Beer Wars—A Case Study: Is the Emerging European Private Law Civil or Common or Mixed or *Sui Generis*?

Markus G. Puder*

* Markus G. Puder serves as Adjunct Professor of Law at the Georgetown University Law Center, where he teaches European Union Law. In addition, he analyzes energy and environmental law and policy in the Environmental Assessment Division of Argonne National Laboratory, a U.S. Department of Energy Office of Science research facility operated by the University of Chicago. First and Second Legal State Examinations (Ludwig-Maximilans University, Munich, Germany), LL.M. (Georgetown University Law Center), and Ph.D. in Law (Ludwig-Maximilans University). Member of the New York State Bar and the United States Supreme Court Bar.

The views and translations of certain foreign source materials offered in this article are strictly those of the author. The article expands on a presentation made at the Georgetown University Law Center on June 18, 2004, to a group of visiting attorneys from the Graduate Program in International Law of the Tecnológico de Monterrey, Mexico.

INTRODUCTION

As a German living, researching, and teaching in the United States the author of this Article could not resist the temptation of drawing on his cultural roots for purposes of reflecting about the Civil Law, the Common Law, and European integration. One of those culturalisms relates of course to food, in particular to a beverage that has been described as liquid bread (*flüssiges Brot*)—Beer (*Bier*). The first recorded descriptions of beer in words or artifacts date suggest that beer brewing originated somewhere between the Tigris and Euphrates rivers several thousands of years ago.[1] The traditional German Purity Requirement for Beer (*Reinheitsgebot für Bier*), which only permits malted barley, hops, and water, ranks among the oldest food-and-drug laws in the world.[2] As early as 1165, the City of Augsburg punished drawing bad beer.[3] In 1487, Duke Albrecht enacted an ordinance fixing the beer price at one cent for the liter of winter beer and two cents for the liter of summer beer.[4] Moreover, brewers were required to perform a brewing oath (*preu-aid*) before the *Rentmeister* of Upper Bavaria.[5]

---

1. CARLO DEVITO, THE EVERYTHING BEER BOOK 5, 11 (1990) (estimating a timeframe of between 6000 and 9000 years).
2. Markus G. Puder, *Phantom Menace or New Hope—Member State Public Tort Liability After the Double-Bladed Light Saber Duel Between the European Court of Justice and the German Bundesgerichtshof in Brasserie du Pêcheur*, 33 VANDERBILT J. TRANSNAT'L L. 311 n.4 (2000).
3. *Id.*
4. *Id.*
5. *Id.*

Decreed by Duke George the Rich of Bayers-Landshut in 1493 and extended to the whole of Bavaria in 1516 by Archduke Wilhelm IV, the original German Purity Requirement for Beer entitled "How in Summer as in Winter the Beer in the Countryside Shall Be Drawn and Brewed" (*Wie das Pier Summer vie Winter auf dem Land sol geschenkt und prauen werden*) finally emerged.[6] Some have noted that the Bavarian Duke was probably somewhat interested in protecting consumers' rights, but even more so keen on improving the national standard so that beer could be reliably exported and taxed.[7]

Fast-forwarding into our times, the German Purity Requirement for Bier moved center-stage in a drama of serial litigation before European and German courts in the context of European integration. The European Community (EC or Community) forms the core of the system of cross-border government established by the nation-state members of the European Union (EU or Union)—a roof construction of integration, cooperation, and coordination, created through multilateral international

---

6. *Id.* For an English translation, see Karl J. Eden, History of German Brewing, 16 (4) Zymurgy (Special 1993), *available at* http://brewery.org/library/ReinHeit.html (last visited July 12, 2004):

> We hereby proclaim and decree, by Authority of our Province, that henceforth in the Duchy of Bavaria, in the country as well as in the cities and marketplaces, the following rules apply to the sale of beer:
>
> From Michaelmas to Georgi, the price for one Mass [Bavarian Liter 1,069] or one Kopf [bowl-shaped container for fluids, not quite one Mass], is not to exceed one Pfennig Munich value, and
>
> From Georgi to Michaelmas, the Mass shall not be sold for more than two Pfennig of the same value, the Kopf not more than three Heller [Heller usually one-half Pfennig].
>
> If this not be adhered to, the punishment stated below shall be administered.
>
> Should any person brew, or otherwise have, other beer than March beer, it is not to be sold any higher than one Pfennig per Mass.
>
> Furthermore, we wish to emphasize that in future in all cities, markets and in the country, the only ingredients used for the brewing of beer must be Barley, Hops and Water. Whosoever knowingly disregards or transgresses upon this ordinance, shall be punished by the Court authorities' confiscating such barrels of beer, without fail.
>
> Should, however, an innkeeper in the country, city or markets buy two or three pails of beer (containing 60 Mass) and sell it again to the common peasantry, he alone shall be permitted to charge one Heller more for the Mass of the Kopf, than mentioned above.
>
> Furthermore, should there arise a scarcity and subsequent price increase of the barley (also considering that the times of harvest differ, due to location), WE, the Bavarian Duchy, shall have the right to order curtailments for the good of all concerned.

7. DEVITO, *supra* note 1, at 11.

law treaties of deepening[8] and widening,[9] and sustained by domestic constitutional law arrangements.[10] The Community dimension of economic integration, otherwise known as the Union's first pillar, covers the creation of a common market based on the free flow of goods,

---

8. Deepening stands for the expanding substantive scope of European integration. The project was launched in the early 1950s with the Treaty of Paris of 1951 (Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 (meanwhile lapsed) (hereinafter ECSC Treaty). By the end of the decade the two Treaties of Rome completed the European Community (EC or Community) dimension. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty]; Treaty Establishing the European Atomic Community, Mar. 25, 1957, 298 U.N.T.S. 167. After more than two decades of resurgent nation-state posturing and severe flashpoints of crises, the integration train did not gather steam until the advent of the Single European Act of 1986. Single European Act, Feb. 17 & 28, 1986, O.J. (L 169) 1 (1986). In the wake of the tremors associated with the fall of the iron curtain, the Treaty on European Union of 1992 created the three-pillar architecture of the European Union (EU or Union), complementing the Community dimension (first pillar) with coordinated policies in foreign and security policy (second pillar) as well as justice and home affairs (third pillar). Treaty on European Union, Feb. 7, 1992, O.J. (C 224) 1 (1992), [1992] 1 C.M.L.R. 719 (as amended) [hereinafter TEU]. The TEU re-designated the EEC Treaty into the Treaty Establishing the European Community. Treaty Establishing the European Community, Feb. 7, 1992, O.J. (C 224) 1 (1992), [1992] 1 C.M.L.R. 573 (as amended) [hereinafter EC Treaty]. Two subsequent treaties—the Treaty of Amsterdam of 1997 and the Treaty of Nice of 2001—were designed to prepare the Union for massive future enlargements. Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, O.J. (C 340) 1 (1997); Treaty of Nice Amending the Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts, Feb. 26, 2001, O.J. (C 80) 1 (2001).

9. Widening refers to the spatial dimension of the integration project. Europe's membership has grown from the original six (Belgium, The Netherlands, Luxembourg, France, Germany, and Italy) to 25 Member States by way of five rounds of enlargement. *See* (Brussels) Accession Treaty of 1972, Jan. 22, 1972, 1972 O.J. Spec. Ed. 5 (Denmark, Ireland, and the United Kingdom); Athens Accession Treaty of 1979, May 28, 1979, O.J. (L 291) 9 (1979) (Greece); Iberian Accession Treaty of 1985, June 12, 1985, O.J. (L 302) 9 (1985) (Spain and Portugal); Corfu Accession Treaty of 1994, June 24, 1994, O.J. (C 241) 9 (1994) (Austria, Finland, and Sweden); Athens Accession Treaty of 2003, Apr. 16, 2003, *available at* http://europa.int.comm/enlargement/negotiations/treaty_of_accession_2003_table_of_content_en.htm (last visited Mar. 5, 2004) (Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, and Slovenia, Cyprus and Malta). For a summary of pending and potential future candidacies, see Markus G. Puder, *Constitutionalizing Government in the European Union: Europe's New Institutional Framework Under the Draft Treaty Establishing a Constitution for Europe*, 11 COL. J. EUR. L. 77, 79-80 n.12 (2005) (Bulgaria and Romania; Turkey; Iceland, Norway, and Switzerland; Andorra, Liechtenstein, Monaco, and San Marino; Bosnia-Herzegovina, Croatia, Serbia-Montenegro, Macedonia, and Albania; and Belarus, Moldova, Russia, and Ukraine).

10. For a comprehensive overview of various constitutional orders in their interaction with EU membership, see GEORGE BERMAN ET AL., CASES AND MATERIALS ON EUROPEAN UNION LAW 282-349 (2003) (presenting France, the Netherlands, Belgium, Luxemburg, Germany, Italy, Denmark, Ireland, the United Kingdom, Greece, Spain, Portugal, Austria, Finland, and Sweden); *see also* GEORG BERMANN ET AL., 2004 SUPPLEMENT TO CASES AND MATERIALS ON EUROPEAN UNION LAW 109-13 (2004) (adding narratives for the new Member States).

persons, capital, and services, as well as the gradual convergence of economic policies.[11] In the literature, the Community's legal order has broadly and summarily been characterized as rooted in the Civil Law.[12] This article offers a case study that endeavors to test, against salient differences that have been identified to describe the Common Law and the Civil Law traditions,[13] the content and fallout of the famous beer judgment *Brasserie du Pêcheur* handed down by the European Court of Justice (ECJ) in 1996—a milestone ruling in the context of extra-contractual liability of the EU Member States for damages incurred by individual parties in the wake of breaches of Community law.[14]

I. THE BRASSERIE DECISION OF THE EUROPEAN COURT OF JUSTICE

A. Background and Facts[15]

The French beer brewery of Brasserie du Pêcheur (hereinafter Brasserie), alleged that, until 1981, it exported significant amounts of beer into the Federal Republic of Germany.[16] Brasserie claimed that it was forced to discontinue exports of beer into Germany in late 1981, because the German authorities objected to the beer alleging that it did not comply with the German Purity Requirement for Beer laid down in the German Law on Beer Duty (*Biersteuergesetz* (BStG)).[17] According to Brasserie, fines were assessed against staff of its German contract partner, which undertook the importation and distribution of the beer in Germany, as well as buyers acting for food market chains, in which the

---

11. *See* Markus G. Puder, *Salade Niçoise from Amsterdam Left-Overs—Does the Treaty of Nice Contain the Institutional Recipe to Ready the European Union for Enlargement*, 8 COL. J. EUR. L. 53, 55 (2002) (describing the three-pillar architecture of the EU).

12. *See* JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 2 (1969) ("The basic charters and the continuing legal development and operation of the European Communities are the work of people trained in the civil law.").

13. For a trifurcated classification of legal traditions into civil law, common law, and socialist law, see id. ("A legal tradition….is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught.").

14. Joined Cases C-46/93 & C-48/93, Brasserie du Pêcheur SA v. Germany & The Queen v. Secretary of State for Transport ex parte Factortame Ltd., 1996 E.C.R. I-1029, [1996] 1 C.M.L.R. 889.

15. *See Brasserie du Pêcheur SA*, 1996 E.C.R. I-1029, [1996] 1 C.M.L.R. 889 (presenting the facts of the case in: (1) the report for the hearing; (2) the Opinion of Advocate General Tesauro; and (3) the judgment of the ECJ); *Brasserie du Pêcheur SA*, [1997] 1 C.M.L.R. 971 (containing the description of the facts by the BGH).

16. Puder, *supra* note 2, at 316 (referencing a figure of more than 100,000 hl).

17. *Id.* at 316-17 (citing to sections 9 and 10 of the German Law on Beer Duty).

beer was sold.[18] Brasserie's distributor then declared that the frequency of administrative proceedings pressed against it as the importer made it advisable to desist from all importation of Brasserie's beer into Germany forthwith until the resolution of the issues raised by the Purity Requirement for Beer.[19]

The European Commission, considering that the provisions of the German Law on Beer Duty contradicted the Treaty Establishing the European Community (EC Treaty), initiated infringement proceedings against the Federal Republic of Germany before the European Court of Justice (ECJ).[20] In addition to serving as the permanent administration in Brussels, the European Commission, one of the five principal managing institutions of the EC Treaty,[21] acts as guardian and watchdog of Community law.[22] The ECJ exercises judicial review, which includes proceedings over treaty violations by the Member States (infringement actions) as well as collaboration with the national courts adjudicating domestic cases that involve questions of Community law (reference proceedings for a preliminary ruling).[23]

The Commission's complaint was two-pronged.[24] It was directed at Germany's prohibition to market under the designation *Bier* (beer) a fermented beverage lawfully manufactured in other Member States according to different recipe rules (designation prohibition).[25] Moreover, the European Commission attacked Germany's importation ban on beer containing additives (ban on additives).[26] In 1987, the ECJ held that the two prohibitions, both deemed outlawed measures of equivalent effect to quantitative restrictions, were incompatible with the freedom of movements of goods under the EC Treaty.[27] Germany's designation prohibition, according to the ECJ, could not be saved as an immanent limitation to the free flow of goods based on consumer protection

---

18. *Id.* at 317.
19. *Id.*
20. *See* Case 178/84, Commission v. Germany, 1987 E.C.R. 1227, [1988] 1 C.M.L.R. 780.
21. Puder, *supra* note 2, at 317.
22. EC Treaty, arts. 211-219; *see also* BERMAN ET AL., *supra* note 10, at 42-50; KLAUS-DIETER BORCHARDT, THE ABC OF COMMUNITY LAW 44-47 (2000).
23. EC Treaty, arts. 220-245; *see also* BERMAN ET AL., *supra* note 10, at 63-70; BORCHARDT, *supra* note 22, at 48-52.
24. Case 178/84, Commission v. Germany, 1987 E.C.R. 1227, [1988] 1 C.M.L.R. 780.
25. *Id.* at 1266-68.
26. *Id.*
27. Case 178/84, Commission v. Germany, 1987 E.C.R. 1227, [1988] 1 C.M.L.R. 780.

considerations,[28] because more proportional options were available.[29] The additives ban was tested against the public health exception allowed under the EC Treaty,[30] and ultimately considered disproportional by the ECJ.[31] The ECJ described the designation prohibition as a more egregious, clear-cut infringement than the ban on additives, where the law and existing jurisprudence were viewed to exhibit less certainty.

Brasserie subsequently brought an action against the Federal Republic of Germany for reparation of the loss incurred from 1981 until 1987 as a result of the import restrictions violative of Community law, including a partial claim for DM 1.8 million ($1.1 million).[32] The District Court (*Landgericht*) and High District Court (*Oberlandesgericht*) rejected the complaint, and Brasserie appealed to the Federal Supreme Court (*Bundesgrichtshof* or BGH).[33] Determining that the case turned on Community law the BGH stayed the proceedings, formulated five questions in law, and made a request for a preliminary ruling by the ECJ.[34] In 1996, the ECJ returned the answers in law relative to the conditions under which a Member State may incur liability for damage caused to individuals by attributable breaches of Community law.[35]

B. Summary of the ECJ's Decision[36]

1. First Question: Can National Legislative Behavior That Fails to Adjust Domestic Law to Community Law Trigger Member State Liability?

The ECJ found that in absence of an explicitly codified provision the principle of Member State liability was inherent in the system of the EC Treaty.[37] And when a Member State breached Community law, it would not matter which of the internal branches of government was responsible for the violation.[38] The ECJ reasoned that the overall twin-

---

28. *Id.* at 1270-71.
29. *Id.* at 1271-72.
30. *Id.* at 1273-74.
31. *Id.* at 1274-75.
32. Puder, *supra* note 2, at 317.
33. *Id.*
34. *Id.* at 318.
35. *Brasserie du Pêcheur SA*, 1996 E.C.R. I-1029, [1996] 1 C.M.L.R. 889.
36. For a detailed discussion of the ruling, see Puder, *supra* note 2, at 318-26, 329-58.
37. *Brasserie du Pêcheur SA*, 1996 E.C.R. I-1029, I-1145 [1996] 1 C.M.L.R. 889, 986.
38. *Id.*

rationale for the rise of Member State liability under Community law was to safeguard uniformity and avoid discrimination.[39]

2. Second Question: What Are the Conditions for Member State Liability in the Wake of Acts and Omissions of the National Legislature Deemed Contrary to Community Law?

Borrowing from the model of the Community's own institutional liability for legislative behavior under the EC Treaty, the ECJ wrote that Member State liability was only triggered if three cumulative conditions were met. First, the rule of Community law breached must be intended to confer rights on the individual parties suffering the loss or injury; second, the breach must be sufficiently serious; and third, a direct causal link must exist between the breach and the damage sustained.[40] The ECJ further explained that the national legal systems, where the actual claims played out in terms of institutional autonomy, were bound by two basic tenets of Community law.[41] The conditions for reparation of loss and damage laid down by national law could not be less favorable than those relating to similar domestic claims.[42] Moreover, the modalities could not be tailored in a way that would in practice make it impossible or excessively difficult for a claimant to obtain reparation.[43]

The ECJ hammered-in several instructions in law relative to the case at bar. Community law ensuring the free flow of goods entailed rights for individual parties and met the first liability condition.[44] Moreover, a breach was sufficiently serious under the second requirement if the Member State manifestly and gravely disregarded the limits of its discretion, taking into account the degree of clarity of the controlling law, the margin of discretion available to the Member State, the intent of the Member State, and the eventual contribution by the Community.[45] Finally, the causation test pursuant to the third condition was to be run by the national courts.[46] With respect to the modalities of securing the reparation in the national systems, the type of state liability (*Staatshaftung*) available under Section 839 of the German Civil Code in conjunction with Article 34 of the German Basic Law, which requires a

---

39. *Id.*
40. *Id.* at I-1149.
41. *Id.* at I-1153.
42. *Id.*
43. *Id.*
44. *Id.* at I-1150.
45. *Id.*
46. *Id.* at I-1152.

violation of official duties directed at third parties (*Drittbezogenheit*) as opposed to the public at large (typically affected by legislative behavior), would indeed make it extremely difficult if not impossible for the claimant to secure reparation.[47]

3. Third Question: Is the National Court Allowed under Community Law to Make Reparation Conditional upon the Existence of Fault?

The ECJ determined that this issue was bounded by the second liability requirement that the alleged breach had to be sufficiently serious.[48] While a national system could connect the rise of liability to certain objective and subjective factors associated with the concept of fault, the linkage could not result in a tighter requirement than that of a serious breach, because otherwise, the reparation right could be frustrated.[49]

4. Fourth Question: What Is the Actual Extent of the Reparation Owed by the Defaulting Member State?

The ECJ answered that the extent of the reparation (*quantum*) had to be commensurate with the loss or damage.[50] In the absence of Community provisions, national law had some leeway within the bounds of not making access to reparation less favorable than under existing liability schemes, nor rendering the claim modalities excessively burdensome.[51] For example, factors amenable to consideration could include the claimant's own diligence to avoid or limit the damage.[52] However, any limitations of the reparation to loss of property, as opposed to economic gain, had to be disregarded.[53]

5. Fifth Question: What is the Extent of the Period Covered by the Reparation Award?

The ECJ reiterated that the rise of Member State liability was tied to the trio of liability conditions outlined in response to the second question.[54] Securing a prior judgment through a Member State

---

47. *Id.* at I-1154.
48. *Id.* at I-1155-56.
49. *Id.*
50. *Id.* at I-1156.
51. *Id.* at I-1157.
52. *Id.*
53. *Id.* at I-1157-58.
54. *Id.* at I-1159.

infringement action was not a pre-requirement to trigger the onset of liability.[55]

C. Outcome Before the BGH

After receiving the ECJ's judgment the BGH, in 1997, denied the claim for damages based on German national law and Community law principles.[56] The BGH held that the German state liability track did not offer any cause of action for the plaintiff's action.[57] According to the BGH, liability for a breach in public office (*Amtshaftung*) failed for lack of *Drittbezogenheit* in legislative settings.[58] Liability for an expropriation-like intrusion (*Haftung für einen enteignungsgleichen Eingriff*) was not triggered in the absence of an intrusion into a property right protected by law.[59] The BGH also dismissed the plaintiff's claim based on Community law flowing from *Brasserie* principles.[60] While constituting a serious breach of Community law, the designation prohibition was not causal for damages since the German authorities had not enforced it.[61] Conversely, the ban on additives satisfied the causation prong but was, in light of the ECJ's own language, a much less clear-cut violation, and hence, in the eyes of the BGH, did not rise to the threshold of a sufficiently serious breach.[62]

II. BRASSERIE IN LIGHT OF SYSTEMIC FEATURES OF THE COMMON LAW AND THE CIVIL LAW TRADITIONS

Summary observations tend to use the broad brush and over- or de-emphasize differences and similarities between objects of comparison when compressing centuries of history and tomes of scholarship relative to the Common Law and the Civil Law into a workable and pragmatic test screen. Commentators also note that the chasm between the two legal traditions has over time softened through mutual "interpenetrations"[63] or "convergence."[64] Others insist that tangible

---

55. *Id.* at I-1160.
56. *See* Brasserie du Pêcheur SA v. Germany, [1997] 1 C.M.L.R. 971.
57. *Id.* at 976.
58. *Id.* at 976-77.
59. *Id.*
60. *Id.* at 977.
61. *Id.* at 980-81.
62. *Id.* at 981.
63. Arthur T. von Mehren, *The U.S. Legal System: Between the Common Law and Civil Law Legal Traditions*, Centro di studi e ricerche di diritto comparato e straniero, 40 SAGGI, CONFERENZE E SEMINARI 1 (2000).

differences remain.[65] A quick canvas of the comparativist literature yields three salient, somewhat overlapping, features for juxtaposing the Common Law and the Civil Law. They involve the points of departure and bases for legal analysis, the influence and reception of Roman law, and the style of legal thinking and reasoning.[66]

A. First Difference: Points of Departure and Bases for Legal Analysis[67]

In the Common Law, judicial decisions and, to a lesser, albeit growing extent, statutes, are the launching pad for legal analysis.[68] Under the Common Law, former decisions—precedents under the axiom of *stare decisis et quieta non movere*—control the courts almost unconditionally.[69] The Common Law deems the rise of a fixed rule of decision indispensable to secure stability and certainty of rights and property, and avoid perpetual embroilment in doubts and controversies.[70]

In the Civil Law, legislation provides the façade to spawn legal analysis.[71] When a system of general rules and norms is in question, the legislation takes the systematized shape of a code.[72] Codes are the

---

64. For a compact description of convergence philosophies and vehicles, see JOHN HENRY MERRYMAN & DAVID S. CLARK, COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS 51-64 (1978). Convergence philosophies include returning to *jus commune*, embracing legal evolution, distilling natural law, conceiving law as a superstructure, conducting international transactions, and pursuing international integration. *Id.* at 52-57. Unification of law, legal transplants, and natural convergence represent convergence vehicles. *Id.* at 57-61; *see also* Luke Nottage, *Comment on Civil Law and Common Law: Two Different Paths Leading to the Same Goal*, 32 VUWLR 843, 848 (2002) (offering a table placing convergence (and divergence) scholars into "rules-plus" and "law in context" factions).

65. *See* MERRYMANN & CLARK, *supra* note 64, at 61-63 (describing sources and forces of divergence).

66. von Mehren, *supra* note 63, at 1-2.

67. *Id.* at 1.

68. *Id.* at 2; *see also* Max Radin, *Case Law and* Stare Decisis*: Concerning Präjudizienrecht in Amerika*, 33 COL. L. REV. 199, 203 (1933) (noting that "Coke and Common Lawyers were jealous of statutes and regarded them as impertinent meddlings").

69. *See, e.g.*, Radin, *supra* note 68, at 199; HENRY JOHN STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS: COMPRISING A SUMMARY VIEW OF THE WHOLE PROCEEDINGS IN A SUIT AT LAW (1871), *available at* http://www.svpvril.com/comcivlaw.html (last visited Aug. 9, 2004) ("Common Law and [Roman] Civil Law—Introduction of the Civil Law and the Common Law").

70. *Id.*

71. *See* MERRYMANN & CLARK, *supra* note 64, at 559-60 (observing that this category is not limited to laws enacted by the legislature, but, depending on the country, could include legislative decrees and decree-laws, or regulations).

72. von Mehren, *supra* note 63, at 1-2.

products of centuries of legal science.[73] For example, the German Civil Code (*Bürgerliches Gesetzbuch* or BGB), promulgated in 1896 and entered into force in 1900, emerged relative late in the wake of national unification.[74] The BGB, humorously known as the Big German Book, consists of five books, including the General Part (*Allgemeiner Teil*), the Law of Obligations (*Schuldrecht*), the Law of Things (*Sachenrecht*), Family Law (*Familienrecht*), and Inheritance Law (*Erbrecht*).[75] In Civil Law jurisdictions judicial decisions do not exhibit the fixed and certain operation of the Common Law, but are generally considered less instrumental in establishing a settled rule.[76] At least doctrinally, the Civil Law does not accept the principle of *stare decisis*.[77]

Throughout the history of European integration the ECJ has fostered Community law pursuant to a messianic maxim of integration through jurisprudence. A high degree of juridification characterizes the relationship between the legal systems of the Community and the

---

73. *See* MERRYMAN, *supra* note 12, at 60-72 ("The concept of legal science rests on the assumption that the materials of law…are naturally occurring phenomena, or data from the study of which the legal scientist can discover certain principles and relationships, just as the physical scientist discovers natural laws from the study of physical data."). The almost two millennia of legal science could be compressed into different thrusts accomplished by various agents, including but not limited to: (1) the Roman jurisconsults who advised the *praetor* and the *judex*; (2) the compilers of the Corpus Juris Civilis; (3) the Medieval Glossators and Commentators whose works presented the rediscovered body of Roman law that was later received throughout Western Europe; and (4) Carl-Friedrich von Savigny and the German Pandectists of the 19th century. *See id.*

74. Rainer Schröder, Rechtsgeschichte 131 (2000) (explaining that the German Civil Code was conceived as a standardization codification (*Vereinheitlichungskodifikation*)). *See generally* HORST H. JACOBS & WERNER SCHUBERT (EDS.), DIE BERATUNG DES BÜRGERLICHEN GESETZBUCHES IN SYSTEMATISCHER ZUSAMMENSTELLUNG DER UNVERÖFFENTLICHTEN QUELLEN (1978).

75. Bürgerliches Gesetzbuch, Gesetz vom 18.8.1896 (RGBl. S. 195), zuletzt geändert durch Gesetz vom 5.5.2004 (BGBl. I S. 718) mit Wirking vom 1.7.2004, *available at* http://dejure.org/gesetze/BGB (last visited Aug. 11, 2004).

76. STEPHEN, *supra* note 69.

77. von Mehren, *supra* note 63, at 8; *see also* William Tetley, *Mixed Jurisdictions: Common Law vs. Civil Law (Codified and Uncodified) (Part I & Part II)*, 3 UNIFORM L. REV. (N.S.) 591 (1999) & 4 UNIFORM L. REV. (N.S.) 877 (1999), *reprinted in* 60 LA. L. REV. 677, 702 (2000) (opining that under the Civil Law judgments only enjoy the "authority of reason," whereas in the Common Law *stare decisis* establishes an order of priority of sources by "reason of authority"). For the role of *stare decisis* and judicial lawmaking in various civil law countries, see, for example, RENÉ DAVID, FRENCH LAW 179-83 (1972) (diagnosing that while "[n]o French court can create legal rules," one can observe "a natural tendency for courts to follow precedents"); Robert A. Riegert, *The West German Civil Code, Its Origin and Its Contract Provisions*, 45 TUL. L. REV. 69-71 (1970) (quoting a German Professor with "the section numbers of the Code are often only systematic places where one files and later finds the results of judge-made law"); L. Neville Brown, *The Sources of Spanish Civil Law*, 5 INT'L & COMP. L.Q. 364-70 (1956) (describing the role of *doctrina legal* in appeals contexts).

Member States.[78] While the ECJ does not officially subscribe to *stare decisis*, many judgments contain quotes from or citations to previous judgments. The first beer judgment even explicitly employs the term "case-law." In the ECJ's *Brasserie* judgment two interesting features shed some light on launch pads for the legal analysis. The ECJ enables and forges the rise of Member State liability through case law. Moreover, the ECJ aligns law-finding with a positive law provision of the EC Treaty.

1. Emergence of Member State Liability Through Case Law

The birth rites of Member State liability connote a Common Law point of departure since the principle and its modalities were announced by a court. The ECJ tempered the absence in the EC Treaty of explicit and specific legal provisions governing claims for damages advanced by individual parties against Member States for breaches of Community law through the consideration that the principle was inherent in Community law, and hence not really judge-made.[79]

Critics charge that the ECJ has pursued a path of judicial activism and usurped legislative, if not treaty-making, powers.[80] Interestingly, the feature of setting minimum standards at Community law for national law operations could be described, in Community parlance, as crossing over into "directive-like."[81] The directive presents the Community legislator with a phased legislative instrument for achieving the harmonization of the national laws of the Member States.[82]

Supporters characterize the ECJ's line of decisions as essential contributions to the viability of Community law.[83] Some offer that the significance of the courts for the rise of state liability is tied to the

---

78. Puder, *supra* note 2, at 368.

79. *Brasserie du Pêcheur SA*, 1996 E.C.R. I-1029, I-1145 [1996] 1 C.M.L.R. 889, 986. For the proposition that early cases, however, suggest the ECJ's historic leaning in favor of Member State liability, see Puder, *supra* note 2, at 329-30. Nevertheless, the ECJ never fully confronted the question until many years later in *Francovich*, which involved the failure by the Italian Republic to transpose a Community insolvency directive. Joined Cases C-6/90 & C-9/90, Francovich v. Italian Republic, 1991 E.C.R. I-5357, [1993] 2 C.M.L.R. 66.

80. *See* Puder, *supra* note 2, at 331-32 (offering a range of references in the literature).

81. Dirk Ehlers, *Die Weiterentwicklung des Staatshaftungsrechts durch das europäische Gemeinschaftsrecht*, 1996 JURISTEN ZEITUNG 776, 777. If municipal law recognized state liability, the claim for damages would derive from that legal system, albeit subject to the requirement that the interpretation of domestic law does not contradict Community law tenets. *Id.* If, however, national law did not allow for government liability, the principles enunciated by the ECJ would be deemed directly applicable within the domestic systems. *Id.*

82. BERMAN, *supra* note 10, at 76.

83. *See* Monika Böhm, *Vorausstezungen einer Staatshaftung bei Verstössen gegen primäres Gemeinschaftsrecht*, 1996 JURISTEN ZEITUNG 53, 54.

subject-matter at hand in light of the general reluctance of governments to enable liability claims against themselves.[84] Others note that the Member States have at several occasions impliedly ratified the ECJ's state liability case law by default when failing to make corrective revisions to the EC Treaty at Maastricht, Amsterdam, and Nice.[85]

2. Law-Finding Through a Positive Law Provision in the EC Treaty

The reference to a general-abstract provision of higher law sounds civilian. The ECJ links the contours of Member State liability for breaches of Community law by the national governments to a regulatory model created by the contracting parties themselves—the standards governing non-contractual liability incurred by the Community under Article 288 (2) of the EC Treaty.[86]

Closer scrutiny of the functionality of this provision, which prescribes the comparative legal method for distilling the applicable law from "the general principles common to the laws of the Member States,"[87] yields a highly unusual, dynamic, and looped flux. The liability vehicle itself is rooted in Community Law. Yet, it is conceived from the common core of fundamental principles governing non-contractual liability in the legal orders of the Member States. The construction elements taken from the national legal orders bounce back up into the Community legal system. Viewed as a whole, they provide the common framework for adjudication. The actual cases then play-out downstream in the national systems pursuant to the principle of institutional autonomy of the Member States. The resultant cross-fertilization and dynamic replenishment embedded in the *Brasserie* judgment could ultimately gravitate toward a European state liability regime styled as a fledgling *jus commune communitatis*, or *unidroit communautaire*, in dynamic search for chemical equilibrium across the Member States.

---

84. *Id.* at 55.

85. *See id.* at 55 n.23. During the Amsterdam Intergovernmental Conference, the United Kingdom had proposed language that would have circumscribed the exposure of Member States to liability litigation. However, the Draft Article on Damages was not approved. *See* Puder, *supra* note 2, at 357-58.

86. Article 288(2) of the EC Treaty: "In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties."

87. *Id.*; *see also* Puder, *supra* note 2, at 339-40 (observing that that high courts in other jurisdictions eye this type of comparativist tool with suspicion).

B. Second Difference: Influence and Reception of Roman Law[88]

The era of Roman law spans the Republic (510-31 BC), the Principate (31 BC-285 AD), and the Dominate (285-476 AD).[89] It even extends to the time of Emperor Justinian (527-565 AD) after the fall of Rome itself.[90] The beginnings of Roman law are recorded in a highly casuistic collection known as the Twelve Tables (*Lex Duodecim Tabularum*) (449 BC),[91] legal texts originally drawn up on twelve wooden tablets and posted in the *Forum Romanum*, but subsequently lost and only preserved in fragments.[92] Among the laws created in the era of the Roman Republic[93] ranks the *Lex Aquilia* (286 BC),[94] a *Plebiscitum* supplementing and modifying previous legislation in the field of compensation for damages,[95] including Table VIII of the Twelve Tables.[96] Several hundreds of years later, long after the center of gravity had shifted to East Rome, Emperor Justinian arranged for the reorganization of most of Roman law into what since the 16th century became known as the *Corpus Juris Civilis* (533 AD).[97] The magnificent compilation features four components. The *Institutiones*, based on the work of Gaius, could be approximated to an elementary teaching manual.[98] The *Pandectae* or *Digesta*, subdivided into 50 books that fall into titles, fragments, and paragraphs, contain interpolated excerpts from the classical writings, especially Ulpian, Papinian, and Paulus.[99] The *Codex* boasts a collection of the imperial laws and edicts.[100] Finally, the

---

88. von Mehren, *supra* note 63, at 2.

89. Schröder, *supra* note 74, at 1 (using the German terms *Republik*, *Prinzipat*, and *Dominat*).

90. *Id.* at 13.

91. *Id.* at 3; *see also* RUDOLF DÜLL, DAS ZWÖLFTAFELGESETZ—TEXTE, ÜBERSETZUNGEN UND ERLÄUTERUNGEN (1995); Wikipedia, Twelve Tables, *available at* http://en.wikipedia.org/wiki/Twelve_Tables (last visited Aug. 11, 2004).

92. Schröder, *supra* note 74, at 3.

93. For a list arranged in alphabetical order, see Wikipedia, List of Roman Laws, *available at* http://en.wikipedia.org/wiki/List_of_Roman_laws (last visited Aug. 11, 2004).

94. *See* WILLIAM SMITH, A DICTIONARY OF GREEK AND ROMAN ANTIQUITIES (1875), *available at* http://www.ukans.edu/history/index/europe/ancient_rome/E/Roman/Texts/secondary/SMIGRA*/Damnum.html (last visited Aug. 11, 2004); Wikipedia, Lex Aquilia, *available at* http://en.wikipedia.org/wiki/Lex_Aquilia (last visited Aug. 11, 2004).

95. *Id.*

96. Wikipedia, Twelve Tables, Tabula VIII (Torts), *available at* http://en.wikipedia.org/wiki/Twelve_Tables#TABVLA_VIII_.28Torts.29 (last visited Aug. 11, 2004).

97. Schröder, *supra* note 74, at 13.

98. *Id.*

99. *Id.*

100. *Id.*

subsequently added *Novellae Constitutiones* include the later statutes of Justinian and his successors.[101]

Within the sphere of the Civil Law, the Roman law influence has been varied and deep.[102] Expressed in the emphatic words of a New York judge, Civil Law is Roman law.[103] Over the centuries following the rediscovery of Roman law its reception in Continental Europe underwent many stages.[104] The glossators who emerged in the late 11th century annotated the old texts of the *Corpus Juris Civilis*.[105] The post-glossators of the 14th century moved from explanation to practical application of the Roman texts as the law governing real-life contexts.[106] With the advent of nationalism the reception process fractured into separate Nordic, French, and Germanic variants.[107] From the end of the 16th century until the 19th century the *usus modernus pandectarum* in Germany denoted the contemporary use of the digest, enriched by German law.[108] The pandectist science of the 19th century, which culminated in the promulgation of the BGB, collected, systematized, and defined legal notions and concepts.[109]

Within the structure and method of the Common Law Roman law influence has been less prevalent and sustained.[110] The Common Law itself was developed by tradition, custom, and precedent among the Anglo-Saxon peoples, especially in England.[111] In the 12th century the Plantagenet King Henry II unified the law "common" to the country through the incorporation and elevation of divergent local customs to the national level.[112] Lay persons started to organize themselves into "inns of

---

101. *Id.* at 14.

102. von Mehren, *supra* note 63, at 2.

103. Personal conversation with Prof. John Wolff, Georgetown University Law Center (June 14, 2004) (referring to language in a judgment handed down in 1804, the year of the Code Napoléon).

104. Thomas Rüffner, Questions and Answers on Roman Law, *available at* http://www.jura.uni-sb.de/Rechtsgeschichte/Ius.Romanum/RoemRFAQ-e.html (last visited Aug. 11, 2004).

105. *See* Schröder, *supra* note 74, at 49-50 (mentioning Irnerius and his four disciples (Bulgarus, Martinus, Jacobus, and Hugo), Azzo, and Accursius); Rüffner, *supra* note 104 (explaining that Accursius wrote the seminal collection called The Gloss (*glossa ordinaria*), which provided the basis for all further elaboration of the *jus commune*).

106. *See id.* at 50 (naming Bartolus and Baldus).

107. Wikipedia, Civil Law, *available at* http://en.wikipedia.org/wiki/Civil_law (last visited Aug. 11, 2004).

108. *See* Schröder, *supra* note 74, at 68-69 (distinguishing the earlier *mos italicus*).

109. *See id.* at 123-27 (describing the work of Windscheid as well as counter trends).

110. von Mehren, *supra* note 63, at 2.

111. KEVIN W. RYAN, AN INTRODUCTION TO THE CIVIL LAW 22 (1962).

112. Wikipedia, Common Law, *available at* http://en.wikipedia.org/wiki/Common_law (last visited Aug. 11, 2004) (offering 1154 AD).

court," thus chipping away at the monopoly on legal knowledge previously enjoyed by the clergy who favored the Civil Law.[113] Four centuries later efforts towards a wholesale reception of Roman law were deflected.[114] One commentator has summarized the overall subtle impact of Roman law within the Common Law as a function of having been administered in "small homeopathic doses."[115]

The ECJ's requirements governing Member State liability for legislative injustice, without mentioning German law professor Karl Larenz by name, appropriate his theory of the Protective Purpose of the Norm (*Schutzzweck der Norm*), which teaches that, for a legal attribution, the damages must fall within the protective scope of the infringed law.[116] Viewed under the magnifying glass of Roman law, especially the ECJ's second condition, which requires that the breach in question must be sufficiently serious, intimates the locution of *damnum iniuria datum*—unjust done damage—under the *Lex Aquilia* notwithstanding the circumscribed scope of that legislation.[117] In the light of the casuistic Aquilian blueprint the ECJ seemingly adopts the posture of post-pandectist borrowing, chiseling, and interpolating Roman law originals to forge an integrative *usus supranationalis* by judicial authority.

C. Third Difference: Style of Legal Thinking and Reasoning[118]

The style of thinking and reasoning under the Civil Law is tied to the abstract-general conditional if-then clauses in the codes. The Civil Law accommodates interests and values contained in broader principles

---

113. STEPHEN, *supra* note 69; *see also* Wikipedia, *supra* note 112 (adding that as early as the 15th century petitions to the King in person by those dissatisfied with traditional avenues under the Common Law gave rise to the system of equity, administered by the Lord Chancellor in the courts of chancery).

114. RYAN, *supra* note 111, at 25 ("The [16th] century was decisive in the history of the common law."); STEPHEN, *supra* note 69 (observing that during the Elizabethan period the character of English jurisprudence was permanently anchored in the Common Law, and the Civil law was repudiated by the great jurists of the time, including Lord Bacon and Lord Coke).

115. For the full Holdsworth quote, see *id.* at 26.

116. *See generally* KARL LARENZ, LEHRBUCH DES SCHULDRECHTS, BAND 1, ALLGEMEINER TEIL (1982); KARL LARENZ & CLAUS-WILHELM CANARIS, LEHRBUCH DES SCHULDRECHTS, BAND 2, BESONDERER TEIL (1994). For judicial sanctioning by the German Federal Supreme Court (Civil Matters), see BGHZ 27, 140.

117. *See* Wikipedia, *supra* note 94, Lex Aquilia, *available at* http://en.wikipedia.org/wiki/Lex_Aquilia (last visited Aug. 11, 2004) (summarizing that (1) the first chapter obligated someone who unlawfully killed another's slaves or four-legged beast to pay the disadvantaged party the highest value enjoyed by the slaves or the beast over the past year; and (2) the third chapter concerned the wrongful burning, breaking or destroying of not only slaves and four-legged beasts but also other things).

118. von Mehren, *supra* note 63, at 2.

and rules.[119] This holds true in particular for the German penchant for professorialisms.[120]

The Common Law proceeds in fact-bound fashion focusing on the interests and values at stake in specific-concrete settings.[121] Thinking and reasoning are advanced in a sweeping and elaborative fashion.[122] Casuistry, a form of case-based reasoning, which revolves around establishing plans of action to respond to particular facts,[123] is understood as a branch of applied ethics.[124]

The rise of the principle of Member State liability reflects the ECJ's commitment to integration through making available a judicial remedy that reinforces the subjective rights of vigilant individual parties under Community law.[125] Especially when compared to the majority of the ECJ's rather terse, almost minimalist, decisions, the more elaborative style espoused in *Brasserie*[126] has a Common Law ring.[127] The ECJ's *Brasserie* judgment does not tire in referencing and processing the facts despite the abstract nature of the reference proceeding. And although the trio of requirements has over the years become mantra-like, the ECJ, in the style of the Common Law, emphasizes that the liability requirements applicable in a particular case will always be driven by the specific factual circumstances under litigation.[128]

---

119. Tetley, *supra* note 77, at 702.

120. von Mehren, *supra* note 63, at 3 (emphasizing the influences of the Lutheran jurists and the *Pandekten* School).

121. *Id.* at 2.

122. Tetley, *supra* note 77, at 701.

123. Wikipedia, Casuistry, *available at* http://en.wikipedia.org/wiki/Casuistry (last visited Aug. 11, 2004).

124. Wikipedia, Applied Ethics, *available at* http://en.wikipedia.org/wiki/Applied_ethics (last visited Aug. 11, 2004).

125. Puder, *supra* note 2, at 368 ("The new feature complements the broad spectrum of Community law inspired remedies in the broadest sense, including restitution, interim relief, damages based on direct effect and indirect effect as well as *Francovich* principles, and informal complaint avenues.").

126. *Id.* at 334 (observing that the ECJ's philosophical rationale and solemn tone of analysis describing the foundations of Member State liability are strikingly similar to its first-generation cases of the early 1960s).

127. *But see* Sjef van Erp, *European Case Law as a Source of European Private Law: A Comparison with American Federal Common Law*, 5.1 E.J.C.L (2001), *available at* http://www.ejcl.org/54/art54-1.html (last visited Aug. 17, 2004) (offering that "European case law is heavily influenced by continental-European, code-based legal reasoning" which creates a "climate . . . to create a coherent system of principals and rules" as a starting point for future cases).

128. *See Francovich*, 1991 E.C.R. I-5357, I-5415 [1993] 2 C.M.L.R. 66, 114.

III. CONCLUSION

This tour de force has yielded quite a mosaic. As one can tell by the use of somewhat evasive fuzzy-isms such as "connote", "sound," "styled as," "appropriate," "intimate," "has a ring," and "in the style of," it does not seem advisable to press the ECJ's *Brasserie* judgment into the drawer of one crystalline legal tradition, especially when considering that tort under Common law and delict under the Civil Law have been converging.[129] The Common Law treats tort as a civil wrong for which the law provides a remedy.[130] A delict under the Civil Law represents an unlawful and culpable intrusion into a right protected by the law or a legal good of a person that thereby incurs damage.[131]

Brasserie intimates the contours of a rising EU legal tradition[132]—one that is elastic and influx. In this sense the Jean Monnet method of progressive integration, which encapsulates the overall secret and relative success of the EU and its Community core,[133] extends to the growing pockets of European private law. And here is the good news. Within the evolving gravity field of an ever closer union among the peoples of Europe[134] the horizons look bright for comparativists.

---

129. For some civilian principles now in the Common Law, see Tetley, *supra* note 77, at 713 (listing negligence—delict—general tort of negligence, and contributory negligence).

130. Wikipedia, Tort, *available at* http://en.wikipedia.org/wiki/Tort (last visited Aug. 11, 2004). The term "tort" (wrong) comes from Law French, an archaic language based on Norman French. Wikipedia, Law French, *available at* http://en.wikipedia.org/wiki/Law_French (last visited Aug. 11, 2004).

131. *See* SHAEL HERMAN, THE LOUISIANA CIVIL CODE—A EUROPEAM LEGACY FOR THE UNITED STATES 50-53 (1993) (deriving the origins of the term delict); *see also* DIETER MEDICUS, BÜRGERLICHES RECHT (1996) (distinguishing (1) liability for injustice based on fault; (2) liability for injustice based on rebuttably presumed fault; (3) strict liability; and (4) vicarious liability).

132. For the general proposition of an emerging "distinct" EU legal tradition, see von Mehren, *supra* note 63, at 16 ("The European Union has brought a confrontation of the Civil Law, the Common Law, and the mixed Scottish and Scandinavian systems that could well result in a new system that blends in an original fashion these legal traditions."). *But see* Sjef van Erp, *supra* note 127 (concluding that while "[m]uch attention is being paid to areas in which private law might become European instead of remaining strictly national . . . European private case law is the exception, not the rule").

133. Jean Monnet, *A Ferment of Change*, 1 J. COMMON MKT. STUD. 203, 211 (1962); *see also* Centro Italia Europea—Eurit, Grand-Place Europe, Jean Monnet—His Life and Work, *available at* http://www.eurplace.org/federal/monnet.html (last visited Feb. 5, 2003). For an in-depth discussion of functionalism, see Renaud Dehousse, Rediscovering Functionalism, 07/00 Jean Monnet Working Paper, Symposium (2000).

134. EU Treaty, prmbl. & art.1; EC Treaty, prmbl.