

75. CT. OF JUSTICE 2007 REPORT, *supra* note 54, at 80-81.

76. *Id.* at 101-03.

77. *Id.* Part of the reason for this disparity may relate to the delay of the U.K. and Ireland in joining the European Union. Both countries joined in 1973. Europa, European Countries, http://europa.eu/abc/european_countries/eu_members/ (last visited Feb. 27, 2009). However, fewer than 500 judgments had been issued by the ECJ before 1973, and more than 7000 judgments were issued between 1972 and 2007. CT. OF JUSTICE 2007 REPORT, *supra* note 54, at 97-98. One might speculate that the relatively small number of reference requests from these jurisdictions already familiar with a system of judicial precedent reflects perceived abilities of the common law trained jurists to extrapolate case law precedents and feel comfortable in ascertaining the meaning of Community law! Of course, other factors may explain this apparent discrepancy, including differential attitudes towards the EU itself, or different needs for precise definition of the controlling law.

78. CT. OF JUSTICE 2007 REPORT, *supra* note 54, at 103.

relating to acts adopted in the field of State aid, “dumping,” and acts by which it exercises implementing powers; 4) actions seeking compensation for damage caused by the Community institutions or their staff; 5) actions based on contracts made by the Communities which expressly give jurisdiction to the Court of First Instance; and 6) actions relating to Community trademarks and appeals, limited to points of law, against the decisions of the Civil Service Tribunal.⁷⁹

CITATIONS OF ECHR DECISIONS

ECHR decisions are frequently cited. For example, *Marckx v. Belgium*⁸⁰ has been cited 108 times and *The Sunday Times v. United Kingdom*⁸¹ has been cited 188 times according to one database of human rights decisions.⁸² Most of these citations are by the ECHR itself, although the database also reports a number of citations by other courts, such as the Constitutional Court of South Africa,⁸³ the House of Lords,⁸⁴ and the Court of Appeals⁸⁵ in the United Kingdom. ECHR decisions have also been cited by United States courts, including the U.S. Supreme Court.⁸⁶

Unfortunately, there appears to be no electronic database that reports French decisions, so one cannot conveniently report the number of citations of ECHR decisions by French cases. However, the impact of the ECHR can be assessed by alternative means. Statistics reported in the ECHR’s 2007 Annual Report indicate that there are 2,346 pending French cases

79. CT. OF JUSTICE 2007 REPORT, *supra* note 54, at 103.

80. *Marchx v. Belgium*, App. No. 6833/74 (Eur. Ct. H.R. 1979), <http://www.echr.coe.int/echr>. In seven of the cited cases, France was the respondent country.

81. *The Sun. Times v. United Kingdom*, App. No. 6538/74 (Eur. Ct. H.R. 1979), <http://www.echr.coe.int/echr>. In five of the cited cases, France was the respondent country.

82. Human Rights Cases database, <http://www.lexisnexis.com> (last visited Oct. 3, 2008).

83. *Case & another v. Minister of Safety & Sec.*, [1996] 1 BHRC 541 (Con. Ct. S. Afr.) (citing *The Sun. Times v. United Kingdom*, App. No. 6538/74 (Eur. Ct. H.R. 1979), <http://www.echr.coe.int/echr>); *Bhe v. Magistrate*, [2004] 18 BHRC 52 (Con. Ct. S. Afr.) (citing *Marchx v. Belgium*, App. No. 6833/74 (Eur. Ct. H.R. 1979), <http://www.echr.coe.int/echr>).

84. *Reynolds v. Times Newspapers Ltd*, [1999] 7 BHRC 289 (H.L.) (citing *Sun. Times*, App. No. 6538/74); *Bellinger v. Bellinger*, [2003] 14 BHRC 127 (H.L.) (citing *Marckx*, App. No. 6833/74).

85. *Locabail (U.K.) Ltd. v. Bayfield Props. Ltd.*, [1999] 7 BHRC 583 (A.C.) (citing *Sun. Times*, App. No. 6538/74); *R. v. Sec’y of State for Work & Pensions*, [2003] 14 BHRC 626 (A.C.) (citing *Marckx*, App. No. 6833/74).

86. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. ¶ 52 (1981), *cited in* *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (holding that criminalization of consensual sodomy between adults was unconstitutional). *Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439 (1989) (holding that extradition of accused murderer to the United States by the U.K. violated the European Convention because of the death row phenomena), *cited in* *Knight v. Florida*, 528 U.S. 990 (1999), *and* *Foster v. Florida*, 537 U.S. 990 (1999).

before the court.⁸⁷ During 2007 the court rendered 48 judgments involving France as a respondent country.⁸⁸ By comparison, the United States Supreme Court in recent terms has been rendering approximately seventy-five decisions a year.⁸⁹ Thus, this single supra-national court, the ECHR, rendered approximately two-thirds as many judgments that were binding upon the French legal system, counting only decisions with France as a respondent. The total number of ECHR judgments for that year (all potentially controlling in France) was 1,503.⁹⁰

CITATIONS OF EUROPEAN COURT OF JUSTICE JUDGMENTS

ECJ decisions are also frequently cited. Three examples demonstrate the point quite directly. The 1963 *Van Gend & Loos*⁹¹ decision has been cited 81 times; the *Costa v. E.N.E.L.*⁹² decision 166 times, and the 1991 *Francovich*⁹³ decision 122 times according to the electronic database available at the website of the European Court of Justice.⁹⁴ Another electronic database, EUR-Lex European Union Cases available on Lexis, reports citations for *Francovich* in 138 cases, *Van Gend & Loos* in 13 cases, and *Costa v. E.N.E.L.* in 9 cases.⁹⁵

Citation of ECJ judgments has not been confined to the ECJ itself. For example, a legal practice guide for doing business in the United Kingdom tells a legal practitioner interested in the relationship between EU law and U.K. law:

The full effectiveness of Community rules would be impaired and the protection of the rights [of individuals] would be weakened if [they] when their rights are infringed by a breach of Community law [by] a Member State . . . [Hence] the principle [of state liability] for loss and damage caused to individuals as a result of breaches of Community law . . . is *inherent* in the system of the Treaty [of Rome].⁹⁶

87. EUR. CT. H.R. 2007 REPORT, *supra* note 52, at 135.

88. *Id.* at 138. Comparable figures for Italy and Germany for the same year are sixty-seven and twelve judgments.

89. *Id.*

90. *Id.* at 139. In the United Kingdom and Wales database on LexisNexis, 2,590 citations to the ECHR are reported. LexisNexis, <http://www.lexisnexis.com> (last visited Oct. 6, 2008).

91. Case C-26/62, *Van Gend & Loos*, 1963 E.C.R. 1.

92. Case C-6/64, *Costa v. E.N.E.L.*, 1963 E.C.R. 585.

93. Case C-9/90, *Francovich v. It. Rep.*, 1991 E.C.R. I-5357.

94. One can search the Court of Justice of the European Communities database in English by visiting <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en>.

95. LexisNexis, <http://www.lexisnexis.com>.

96. Joined Cases C-6/90 & C-9/90, *Francovich v. It. Rep.*, 1991 E.C.R. I-5357, 5413-14 (emphasis added). *See also* Joined Cases C-46/93 & C-48/93, *Brasserie du Pecheur & Factortame*, 1996 E.C.R. I-1029, 1142; Case C-392/93, *The Queen v. H.M. Treasury, ex parte British*

As previously mentioned, the ECJ reports numerous cases referred to it from the three major civil law countries of Europe, including 743 cases from France, 939 cases from Italy, and 1,601 cases from Germany.⁹⁷

REFERENCES TO EU OR ECHR LAW IN FRENCH, ITALIAN, AND GERMAN JURISPRUDENCE

Documenting the impact of these complex legal systems on the domestic activities of national courts is difficult for several reasons. First, there are apparently no electronic databases that cover French, Italian, or German jurisprudence as of today, although isolated cases are sometimes available. Second, one would not expect that civil law jurisprudence would leap from opinions that recite only statutory text and minimal reasoning to full-fledged discussion of complex case lines complete with subtle distinctions between case A and case B. European civil judges on the bench today are generally not trained in any such exercises. Furthermore, attaining a higher judicial office in civil law jurisdictions typically depends upon longevity in office, so even if new legal training regimes were instituted it would be decades before the newly graduated and admitted judges would occupy high judicial positions.

However, recent jurisprudence provides many examples of the impact that the legal system of precedent has upon the domestic legal order. Secondary writing reflects this impact. Germany, for example, through decisions of its highest courts, had difficulty in accepting the binding impact of ECJ decisions.⁹⁸ A recent assessment, however, states:

In summary, as far as the supremacy of Community law over national

Telecomms., 1996 E.C.R. I-1631, 1667; Case C-5/94, *The Queen v. M.A.F.F., ex parte Thomas*, 1996 E.C.R. I-2553, 2612; Joined Cases C-178/94, C-179/94, C-188/94, C-189/94, & C-190/94, *Dillenkofer*, 1996 E.C.R. I-4845, ¶ 20; Case C-66/95, *The Queen v. Sec'y of State for Soc. Sec., ex parte Sutton*, 1997 E.C.R. I-02163, ¶ 31. The principle is subject to conditions set out in these cases—especially *Dillenkofer* and *Sutton*. The conditions depend on the nature of the breach of Community law; while language has been used as regards Directives to make it clear that rights must be identifiable on the basis of the Directive, basically a right to reparation arises where (a) the rule of law infringed was intended to confer rights on individuals, (b) the breach is sufficiently serious, and (c) there is a direct causal link between the breach of obligations by the State and the damage sustained. *See also* *Regina v. Sec'y of State for the Home Dep't, ex parte Gallacher*, [1996] 2 C.M.L.R. 951 (CA). The terms 'EC law' and 'Community law' are synonymous. However, 'EU law' (although it overlaps to a considerable extent with EC law) is not strictly a further synonym, though in common parlance it is often so treated. *See* ANGUS CAMPBELL, *DOING BUSINESS IN THE UNITED KINGDOM* § 2.02 (Matthew Bender & Co., Inc. 2008).

97. On the Lexis database for the United Kingdom and Wales, more than 3,000 citations are reported for the ECJ. LexisNexis, <http://www.lexisnexis.com> (last visited Oct. 6, 2008).

98. Dieter H. Scheuing, *The Approach to European Law in German Jurisprudence*, 5 GERMAN L.J. NO. 6, at ¶ 23 (June 1, 2004), available at <http://www.germanlawjournal.com/article.php?id=446>.

law is concerned, it can be underlined that the German courts accept this supremacy as a necessary consequence of Germany's participation in the project of European integration. Certain reservations and restrictions which the Bundesverfassungsgericht had felt inclined to introduce in order to protect German constitutional law have remained without practical significance.⁹⁹

Decisions of the Italian Constitutional Court since 1999 are available on an electronic database in English¹⁰⁰ and refer to "the principle applied in repeated judgments by the Court of Cassation."¹⁰¹ Lower Italian courts note "decisions of the Constitutional Court upholding constitutionality of provisions"¹⁰² or cite direct references to the European Convention on Human Rights and Fundamental Freedoms,¹⁰³ or refer to "previous case law of the Court."¹⁰⁴

Limited numbers of French judicial decisions are readily available, such as decisions by the Constitutional Council,¹⁰⁵ the Conseil d'Etat,¹⁰⁶ or the Cour de Cassation.¹⁰⁷ A decision by the Constitutional Council stated that, because the time-line mandated for its own decisions is curtailed, it is limited in its ability to rule on European Directives because it cannot request a preliminary ruling from the Court of Justice of the European Communities.¹⁰⁸ As previously noted, the French Conseil d'Etat has referenced judicial opinions in some of its decisions.¹⁰⁹ Similarly, decisions

99. Dieter H. Scheuing, *The Approach to European Law in German Jurisprudence*, 5 GERMAN L.J. NO. 6, at ¶ 23 (June 1, 2004), available at <http://www.germanlawjournal.com/article.php?id=446>.

100. Corte Costituzionale, <http://www.cortecostituzionale.it/> (last visited Feb. 27, 2009).

101. Corte Costituzionale, Judgment No. 341, at 2, Oct. 27, 2006, available at <http://www.cortecostituzionale.it/> (determining which Italian governmental entity had jurisdiction over complaints by prisoners and detainees governing their status as workers, including pay and remuneration).

102. Corte Costituzionale, Judgment No. 26, at 4, Jan. 24, 2007, available at <http://www.cortecostituzionale.it/> (concerning the ability of the prosecutor to lodge appeals).

103. *Id.* at 5.

104. *Id.* at 9.

105. Conseil Constitutionnel, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/2008/decisions-par-date/2008/les-decisions-de-2008.425.html> (last visited Feb. 27, 2009).

106. Le. Conseil d'État, <http://www.conseil-etat.fr/ce/home/index.shtml#> (last visited Feb. 27, 2009).

107. Legifrance, <http://www.legifrance.gouv.fr/rechJuriJudi.do?reprise=true&page=1> (last visited Feb. 27, 2009).

108. Conseil Constitutionnel, Decision No. 2006-543 DC, at ¶ 7, Nov. 30, 2006, available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/depuis-1958/decisions-par-date/2006/les-decisions-de-2006.977.html>.

109. See *supra* note 52 and accompanying text (referencing Conseil decision of Oct. 27, 1995–

by the French Cour de Cassation now reference previous judicial decisions.¹¹⁰

CONCLUSION

A fundamental transformation is underway in the entire civil law jurisprudential system, bringing nearer the two great legal traditions of the civil law and the Anglo-American case law system. Both judges and attorneys who practice in European countries must now be aware of this extensive body of judicial decisions. This assimilation of the case law precedent system with the civil law system is merely one other sign of the shrinking legal world we live in today. As the civil law system reaches beyond the European continent to glean the benefit of the system of legal precedent, U.S. judges have reciprocated by crossing the “pond” to observe the legal systems in Europe. For the most explicit example of that gesture, several years ago a class of U.S. law students that I was teaching, sat in the courtroom of the European Court of Justice to see four U.S. Supreme Court Justices enter the courtroom and walk forward to sit in the first spectator row to observe the argument of a case before that court!¹¹¹

Commune de Morsang-sur-orge- Rec Lebon).

110. See Cour de Cassation, chambre criminelle, Decision No. 98-83307, at 3, Oct. 12, 1999, available at <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007068665&fastReqId=684119306&fastPos=1> (referencing, inter alia, the *Cassis de Dijon* decision of the European Court of Justice concerning the importation of French products into Germany, and the *Smanor* decision of the European Court of Justice concerning the importation into France of “yaourt,” frozen products manufactured outside of France).

111. Justices Ginsburg, Kennedy, Souter, and Breyer.
