# The phenomenon of translatability in the Europeanization of the Law

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**Abstract**

The integration of legal systems in European is one of the most important issues. This process has started by the fact that there are significant differences between the civil law and common law system and between the legal families in it. A law (at domestic or international level) should not be viewed against the backdrop of the historical, political, cultural, social and economic context in which they function.

In order to shed further light for our readers, we analyze by emphasizing the significant differences between the civil law and common law system on one side and the legal families that are part of the same legal system, either "Civil" or "Common," on the other side.

The Europeanization of law refers to the communization of the law by EU institutions and to a process that aims at creating a common Europe legal system. In the end, either in medium or long term, the Europeanization is contributing to the so-called non-mandatory or soft harmonization of private law. It is in the best interest of the EU to seek adequate judicial instruments to accommodate the massive numbers of laws deriving from different Civil Law and the Common law systems.

**Keywords:** legal system, legal family, translatability's phenomenon

## Introduction

*The function of the "law" is to fix the general maxims of justice, to establish principles of law, and not to descend into the details of the questions that can arise in each instance*[1]. *(Portalis 1803)*

One of the current most intractable problems of European legal integration is the reconciliation of the civil law and the common law families. The differences between the two are what most people know about, however, the process is even more difficult and challenging. In order to shed further light for our readers, we analyze by emphasizing the significant differences between the civil law and common law system on one side and the legal families that are part of the same legal system, either "Civil" or "Common," on the other side.

[1] The comments made by Portalis, government commissioner in the Prize Court and a member of the four-man drafting committee appointed by Napoleon in March 1803.

One simple way of doing that is by taking into consideration the common elements of the French and the German laws which justify our skill speaking as "Civil law systems." The German and the French laws respectfully belong to the Civil law due to their methods of thought, their attitudes to law and its sources. Historically, they derive from centuries in which the *ius commune*, Romanistic but not Roman, was created out of the materials in the *Corpus Iuris Civilis*[2]. Respectfully, in both cases, they represent the Civil law. Even though, we will found out later, there are significant differences among different aspects.

Consciously, it is also true that in many cases, common problems are and will be solved in much the same way by the various legal systems, to whichever legal family they may belong. Yet, as we shall argue later, there still remain major differences between civil law and common law systems in regard to legal structure (institutions), legal thinking, sources of law and classifications and legal policy. Illustrating these differences is the aim of this scientific research paper.

Furthermore, there have been two major instances in the world, as we speak of today, in creating institutions with the purpose of facilitating the growth of legal tradition through widespread public participations. The first instance was that of Roman law and the second instance was that of the common law. They both choose different paths, but they both looked to public participation in an institutional framework from departure.

In sum, the comparison of different legal systems has been much as a trend by the end of the 19th century. Since then, the great civil law codifications of the 19th century and the first years of the 20th century entered into force throughout continental Europe. As such, European lawyers have used "Comparative Law," in order to find guidance for the interpretation of their respective national codes, to enhance their national laws, and to fill the gaps in their national codes, statutes or case law. Within few words, the Comparative law was primarily used to improve one's own domestic law (national legal system).

**Historical foundation of the European legal systems**

As many of us know today, historically, the name of the Civil Law system is attached to the Roman law. To the Romans the term *ius civile* had meant, at its widest, the law of a particular state, or, more narrowly, the law of Rome itself. The most important influence in this dwindling of the Roman element has been the moment for the codification, the first great achievement of which was the enactment of Napoleon's Civil Code of 1804.

[2] Barry, Nicholas. "The French Law of Contract", Clarendon Press Oxford, 1992, p.2

Undoubtedly, the Roman law constitutes an important unifying factor in the historical formation of the European civil law due to penetration of it, in various parts of Europe. As result of this high degree of diversity, especially when compared to the history of the common law in the English speaking world[3], Roman law is relatively dominant in European civil law.

The history of continental or civil law largely dates as the history of two periods, that of roman law and that of modern continental law, beginning with the 're-discovery' of roman law in the eleventh century AD[4]. Now it is known that the first writing act and a source of law was that of Twelve Tables (around 450 BC), which contained some very elementary principles of how to resolve disputes between people who lived in roman society, those of high rank and those of lower rank. The idea of a source of law is related to the way how people think their lives should be governed.

On the other side, during the twelfth century Europe, referring to historical relevance, the common law was in a reconstruction stage of the complex experience of another sort of "common law" - *ius commune*. This reconstruction was due to political and social climate of profound changes of mediaeval times. As result of these changes, experience was not the only terrain on which extensive and repeated renovation took place on the European continent but also a secure point of reference in the tumultuous variety of particular systems of law (*iura propria*).[5]

During the Industrial Revolution, we have what is called the "age of codification" that began in the eighteenth century. The age of codification was also a process of "consolidation" in which a number of provisions were collected together. These came as result of concerted effort to draw up a body of rules articulated within an orderly and carefully crafted outline- a "code" authoritatively imposed to constitute the precept, mark the limit, and state the guarantee it offered all the citizens of a state.[6]

At that period in time, the common law was not the only law system that went through the "age of consolidation," the great civil law went through the same path of codification as well. The great civil law codifications of the 19th century entered into force throughout the Europe continent.[7] During this period the influence of the Roman law was once again the cornerstone of the codification process. It enabled the

[3] Vranken, Martin. "Fundamentals of Europian Civil Lw', Federation press, 2010, p.32

[4] Glenn, H.Patrick. "Legal History of the World', Oxford, 2007,p.125

[5] Bellomo, Manlio. "The common legal past of Europe 1000-1800", The Catholic University of America Press Washington,D.C, 1995, p.32

[6] Bellomo, Manlio. "The common legal past of Europe 1000-1800", The Catholic University of America Press Washington,D.C, 1995, p.2-4.

[7] The French Civil Code of 1804; the Austrian Civil Code of 1811 (ABGB); the Italian Civil Code of 1865; the Portuguese Civil Code of 1867; the Spanish Civil Code of 1889 and – in the a second wave of codification – Swiss Code of Obligation of 1881; the German Civil Code of 1896/1900 (BGB) and the Swiss Civil Code and the revised Code of Obligations of 1907/1911.

creation of uniformity, as the drafting of a code and the building of a (new) national identity.[8]

Traditionally, the civil law system has been subject of several codification and consolidation processes during different periods in time, either influenced from political, social or economic reforms. As result of this evidences, the process of codification of the civil law system is an unstoppable process of adaptation. So far, there have been two major instances of adaptation. The first adaptation started between countries that apply the civil law system and those who apply the common law system. The first represents the Roman law; the other represents the common law.[9] The second adaptation was between the legal families of the civil law system such as, France and Germany in Europe.

Furthermore, during the 20th century, there have been some good wills to rapprochement the civil law and common law system. Even though, the civil law lawyer still had the tendency to read cases through different eyes from the common law lawyer. For example, the common law lawyers had the tendency to draft and interpret the statutory law, influenced by the case law where the civil law lawyers based their argumentation on the law itself or codes. As such, the civil law system is considered as a closed system, of legal reasoning,[10] whereas the common law is an open system[11].

Since the European continent, is the place of the "open system" of the common law and the "closed system" of the civil law, it is of extreme importance to analyze first the history of the legal systems of Europe rather than the history of the EU in itself. As such, in regard to this diversity, the "EU legal system" is unique in itself and the idea of the EU legal system dates earlier than 1950[12]. It is related to the expression of the "United States of Europe"[13], used before and after the intervention of two World Wars. It is also related to the Western Europe growing dependence by the United States (U.S.). The 1947, Marshal Plan[14] and the North Atlantic Treaty Organization (NATO) are the major U.S. incentives that prove the Western Europe dependence by the United States. As result, Europe had plenty of reasons to be grateful to the American assistance in rebuilding the continent and strengthening the idea of the EU legal system.

[8] Vranken, Martin. "Fundamentals of European Civil Lw', Federation press, 2010, p.32.

[9] Glenn, H.Patrick. "Legal History of the World',Oxford, 2007,p.128.

[10] In that any legal question that arises can and, in principle, must be answered through the interpretation of an existing rule of law.

[11] Law does not approach law as a science but as a method, law is treaded as "made", rather than "found".

[12] The most renowned achievement to date is the 1950 Convention on the Protection of Human Rights and Fundamental Freedoms. The **Schuman Declaration** of 9 May 1950 was a governmental proposal by then-French Foreign Minister Robert Schuman to create a new form of organization of States in Europe called a supranational Community.The event is celebrated annually as Europe Day and Schuman himself is considered one of the Founding fathers of the European Union.

[13] In 1849 by Victor Hugo/ in 1946 by Winston Churchill.

[14] In 1948 resulted in the establishment of the organization for European Economic Co-operation (OEEC).

Even though, the Western Europe after World War Two (WWII) developed the idea of the EU, the origin framework of the E.U. is sealed by the 1957 Treaty of Rome. The treaty consists of 240 articles in six separate parts, preceded by a preamble (in the form of relatively short one or more sentences), which resemblance is associated with that of the civil code deriving from the Civil Law not the Common Law.

In addition, since the beginning of the 20th century, many legal scholars are used to talk about "re-Europeanization" of the private law. The term Europeanization in itself refers, on the one hand, to the communization of the law by EU institutions and on the other hand to a process that aims at creating a common Europe legal system/science and consciousness. As such, since the beginning of 1990s, several English judges have also been more and more willing to take into consideration not only common law jurisdiction, but also the legislation and case law of countries on the continent that apply the civil law system. In the end, either in medium or long term, the Europeanization is contributing to the so-called non-mandatory or soft harmonization of private law.[15]

**Concept of legal families**

Since the creation of the statehood and the nationhood concept during the 17th century, all states starting from Europe continent, embraced the idea of building their own national legal system. As we speak of today, the total number of national legal systems is close to 200 in the world. These state of affairs indicates the level of independence that sovereign countries have among each other, however, at the same time makes the process more difficult in case of analyzing them separately. As result of this vast number of national legal system, many scholars have categorized the concept of legal systems into families. The concept of legal families allows us to reduce this number by bringing them together under few heading legal systems that show certain similarities to one another.

However, as many of us know, the law is an emanation of the political will of a particular nation at any particular moment in time; it also tends to be associated with feelings of belonging and national pride. Some time the law is a combination of necessity and choice. As result of these necessities and choices, the notion of a family law assumes that one is able to look beyond the concept of legal system in it narrow sense of the legal rules and institutions pertaining to a particular country.

- **The characteristics of legal families are:**

  The primary characteristics of a civil law system, as part of the legal families, is that it possesses a structure made up of logically linked concepts, beginning

[15] Graziano, Thomas Kadner. "Comparative Contract Law" cases, materials and exercises, published 2009 by Palgrave Macmillan, p.9

with general principles and moving to the more detailed rules. As result many civil law systems in Europe, fits together as a complete, self-contained entity (this structure extends to the whole of law covered by the civil code).[16]

In addition, the Civil law systems are based in a general and pervasive principle of "good faith" where in the European common law systems there is no such general principal. As such, in the main perspective, the Civil law system has as a requirement the "good faith" concept, and only in some limited situations when there is a series of specific rules achieving almost the same results it might not require the referring of the "good faith" concept.

In the end, the Civil law considers it legitimate for a contract to contain penalty clauses designed to deter a party from breaking the contract where the common law regards the imposition of penalties (as opposed to liquidated damages by way of compensation for anticipated loss) as improper and unenforceable.

- **Classification criteria of legal families are:**

The historical development of a particular legal system is the first factor that dictates *the Legal Structure of its institutions*. It is a factor that unmistakably differentiates the civil law system from the common law system. As result of the historical factors that are easily verified among the various families of the civil law system, the legal civil law families are less homogeneous than their common law legal families. In addition the civil law system is separated into "sub-categories": the Romantics (France, Italy, Spain, Portugal and the Benelux Countries), the Germanic (Germany, Austria, and Switzerland), and the Nordic systems have a closer relationship with each other than the common law system. For example, Albania belongs to the Romantic-Germanic legal families.

In regard to the *Legal Thinking*, the Civil law system has the tendency to use abstract legal terms and more generally, to adapt a conceptual approach to legal reasoning. Whereas, the legal thinking of the common law system, based on the court decisions are viewed as individual illustrations of, or specific expectation to, the law as embodied in a general rule, principle, or concept. The legal thinking or sometimes called legal reasoning in the European civil law moves from the general to the more specific principles. At a more principled level, it would appear that the perception of law itself differs in civil law and common law. As result of different legal thinking, the civil law lawyers tend to read cases through different eyes from the common law lawyers.

[16] Marsh. P.D.V, "Comparative contract law England,France,Germany", Gower, 1996,p.33

In addition, the civil law and the common law are almost different in regard to *The Sources of Law*. The codes and the supplementary statutes adapted outside of the codes, remain fundamentally different between the civil law and the common law. For example, the primary sources in the civil law are codes (organic laws) where in the common law the primary source of law are the case law. As such, the primary sources of the civil law and the common law remain fundamentally different.

Even though there are significant differences, still there have been some sort of rapprochement between the civil law and common law during the second half of the 20th century. These rapprochements triggered the penetration of statute in virtually areas of the common law and existence of precedent in the civil law. In the common law the statutes are drafted and interpreted by the cases, whereas in the civil law the cases are interpreted by the statutes. A court decision cannot be underpinned by the cases. As in regard to the source of the law political, economic or even cultural foundations of the law in both legal families are too similar for it to be otherwise.[17]

**The phenomenon of translatability between common law and civil law systems**

*A law is as an organic thing the same as the particular species of fauna or flora of a country and the comparative method is as indispensable to the scientific lawyer as it to the biologist.* *(Schuster 1907: III-IV)*

The phenomenon of translatability regarding the aspects of foreign law into the domestic legal law is the argument of the day, in many European Union countries. Since the 1957 Treaty of Rome till nowadays, the phenomenon of translatability depended on some particular aspects of the law that are most suitable for importation. As an analogy to the modern medicine, where the transfer of a "living organism" from one body to another is done for the well-being of both of them, the same applies for the coexistence of the Civil law and Common law system inside the European Union.

The same phenomenon of translatability exists even when it is required to assist in confirming whether and how, a particular development of the domestic legal scene of a European country fits in with legal change internationally. For instance, parallels can be drawn between the common law and civil law in the excesses of "contractual freedom"; "fault" as the exclusive basis for tort liability in civil law and common law alike etc.[18]

Comparative studies have been as an intellectual exercise in its own right, resulting in a broadening of knowledge that is valuable for its own sake. As such, the knowledge acquired through comparative study has two dimensions; a) it leads to a better understanding of foreign legal systems (including its surrounding context) and b) it

[17] Vranken, Martin. "Fundamentals of Europian Civil Law', Federation press, 2010, p.16.

[18] Vranken, Martin. "Fundamentals of Europian Civil Law', Federation press, 2010, chapter 5 & 6.

provides a deeper understanding of the law domestically (and to enlighten the student about conflicts-of-law).[19]

As result of these incentives treating various fields of law, comprising particular legal systems as a homogeneous entity, they have served as the driven mechanism of unifying the European legal system. Although in many cases, might not be the case of unification since the factors that influence on them are a lot[20]. Still they have created the facts that either domestic or international, the Civil and the Common laws never operate in a vacuums. They are better understood when viewed against the backdrop of the historical, political, cultural, social and economic context in which they function[21].

## Conclusion

As we speak of today, it is presumed that it is in the best interest of the EU to seek adequate judicial instruments to accommodate the massive numbers of laws deriving from different Civil Law and the Common law systems. But, there are still major differences between civil law and common law systems in regard to legal structure, reasoning, terminology, fundamental concepts and classifications and legal policy

The integration of legal systems in Europe is one of the most important issues. This process has started by the fact that there are significant differences between the civil law and common law system and between the legal families in it. A law (at domestic or international level) should not be viewed against the backdrop of the historical, political, cultural, social and economic context in which they function.

The Europeanization of the law refers to the communization of the law by EU institutions and to a process that aims at creating a common Europe legal system. In the end, either in medium or long term, the Europeanization is contributing to the so-called non-mandatory or soft harmonization of private law.

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6. Marsh, P.D.V. “Comparative contract law England,France,Germany”, Gower, 1996,p.33

[19] Vranken, Martin. “Fundamentals of Europian Civil Law’, Federation press, 2010, p.7.

[20] The factors may include: **historical; legal thinking; institutional; sources of law; ideological.**

[21] Vranken, Martin. “Fundamentals of Europian Civil Law’, Federation press, 2010, p.6.