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# The Role and Relevance of the Civil Law Tradition in the Work of the European Court of Justice[1]

David A.O. Edward, *European Court of Justice*

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## I. Introduction

It is now 500 years since civil law was first taught at the King's College of Aberdeen. As a way of celebrating this achievement, we were invited to celebrate the civilian tradition which, throughout those 500 years, has been a basic building block and inspiration for most of the legal systems of Europe. Though the legal map has become ever more complex and densely filled, civil law rightly remains a core subject in the Aberdeen law degree.

[1] Particular thanks are due to *Nicolas Lockhart*, Legal Secretary at the Court of Justice, both for his help and his insights. The opinions expressed are those of the author alone. **<310>**

At the other end of the historical spectrum, the newest addition to the core subjects, not only in Aberdeen but in all the Scottish law degrees, is European Community law. Though it has emerged only in the last 45 years, Community law has fast become the focus of a rather different European legal tradition. So Judge *Thijmen Koopmans* and other commentators speak of "a new *ius commune* for Europe". On this side of the Channel there may be those who are perturbed by that idea, but I suspect that the first teachers of civil law at King's College would have regarded it as normal, natural and desirable.

The question I have been asked to address is whether the civilian tradition - the old *ius commune* - has had an influence on the way in which the Court of Justice has developed the new *ius commune*?

Put briefly, my answer is that, if you look for obvious traces of the civil law in the Court's judgments, you will find very few. The main reason is that Community law and the civil law deal with different kinds of problem.

On the other hand, if the civilian tradition is today, as Professor *Zimmermann* puts it, "a fundamental intellectual unity created by a common tradition" - an attitude of mind rather than a set of rules or principles - that tradition could be said to permeate the work of the Court at the deepest level. I suspect that common lawyers find some of the Court's case law difficult to understand precisely because **<310>** the Court is, in a deep though not immediately obvious sense, profoundly civilian in outlook.

I propose to address three points. First, why does the substantive civil law have so little influence on the work of the Court? Second - perhaps a sub-point of the first - why does the Court seem to avoid civilian solutions in cases under the Brussels Convention - the very field where it might have been expected to find them useful? Third, in what sense, nevertheless, can the Court be said to be profoundly civilian in outlook?

## II. Why the Civil Law is *Not* an Influence

Lord *Mackenzie Stuart* has pointed out in his paper some of the reasons why there are relatively few traces of the civil law, as such, in Community law. I would add a further reason.

One has only to remember what the European enterprise is all about. It was conceived after the Second World War as a means of cementing the new peace by creating a zone of economic (and therefore political) stability in western Europe. The aim was to tackle, by legal and institutional means, the economic problems of the latter part of the 20th century - and beyond.

It would be demanding a great deal of foresight from those first teachers at

King's College, and even more so from the Romans, to expect their civilian system to provide many of the answers to the problems of today's global economy. To take one example, how would they have reacted to, never mind resolved, the problem that the number of fish in the sea is not, as we were always told, unlimited?

Indeed, so much of the Community legal system is entirely new that not even the national systems provide many answers to the issues with which it has to deal. The institutional structure is unique, the constitutional framework is still evolving and attempts to channel its development in the direction of national preconceptions have almost always failed.

At a more technical level, new Community concepts and terminology are needed to tackle problems, such as the elimination of non-tariff barriers to trade in goods or mutual recognition of professional diplomas, precisely because such issues simply do not arise in national law which (except, in a sense, in the United Kingdom) is concerned with problems internal to a single State, rather than those arising between states.

It does not even enter our heads that Baxters' soup from Speyside might not, for legal reasons, be as marketable in Edinburgh or London as in Aberdeen. Far otherwise when it comes to marketing the same soup in Helsinki or Athens. What is the Finnish or Greek consumer to make of a tin labelled 'Cock-a-Leekie'? And what **<311>** insights as to ingredients and preparation would the couthy accents of Grampian offer to the harassed housewife of Brindisi?

States (apart from our own) do not have an internal problem of mutual recognition of diplomas but they are very chary of recognizing other peoples'. Even the proud possessor of an Edinburgh LL.M. may find himself in difficulties if he puts it on his visiting card in Baden-Württemberg[2].

Community law is late-20th-century law to deal with late-20th-century social and economic problems on a transnational basis. So it is not surprising that national systems provide few clues to the solution of questions which, almost by definition, go beyond the scope of national law.

That is not to say that Community law finds nothing to borrow from pre-existing national law. The members of the Court - Judges and Advocates General - see problems through the spectacles of their own training and practice. Instinctively, they reach for the tools they would normally use to solve them. Since most of them come from what could broadly be called a civilian background, it would be astonishing to find no civilian influences at all in the working of the Court.

[2] See Case C-19/92 *Kraus v. Land Baden-Württemberg* [1993] E.C.R. I-1663. **<312>**

But, as Professor *Zimmermann's* paper shows, there is no single civilian tradition. Each national legal system has undergone a reception peculiar to itself, frequently dictated by its own history, and has evolved the civilian concepts it has received in a more or less different way. Their lawyers and judges have delved into the civil law toolbox only to the extent that the tools they found there seemed useful or appropriate. It would, I think, be mere antiquarian romanticism to suppose that there exists - somewhere 'out there' - a collection of pure civilian principles, unalloyed by national adaptations, which lie ready to hand as useful tools to solve the problems of a late 20th-century economic community. Moreover, such Platonic idealism, with its appeal to a 'purer' past, is a denial, rather than an affirmation, of the living civilian tradition.

There is, however, one field in which one might have expected to find civilian influences actively at work. That is the interpretation of the Brussels Convention on civil jurisdiction and the recognition and enforcement of judgments.

## III. The Brussels Convention on Jurisdiction and the Recognition and Enforcement of Judgments

The Brussels Convention was originally concluded in 1968 when all the Member States were 'civil law countries'. Although it has been modified at the time of subsequent accessions, much of the terminology remains recognizably civilian.

The Court's approach to Brussels Convention cases may, at first blush, seem like a stubborn rejection of outside influence. After all, the Convention is concerned **<312>** with the very stuff of what national courts do: civil and commercial courts are constantly having to ask themselves whether they have jurisdiction and whether their judgments are effective. Yet, even in this field, there is a positive effort on the part of the Court to ensure that the language it employs does not identify the case-law with any system, civilian or otherwise, but rather to look for autonomous concepts or independent definitions.

Why abstraction rather than borrowing? Why not use grammar that lies ready to hand? Some examples will illustrate the reason.

In the first *Reichert* case[3] the Court was asked whether a claim under the French Civil Code, known as the *action paulienne*, fell within Article 16(1) of

[3] Case 115/88 *Reichert & Kockler v. Dresdner Bank AG* [1990] E.C.R. I-27. See subsequently Case C-381/89 *Reichert & Kockler v. Dresdner Bank A.G.* [1992] E.C.R. I-2149.

the Convention. That Article confers exclusive jurisdiction on the *forum situs* "in proceedings which have as their object rights *in rem* in immovable property". A civil lawyer would probably disclaim attribution of the *action paulienne* to the learned civilian whose name it bears. But a Scots lawyer would have no difficulty in recognizing the proceedings between the Reichert family and the Dresdner Bank as an attempt by a creditor to reduce a disposition to conjunct and confident persons. Probably all legal systems have a similar remedy, but not all systems have the same form of action.

In his opinion Advocate General *Mischo*, referring explicitly to the French notion, proposed that the Court should rule that an action "such as the *action paulienne* under Article 1167 of the French civil code" does not come within Article 16(1) of the Convention[4]. But in the operative paragraph of its judgment, the Court avoided any direct reference to the French terminology. Instead it stated that "an action whereby a creditor seeks to have a disposition of right *in rem* in immovable property rendered ineffective as against him on the ground that it was made in fraud of his rights by his debtor" does not fall within Article 16(1). The ruling was thus neutral, abstract or "non-system-specific".

One can see a similar approach in the Court's very recent ruling in *Danværn*[5] which was concerned with interpretation of Article 6(3) of the Convention, which limits "reconventional jurisdiction" in counterclaims.

Sued in the court of his own domicile, the Danish defender sought by way of defence to set off a debt allegedly due by the German pursuer to him. The question was whether "set-off as a defence" was to be treated as a counterclaim falling under Article 6(3) of the Convention. If it was, the defender would not be entitled to set-off his debt against a pursuer not domiciled in Denmark since the debt in question did not "arise from the same contract or facts on which the original claim was based". **<313>**

What was the nature of the defender's claim and how did it fit with the language of Article 6(3)?

The French text of Article 6(3) refers to *une demande reconventionnelle*, thus putting the emphasis on the necessity to establish jurisdiction by reconvention. French law, like Scots law, distinguishes between *compensation légale*, where one debt cancels another out by simple operation of law, and *compensation judiciaire*, where the second debt must be judicially constituted and *then* set off against the first. Since it is necessary to establish jurisdiction

[4] [1990] E.C.R. I-27, at p. I-37, point 27(2).

[5] Case C-341/93 *Danværn Production A/S v. Schuhfabriken Otterbeck GmbH & Co* [1995] E.C.R. I-2053. **<313> <314>**

by reconvention in the second case but not in the first, the very terms of the French text suggest that "set-off as a defence" does not fall within the scope of Article 6(3).

However, the law of set-off has developed differently in Germany and France - see Professor *Zimmermann'*s paper. The German text of the Convention refers to *eine Widerklage*, and a German court had (in an earlier case) held that set-off as a defence did fall within Article 6(3).

Other language versions neither clearly cover, nor clearly rule out, set-off as a defence. The English text refers to "a counter-claim" which puts the emphasis on procedure rather than jurisdiction. The Danish text is equally inconclusive since the word used in Article 6(3) - *modfordringer* - covers both types of claim.

In order to solve the problem, it would have been possible for the Court to rely on the precisely developed conceptual distinctions of French law, importing into Community law the notions of "set-off by operation of law" and "judicial set-off". The looser terminology of English, Danish and possibly German law could perhaps have been ignored as anomalous and/or unimportant.

The Court's approach, however, was to begin by describing the two possible situations by reference to the procedural context in which they arise. In a sense, it combined the French approach (distinguishing between the legal effects of the two types of claim) and the English approach (referring to the procedural context as a way of defining the distinction).

The Court then related the two possible procedural situations to the purpose of the Convention - namely, jurisdiction and recognition of judgments. It concluded that a defence, being an integral part of the main action, does not, by its nature, require constitution of jurisdiction. Consequently, it is regulated by national law and not by the Convention.

This non-system-specific approach is consistent with, if not positively required by, the role assigned to the Court by the Convention, which is to ensure that the Convention is applied uniformly in all the contracting States. Only in this way can mutual recognition and enforcement of judgments become a matter of obligation rather than discretion. As the Court said in *Reichert*,

> "In order to ensure that the rights and obligations of the Convention for the Contracting States and for individuals concerned are as equal and as uniform as possible, an *indepen-* **<314>** *dent definition* must be given *in Community law* to the phrase 'in proceedings

which have as their object rights *in rem* in immovable property'"[6].

However, as the case of *Webb* shows[7], the terms of the Convention may themselves be system-specific. A father had conveyed immovable property in France to his son. They subsequently fell out and the father claimed in the Chancery Division that the son held the property as a trustee for him. The question put by the Court of Appeal was as cagey as could be:

> "Whether on the true interpretation of Article 16(1) of the Brussels Convention the proceedings in the Chancery Division..., the short title and reference to the record of which is *Webb v. Webb* 1990 W. No 2827 are proceedings in respect of which the courts of France have exclusive jurisdiction?"

Ultimately, the question was whether the father's action for declaration of trust was "proceedings which have as their object rights *in rem* in immovable property". The reference in the Convention to "rights *in rem*" is, by its nature, system-specific in the sense that it presupposes a system where a meaningful distinction can be drawn between rights *in rem* and one or more other categories of rights (notably, rights *in personam*) and which provides us with criteria for making the distinction. The problem in *Webb* was that the civilian concept of rights *in rem* and the English concept of equitable rights belong to different category-systems.

In its judgment, the Court relied on the conventional conception of a right *in rem* as a right that can be vindicated against the whole world, and concluded:

> "The father does not claim that he already enjoys rights directly relating to the property which are enforceable against the whole world, but seeks only to assert rights against the son. Consequently, his action is not an action *in rem* within the meaning of Article 16(1) of the Convention but an action *in personam*"[8].

Perhaps it was only to be expected that an English commentator would dismiss this approach as an "airy certainty", asserting that:

> "A claim that, by reason of the conduct of the parties throughout the years, a plaintiff is entitled, one way or another, to be made, recognized or constituted as the legal owner of land appears to fall squarely with the wording of Article 16.1 of the Convention"[9].

[6] [1990] E.C.R. I-27, at p. I-41, point 8, emphasis added.
[7] Case C-292/92 *Webb* [1994] E.C.R. I-1717.
[8] [1994] E.C.R. I-1717, at p. I-1738, point 15.
[9] *Adrian Briggs*, Trusts of Land and the Brussels Convention, (1994) 110 LCQ 526, at

A civil lawyer in his turn might be forgiven for regarding that proposition as the quintessence of airy certainty. Be that as it may, the episode demonstrates very clearly why the Court tries, where possible, to abstract from system-specific concepts. **<315>**

A further example of the same type of problem is Article 5(3) of the Convention which provides that "a person domiciled in a Contracting State may ... be sued ... in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event [*le fait dommageable/das schädigende Ereignis*] occurred". What, in that context, is "the harmful event"?

What, in particular, is the situation where an industry in State A pollutes a river causing injury to downstream users of the river water in State B[10]? Did the harmful event occur in State A or State B, or was there "a harmful event" in both? Where a magazine publisher in State A distributes his magazine containing a defamatory article both in that state and in a number of other states, do the courts of each of those states have jurisdiction and, if so, (a) only in relation to the damage to reputation sustained in that state or (b) in relation to all damage to reputation everywhere[11]? Where, due to a bank error, the plaintiff has been arrested and detained in State A on suspicion of money-laundering, do the courts of State B (where the plaintiff has his principal place of business) have jurisdiction in relation to the damage caused to that business in that state[12]?

It goes without saying that the private international law of each state will offer a solution to each of these problems. A civil lawyer's first reaction would probably be to define "the place where the harmful event occurred" as the place where, for the first time, there has been concurrence of *damnum* and *iniuria*. But that will not do as a uniform solution for states whose law is not derived from the *lex Aquilia*.

How does one solve the problem without using expressions that have become system-specific, such as 'initial loss', 'consequential loss', 'pure economic loss', 'direct and indirect loss' and so on? Even with a common final court of appeal, Scots law and English law are liable to move in different directions in this field.

The answers are not obvious but it is clear that the dictates of uniformity, in order to achieve effective mutual recognition of judgments, run counter to any contribution which the civil law, as such, might have to offer. The Court

pp. 529 and 530. **<315>**

[10] Case 21/76 *Bier v. Mines de Potasse d'Alsace* [1976] E.C.R. 1735.

[11] Case C-68/93 *Shevill and others v. Presse Alliance SA* [1995] E.C.R. I-415.

[12] Case C-364/93 *Marinari v. Lloyds Bank* [1995] E.C.R. I-2719. **<316>**

must try to abstract the problem from the national context in which it arises, decouple it from loaded terminology, and present the answer in a system-neutral way which, hopefully, all national courts can then apply in roughly the same way.

## IV. The *Real* Civilian Influence

While the issues the Court has to resolve may be novel, and the Court must try to provide system-neutral answers, its jurisprudence did not evolve in a vacuum. The "new legal order"[13] did not arrive, God-given, on tablets of stone. Indeed, the **<316>** complaint of the former Warden of All Souls (Sir *Patrick Neill, Q.C.*) in his much-publicized Case Study of Judicial Activism is that the Court of Justice has gone beyond the tablets on which the treaties were written and, in pursuance of a private judges' agenda, has invented doctrines designed to distort the intentions of the contracting states and usurp their powers.

This is not the place to rebut this attack, which has gained a good deal of currency in the press. Its relevance for present purposes is that it calls in question two essential features of the way in which the Court approaches its task. The first is its view that Community law is and ought to be systematic: that Community law is a *system* of law and not just an *ad hoc* collection of rules and diplomatic compromises written down in the treaties. The second, which may simply be an aspect of the first, is the view that obligations beget rights, and breaches of obligation beget remedies.

### *1. System and coherence*

In one of the first cases to come before the Court of the original Coal and Steel Community, Advocate General *Lagrange* had to deal with the argument that the principle of strict interpretation of the text must always prevail. He approached the problem in this way:

> "[There] is a commonly accepted principle ... that it is necessary to interpret and seek the presumed intention of the authors of a text only when the latter is obscure or ambiguous and that when the letter of the law is clear it must always prevail. ... I am in full agreement as to the method of interpretation.
>
> The essential question is, however, whether the text is clear and requires no interpretation. In that respect, the very existence of the present action and the ramifications to which it

[13] Case 26/92 *Van Gend en Loos* [1963] E.C.R. 1, at p. 12.

> has given rise are sufficient to show that it is not. ...
>
> The text lays down a procedural requirement ... but it fails to state by whom [it is to be accomplished]. It is therefore necessary to interpret the text in order to fill that lacuna. Even though the Code Napoléon is not applicable here I cannot refrain from recalling Article 4:
>
> *'le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice*'"[14].

The reference to the *Code Napoléon* shows, of course, that the Advocate General was inspired by more than a purely historic civilian tradition. Nevertheless, the underlying assumption is that there exists a body of law - a *corpus iuris* - which the lawgiver is presumed to intend should be complete and coherent. ("Coherence" is a word often heard in the mouths of lawyers from civilian jurisdictions.) The **<317>** task of the judge is to find the piece of the jigsaw whose shape and appearance is marked out by the existing pieces, but which for some reason is missing.

Thus, in the two landmark judgments of the early 1960s - *Van Gend en Loos*[15] and *Costa v. E.N.E.L.*[16] - the Court lays out the available pieces of the jigsaw (the aim of the treaty, its structure and its terms) as the premises from which the principles of direct effect and primacy can be deduced. Notably, in *Van Gend en Loos*, the fact that the treaty involves individuals in the working of the Community and imposes obligations on them implies that they may also derive rights directly from it. Similarly, in *Costa*, the primacy of Community obligations follows both from the institutional structure established by the treaty and from the member states' reciprocal obligation of performance.

Perhaps even more striking is the Court's development of the idea that the treaty creates "a complete system of legal remedies". Coming to the treaty for the first time, the common lawyer might feel himself at home. In very few cases does the Treaty state positively that there shall be a right of action in particular circumstances. Rather, it sets out, article by article, a series of forms of action - the action of annulment, the action for failure to act, and so on.

In *Les Verts*, the question was whether acts of the European Parliament could be challenged under Article 173 even though the Parliament was not mentioned in that article as a potential pursuer or defender. The Court recognized that, whatever might have been the position in the past, the

[14] Case 8/55 *Fédération Charbonnière de Belgique v. High Authority* [1954 to 1956] E.C.R. 245 at p. 277. **<317>**
[15] Case 26/62 *Van Gend en Loos* [1963] E.C.R. 1.
[16] Case 6/64 *Costa v. E.N.E.L.* [1964] E.C.R. 585.

Parliament was now empowered to adopt acts which could encroach upon the interests of individuals or groups, other institutions or the Member States:

> "The European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. In particular, in Articles 173 and 184, on the one hand, and in Article 177, on the other, the Treaty established *a complete system of legal remedies and procedures* designed to permit the Court of Justice to review the legality of measures adopted by the institutions"[17].

In the *Chernobyl* case the question was whether the Parliament had a privileged right of action under Article 173 to protect its institutional position. In holding that it did, the Court again reasoned from the system as a whole (the institutional balance) to conclude that "Parliament's prerogatives ... cannot be breached without it **<318>** having available a legal remedy ... which may be exercised in a certain and effective manner"[18].

Again, in *Foto-Frost*, the Court reasoned from the coherence of the system established by Articles 173, 177 and 184 to conclude that only the Court itself could definitively declare invalid acts of the Community institutions[19].

The Court's insistence on sympathetic coherence reflects a recurring theme of the Aberdeen conference: that the true civilian tradition consists in taking a rational overview of the law as a whole, relating one part to another so as to form a structure or 'system'.

### 2. *Obligations, rights and remedies*

One has only to read, on the one hand, the speeches in the House of Lords in *Garden Cottage Foods*[20] and in the Court of Appeal in *Bourgoin*[21] and, on the other, the judgment of the Court of Justice in *Francovich*[22] to perceive a

[17] Case 294/83 *Parti Ecologiste 'Les Verts' v. Parliament* [1986] E.C.R. 1339, at p. 1365, point 23 (emphasis added). It is right to take this opportunity to record that the Judge Rapporteur in *Les Verts* and subsequent cases of the same family was Judge *René Joliet* who died on 15 July 1995. He had studied in America and was a most unlikely participant in any supposed judicial agenda to usurp the powers of the Member States. **<318>**

[18] Case 70/88 *Parliament v. Council (Chernobyl)* [1990] E.C.R. I-2041 at p. 2073, point 25.

[19] Case 314/85 *Foto-Frost v. HZA Lübeck-Ost* [1987] E.C.R. 4199, at p. 4231, points 16-17.

[20] *Garden Cottage Foods v. Milk Marketing Board*, [1984] AC 130; [1983] 3 CMLR 43.

[21] *Bourgoin v. MAFF*, [1985] 3 All ER 585; [1986] 1 CMLR 267.

[22] Joined Cases 6/90 and 9/90 *Francovich and others v. Italy* [1991] E.C.R. I-5357.

fundamental difference of approach to the problem of obligations, rights and remedies.

*Garden Cottage Foods* raised the question whether English law provided a remedy as between private parties for damage caused by breach of Articles 85 and 86 (the competition rules) of the Treaty. The majority view in the House of Lords appears to have been that, as well as the possibility of injunction, there was a remedy of damages for "breach of statutory duty" - that being the best available procedural pigeon-hole into which the breach of the competition rules could be fitted. *Bourgoin* raised the question whether English (or perhaps United Kingdom) law provided a remedy for loss caused by ministerial action in breach of Community law. The Court of Appeal held that there was a remedy only if misfeasance was proved.

In *Francovich* the question was whether the Italian state was liable to make reparation to individuals who suffered loss through the state's failure to implement a directive for the protection of employees on the employer's insolvency. The Court said that "the issue must be considered in the light of the *general system* of the Treaty and its fundamental principles"[23].

In a sense, the Court had already answered the question 21 years before in *Humblet*: **<319>**

> "If the Court rules in a judgment that a legislative or administrative measure adopted by the authorities of a Member State is contrary to Community law, that Member State is obliged ... to rescind the measure in question and to make reparation for any unlawful consequences which may have ensued. That obligation is evident from the Treaty ..."[24].

In *Francovich*, the Court went back, not only to *Humblet*, but to the logic of *Van Gend en Loos* and *Costa v. E.N.E.L.*:

> "The E.E.C. Treaty has created its own legal system, which is integrated into the legal systems of the Member States and which their courts are bound to apply. The subjects of that legal system are not only the Member States but also their nationals. Just as it imposes burdens on individuals, Community law is also intended to give rise to rights which become part of their legal patrimony. *Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes* in a clearly defined manner both on individuals and on the Member States and the Community institutions. ...
>
> It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held

[23] [1991] E.C.R. I-5357, at p. I-5413, point 30 (emphasis added). **<319>**

[24] Case 6/60 *Humblet v. Belgium* [1960] E.C.R. 559, at p. 569.

responsible is *inherent in the system of the Treaty*"[25].

This reasoning has been criticized by certain British commentators as being inadequate if indeed, according to them, it can be characterised as reasoning at all. Certainly, there was no attempt by the Court to classify the obligation to repair according to the nature or seriousness of the breach, a point which was only decided six months after the conference[26]. One English commentary has suggested that there are four possible causes of action depending on the nature of the Community obligation breached[27]. In England, correct classification of the action at the outset will be important, and failure to pick the right one may lead to difficulties.

What seems interesting for present purposes is, first, that from a civilian point of view the notion that an obligation begets rights and that breach of that obligation, when it causes loss, begets a remedy is a proposition that hardly needs to be supported by reasoning. Second, while common law commentators say that *Franco-* **<320>** *vich* created 'a new cause of action' not provided for in the treaties, the civilian might ask why the treaties should need to create a cause of action.

In principle, the national courts are the Community courts of general jurisdiction (*tribunaux communautaires de droit commun*). Where there is no right of access to the Community courts in Luxembourg, it falls to the national courts to protect Community rights and obligations through their own procedures. *Ubi jus ibi remedium* - to complete a right there must be a remedy. Civilian logic therefore *presumes* that the national systems will provide appropriate remedies offering effective protection of Community rights.

[25] [1991] E.C.R. I-5357, at pp. I-5413 sq., points 31 and 35 (emphasis added).

[26] See Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* and *Factortame III*, judgment of 5 March 1996, not yet reported. Note, in particular, at points 53 and 55, the Court's insistence on coherence between the rules governing the liability of the Community and those governing the liability of the Member States. Note also the Court's refusal, at points 76, 79 and 80, to use any national concept of "fault" as a criterion of liability since the national conceptions are different and exclusive reliance upon them would undermine the Community nature of the obligation. But the Court did accept, at point 78, that factors which would be relevant in national law are also relevant in Community law.

[27] *Brealey and Hoskins*, Remedies in E.C. law - Law and Practice in the English and E.C. Courts, London, 1994, pp. 75 sqq. They suggest that the possible causes of action are: (1) misfeasance in public office; (2) breach of statutory duty; (3) innominate tort; and (4) negligence. **<320>**

## V. Conclusion

The examples of possible civilian influence that I have considered in the last section are drawn from what might be called the "constitutional" elements of Community law. It is in these structural areas in particular that the Court defines the way it looks at law.

There is of course no proof that the Court has lighted on this way of thinking *because of* the civilian tradition. (It has, after all, dipped into the common law toolbox from time to time.) So perhaps it is just coincidence. Perhaps the Court has brought an apparently "civilian" approach to bear simply because it is a sensible way to think about law, which neither consciously nor unconsciously reflects the civilian upbringing of most of the judges.

Whether coincidence or not, there can be no doubt that in important respects the Community conception of law mirrors what, in modern Europe at least, can be identified as the civilian conception. It is also fair to say that, without this way of thinking, Community law would have been deprived of its effectiveness and content. It would not have become a system of law capable of being described as a second *ius commune*.