RESEARCH ARTICLE

On the Meaning of 'System' in the Common and Civil Law Traditions: Two Approaches to Legal Unity

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In this paper, I offer an analysis of the different understandings of 'system' in connection with the two main Western legal traditions. In the continental 'civil law' tradition, 'system' is used in relation to the substance of the law, whereas in the English 'common law' tradition 'system' is rather used in relation to the functioning of the law, in the sense of finding solutions to legal problems that are consistent with earlier ones. I explain these different uses from a historical point of view: in the civil law tradition the notion of system goes back to the exposition of substantive legal doctrine, which – under the influence of Stoic thought – was already developed by lawyers in the Roman Republic, and for the first time elevated to statute by the Byzantine Emperor Justinian, whereas in the common law tradition the Byzantine-Roman organisation was not taken over, and system rather connotes with the manner in which conflicts can be resolved on a case-by-case manner, and hence has come to refer to the machinery of law. These different meanings may pose a challenge where legal unity is sought between jurisdictions that belong to different traditions.

Keywords: system; Stoicism; Roman law; civil law tradition; common law tradition; legal unity

I. Introduction

In this paper I offer an analysis of the different understandings of the notion of system in the two main Western legal traditions, which due to colonialism have spread out over the rest of the world.[1] I will do so from a historical point of view, in two ways: first, with regard to the meaning of 'system' as such, and, second, with regard to the application of the notion in the two traditions. Once again, as in my other work on pivotal notions in law, the simple, but fundamental point will be that understanding the origins of legal notions is relevant for making sense of the present, such that informed judgments can be made about the future.[2]

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[1] On the legal traditions see K Zweigert and H Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998), the standard work; Thomas Lundmark, *Charting the Divide between Common and Civil Law* (OUP 2012), who downplays the differences; Paul Brand and Joshua Getzler, *Judges and Judging in the History of the Common Law and the Civil Law* (CUP 2012), an edited volume, which leaves out antiquity; H Patrick Glenn, *Legal Traditions in the World* (5th edn, OUP 2014), an engaging overview of different legal traditions, including those of the civil and the common law; Mary Ann Glendon, Paolo G Carozza, and Colin B Picker, *Comparative Legal Traditions in a Nutshell* (4th edn, West Academic Publishing 2016), a useful overview. A different approach in which the resemblances between the traditions emerging between the 16th and 19th centuries are stressed is Gino Gorla and Luigi Moccia, 'A "Revisiting" of the Comparison between "Continental" and "English Law" (16th–19th Century)' (1981) 2 Journal of Legal History 143.

[2] On justice see 'Aristotle on Justice in the *Ethics* and *Politics*' In: Emma Cohen de Lara and René Brouwer (eds.), *Aristotle's Practical Philosophy: On the Relationship between His Ethics and Politics* (Springer 2017), on equity see 'On Law and Equity: the Stoic View', (2011) 128 SZ 17–38, on rights see 'Over de klassieke oorsprong van de rechten van de mens', (2011) 40 NJLP 98, on persons 'Funerals, Faces and Hellenistic Philosophy: On the Origins of the Concept of Person in Rome' In: Antonia Lolordo (ed.), *Persons* (OUP forthcoming), and on constitutions '"Richer Than the Greeks": Cicero's Constitutional Thought in *Republic* 1' In: O Höffe (ed.), *Ciceros Staatsphilosophie* (De Gruyter 2017). For my work on notions that go beyond law, but with implications for law, such as wisdom, sympathy and cosmopolitanism see *The Stoic Sage: The Early Stoics on Wisdom, Sagehood and Socrates* (CUP 2014) and 'Stoic Sympathy' In: Eric Schliesser (ed.), *Sympathy* (OUP 2015) respectively.

In the civil law tradition, the tradition which developed in continental Europe based on the Byzantine codification of Roman law, 'system' is used in relation to substantive doctrine, especially as set out in codes, i.e. in axiomatically organized accounts of law. These codes contain an overall exposition of the legal rules within a field of law, with the most general definitions put upfront, to be followed further down the road by more specific rules. In the common law tradition, the tradition developed in England since Norman times, 'system' is used in relation to the functioning of the law, especially with regard to the ways conflicts are being resolved by the courts, and as such is associated with consistency, of finding solutions to legal conflicts that are in accordance with earlier decisions.

The relevance is obvious: grasping these different meanings of system can contribute to a better understanding of the differences in method by which lawyers working in their respective traditions resolve legal conflicts. Even if lawyers from the two Western traditions agree about the outcome of a conflict, they most likely differ about the way a conflict must be resolved. Understanding the differences in method should facilitate the cooperation between lawyers; disregarding these differences can lead to tensions. One of these tensions relates to the European Union. Since the EU is a product of the continental legal tradition, the English legal tradition fits in uneasily. This may well be yet another reason as to why the United Kingdom, with England as the dominant nation, has decided to leave the European Union.

I will proceed as follows: I start with the origins of the notion of system, with particular attention to the Stoics, who were the first to use the notion in a relevant theoretical sense (section II) and make clear how this particular understanding had a lasting influence on the understanding of legal system on the European continent (section III). I continue with the notion of system in English law, where it was introduced at a much later stage and used in an altogether different sense (section IV). I end with discussing some of the implications of these two different understandings of system, or indeed the two different methods of resolving conflict with regard to legal unity, both within the tradition as well as vis-à-vis each other, especially in relation to European legal unity (section V).

II. Origin of the Notion of System

As so very often in Western thought, for the origin of notions such as system we have to go back to antiquity. The word 'system' goes back to the ancient Greek *sustēma*, which is the noun derived from the verb *sunistēmi*, 'to set together'.[3] *Sustēma* is a *nomen acti*, i.e. the noun that denotes the result of an action, and system thus refers to that which is set together.[4] In our extant sources its first occurences are with regard to human beings, who are put together on a ship or in an army. In the writings of the Greek philosophers, from whom as we shall see its usage was taken over by the lawyers in Republican Rome, the notion occurs relatively late. If Plato, Aristotle, or Epicurus use the word, they only do so in passing.

As for Plato (424/3–348/7), he uses it twice.[5] In his *Philebus*, at 17c–d, it occurs with regard to knowledge of music, where *distema* or 'interval' is contrasted with *sustēma* or 'combination':

> But you will be competent, my friend, once you have learned how many intervals there are in high pitch and low pitch, what character they have, by what notes the intervals are defined, and the kinds of combinations they form – all of which our forebears have discovered and left to us, their successors, together with the names of these modes of harmony.[6] (tr. D. Frede).

In the *Laws*, at 686b, Plato uses system with regard to political constitutions: 'It is worth investigating, is it not, just what kind of accident could have destroyed such – and so great – a system?'.[7]

Aristotle (384–322), Plato's most famous pupil, follows his teacher here: in Aristotle's extant works the word is not very important either. In his study of living nature, in *On the Generation of Animals*, at 740a19–21, Aristotle uses it with regard to the heart as the first principle of animals, since it transports the nourishment through the blood vessels;[8] in his teachings on human conduct, in the *Nicomachean Ethics* at 1168b31–33, he does so with regard to cities and human beings, which he describes as composite: 'But just as a city too or

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3   See e.g. Franco Montanari, *The Brill Dictionary of Ancient Greek* (Brill 2015) s.v.

4   See Pierre Chantraine, *Dictionnaire étmologique de la langue grecque* (2nd edn, Klinksieck 1999) s.v. ἵστημι.

5   See Friedrich Ast, *Lexicon Platonicum sive vocum Platonicarum index* (Weidmann 1835–1838) s.v.

6   ἀλλ', ὦ φίλε, ἐπειδὰν λάβῃς τὰ διαστήματα ὁπόσα ἐστὶ τὸν ἀριθμὸν τῆς φωνῆς ὀξύτητός τε πέρι καὶ βαρύτητος, καὶ ὁποῖα, καὶ τοὺς ὅρους τῶν διαστημάτων, καὶ τὰ ἐκ τούτων ὅσα συστήματα γέγονεν – ἃ κατιδόντες οἱ πρόσθεν παρέδοσαν ἡμῖν τοῖς ἑπομένοις ἐκείνοις καλεῖν αὐτὰ ἁρμονίας.

7   πῶς οὖν καὶ πῇ διώλετο; ἆρ' οὐκ ἄξιον ἐπισκοπεῖν τηλικοῦτον καὶ τοιοῦτον σύστημα ἥτις ποτὲ τύχη διέφθειρε.

8   ἤδη γὰρ ἀρχὴν ταύτην [sc. the heart] ἄξιον ἀκοῦσαι τοῦ ζῴου καὶ τοῦ συστήματος ὅταν δέηται τροφῆς· τὸ γὰρ δὴ ὂν αὐξάνεται.

any other system, seems to be most of all its most powerful part, so also is it the case with a human being'.[9] More frequent is Aristotle's use of *sustasis*, the *nomen actionis* that goes with the verb *sunistēmi*, and that refers to the action of putting together. Even if Bonitz in his index of words in Aristotle's writings is right that for Aristotle *sustasis* would have the same meaning as *sustēma*,[10] he uses *sustasis* above all with regard to animals, and even there it does not seem to be an important term.[11]

A generation or so after Aristotle, Epicurus of Samos (341–270) still uses system almost in passing. In his *Letter to Herodotus*, at Diogenes Laertius 10.66, the word occurs with regard to the combination of soul and body, due to which the soul is able to perceive.[12]

In contrast with Plato, Aristotle, and Epicurus, however, for the Stoics, a school of thought that started with Zeno of Citium (c. 334–c. 262), 'system' is an important term. They use it with regard to each of the three parts in the main division of knowledge: the study of nature, of human conduct, and of human reason, that is of physics, ethics, and logic respectively.[13] In physics they use it with regard to the world as 'a system of heaven and earth and of all natures therein',[14] in their ethics with regard to 'the world as a system of gods and human beings', who are 'members of a community because of their participation in reason, which is natural law'.[15] Most important here is their use in logic, which they understood in a broader sense than just the theory of valid reasoning, and included not only rhetoric, but also epistemology. They thus not only defined an argument as a 'system of premises and conclusion',[16] they also characterized knowledge and expertise in terms of a system. Knowledge they defined as 'a system of such [sc. secure and unshakeable] cognitions, like the knowledge of the part of logic as it exists in the perfectly rational human being',[17] whereas expertise was defined similarly, with the addition that is used for some specific end: 'Zeno says that "expertise is a system of cognitions unified by training towards some useful end in life"'.[18] Knowledge has a general application, expertise refers to specific fields of knowledge. These definitions of knowledge and expertise became important in the legal tradition on the European continent. To this development I will now turn.

III. 'System' in the Civil Law Tradition

The first occurrences of the notion of system in law are not to be found in law itself, but rather in the study of law (or in 'legal science' as continental lawyers usually say) as it developed in Rome in the second and first centuries BCE.

In order to understand this development, we have to take step back and look at conflict resolution in Rome. By the end of the 2nd and the beginning of the 1st century BCE, in the non-egalitarian society that was Rome, legal conflicts came to be resolved by respectable citizens, who were thought to embody the values of 'authority' (*auctoritas*) and 'dignity' (*dignitas*). These citizens were at first priests, but, from the 3rd century BCE onwards, could be laymen too. If confronted with complicated conflicts, these laymen started to ask for advice before deciding. The judges' legal advisers came to be known as *iurisconsulti*. Their written answers or *responsa* brought into being a whole body of rich, learned legal material. The importance thereof for the development of law on the European continent cannot be easily exaggerated: law became and indeed still is a matter for specialists.[19]

Next to the development that legal specialists were needed to resolve conflicts, two further developments are important with regard to the notion of system. First, at some point the judges must have become aware of the fact that in line with the office of judging, and the dignity that goes with the task, the reasons

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[9]   ὥσπερ δὲ καὶ πόλις τὸ κυριώτατον μάλιστ᾽ εἶναι δοκεῖ καὶ πᾶν ἄλλο σύστημα, οὕτω καὶ ἄνθρωπος.

[10]   Hermann Bonitz, *Index Aristotelicus* (Reimer 1870) 736.

[11]   In e.g. Wolfgang Kullmann, *Aristoteles als Naturwissenschaftler* (De Gruyter 2014), a fundamental study of Aristotle's physics (including his biology), the notion of system is not discussed.

[12]   οὐ γὰρ οἷόν τε νοεῖν αὐτὸ αἰσθανόμενον μὴ ἐν τούτῳ τῷ συστήματι καὶ ταῖς κινήσεσι ταύταις χρώμενον, ὅταν τὰ στεγάζοντα καὶ περιέχοντα μὴ τοιαῦτα ᾖ, ἐν οἷς νῦν οὖσα ἔχει ταύτας τὰς κινήσεις.

[13]   See Diogenes Laertius 7.39 (*SVF* 1.45, LS 26B), Aetius 1, Preface 2 (*SVF* 2.35, LS 26A); see further Brouwer, *Sage* (n 2) 7–41.

[14]   Stobaeus 1.184.8 (*SVF* 2.527): σύστημα ἐξ οὐρανοῦ καὶ γῆς καὶ τῶν ἐν τούτοις φύσεων.

[15]   Arius Didymus ap. Eusebius of Caesarea, *Preparation for the Gospel* 15.15.1 (*SVF* 2.528, LS 67L): λέγεσθαι δὲ κόσμον καὶ τὸ οἰκητήριον θεῶν καὶ ἀνθρώπων […] κοινωνίαν δ᾽ ὑπάρχειν πρὸς ἀλλήλους διὰ τὸ λόγου μετέχειν, ὅς ἐστι φύσει νόμος.

[16]   Diogenes Laertius 7.45 (*SVF* 2.235): εἶναι δὲ τὸν λόγον αὐτὸν σύστημα ἐκ λημμάτων καὶ ἐπιφορᾶς.

[17]   Stobaeus 2.73.21-23 (*SVF* 3.112, LS 41H): ἐπιστήμην σύστημα ἐκ καταλήψεων τοιούτων, οἷον ἡ τῶν κατὰ μέρος, λογικὴ ἐν τῷ σπουδαίῳ ὑπάρχουσα.

[18]   Olympiodorus, *Commentary on the Gorgias* 12.1 (*SVF* 1.73, LS 42A): Ζήνων δέ φησιν ὅτι ʽτέχνη ἐστὶ σύστημα ἐκ καταλήψεων συγγεγυμνασμένων πρός τι τέλος εὔχρηστον τῶν ἐν τῷ βίῳ'.

[19]   See Glenn (n 1) 136.

underlying the decisions – as formulated with the help of the *responsa* from the *iurisconsulti* – must have 'gravity'. The judgment does not only settle the actual conflict between the parties, it also affects future cases. A future case that is similar will have to be decided in a similar manner, with the help of the reasons given in the earlier case. Next to formulating a judgment as such in a given case, at some point *iurisconsulti* will thus also have started looking for earlier, similar cases, from which they could extract the reason (or reasons) for the judgment and apply the reason(s) to the case at hand. Later, yet again under the influence of Greek thought, the technical term for the reason underlying the decision became 'rule', from *regula* (pl.: *regulae*) in Latin, or *kanōn* (pl.: *kanōnes*) in Greek, which had been developed in Hellenistic grammar as well as in epistemology.[20]

Second, by the end of the 2nd century BCE these *iurisconsulti* started to systematize these earlier reasons. Here they were helped by methods which had been devised in Greek thought, especially among Stoic thinkers, who – unlike Aristotle, as is often too easily assumed in the modern literature, since his writings had yet to make their reappearance[21] – by then exerted considerable influence upon the Roman elite.[22] They took the Stoic definition of expertise as their starting point and systematized the legal output with the use of the Stoics' dialectical techniques of categorizing and defining.[23]

The systematization of the study of law was not an isolated phenomenon. In the second century BCE, many disciplines transformed from a 'knack' into a science or expertise, i.e. into some sort of system.[24] For an enumeration of the disciplines turned into sciences, an important piece of evidence is Cicero, *On the Orator* 1.187–189, who mentions music, geometry, astronomy, literary studies (including the study of poetry, history, and grammar), and rhetoric:

> Nearly all elements, now forming the content of the sciences, were once without order or correlation: in music, for example, rhythms, sounds and measures; in geometry, lines, figures, dimensions and magnitudes; in astronomy, the revolution of the sky, the rising, setting and movement of heavenly bodies; in grammar, the study of poets, the learning of histories, the explanation of words and proper intonation in speaking them; and lastly in this very theory of rhetoric, invention, style, arrangement, memory and delivery, once seemed to all men things unknown and widely separate one from another. And so, a certain science was called in from outside, derived from another definite sphere, which philosophers arrogate wholly to themselves [i.e. Stoic dialectic], in order that it might give coherence to things so far disconnected and sundered, and bind them in some sort of scheme.[25] (tr. Sutton and Rackham, slightly modified)

As for the systematization of the study of law, according to Pomponius, whose *Handbook* contains an account of the history of Roman law, Quintus Mucius Scaevola Pontifex (c. 140–c. 82) was the first to bring this about. The legal historian Fritz Schulz even speaks of a scientific revolution here.[26] The relevant passage from Pomponius' *Handbook* survived in Justinian's *Digest*, at 1.2.2.41: 'Quintus Mucius, son of Publius and a pontifex maximus, became the first man to divide the civil law into kinds by arranging it into eighteen books'.[27] In the systematizations of the *responsa* on the basis of which future cases came to be decided the

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[20] For the background in grammar see Peter Stein, *Regulae Iuris: From Juristic Rules to Legal Maxims* (Edinburgh University Press 1966) 53. I will deal with epistemology in my *Law and Philosophy in the Late Roman Republic* (in preparation).

[21] See esp. Strabo, *Geography* 13.1.54.3. Cf. esp. Oliver Primavesi, 'Ein Blick in den Stollen von Skepsis: vier Kapitel zur frühen Überlieferung des Corpus Aristotelicum' (2007) 151 *Philologus* 51–77; for further references see Brouwer, 'Aristotle' (n 2) 53.

[22] For the setting see Jean-Louis Ferrary, *Philhellénisme et impérialisme* (2nd edn, École française de Rome) 589–615, 734 (with further references).

[23] See Brouwer, *Law* (n 20).

[24] See further Henri-Irénée Marrou, *Histoire de l'éducation dans l'antiquité* (Seuil 1948); Manfred Fuhrmann, *Das systematische Lehrbuch* (Vandenhoeck & Ruprecht 1960); Elizabeth Rawson, *Intellectual Life in the Late Roman Republic* (Duckworth 1985); Catherine Wolff, *L'éducation dans le monde romain* (Picard 2015).

[25] *omnia fere, quae sunt conclusa nunc artibus, dispersa et dissipata quondam fuerunt; ut in musicis numeri et voces et modi; in geometria lineamenta, formae, intervalla, magnitudines; in astrologia caeli conversio, ortus, obitus motusque siderum; in grammaticis poetarum pertractatio, historiarum cognitio, verborum interpretatio, pronuntiandi quidam sonus; in hac denique ipsa ratione dicendi excogitare, ornare, disponere, meminisse, agere, ignota quondam omnibus et diffusa late videbantur. adhibita est igitur ars quaedam extrinsecus ex alio genere quodam, quod sibi totum philosophi adsumunt, quae rem dissolutam divulsamque conglutinaret et ratione quadam constringeret.*

[26] See Fritz Schulz, *History of Roman Legal Science* (Clarendon 1946) 62–69; Franz Wieacker, 'Über das Verhältnis der römischen Fachjurisprudenz zur griechisch-hellenistischen Theorie' (1969) 20 Iura 448, 469; Franz Wieacker, *Römische Rechtsgeschichte* 1 (Beck 1988) 618–639.

[27] *Quintus Mucius Publii filius pontifex maximus ius civile primus constituit generatim in libros decem et octo.*

factual settings thus not only came to be distinguished from the reasons or rules upon which the decisions were based, these rules came to be presented in categories, which were headed by definitions. With regard to each of these categories the most general rules were put up front and followed by the more specific ones. This ordering of the available legal material led to the law becoming more abstract, in two ways: not only were the rules presented without reference to the factual settings in which they were developed, also the terminology used in these rules became more abstract.

The most important among these teaching manuals was a 2nd century CE textbook written by someone we only know under the name of Gaius.[28] It must be noted, though, that the teaching manuals thus produced were still intended for classroom use, in order to give students and lawyers a summary of the law developed on the basis of judgments. It should be noted, too, that the origin of law as a system of rules is thus not to be found in statute. Indeed, in Republican times 'statutes' (*leges*) play a minor role only: they were usually but introduced as a solution to a specific, societal problem.[29] Only in imperial times, when power had become concentrated in the hands of one man, legislation became more important as an instrument for exercising that power.

At the beginning of the 6th century CE, Justinian, the new ruler of the Byzantine empire, decided – like his imperial predecessors – to use statute as an instrument to impose order on his realm, taking the momentous step to turn an adaptation of Gaius' teaching manual into statute. This adaptation is referred to as Justinian's *Teaching Manual*, even though, first, the work was in fact carried out by Tribonian, Justinian's chancellor, and his collaborators, and even though, second, the work was no longer just a teaching manual, but had become a legal source itself. As we shall see in a moment, the importance of the elevation to law cannot be overestimated: with reference to the Latin title, Stein introduced the phrase 'institutional system' here.[30] Next to this adaptation, Tribonian and his collaborators also produced a *Digest*, a systematization of what they considered to be the most important among the Roman *responsa*, and a *Code*, that is a collection of Roman legislation, most of it of imperial date.[31]

In Western Europe at the end of the 11th century, versions of the Justinian legal corpus resurfaced or – after centuries of neglect – were studied and put to use again.[32] In the 'universities', the new establishments of higher education, with Bologna taking pride of the first place here, the version known as the *littera bononiensis* or Bolognese Vulgate was read.[33] In the Italian Republics, where after dark ages with invasions from the Scandinavian North and the Arab South, commerce began to flourish once more, this learning was in high demand. In order to find solutions for the legal problems that these more complex commercial societies were confronted with, Justinian's rich body of Roman law was obviously very helpful, indeed. This *ius commune,* as the reuse of the material came to be known, would have a profound and lasting influence on the manner in which conflicts on the European continent would be resolved, that is on the basis of law understood as a collection of written substantive rules, from which the appropriate rule has to be applied to the case at hand. The authoritative statement on how to judge a conflict was found in Justinian's *Code*, at 7.45.13: 'Judging ought to be based on statute, not on earlier examples'.[34]

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[28] Gaius' *Teaching Manual* is referred to in one of Justinian's introductory statutes to the *Digest*, in the *Constitutio omnem*, at 1, as one of the six books 'out of two thousand books and three million lines' (*in librorum quidem duo milia, versuum autem tricies centena extendebatur*) still in use by students, 'on the advice of their teachers' (*a voce magistra*). See further A.M. Honoré, *Gaius* (Clarendon 1962) 126–130; and O Stanojevic, *Gaius Noster* (Gieben 1969) 13–14. On its rediscovery in Verona in 1816 see Mario Varvaro, *Der Glücksstern Niebuhrs und die Institutionen des Gaius* (Jedermann 2014).

[29] The Twelve Tables (450 BCE) are the exception here: in Rome they were presumably introduced in order to solve the struggle between patricians and plebeians. The model here is the legislation, which Solon had devised for solving societal problems in Athens, and with which the Romans had become familiar through an embassy (see Livy 3.31.8). Different from Rome, where unwritten law remained the norm, in Athens written law developed into the main source of law, proudly put on display in public spaces: see Karl-Joachim Hölkeskamp, '(In-)schrift und Monument. Zum Begriff des Gesetzes im Archaischen und Klassischen Griechenland' (2000) 132 ZPE 73, 92. For the contrast between Rome and Athens see Vincenzo Arangio-Ruiz, *Rariora* (Edizione di storia e letteratura 1946) 241.

[30] See Peter Stein, 'The Development of the Institutional System' in P.G. Stein and A.D.E. Lewis (eds.), *Studies in Justinian's Institutes in Memory of J.A.C. Thomas* (Sweet & Maxwell 1983); Peter Stein, *Legal Institutions: The Development of Dispute Settlement* (Butterworths 1984) 125–129; Peter Stein, *Roman Law in European History* (CUP 1999) 81; cf. – with a simple, but helpful table – Geoffrey Samuel, *An Introduction to the Comparative Law Theory and Method* (Hart 2014) 98–99.

[31] For Tribonian and his work see A.M. Honoré, *Tribonian* (Duckworth 1978) 139.

[32] 'Roman law came crashing back in the tumultuous events to the eleventh to thirteenth centuries in Europe', according to Glenn (n 1) 139.

[33] For a classic account of the rediscovery see Paul Vinogradoff, *Roman Law in Medieval Europe* (2nd ed, OUP 1929) 55–61.

[34] *non exemplis, sed legibus iudicandum est.* See further Stein, *Roman Law* (n 30) 93.

In the 15th and 16th centuries these texts were not only studied for practical purposes, but also in their own right as historical texts from antiquity. Continental 'humanist' jurists started to become aware of the fact that the Roman collection was not just a product of 'natural' reason, but also of the circumstances, in which it had been developed. Lawyers started to feel the need to adapt Roman law for their own times.[35] Hence lawyers on the continent became particularly interested in producing national versions of Justinian's *Teaching Manual*, which included making it more accessible in the vernacular.[36] Grotius' *Introduction to the Jurisprudence of Holland*, written in Dutch between 1619–1621, is an early example, even though it was never introduced as statute in Holland.[37] Other examples, that were put in force, include Napoleon's influential *Code civil*, which was the model for the Dutch and Belgian *Civil Codes*, among others, and – at the beginning of the 20th century, and with the incorporation of the *Digest* – the German *Bürgerliches Gesetzbuch*.

These developments towards statutory systematizations were not confined to private law alone (even though private law had a much broader scope as is usual now). In his *On the Law of War and Peace* yet again Grotius produced one of the first attempts of offering a systematized account in the field of 'international' law, as Jeremy Bentham would later coin it, based on a mitigated account of the Stoic doctrine of natural law and on observation of the common practice among the peoples.[38] With the rise of the nation state also other areas of law, such as criminal law or administrative law, expanded, in which comparable statutory systematizations were introduced. These systematizations followed the Justinian model of private law: here also, jurists devised systematic sets of substantive rules, organized in categories, with for each category the most general rules put upfront, which were subsequently put into force as statute by the lawgiver.

Due to the abstract nature of these systematic accounts, in the double sense of, first, having abstracted from the facts and, second, the use of abstract terms (as we have seen above), a variety of methods of interpretation had to be developed on the basis whereof the rules with the abstract terms could be explained and applied to actual conflicts. In e.g. Dutch law, Scholten's *General Part* offers a good example of the variety of methods that can be used, including the historical, teleological, and indeed the systematical approach.[39]

In sum: in Republican Rome under the influence of Greek, especially Stoic thinkers, Roman lawyers were able to turn the study of law into a science or – as it is also called – an expertise. In Stoic terminology, these terms can be used interchangeably. Lawyers, such as Gaius, produced systematic overviews of substantive law, based on the reasons or rules distilled from earlier judgments. In their teaching manuals the rules were divided into categories, with for each category the most general rules put upfront, to be followed by the more specific ones. In Constantinople, the 'second' Rome, Justinian declared an adaptation of Gaius's systematic account to be statute, and as such it became the model for the modern continental codes as systematic sets of rules in a particular field of law and as promulgated by a lawgiver.

IV. 'System' in the Common Law Tradition

The rediscovery and subsequent adaptation of the Byzantine systematization of Roman law in continental Europe had little effect on the English legal tradition, in which a different, procedural understanding of the notion of system has become dominant. The English legal tradition, or the procedural understanding of system that goes with it, has to be understood in relation to the Norman invasion in England of 1066.[40]

In their attempt to gain control over the realm they had acquired, William the Conqueror (1028–1087), duke of Normandy and Scandinavian in origin, and his successors, notably his fourth son Henry I (1068–1135) and above all Henry II (1133–1189), developed a supplementary system of adjudication, alongside the

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[35] For humanism see Paul Koschaker, *Europa und das römische Recht* (4th edn, Beck 1966) 105–124.

[36] For the interest in the *Teaching Manual* see Stein, *Roman Law* (n 30) 80.

[37] The standard edition is F. Dovring, H.F.W.D. Fischer, and E.M. Meijers, *Hugo de Groot. Inleidinge tot de Hollandsche rechts-geleerdheid* (2nd edn, Leiden Universitaire Pers 1965), which includes Grotius' tables, which so vividly illustrate the systematic nature of his code; for an English translation see R.W. Lee, *Hugo Grotius. The Jurisprudence of Holland* (2nd edn, Clarendon 1953), which unfortunately lacks these illuminating tables.

[38] The first edition was published in 1625. The best modern edition is BJA de Kanter-Van Hettinga Tromp, R Feenstra, and CE Persenaire, *Hugo Grotius. De Iure Belli ac Pacis* (Scientia 1993); a critical edition remains a desideratum. For Grotius' use of a mitigated version of the Stoic doctrine of natural law see René Brouwer, 'On the Ancient Background of Grotius's Notion of Natural Law' (2008) 29 Grotiana 1. For international see Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Payne and Son 1789) 324: 'The word international, it must be acknowledged, is a new one; though, it is hoped, sufficiently analogous [with national, RB] and intelligible.'

[39] Paul Scholten, *Algemeen deel* (Tjeenk Willink 1931). An English translation, alongside the original Dutch text, has been made available by the Paul Scholten project; see <www.paulscholten.eu> accessed 29 May 2018.

[40] For an overall and inspiring account see Glenn (n 1) 237–260, with further references; for an account of the development of English from the view point of the academic study of law see René Brouwer, 'The Study of Law as an Academic Discipline' (2017) 13(3) Utrecht Law Review 41, 42–43.

existing Anglo-Saxon institutions.[41] In the supplementary system of adjudication, the Norman King's civil servants played a vital role. These servants were ordered to resolve conflicts in the name of the Norman king, not only in London, but above all 'on eyre', in the old French expression, which goes back to the Latin *iter*, that is, journey. Judges thus travelled round and offered their services throughout the country.[42] In doing so, by giving parties the opportunity to express their side of the case, by making the common customs of the people of England explicit, and by instructing twelve local bystanders to judge on the facts of the case (the origin of the jury system), these civil servants, as specialists in the law, made the English people participate in and accept the rule of the king.

This Norman type of conflict resolution did not infringe upon the ancient Anglo-Saxon arrangements of conflict resolution. Rather, it turned out to be so successful that it not only replaced them, but also has remained in place to this very day. The Norman method of conflict resolution was also successful in the sense that it kept the Byzantine systematization of Roman law out. Here the timing surely must have played a role: Roman law only made its gradual reappearance on the European continent *after* the Normans had established their rule in England.

The doctrine underlying the Norman type of conflict resolution has come to be known as *stare decisis* or binding precedent. Of course, this is not the place for an extensive discussion of this doctrine: here I will but deal with it in order to show that it keeps English lawyers clearly focused on the cases as such, rather than – as on the European continent – on sets of legal rules, systematized with the help of abstract notions. *Stare decisis* is an expression popularized by Sir Matthew Hale CJ in the 1670's;[43] the doctrine of binding precedent can be dated back to the early half of the 19th century, stressed by among others Justice James Parke:

> Our common-law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unrea-sonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised.[44]

In order to decide a conflict, English lawyers start out from a comparable earlier case, by taking into account its 'material' facts as well as the decision. As for the material facts, the presumption is that the facts that relate to person, place, time etc. are not material, unless there are good reasons to think otherwise.[45] They will thus try to find the reason (or reasons) underlying the earlier decision, which are usually referred to as the *ratio(nes) decidendi*. Once the *ratio* has been found, they can be applied to the conflict at hand. If a court offers two similar *ratios* – in the plural the English lawyers tend to prefer over the correct Latin form of *rationes* – both will be binding.[46]

An additional complicating factor, often bewildering for continental lawyers, who are used to the courts speaking by one single authoritative voice,[47] is that in appeal cases most decisions consist of the opinions of three or more judges, each of them giving a separate judgment on the case. In order to find the ratio(s), not all of these opinions may need to be taken into account: only those opinions that turn out to be part of the majority are binding. In the appeal at the Supreme Court of the UK most judgments will even consist of five (or occasionally even seven) opinions, which brings five (or even seven) possible sets of ratios into play.

Even in those areas of law where statutes (or Acts of Parliaments) are put into force – with the Glorious Revolution of 1688 the King formally recognized English Parliament as the highest lawgiving body in the country; the judges in the courts, in the common law tradition after all those who make the customs of the people of England explicit, did in fact, too –, Parliament has usually not set aside the already developed case

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[41] R.C. van Caenegem, *The Birth of the English Common Law* (2nd edn, CUP 1988) 20–28.

[42] Good accounts are John Hudson, *The Formation of the English Common Law* (Longman 1996) 33–34; Harry Potter, *Law, Liberty, and the Constitution* (Boydell & Brewer 2015) 44–45 (under Henry I), 47–50 (under Henry II).

[43] *Hanslap v Cater* [1673] 86 ER 163: 'Hale consented that it should be reversed according as the later precedents have been; for he said it was his rule, *stare decisis*.'

[44] See *Mire v Rennell* [1833] 6 ER 1015, 1023. For a critical assessment of the doctrine see JH Baker, *An Introduction to English Legal History* (4th edn, OUP 2002) 199.

[45] For the notion of 'material facts' see A.L. Goodhart, 'The *Ratio Decidendi* of a Case' (1930–1931) 40 Yale Law Review 161.

[46] Ian McLeod, *Legal Method* (9th edn, Palgrave MacMillan 2013) 146–48.

[47] The contrast with French case law is especially noteworthy. The judgment of the French Supreme Court is given in a single sentence with the following structure, which follows the practical syllogism developed after Aristotle. See further below, section 5.

law in the fields of private or criminal law: only in a piecemeal manner legislation is added.[48] Where statute has been added, the courts deal with it in a cautious way, interpreting it in a strict, literal manner,[49] from which they but deviate in exceptional cases, such as when the literal meaning would lead to an absurd result.[50]

When overviews of substantive law were produced, these accounts firmly remained within the domain of the study of law, with notable exceptions, such as Bracton, *On the Statutes and Customs of the English* (13th century), in which the influence of Roman law can be discerned,[51] or Blackstone's *Commentaries on the Laws of England* (1765–1769), in which already the division into its four books is clearly inspired by Justinian's *Teaching Manual*.[52] Both Bracton's and Blackstone's works were elevated to the special status of 'book of authority', and as such can be invoked as a legal source in the courts.

Despite the absence of systematic accounts of substantive law (let alone of the institutional system), which are promulgated by a lawgiver, the notion of system in English law is not altogether absent. On the contrary: these days the notion of system is a much used in the phrase 'English legal system'. This popularity appears to be a relatively recent development, for which the model has been set in 1940 by Richard Jackson's *The Machinery of Justice*, in which he describes the operations of the English law, including the manner in which conflicts are resolved, with the doctrine of binding precedent for case law and the literal method of interpretation for statute at its core.[53] In 1967 Ronald Walker used the phrase 'English legal system' as the title of his book, which just like Jackson's work deals with the manner in which the English law functions. Walker's *English Legal System* turned out to be a lasting success: it is now in its 11th edition.[54] In its slipstream other books with the same title on the very same subject have made 'the English legal system' into a standard expression.

'English legal system' has thus come to refer to the manner English law functions, with emphasis on the doctrine of binding precedent and the literal method of interpretation of statute. A few examples from recent textbooks make this already clear. This is how Slapper and Kelly's in the most recent version of their textbook on the English legal system put it: 'Taken together, the set of institutions, processes, laws and personnel that provide the apparatus through which law works, and the matrix of rules that control them, are known as the legal system'.[55] It thus explicitly does not deal with substantive English law, as Cownie, Bradney, and Burton in the recent version of their *English Legal System in Context* make clear: 'It is about how law functions in England and Wales. We intend to describe and analyse legal processes in England and Wales. [...] [It is] not concerned with describing the substance of the legal rules of the state'.[56] The relation between the English legal system on the one hand and English substantive law on the other hand is described by Huxley-Binns, Marin, and Frost in *Unlocking the English Legal System* in terms of underpinning:

> English legal method and the English legal system are important as they underpin understanding of the development and practice of all substantive areas of law. This book starts with an outline of the sources of law, followed by detailed consideration of the operation of judicial precedent and statutory interpretation. [...] The court structure in England and Wales is then explained, together with how cases are funded. Chapters 8–11 concentrate on the personnel, both professional and lay, in the legal system. [...] The book should provide students with a clear understanding of our legal system.[57]

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[48] In the English Civil War the struggle for power was thus not only between King and Parliament, but also with the courts. The battle between the King and the courts, that is to say between the King's authoritative use of reason and the courts' use of natural reason finding the right solution for each case, is the theme in Thomas Hobbes, *Dialogue between a Philosopher and a Student of the Common Laws of England* (first published in 1681, Thomas Cromartie ed, OUP 2005).

[49] McLeod (n 46) 246–264.

[50] See *Pepper v Hart* [1992] UKHL 3, [1993] AC 593.

[51] G.E. Woodbine (ed.), Bracton *de Legibus et Consuetudinibus Angliae* (Yale University Press 1915–1922). For a discussion of the influences of Roman law on Bracton see Theodore FT Plucknett, *A Concise History of the Common Law* (5th edn, London 1956) 261–262; Stein (n 30) 64.

[52] The standard edition is now William Blackstone, *Commentaries on the Laws of England* (William Prest ed, OUP 2016). Prest discusses Justinian's *Teaching Manual* as Blackstone's model in his introduction, vol. 1, at p. x.

[53] R. M. Jackson, *The Machinery of Justice* (CUP 1940).

[54] Richard Ward and Amanda Akhtar, *Walker and Walker's English Legal System* (11th edn, OUP 2011).

[55] Gary Slapper and David Kelly, *The English Legal System* (11th edn, Routledge 2017) 1.

[56] Fiona Cownie, Anthony Bradney, and Mandy Burton, *English Legal System in Context* (6th edn, OUP 2013) 1.

[57] Rebecca Huxley-Binns, Jacqueline Martin, and Tom Frost, *Unlocking the English Legal System* (5th edn, Routledge 2017) xv.

A side-effect of this division between form and matter is that textbooks on English law covering both are rare: Slapper and Kelly's *English Law* is an exception.[58]

V. Conclusion

It can thus be concluded that in the Western legal traditions 'system' has come to be understood in two different ways. In the continental civil law tradition law, due the influence of the Stoic thinkers on the Roman lawyers, system is understood in a substantive sense: system refers to the material legal rules, which are organized by means of categories and definitions, and which – following Justinian's example – are promulgated by a lawgiver. This understanding implies a capability to deal with abstract notions and rules, which can be applied with the help of liberal methods of interpretation. In the English common law tradition this substantive understanding of system as developed in Byzantine-Roman law is absent. Here in a recent development system is now understood in relation to the operations of the law, in which statutes deal with specific topics, and judges find solution to legal conflicts by literal interpretation of these statutes or by applying the relevant ratio(s) from earlier cases.

The difference between these two understandings of system can also be formulated with the help of the terms top-down and bottom-up, or deductive and inductive. Top-down or deductive applies to the civil law tradition: legal conflicts are solved by applying the relevant rule(s) from the systematic code to the case. The model here is Aristotle's practical syllogism, with the relevant article from the code serving as the major proposition, the facts as the minor, from which a conclusion ought to follow. The *jurisprudence* from the French Supreme Court offers the best instances thereof. It still formulates its judgment in the form of one single sentence, with (usually only a reference to) the article from the code as the major, with a summary of the facts as the minor, to be followed by a conclusion.[59] Of course, the general formulations in the major may sometimes need to be explained by the court. Here the liberal methods of interpretation developed within this tradition in order to operationalize abstract notions can do the trick. Bottom-up or inductive applies to the common law tradition: legal conflicts are solved by finding a case based on similar facts. From this case the *ratio(s)* can or rather, based on the doctrine of binding precedent, *must* be distilled and thereafter applied to the conflict at hand. If the conflict relates to the interpretation of a particular statute, the interpretation will remain as literal as possible.

This difference between the meanings of system is surely not confined to law alone but fits a larger pattern. The different meanings of philosophy offer a parallel and can also be expressed in terms of the opposites top-down (or deductive) and bottom-up (or inductive). On the continent, philosophy is often understood as dealing with world views, developed by system builders and dominated by abstract notions. One example is the grand theory developed by Hegel (1770–1831) about 'Spirit' (*Geist*), which found its first expression in the *Oldest Systematic Programme of German Idealism* (presumably written by his fellow student and poet Hölderlin (1770–1843); Hegel was most likely only its co-author);[60] another is the world view developed by Martin Heidegger (1899–1976) about 'Being' (*Sein*) and 'Being-in-the-World' (*Dasein*).[61] In England, philosophy has come to be understood as analytic, in which the focus is on the logical analysis of concepts and the careful step-by-step-argumentation that goes with that and without taking much for granted.[62]

Other examples can be added, such as the different manners in which Aristoteles' works were read, or the different ways, in which positivism has developed. As for Aristotle's works: on the continent, they are read as offering a substantive system of thought (although in Protestant Northern Europe in the early modern period they were replaced by texts in which new substantive systems of thought were offered); in England, Aristotle's texts were (and still are) read as offering a good starting point for the analysis of a particular concept.[63] As for positivism (whether in the logical or legal variant): on the continent, positivism

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[58] Gary Slapper and David Kelly, *English Law* (3rd edn, Routledge-Cavendish 2010).

[59] A judgment looks in principle like this: 'Vu l'article … (*major*), en attendu que … (*minor*), casse … (*conclusion*)'.

[60] See Christoph Jamme and Helmut Schneider, *Mythologie der Vernunft; Hegels ältestes Systemprogramm des deutschen Idealismus* (Suhrkamp 1984).

[61] Martin Heidegger, *Sein und Zeit* (Niemeyer 1927).

[62] See Edward Craig, *The Mind of God and the Works of Man* (Clarendon 1987), Simon Critchley, *Continental Philosophy* (OUP 2001).

[63] See J.O. Urmson, 'The History of Analysis' in Richard Rorty (ed.), *The Linguistic Turn* (University of Chicago Press 1967); see also Mario Riccardi, *Diritto e natura: H.L.A. Hart e la filosofia di Oxford* (Edizione ETS 2008) 73–85.

is aimed at overall system-building, whether in science or in law;[64] in England, positivism is focused on conceptual analysis.[65]

Two possible objections against this analysis of the two understandings of system in law should not go unmentioned. A first, common objection is that the traditions have converged, such that the different understandings of system have lost their significance. Statute has become a more important source in English law, whereas on the continent case law has become more relevant. Whereas the convergence of the sources is surely correct, the objection has to be rebutted: it has not affected the different understandings of system. In English law, statutes are still limited in scope and do not contain overall substantive systematization of fields of law. In the continental jurisdictions, the augmented importance of case law has not affected the understanding of law as systematic in substance. On the contrary: case law rather contributes to this systematicity and offers further elaborations of the system.

Another objection relates to English law as such. Even if system in English law refers to the functioning of the law, could it not be maintained that an implicit substantive systematization is in fact underlying English law? Should the textbooks in the different areas of law, as in e.g. tort or contract law, not be considered as evidence for an underlying system of substantive law? The objection cannot stand either. In the end these systematic overviews are at best considered an 'extrinsic aid': when a particular legal problem will have to be solved, recourse will always be taken to the specific relevant legal sources, i.e. to case law or the statutes.[66]

If this analysis of the different meanings of system in the two traditions is correct, it must result in different understandings of legal unity in jurisdictions that belong to a different tradition. In a civil law jurisdiction legal unity will primarily be understood in terms of substantive, statutory law; in a common law jurisdiction legal unity will be understood in terms of following earlier precedent or – where statutes are involved – in interpreting them literally. These different understandings of system and legal unity can pose a challenge where countries that belong to the different traditions have to cooperate. In this respect the United Kingdom is an interesting case in two different ways. Scots law once surely belonged to the civil law tradition, but here the challenge seems to have been overcome with common law characteristics, including the doctrine of binding precedent, now firmly embedded in its jurisdiction.[67] The challenge appears to have become unsurmountable in the relation between the UK and the EU, where the different understandings of system in the English common law tradition and the continental civil law may have led to the opposite effect.[68] Of course, the discussion of these examples oversteps the analysis of the notion of system in both traditions as such and is thus best left to another occasion.

Competing Interests
The author has no competing interests to declare.

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[64] See e.g. for science the 'Wissenschaftliche Weltauffassung der Wiener Kreis' ('Manifesto of the Vienna Circle'), first published in 1929, reprinted in e.g. Michael Stöltzner and Thomas Uebel, *Wiener Kreis* (Meiner 2006); and for law Hans Kelsen, *Reine Rechtslehre* (Deuticke 1934).

[65] See e.g. HLA Hart, *The Concept of Law* (2nd edn, OUP 1994) or Joseph Raz, *The Concept of a System* (Clarendon 1980).

[66] The differences between the traditions can be pushed beyond the law itself: for an assessment of the different approaches with regard to legal scholarship see Brouwer (n 40) 42–44.

[67] On Scotland see Zweigert and Kötz (n 1) 202–203; Stein, *Roman Law* (n 30) 87.

[68] See e.g. Fernanda G Nicola, 'Luxemburg Judicial Style With or Without the UK' (2016–2017) 40 Fordham International Law Journal 1505.