

Towards a procedural ius commune?

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TOWARDS A PROCEDURAL IUS COMMUNE?

C.H. van Rhee, Maastricht University¹

Introduction

During the last decade or so, the question whether or not European legal systems are converging has been debated fiercely. According to the main proponent of the anti-convergence argument, Pierre Legrand, no convergence is taking place. This author holds that differences in legal culture prevent the various national systems from growing together despite the introduction of similar rules of law in the different member states of the European Union.² Other authors, on the contrary, are convinced that approximation of the national systems of law is taking place.³ Some of these authors also believe that the creation of a harmonised set of legal rules for the European Union is a feasible option. This conviction is shown strikingly in the second edition of *Towards a European Civil Code* edited by A.S. Hartkamp and others.⁴ Unlike the first edition of this book, the considerably revised second edition takes the feasibility of a European *ius commune* for granted; it directly addresses the possible content of harmonised European rules.⁵

On an earlier occasion,⁶ I have expressed the opinion that I tend to agree with the authors who favour the convergence argument. Although one might concur with Legrand that common rules of law do not necessarily guarantee their uniform interpretation and application, it cannot be denied that the introduction of similar rules nevertheless brings legal systems somehow closer together than they were before. Additionally, the existence of similar rules may trigger their uniform interpretation, at least to some extent, in situations where information on their interpretation and application in one or more jurisdictions is readily available to courts and practitioners. An example of such a situation may be found in the Netherlands at the time of the introduction of the 1838 Code of Civil Procedure: not only was this Code to a large extent modelled on the French *Code de procédure civile*, so, too were French treatises on civil procedure, which were apparently widely available and cited frequently in the first decades of the Code's existence.⁷

The above example is a special case in the sense that it deals with an area of the law which for a long time has been considered to be immune from foreign influences and, therefore, from anything but the most incidental and haphazard converging tendency (mistakenly so, as the example shows). In support of the thesis that civil procedure is a purely national branch of the

1. The author would like to thank Professor W. de Vos (Stellenbosch) for correcting the English of an earlier version of this paper.

2. E.g. P. Legrand, European Legal Systems are not Converging, *International and Comparative Law Quarterly* (1996), 52ff; Idem, On the Unbearable Localness of the Law: Academic Fallacies and Unseasonable Observations, *European Review of Private Law* (2002), 61ff.

3. E.g. H.P. Glenn, La civilisation de la 'common law', *Revue Internationale de Droit Comparé* (1993), 567; B.S. Markesinis, Learning from Europe and Learning in Europe, in: B.S. Markesinis (ed.), *The Gradual Convergence: Foreign Ideas, Foreign Influences, and English Law on the Eve of the 21st Century*, Oxford 1994, 30; A. Watson, *Legal Transplants and European Private Law* (Ius Commune Lectures on European Private Law 2), Maastricht 2000.

4. First edition Nijmegen 1994; second edition Nijmegen 1998.

5. Cf. the prefaces to the first and the second editions.

6. See my 'Civil Procedure: a European Ius Commune?', *European Review of Private Law* (2000), 589ff.

7. French textbooks are, for example, frequently cited by A. Oudeman, *Het Nederlandsch Wetboek van burgerlijke regtsvordering, naar deszelfs beginselen ontwikkeld en door formulieren in praktijk gebragt*, 4 vols., Groningen 1842-1845; A. de Pinto, *Handleiding tot het Wetboek van burgerlijke regtsvordering*, 2 vols., 's-Gravenhage 1845.

law, it has been claimed that procedure is very much linked to court organisation, an area of the law which is traditionally considered to be the exclusive domain of the national legislature. Additionally, it is held that the way in which litigation is conducted is closely linked to national convictions and traditions. It seems, however, that these ideas are subject to erosion. After all, the new Article 65 of the *Treaty Establishing the European Community* lays down that ‘Measures in the field of judicial cooperation in civil matters having cross border implications, to be taken in accordance with Article 67 and insofar as necessary for the proper functioning of the internal market, shall include: [...] c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.’ Even before the introduction of this Article, however, international attempts to harmonise procedural legislation had already been made. Of course, the report of the Storme Working Group immediately comes to mind as regards harmonisation of procedural law within the European Union.⁸ Currently, further attempts are being made on an even wider international level under the aegis of the *American Law Institute* and *Unidroit*.⁹

The present article seeks to question the anti-convergence argument from the perspective of legal history. It gives a brief overview of the shared legal past of most modern systems of civil procedure in Europe and tries to identify areas of procedural law which have been susceptible to convergence, areas of the law which in my opinion merit further investigation. The main focus of attention will be on the influence of continental civil procedure on its English counterpart. Before addressing this theme, however, something needs to be said about the terminology *ius commune* which I use in this article as well as about the reception of the Romano-canonical procedure in secular courts.

1 *Ius Commune*

Today, *ius commune* is often used to denote a common law of Europe, i.e. a set of rules shared by the various member states of the European Union. In that sense, *ius commune* is to a large extent something of the future, a goal to be achieved. In the past, however, this was not the case. At that time *ius commune* was in many instances *not* used to refer to a common set of legal rules. As P. Nève has shown,¹⁰ the historical terminology *ius commune* had many different meanings. Usually, it could best be defined as a common legal science (doctrine),¹¹ mainly based on Roman Law (*Corpus Iuris Civilis*) and Canon Law (*Corpus Iuris Canonici*). In the field of procedure, however, the situation might have been different. In order to make this clear, we need to have a look at the early history of the modern systems of procedural law.

As we all know, the ‘mother’ of most modern systems of civil procedure on the European Continent is the so-called Romano-canonical procedure, which came into existence in the 12th century. It was developed on the basis of materials derived from the *Corpus Iuris Civilis* as well as from some other sources, for example those belonging to Canon Law.¹² According to Nève,¹³ unlike substantive private law, procedure consisted from the outset of a blend of Roman and Canon Laws. It could therefore rightly be considered to be a *ius commune*, not in the traditional sense, but in the sense of a single system of procedural law built from elements of the two learned laws.

8. M. Storme (ed.), *Approximation of Judiciary Law in the European Union*, Dordrecht etc. 1994.

9. *Principles and Rules of Transnational Civil Procedure* at <http://www.ali.org/ali/transrules.htm>.

10. P.L. Nève, *Ius Commune oftewel ‘gemeen recht’: traduttore traditore?*, in: *Tertium datur: Drie opstellen aangeboden aan Prof. mr. J.A. Ankum*, Tilburg 1995, 3-58. See also idem, (Europäisches) *Ius Commune* und (nationales) *gemeines Recht: Verwechslung von Begriffen?*, in: G. Köbler, H. Nehlsen (eds.), *Wirkungen europäischer Rechtskultur*, Festschrift für Karl Kroeschell zum 70. Geburtstag, Munich 1997, 871ff.

11. Also R. Schulze, *Allgemeine Rechtsgrundsätze und europäisches Privatrecht*, *Zeitschrift für Europäisches Privatrecht* (1993), 442.

12. See e.g. R.C. van Caenegem, *History of European Civil Procedure*, in: *International Encyclopedia of Comparative Law* XVI, Tübingen/Paris/New York n.d., Chapter 2, 16.

13. Nève, *Ius Commune*, 20-21.

Quickly, the new procedure became a separate field of study, something which appears from the considerable body of contemporary literature solely dealing with procedural topics.¹⁴ This was a new development, since procedure was not treated as a separate subject in the *Corpus Iuris Civilis*. There, rules concerning procedure (often rules of the procedure *extra ordinem* from the time of Justinian) were not grouped together and, consequently, it was the task of the early students of Roman Law to bring the scattered procedural rules from the *Corpus Iuris* together.

The new procedure was applied by a new type of ecclesiastical courts known as officialities. These officialities were spread all over Europe and dealt with a wide range of issues. As a result, the Romano-canonical procedure became known in the greater part of the medieval Christian world.

As regards the particular way in which the Romano-canonical procedure was applied at the ecclesiastical courts, final conclusions cannot be drawn at the present stage of research. The available evidence suggests, however, that it was not applied in an identical manner (something that would, indeed, have been surprising in the light of the local differences that exist even today in a single codified legal system); variations can be observed.¹⁵ As regards the ecclesiastical courts in England, for example, R.H. Helmholz states: 'It would be fair to say that the procedure used in the English spiritual courts always followed the outlines of that found in contemporary *ordines* and other procedural manuals, but that it often did so in simplified fashion.' These variations may prevent us from referring to the Romano-canonical procedure as a *ius commune* in the sense of a common procedural law for the ecclesiastical courts in Europe. However, after listing the differences between the law on the books and the rules of procedure actually applied in the spiritual courts, professor Helmholz also remarks that '[t]hese, and other such features, seem to have been permissible variants of Romano-canonical procedure. Not all were features one could read about directly in the medieval handbooks. But neither were they contrary to the canon law.'¹⁶ Whether one can refer to the Romano-canonical procedure as *ius commune* in the sense of a common European law of procedure is, therefore, to a large extent a matter of personal preference. In the present article I opt for using the terminology *ius commune* in referring to the learned Romano-canonical procedure. One should, however, be aware of the limitations of this terminology.

2 The reception of the procedural *ius commune* in secular courts

2.1 Reception on the Continent

The introduction of a learned procedure in the domain of the secular courts of the European Continent¹⁷ was the result of different factors (which can only be discussed here in part). One of them was that clerics regularly acted as judges in superior lay courts. Apart from a thorough knowledge of substantive Roman and Canon Law, they were usually acquainted with the Romano-canonical procedure. These lawyers often had recourse to the *ius commune* when it was possible and necessary to supplement and modify the rules of procedure of the secular courts to which they were attached. Additionally, European rulers introduced Romano-canonical rules when they made attempts to modernise and centralise the administration of justice in their realm,

14. On the early procedural literature, see L. Fowler-Magerl, *Ordo iudiciorum vel ordo iudiciarius*, Frankfurt a. M. 1984; W. Litewski, *Der römisch-kanonische Zivilprozess nach den älteren ordines iudicarii*, 2 vols., Kraków 1999.

15. Also R.C. van Caenegem, *European Law in the Past and the Future. Unity and Diversity over Two Millennia*, Cambridge 2002, 20.

16. R.H. Helmholz, The Universal and the Particular in Medieval Canon Law, in: P. Landau, J. Mueller (eds.), *Proceedings of the Ninth International Congress of Medieval Canon Law* (Monumenta Iuris Canonici, Series C: Subsidia, Vol. 10), Vatican City 1997, 653.

17. When mentioning continental Europe, one should not forget that Scotland, at least from the 16th century, also belonged to the continental tradition. The supreme civil court in Scotland, established as a 'college of justice' in May 1532, for example, used a procedure that had a distinct Romano-canonical outlook. See J. Finlay, *Men of Law in pre-reformation Scotland* (Scottish historical review monograph 9), East Lothian 2000, esp. Chapter 5.

i.e. when they deliberately introduced new rules of process. This was to some extent the result of the apparent superiority of the new procedure as compared with indigenous legal practice. Trial by battle and ordeals, for example, was a common feature of the old procedure. These methods lost their appeal in the quickly changing late medieval society. This society needed a new, rational procedure for which the Romano-canonical procedure was able to provide the model.

The reception of Romano-canonical rules of procedure did not result in a uniform procedure on the European Continent. As stated above, even at the level of the ecclesiastical courts, procedure showed local differences. Such differences were even more likely within the atmosphere of the secular courts since these courts were not subject to a single Pope and a single Canon Law, but to different princes and different regional customs. The differences that may be observed in the various procedures of the secular courts in Europe are so numerous, that it is wrong in my opinion to use the terminology *ius commune* in order to refer to these procedures. Nevertheless, marked similarities did exist. I will mention just a few examples.

First, the Romano-canonical model gave rise to procedures that were mainly written. These procedures relied heavily on documents; all steps in a lawsuit had to be recorded. This was in sharp contrast to indigenous legal practice, where the oral element was preponderant. As a result of the reception of the Romano-canonical forms of process, the oral element in the procedures of continental Europe became less important and nearly disappeared in some places.¹⁸ Secondly, the Romano-canonical procedure furnished European lawyers with a procedural terminology and concepts that were, at least to a certain extent, standardised. All European lawyers were (and are) familiar with terms such as *citatio*, *exceptio* or *litis contestatio*.¹⁹ This, of course, facilitated the international legal debate. Finally, the influence of the Romano-canonical model resulted in particular procedural rules to be the same in some or all continental European states. A notable example of a shared rule on the European Continent was that a single witness did not suffice for full proof. The availability of counterclaims is another.²⁰

2.2 Reception in England

The reception of the Romano-canonical procedure in English lay courts was less successful than on the European Continent. This was due to the fact that at the time of the initial reception of the learned laws on the Continent, i.e. in the 12th century, in England the ‘common law emerged [...] from the efficient and rapid expansion of institutions which existed in an undeveloped form before 1066.’²¹ This common law may rightly be called a *ius commune* for England in the sense of a system of rules common to the whole realm. While other European ‘nations’ turned to Roman Law for modernisation of the law, England developed its own legal system.²² This system was sufficiently modern to meet the demands of the time. Therefore, Roman Law did not gain as much ground there as on the Continent. The same was true for the Romano-canonical procedure. The exclusion of this procedure was reinforced by the fact that under the common law, procedure and substantive law were interrelated subjects. Forms of action dominated the scene and the particular procedural rules to be followed were determined by the available writ.²³

18. Van Caenegem, *History*, 12.

19. For the Romano-canonical variant of procedure applied at one of the supreme courts of the Low Countries, the Great Council of Malines, see my *Litigation and Legislation. Civil Procedure at First Instance in the Great Council for the Netherlands in Malines (1522-1559)*, Brussels 1997.

20. It should be noted, however, that, although counterclaims were (and are) allowed in most continental jurisdictions, a difference of opinion existed (and still exists) regarding whether or not a counterclaim needs to be related to the original claim. This subject is discussed in my ‘De vordering in reconventie in Nederland en Europa’, in: E.H. Hondius e.a. (eds.), *Liber Amicorum Paul Meijknecht. Van Nederlands naar Europees Procesrecht?!*, Deventer 2000, 227ff.

21. J.H. Baker, *An Introduction to English Legal History*, 3rd edition, London etc. 1990, 14.

22. Van Caenegem, *History*, 15.

23. F.W. Maitland, *The Forms of Action at Common Law: A Course of Lectures*, Cambridge 1968 (reprint), 2: ‘The choice [between forms of action] is not merely a choice between a number of queer technical terms, it is a choice between methods of procedure adapted to cases of different kinds.’

However, even though the common law furnished England with its own substantive and procedural law, this did not mean that English and continental systems of procedure lacked common features. On the contrary, similarities did exist. Some of these similarities might have been remnants of older forms of process which were incorporated in the Romano-canonical procedures of the Continent and the common law forms of action. An example are the so-called 'essoins'.²⁴ Both according to the medieval common law²⁵ and according to procedure on the Continent,²⁶ a litigant who failed to appear in court was allowed to send excuses by so-called 'essoiners' which in French procedural language and in English Law French were called 'essoins.' The messengers, known as 'essoiners', could excuse the defaulter from being absent by explaining that he was sick, abroad, on the King's service, cut off by a flood, a broken bridge, and so forth. 'Essoins' secured delays of varying length.

The observance of (aspects of) the rule *audite et alteram partem*, i.e. the rule that both parties should be given equal opportunities to be heard by the court, may also be an example of continuity in European civil procedure finding its origin in the period from before the introduction of the new systems of procedural law in England and on the Continent.²⁷ This rule dominated (and still dominates) procedure both in common law and civil law jurisdictions. Observance of the rule appears where courts go to particular lengths to make the parties appear before them.²⁸ Defendants need to be summoned. If they do not make their appearance in court, proceedings are postponed. After appearance, the litigants have the opportunity to respond to the allegations of their opponents. Although differences may be observed in this area of the law,²⁹ the basic rule is the same everywhere.

Apart from the above similarities, further similarities came into being as a result of the fact that the *ius commune* influenced English procedure in various ways. A channel through which English law was influenced by Roman and Canon Law at an early stage was equity. Equity aimed at mending defects of the common law. J.H. Baker mentions the example of the debtor who gave his creditor a sealed bond, but did not ensure that it was cancelled when he paid up. The common law regarded the bond as incontrovertible evidence of the debt, and so payment was no defence. In such situations, petitions for relief were presented to the English King. The King had these petitions decided by his Chancellor, not according to the rules of common law but on the basis of equity and justice. Slowly, this gave rise to a new jurisdiction which became known as equity.³⁰

At an early stage most Chancellors were clerics and, therefore, acquainted with Roman and Canon Law as well as with the Romano-canonical procedure. It is not surprising that they, just as their colleagues at the secular courts on the European Continent, made use of this knowledge and, as a result, the body of law which became known as equity shows marked influences of the the learned law.³¹ Even professor J.H. Baker, who in his *Introduction to English*

24. Van Caenegem, *History*, 9.

25. T.F.T. Plucknett, *A Concise History of the Common Law* (5th ed.), Boston 1956, 384.

26. For France, see A. Tardif, *La procédure civile et criminelle aux XIIIe et XIVe siècles ou procédure de transition*, Paris 1885 (reprint Aalen 1974), 55-56. For the Low Countries, see Ph. Wielant, *Practijke Civile*, Antwerp 1573 (reprint Amsterdam 1968), 89-91.

27. On the history of this rule from Roman times, see L. Coenraad, *Het beginsel van hoor en wederhoor in het Romeinse procesrecht*, Rotterdam 2000.

28. For common law jurisdictions, see Plucknett, *A Concise History*, 385.

29. In common law jurisdictions, for example, it is usually the plaintiff who has the last word, whereas on the Continent the last word is traditionally reserved for the defendant.

30. See e.g. A. Reppy, The Field Codification Concept, in: A. Reppy (ed.), *David Dudley Field Centenary Essays. Celebrating One Hundred Years of Legal Reform*, New York 1949, 21ff.

31. Van Caenegem, *History*, 45: 'The special nature of the chancellor's intervention and the fact that he was a cleric and surrounded by a staff of clerics led to the adoption of a procedure that was very different from that of the Common Law and very close to the Romano-canonical procedure, especially in the summary form of the decretal *Saepe*, which had been issued in the early fourteenth century.' See also R.W. Millar (ed.), *A History of Continental Civil Procedure*, London 1928, 19-20, who calls chancery procedure 'the joint product of canon and common law'; D.S. Clark, *The Civil Law*

Legal History is generally rather sceptical as regards the influences of the learned law on English law, states: ‘The procedure [of the Court of Chancery] clearly owed something to the inquisitorial³² procedure of the canonists.’³³ This is, however, not to say that only equity was influenced by the *ius commune* and that the common law remained immune from these influences. An example of civilian influences on the common law in the early-modern period can be found in the area of proof (a subject which, at least from a continental perspective, clearly belongs to the domain of procedural law).

In his excellent book on *The Law of Proof in Early Modern Equity*,³⁴ Michael Macnair explains that, in the period discussed by him, the common law should be viewed as local positive law, within the general hierarchy of laws accepted in later medieval and early modern thought (the hierarchy being divine law, natural law, the law of nations and positive law). Within this framework, he claims, the basic ideas of the law of proof were considered to be of divine law, since they could be supported from the Bible. As such they were binding on all tribunals. Divine law as a source was later replaced by more general natural law concepts drawn from the universal usages of nations. A substantial part of these concepts was to be found in the civilian and theological literature and did directly influence the common law of proof. According to the learned author, this may have been due partly to the fact that courts of equity sought to offer relief from the defects of the common law. Some of these defects were to be found in the existing rules of proof at common law (for example those concerning common law estoppels and the absence of compulsion of witnesses). By reforming their proof rules, common law lawyers could prevent the intervention of equity courts and consequently increase their business.

The question whether or not, in adapting the common law, English common law lawyers consulted civilian and theological sources themselves has often been answered negatively. It has been suggested that these lawyers copied ‘civilian’ concepts of proof from equity. Equity might indeed have been the origin of these concepts at common law since, according to Dr. Macnair, there are at least three reasons to suppose that equity proof was a system which applied the general principles of the Roman-Canon Law of proof (although the author also claims that the rules of proof in equity were certainly not equivalent to those of the Roman-Canon Law). The author states: ‘The first [of these reasons] is parallelism of

Influence on David Dudley Field’s Code of Civil Procedure, in: *The Reception of Continental Ideas in the Common Law World (1820-1920)*, Berlin 1993, 69 (‘the common Romano-canonical influences on ... chancery ... procedure’); *ibidem*, 75-76 (‘Equity courts ... were viewed as Romano-canonical’).

32. Even though it must be admitted that the Romano-canonical procedure can be described as inquisitorial in certain respects, describing this procedure as ‘inquisitorial’ *tout court* is in my opinion overstating the case. The same is true for modern systems of civil procedure on the European Continent, which, however, incidentally are also described as inquisitorial by some Anglo-American lawyers. Indeed, before the introduction of the recent reforms in English civil procedure, the powers of the English judge were rather limited (they still are for today’s American judge). A comparison of his position with that of his continental counterpart inevitably leads to the conclusion that continental systems are *less* adversarial. Nevertheless, some kind of party autonomy has always been a feature of both modern continental systems of civil procedure and of the Romano-canonical procedure. Therefore, calling these procedures ‘inquisitorial’ in the sense of completely judge-driven gives, I respectfully submit, the wrong impression. J.M.J. Chorus agrees with this point of view, at least as regards modern continental systems of civil procedure. See his ‘The Judge’s Role in the Conduct of Civil Proceedings’, in: D.L. Carey Miller, D.W. Meyers (eds.), *Comparative and Historical Essays in Scots Law*, Edinburgh 1992, 32ff. See also *idem*, Civilian Elements in European Civil Procedure, in: D.L. Carey Miller, R. Zimmermann (eds.), *The Civilian Tradition and Scots Law. Aberdeen Quincentenary Essays*, Berlin 1997, 299: ‘At the outset we must forget this inquisitorial label. It is an unfortunate label because to lawyers of today it no longer refers to the great traditions of continental Romano-canonical procedure and, indeed, those of the old Court of Chancery and the Court of Session of the 17th and 18th centuries, which might, with greater justification, be styled inquisitorial (with a positive connotation).’

33. Baker, *An Introduction*, 119. On the history of the Court of Chancery, see the introduction to D.C.C. Yale (ed.), *Lord Nottingham’s Chancery Cases* (Selden Soc. Publ. 79), London 1961, 7-207.

34. Berlin 1999.

content; the second linguistic echoes; and the third instances of direct citation.³⁵ There are various situations in which rules indeed might have been copied by common law lawyers from equity (for example rules concerning ‘discovery’ and *subpoenas ad testificandum*). However, in other areas the sources for equity proof doctrine largely begin at the same period as the first steps in common law evidence doctrine (e.g. documentary originals, exceptions to witnesses) and, as a result, equity could not have been a source. According to Dr. Macnair, in the latter areas there is direct or near-direct evidence of common law lawyers referring directly to civilian sources on proof matters.³⁶

Consequently, it can be stated that the law of proof was in its own time a *convergence* (albeit not a complete one) between the common and the civil laws. True, later developments (mainly the abolition of the old law of proof in continental Europe at the end of the 18th century) resulted in continental law and English law, after a period of convergence, growing apart again in this particular area of the law. But, the point I would like to stress here is that even the common law of proof did not flourish in ‘noble isolation’³⁷ from the learned law. As will be shown hereafter, more examples in the area of procedure can be mentioned, examples that sometimes have resulted in lasting similarities between England and the Continent. These date mainly from the 19th century, and it is on this period that I would like to focus attention now.

3 Codification of procedure

The 19th century was the age of codification. It witnessed the birth of various codes, including Codes of Civil Procedure. Although the codification movement was very successful on the European Continent, it did not gain ground in England, the country of Jeremy Bentham who seems to have coined the term ‘codification.’ However, even in 19th century England, the legislature was active in the field of procedure. England gave birth to some very important statutes regarding judicial organisation and procedure. The most important Acts date from 1873 and 1875 and are known as the Judicature Acts. These Acts resulted in a streamlined court system. Courts of common law and equity were fused and the forms of action were abolished. The Judicature Acts provided a uniform ‘code’ of civil procedure and pleading.³⁸

On the Continent, the law, including procedure, lost some of its European appearance as a result of the activities of the national legislatures. However, similarities continued to exist in the juridical landscape. Most codifications did not break with tradition. The codification of judiciary law was based on Romano-canonical models. In France, for example, the ordinance on procedure of 1667,³⁹ which combined Romano-canonical and indigenous elements, formed the basis of the Code of Civil Procedure (1806). In Germany the *Zivilprozessordnung* (1877) had a distinctly Romano-canonical flavour even though it contained important innovations.⁴⁰

Similarities on the European scene were caused not just by the Romano-canonical background of many codified rules. Additionally, the influence of some of the procedural codes and ideas in other countries resulted in a similarity of different national procedures. The French *Code de Procédure Civile* of 1806 was very influential. The Netherlands, Belgium, Germany, Italy, Spain and Switzerland were all influenced by this code.⁴¹ In Holland and Belgium the French Code of Civil Procedure continued to apply after the defeat of the French emperor. In

35. See p. 289.

36. See p. 38.

37. Baker, *An Introduction*, 35.

38. W. Holdsworth, *A History of English Law* XV, (4th ed.) London 1994, 128.

39. *Ordonnance civile pour la réformation de la justice* of Louis XIV (also known as *Code Louis*).

40. I do not agree with P.H. Lindblom, who states: ‘In Germany, there seems to be no reason to characterise the national procedural law as a version of the procedural law of *ius commune*’ (Harmony of the Legal Spheres: A Swedish view on the construction of a unified European procedural law, *European Review of Private Law* 1997, 18).

41. Van Caenegem, *History*, 91.

Belgium it remained in force for more than 150 years until the introduction of the new 1967 Code. Although the Netherlands only left the French code in force until 1838, the new Dutch code nevertheless leaned heavily on the French example; many of the rules it originally contained were a direct translation from the provisions of the French code. In the more recent past, Austrian-German procedure has been very influential, for example in France and Italy.⁴²

Although the activities of the national legislatures might have caused continental procedure to lose some of its European appearance, the opposite is true for the English Judicature Acts. In England, the new legislation brought procedure closer to continental models. J. Chorus states: 'In England ... the new forms of process, as laid down in the Judicature Acts of 1873 and 1875 and in the Rules of Court which came to supplement these Acts, must be regarded as the triumph of chancery, and thus the triumph of civilian ideas.'⁴³ How did this change come about? Unfortunately, not all details concerning the drafting of the Judicature Acts have been explored. We do not know completely, for example, to what extent foreign examples (including those from Scotland) were used as a source of inspiration. Nevertheless, it seems likely that developments across the Atlantic played a role, since some of the more important innovations introduced by the Judicature Acts in English procedural law had several decades before been incorporated in the Code of Procedure for the State of New York. Surprisingly enough, until now references to this so-called Field Code (after its main drafter) have only been found very sparingly in sources related to the drafting of the Judicature Acts.⁴⁴

The Code of Procedure of New York was one of several codes drafted by David Dudley Field (1805-1894), who dominated the American codification scene for a considerable part of the 19th century.⁴⁵ The Code of Procedure was one of the few codes which were actually enacted. This happened in 1848. The new procedure for New York combined elements of the forms of action at common law and the procedure in equity, the emphasis being, at least according to some authors, on the latter procedure.⁴⁶ The Field Code shows a marked influence of the Romano-canonical procedure. This might have been the result of two factors: (1) the fact that Field used equity as a source for his new procedure; and (2) the fact that some New York rules of procedure were related to procedural rules enacted in the State of Louisiana, a civil law jurisdiction (additionally, the drafters of the Field Code occasionally refer to Scotland). The 1825 Louisiana Code of Procedure was, according to D. Clark, probably the most important vehicle for Field's ideas about the codification and content of civil procedure. This code was based on French, Spanish, and Roman civil law sources as well as the common law tradition. The *Corpus Iuris*, the *Siete Partidas*, and the writings of Jean Domat (1625-1696) and Robert Pothier (1699-1772) were, for example, consulted when drafting this piece of legislation.⁴⁷ If it can be shown that the procedural rules of the Judicature Acts have been influenced by the Field Code and, consequently, by the Romano-canonical procedure - either directly or through some intermediate stage (possibly the procedural legislation for British India, dating from the 1850's)⁴⁸ - this would

42. R. Stürner, Das Europäisches Zivilprozessrecht - Einheit oder Vielfalt?, in: *Wege zu einem europäischen Zivilprozessrecht. Tübinger Symposium zum 80. Geburtstag von Fritz Baur*, Tübingen n.d., 23.

43. Chorus, *Civilian Elements*, 296.

44. J. Jacob, The Judicature Acts 1873-1875, Vision and Reality, in: *The Reform of Civil Procedural Law and Other Essays in Civil Procedure*, London 1982, 315-316.

45. On Field, see H.M. Field, *The Life of David Dudley Field*, New York 1898; A. Reppy (ed.), *David Dudley Field Centenary Essays. Celebrating One Hundred Years of Legal Reform*, New York 1949.

46. Cf. A. Reppy, *The Field Codification Concept*, 49ff. An author who does not agree with this point of view is S.N. Subrin, David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision, *Law and History Review* 1988, 337: 'They [i.e. Field and the other Code commissioners] used the merger of law and equity as much as an occasion for conforming equity to common-law procedure as the reverse'; *ibidem*, 338: 'It was more obvious to those closer to David Dudley Field's times that this Code was confining and formalistic and that Field was deeply tied to common-law procedural thought.'

47. Clark, *The Civil Law Influence*, 74.

48. I consulted *The New Procedure of the Civil Courts of British India*, 4th edition, London 1860.

be an extra argument for the thesis that the gap between continental Europe and England is not as wide as is usually thought. Further research into this topic is very much needed.

4 Common elements of civil procedure in Europe

The developments described above justify the conclusion that procedural law is not as national a subject as has long been held. Similarities between the national procedures can often be explained on the basis of contacts with foreign legal systems. I will discuss some of these similarities below. In doing so I will focus on similarities between the Continent and England. First I will discuss the 19th century and afterwards I will deal with an important example of convergence in the 20th century.

4.1 Shared elements of civil procedure in 19th century Europe

According to T. Plucknett, one of the most significant themes in the study of legal history is the growth of the power to think of law apart from its procedure.⁴⁹ This development is already apparent from Roman Law, although even at a late stage in its development procedure was discussed as an integral part of substantive law: the *Corpus Iuris Civilis* does not separate procedural issues from substantive law. The definition of procedure as a separate field of study is due to the medieval students of the Roman and Canon Laws (even though it must be admitted that elements of substantive law continued to play a significant role in procedural treatises).⁵⁰ In England, however, the separation of substantive and procedural law occurred much later in history. Although first traces of attempts to describe substantive law apart from procedure may be found in the medieval treatises of Glanvill and Bracton, the first serious attempts to separate substantive law from procedure seem to date from the 18th century. Inspiration for doing so came, according to Plucknett, from abroad. In the 18th century English lawyers took an interest in French and Dutch works, and ‘under this stimulus they attempted to think in terms of substantive law rather than merely of procedure.’ Blackstone’s *Commentaries* are a good example of this attempt. However, only the reforms of the 19th century made it possible to effectively separate substantive law from procedure⁵¹ (these reforms seem to have followed the example of the American Field Code in this respect). Currently we find both in England and on the Continent separate textbooks dealing with procedure. Additionally, courses solely concentrating on the law of procedure are a feature of many European law faculties.

A similar tendency of convergence can be witnessed in the area of forms of action available for bringing a lawsuit. At a certain point in time, the Roman Law possessed a more or less closed system of actions. Only where the complaint could be brought under one of the available *formulae* granted by the Roman *praetor* could a lawsuit be started. The writ system of the English common law resulted in a similar situation.⁵² However, things changed. As a result, the Romano-canonical procedure, as well as the continental European systems derived from it, only know a single, general action for bringing a lawsuit. The same development occurred in England as a result of the Judicature Acts. The forms of action were abolished. In their place a single, general action was created. It is not unlikely that this development was the result of civil law influences through the example of the 1848 Code of Procedure for the State of New York (Field Code): the Field Code was the first piece of legislation to mandate a single form of action in a common law jurisdiction. As in Louisiana, this action was called the ‘civil action.’⁵³

The concept ‘cause of action’ is possibly another element in the Judicature Acts that has been influenced by continental legal thinking, possibly through the Field Code. According to

49. Plucknett, *A Concise History*, 381.

50. See e.g. Ph. Wielant, *Practijke civile*.

51. Plucknett, *A Concise History*, 381-382.

52. On this issue, see Pringsheim, *The Inner Relationship between English and Roman Law*, *Cambridge Law Journal* 1935, 347.

53. Field Code §§ 1 and 4. Cf. Clark, *The Civil Law Influence*, 79 and 82.

Stephen Subrin, 'Field and the others [i.e. the other members of the codification commission] used the term 'cause of action' to try to describe those groupings of facts to which legal consequences attach.' He further mentions: "'Cause of action' was their way of describing a right of citizens that could be enforced in court."⁵⁴ Section 142 of the Field Code specifically mentions the 'cause of action' where it states that '[t]he complaint shall contain [...] [a] statement of the facts constituting the *cause of action*, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended [...].'

According to Clark, the concept of 'cause of action' can be traced back through the Louisiana Code of Practice (Article 172; there it is rendered in French as 'les motifs de l'action' and 'la cause de l'action') to the French Code of Civil Procedure.⁵⁵ However, further investigation into this matter is needed since other authors claim that 'cause of action' is a concept which can already be found in English 15th century legal sources, and it is not clear whether its definition in English legal practice (as opposed to its definition in the Field Code) is related to the civil law.⁵⁶

Pleading is also an interesting subject for those interested in a possible convergence of civil procedural law, even though at first glance pleading is, of course, a very technical area which sets the common law apart from continental jurisdictions. According to Holdsworth, however, pleading in the Judicature Acts owed something to the system in use in the Court of Admiralty.⁵⁷ This court had a procedure based on the Romano-canonical model.⁵⁸ Additionally, the Romano-canonical model might have influenced the new rules of pleading through the American Field Code which, in its turn, might have influenced the Judicature Acts. It seems that for his rules on pleading (which put an emphasis on pleading facts, i.e. 'fact-pleading' or 'code-pleading')⁵⁹ Field drew primarily on the Romano-canonical system as illustrated by French and Spanish law.⁶⁰ He permitted only four types of pleadings: the complaint, answer, reply, and demurrer (§ 156). A reply was only allowed when an answer contained new matter (§ 153). As a result, in most suits in which the defendant raised no affirmative defence, the pleading stage could be completed in two or maybe three (with a demurrer to make dilatory objections) steps.⁶¹

Particularly interesting from the 'convergence perspective' are counterclaims. Counterclaims were not allowed at common law. Only the relief for which the suit had been instituted could be granted. Since counterclaims are brought in pending lawsuits, they can by their very definition never be the relief for which the suit is instituted. On the Continent the Romano-canonical procedure and the systems based on it allowed counterclaims (under the 1806 Code of civil procedure in France such claims were also allowed, even though they were not mentioned as such; see currently the new *Code de Procédure Civile*, Article 64).⁶² The Judicature Acts made counterclaims generally available in England. Holdsworth claims that this change was based on a rule of practice prevailing in the ecclesiastical courts (the 1848 Field Code did not contain provisions on counterclaims; in 1852, however, a provision was included).⁶³ This rule allowed the court to give the relief to which the parties were entitled though the suit had been instituted for a different kind of relief.⁶⁴ Since the procedure of the ecclesiastical courts is of Romano-canonical origin, the rise of counterclaims in English procedure is possibly another illustration of civil law influence on the British Isles.

54. Subrin, *David Dudley Field*, 329.

55. Clark, *The Civil Law Influence*, 82-83.

56. C.E. Clark, *The Code Cause of Action*, *Yale Law Review* 1923-1924, 820ff.

57. Holdsworth, *A History* XV, 134. See also *ibidem* XII, 684.

58. Chorus, *Civilian Elements*, 296.

59. Fact-pleading also became a feature of English civil procedure. See Glenn, *La civilisation*, 573: 'Certaines institutions de la procédure civile s'alignent aussi sur le modèle civiliste. On ne plaide plus, en principe, le droit ...'

60. Clark, *The Civil Law Influence*, 76.

61. Clark, *The Civil Law Influence*, 83.

62. On counterclaims in continental jurisdictions, see my 'De vordering in reconventie in Nederland en Europa', 227ff.

63. Clark, *The Code Cause of Action*, 823; Subrin, *David Dudley Field*, 332.

64. Holdsworth, *A History* XV, 135. See also *ibidem* XII, 684-685.

A last example of convergence in the 19th century is the appeal. Originally, the common law did not know a system of appeal, i.e. a means of recourse by way of rehearing a case in a higher court. Without a hierarchy of courts, which originally did not exist in England, such a system of recourse is not feasible.⁶⁵ English lawyers got acquainted with the appeal system through the Romano-canonical procedure of the ecclesiastical courts. This system was copied in England, at least in externals.⁶⁶ Later, the Judicature Acts introduced a system of appeals which might have been derived from the Field Code, which in its turn might have been based on the Louisiana Code. At the same time, these Acts, like the Field Code (§ 323), abolished the writ of error of the common law, a means of recourse which aimed at reviewing questions of law (error in the proceedings) which appeared on the record of the court below.⁶⁷ Under the new procedure, an appeal could also be lodged in cases where formerly the writ of error had been available.⁶⁸

4.2 Convergence of civil procedure in the 20th century

Reforms of civil procedure in the 20th century have been the cause of convergence of the rules of procedural law in many European countries. In the present paper I would like to discuss only one example of convergence, albeit a very important one: the importance of the judge in the conduct of civil litigation in England and the Continent.

Traditionally, both the systems inspired by the Romano-canonical procedure and the forms of action at common law aim at avoiding arbitrary decisions. They seek to guarantee that judicial decisions are based on the truth (be it the formal or the substantive truth). In order to reach this goal, they assign to the judge and the parties a fixed role in the proceedings. Both systems have, to a certain extent, an adversarial character,⁶⁹ even though some present-day common law lawyers are inclined to describe continental civil procedures as inquisitorial.⁷⁰ The adversarial character of the procedures both on the Continent and in England appears from the fact that in England as well as on the Continent the principle of party presentation (*Verhandlungsmaxime*) applies.⁷¹ The principle prescribes that the scope and the content of the judicial controversy are to be defined by the parties or, conversely, that the court is restricted to a consideration of what the parties have put before it.⁷² In addition, the principle of 'party control over the subject matter' (*Dispositionsmaxime*) is a feature of both continental and English civil procedure. This means that the aggrieved party decides whether or not a lawsuit will be started, that the defendant decides whether or not he will introduce his defense, and that each party takes the sundry procedural steps.⁷³ As a result, the judge is relatively passive, even though it cannot be denied that judges have some power to take initiatives in the conduct of the proceedings without any demand by parties or counsel to do so.⁷⁴ Nevertheless, in the end, it is the parties who dominate the litigation, not the judge.

65. Van Caenegem, *History*, 30: 'The Common Law knew nothing of an appeal, i.e., a rehearing of a case [...] (the term 'appeal' was used for a criminal accusation), consequently there were no real appeal courts either. Appeal was linked with Roman Law, which was alien to the Common Law, and it presupposed a hierarchy of courts unknown in England [...]'; idem, *Judges, Legislators and Professors. Chapters in European Legal History*, Cambridge 1998, 4-6.

66. Plucknett, *A Concise History*, 387-388

67. Van Caenegem, *History*, 30-31; Plucknett, *A Concise History*, 388.

68. Holdsworth, *A History XV*, 131. Cf. Field Code § 325.

69. Cf. R.C. van Caenegem, *European Law in the Past and the Future*, 51-53.

70. J. Jacob, *The Fabric of English Civil Justice*, London 1987, 7.

71. Holdsworth, *A History XV*, 116: '[...] common law procedure has, like the systems of procedure in Roman and early German law, adopted the principle of 'party presentation', and not the principle of 'judicial investigation'. Pollock has made it clear that this has been true of the procedure of the common law throughout its history and is still true today'; Millar, *A History*, 19-20: 'Whatever of investigative character manifested itself in the chancery procedure was borrowed from the canon procedure, and that the civil procedure of the canon law at all times yielded first place to the principle of party presentation can admit of no doubt.'

72. Millar, *A History*, 19-20.

73. Van Caenegem, *History*, 14.

74. Cf. J.M.J. Chorus, *The Judge's Role*, 33ff. See also idem, *De lijdelijkheid van de rechter: historie van een begrip*,

Undue delays in the proceedings and high costs have, however, resulted in measures increasing the directive powers of the judge. Of course, these measures are not as extreme as those introduced in 18th century Prussia under Frederick the Great, which resulted in a procedure that could rightly be called inquisitorial.⁷⁵ Nevertheless, there has been a slow movement into the direction of a more active role for the judge. This is especially true for England. Although the Judicature Acts did not seriously affect the principle of ‘party presentation,’ they gave the court slightly larger powers to regulate the course of the procedure.⁷⁶ Unfortunately, they did not solve the existing problems since English procedure remained expensive and cumbersome. However, the recent reforms of civil procedure in England will most likely be more successful. The basis of these reforms were two reports by Lord Woolf entitled *Access to Justice*⁷⁷ in which the negative aspects of the English adversarial system were pointed out.⁷⁸ The main characteristics of the reforms are an increase in the directive powers of the judge and the emphasis on a cultural move towards court control of litigation practices. It should be the courts, and not the parties, who determine the pace of the litigation process and its intensity.⁷⁹ The adversarial principle, which was so dominant a feature of English civil procedure, is therefore under attack.⁸⁰ Consequently, we may conclude that also in this area of procedure convergence between England and the Continent is taking place.

Summary

Interaction between the various systems of procedure in Europe has been taking place for at least 800 years. In this respect, the reception of the Romano-canonical procedure in secular courts and the changes brought about by the English Judicature Acts and by Lord Woolf are crucial. The convergence of procedure resulting from this interaction makes it likely that the approximation of judiciary law in the European Union is a feasible option. In my opinion initiatives aiming at harmonisation may benefit from paying attention to the rich history of procedure. I am convinced that knowledge of the history of procedure will smooth the path for those who feel that a fragmented Europe in the field of procedural law distorts the proper functioning of the internal market and is undesirable.⁸¹

Deventer 1987.

75. Van Caenegem, *History*, 92. See also J.M.J. Chorus, *The Judge's Role*, 34ff.

76. Holdsworth, *A History*, 132.

77. *Access to Justice: Interim Report to the Lord Chancellor on the civil justice system in England and Wales*, London 1995; *Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales*, London 1996.

78. See A.A.S. Zuckerman, Reform in the Shadow of Lawyers' Interests, in: A.A.S. Zuckerman, R. Cranston (eds.), *Reform of Civil Procedure. Essays on Access to Justice*, Oxford 1995, 75.

79. Zuckerman, *Reform*, 62. See also M. Zander, Why Lord Woolf's Proposed Reforms of Civil Litigation should be Rejected, in: A.A.S. Zuckerman, R. Cranston (eds.), *Reform of Civil Procedure. Essays on 'Access to Justice'*, Oxford 1995, 80: 'The mood of the times, both here and in other common law countries, is to follow the lead of the United States and embark on a period of reform under a banner called 'Judicial Case Management.'

80. See already in 1993 Glenn, *La civilisation*, 573-574: 'Même cette procédure [i.e. the adversarial procedure] est de plus en plus contestée; elle est souvent absent dans les phases préparatoires du procès. Le fardeau de l'acte de jugement s'impose partout.'

81. On differences in procedure and distortions in the proper functioning of the internal market, see M. Wolf, Abbau prozessualer Schranken im europäischen Binnenmarkt, in: W. Grunsky et al. (eds.), *Wege zu einem europäischen Zivilprozessrecht. Tübinger Symposium zum 80. Geburtstag von Fritz Baur*, Tübingen n.d., 35ff; K.D. Kerameus, Procedural Unification: The Need and the Limitations, in: *International Perspectives on Civil Justice*, London 1990, 47ff; idem, Procedural Implications of Civil Law Unification, in: A. Hartkamp et al. (eds.), *Towards a European Civil Code*, Nijmegen 1998, 121ff.