COMMON-LAW AND CIVIL-LAW LEGAL FAMILIES: A MISLEADING CATEGORISATION

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Certification

This thesis is submitted to Bond University in fulfilment of the requirements for the Degree of Master of Laws by Research.

This thesis represents my own work and contains no material which has been previously submitted for a degree or diploma at this University or any other institution, except where due acknowledgement is made.

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SUMMARY

This thesis examines common-law and civil-law jurisdictions in order to find differences between them. These differences are then being qualified as either relevant or irrelevant for the categorisation of individual jurisdictions. This reflects the argument that only features occurring in only one of the legal families can be relevant when categorising jurisdictions. Only such features can be, from the author's point of view, specific and typical for their legal family and inherent features of them..

The first thing to be considered under this premise is the respective sources of law (Chapter 1). These are in civil-law jurisdictions traditionally statutes and in common-law jurisdictions predominantly courts' decisions. There are, of course, statutes also in common-law jurisdictions and previous courts' decisions play an important role also in civil-law systems. The differences are not inherent. Furthermore, there are fundamental legal concepts, that is important concepts underlying the respective rules. These concepts may explain differences between the rules. The examination of sources of law, altogether, does not reveal any distinguishing factors.

Chapters 2–5 discuss the issue of attitudes of common-law and civil-law judges to statutory interpretation. Chapter 2 examines the respective methods of statutory interpretation. This does not reveal any differences as to common-law and civil-law judges' attitudes; for instance, greater adherence of common-law judges to the literal meaning of rules arguably does not exist. As shown in Chapter 3, this is true also in

the area of Criminal Law under the special safeguards this subject provides. Chapter 4 asserts terminology causes differences between the systems; this is true even in case of identical terminology which is sometimes being interpreted in a diametrically different way. Moreover, differences can also be compensated for elsewhere in the legal system. Altogether, Chapter 4 does not reveal any inherent differences between the systems. As Chapter 5 shows, there is an ongoing process of convergence between common-law and civil-law systems, which means the categorisation into legal families becomes even less plausible.

Chapter 6 shows that the categorisation into legal families is not only incorrect but also highly misleading and that there are numerous scholarly statements relying incorrectly on the family concept. The proposition (Chapter 7) is that it may nevertheless be feasible to structure comparative-law texts according to the well-known legal families, as these show a common historical background. However, for conducting research into particular foreign legal rules (micro-comparative research), the family concept becomes a misleading starting-point. Insofar the concept should be abandoned or, at least, used only together with an appropriate warning.

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INTRODUCTORY MATTERS

There cannot be found any clear-cut definition either of Common Law or of Civil Law which would permit an inference regarding the distinction between them. The Common Law is just said to be a "large body of rules founded on unwritten customary law evolved and developed throughout the centuries".[1] The civil-law systems, on the other hand, are being described by "notions of codification" and of "systematisation of concepts", resulting probably from "a more chequered history".[2] These distinguishing factors obviously are rather theoretical.

Yet there are many short characterisations available. They typically consist only of a single attributive phrase and are often presented by way of contrasting particular features of the systems (for example the forensic and pragmatic Common Law as opposed to the academic and theoretical Civil Law)[3]. Though this might not always be obvious from the terminology used, such characterisations usually focus either on the different sources of law or the different modes of interpretation of the law. These topics will be separately discussed below.

The concept of legal families

The distinction between common-law and civil-law systems is reflected in the concept of "legal families". This concept is a "key concept" of Comparative Law;[4] it goes back to the year 1900, the year of the First International Congress of Comparative Law in Paris.[5] The

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1 De Cruz "Comparative Law in a Changing World" p 36; similarly Zweigert/Kötz "Introduction to Comparative Law" p 265. Also Graw "An Introduction to the Law of Contract" para 1.3.1.

2 De Cruz, above n 1, pp 36–37.

3 For these examples see Zweigert/Kötz, above n 1, p 258.

4 De Cruz, above n 1, p v.

5 Ibid, p 34; also Cole/Frankowski/Gertz "Criminal Justice Systems of the World" p 21; Zweigert/Kötz, above n 1, p 2.

concept involves national jurisdictions being categorised by grouping them. This results in groups of similar jurisdictions, called "legal families". Legal families are said to be a set of "deeply rooted historically conditioned attitudes about the nature of law, the role of law in the society and the political ideology, the organisation and operation of a legal system".[6] Considering this description, it is not surprising that the details of the categorisation are somewhat unclear. The question of which legal families should be acknowledged, has not been answered unanimously. There are proposals to regard Common Law and Civil Law as the only legal families,[7] whereas other proposals acknowledge up to seven distinct legal families[8]. Nor is the correct classification of some particular jurisdictions clear.[9]

However, it can be said that England, the United States of America,[10] Canada[11] and Australia undoubtedly belong to the common-law family.[12] Furthermore, France, Italy and Germany can definitely be grouped into the civil-law family.[13] The view mentioned in the last paragraph, which supports a more complex categorisation and the establishment of some more legal families, does not lead to a different conclusion: It mainly emphasises the differences between the various civil-law jurisdictions and differenti-

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6 De Cruz, above n 1, p 33; Merryman "The Civil Law Tradition" p 2.

7 Cole/Frankowski/Gertz, above n 5, pp 17–18, 23; de Cruz, above n 1, p vi. The older publications usually also refer to a distinct family of socialist jurisdictions. The former socialist jurisdictions nowadays have to be considered as part of the Civil Law; see de Cruz, ibid, pp vi, 41.

8 Zweigert/Kötz, above n 1, p 65. See also the preceding footnote.

9 Particularly difficult seems to be the correct classification of East-Asian jurisdictions like China, Japan, South Korea and Taiwan. See on this Merryman, above n 6, p 5; Zweigert/Kötz, above n 1, p 66. Maybe this indicates the necessity of the introduction of a distinct far-eastern family.

10 With the exception of Louisiana.

11 With the exception of Québec.

12 Also Wales and Northern Ireland as parts of the United Kingdom, the Republic of Ireland, New Zealand, India, parts of sub-Saharan Africa – such as Nigeria, Kenya and Tanzania –, of the Far East – such as Singapore, Malaysia and Hong Kong – and of the South Pacific – for instance Fiji Islands and Papua New Guinea –. See on this de Cruz, above n 1, pp 35, 100, 101; also Cole/Frankowski/Gertz, above n 5, p 27.

13 Along with Austria, Switzerland, Spain, Portugal, The Netherlands, Belgium, Scandinavian countries, Turkey and – outside Europe – Latin American countries, various Arab states, North African countries and – in South-East-Asia – in Thailand and Indonesia. See on this de Cruz, above n 1, p 35; also Cole/Frankowski/Gertz, above n 5, p 105.

ates Romanistic (with, for example, France and Italy), Germanic (with, for example, Germany) and Scandinavic legal systems. In other words: The actual classification of France, Italy or Germany as civil-law systems is not in issue; in issue is rather whether the differences between these jurisdictions should be reflected in a refined scheme of legal families.[14] It is worth noting that, in addition to the common-law and civil-law jurisdictions, there are several hybrid (mixed) systems.[15]

Historical development of Common Law and Civil Law

As can be seen from the descriptions of common-law and civil-law systems at the beginning of this thesis, historical development plays an important role in the explanation of their features. The description of the Common Law suggests that the entire Common Law can only be described as the result of historical development over the centuries. This means the process of development is to be emphasised rather than its result. Also the characterisation of the Civil Law reflects a very important historical factor: the civil-law systems as the result of the respective historical incidents, for example revolutions.

The entire legal history of, on the one hand, England (as the origin of Common Law) and, on the other, continental-European countries (the original civil-law countries), was very different.[16] England, of course, also was conquered by Romans, as were vast parts of continental Europe. However, England's powerful monarchs and its strong legal

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14 Which also addresses the Islamic Law, the Hindu Law and the Far-Eastern jurisdictions as further legal families. See Zweigert/Kötz, above n 1, pp vii–viii, and ibid, pp 68–69, with an explanation of their categorisation.

15 Like Scotland in the United Kingdom, Greece, South Africa, the Philippines, the Seychelles, Québec in Canada, Louisiana in the United States and Puerto Rico. On this see Zimmermann/Visser/Reid "Mixed Legal Systems in Comparative Perspective" p 3; Zweigert/Kötz, above n 1, p 72.

16 Zweigert/Kötz, above n 1, pp 257–258.

profession were able to prevent any takeover by Roman Law. Consequentially, English law could develop independently from foreign influences.[17] On the other hand, Roman law informed each aspect of the laws of large parts of continental Europe during their occupation. These laws were relatively simply structured and therefore receptive to the adaptation to the more sophisticated Roman law.[18]

Traditionally, England did not respond to problems and disputes occurring in society with the enactment of statutes; it rather tended to look towards the courts' previous decisions in similar cases, the "precedents". The precedential decisions of superior courts even became binding for the judges at the beginning of the 19th century, when there was a sufficient range of law reports, from which the judges could gain the necessary information about the previous cases.[19] On the other hand, the civil-law tradition – influenced by Roman-law thinking – was to develop rather abstract and systematic legal ideas. This led to a stronger tendency towards the enactment of statutes and particularly the enactment of comprehensive codes. In France, for example, the famous *Code Civil* was introduced in 1804; the German Civil Code (*Bürgerliches Gesetzbuch* or – abbreviated – *BGB*) was enacted in 1896 and came into force in 1900.[20]

Beyond these observations, legal history is not discussed in detail here, as the main concern of this thesis is to compare the current state of legal systems rather than their past.

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17 De Cruz, above n 1, pp 57 and 80; Heydon "Judicial activism and the death of the rule of law" (2003) 14 AIPJ pp 78 at 81. Similarly Bogdan "Comparative Law" p 102. Bogdan, ibid, pp 102–103, states that Latin terms were not used in the English legal language until the Middle Ages.

18 De Cruz, above n 1, pp 80–81.

19 See on the principle of binding precedents below pp 24–26.

20 Zweigert/Kötz, above n 1, pp 81 and respectively 142. Also Corkery "Starting Law" p 120.

The current situation is characterised by new societal challenges which are similar in all industrialised countries. These well-known challenges comprise, for example, the need for a just distribution of welfare funds and public resources in general, the need to make medical services available to everyone and the need to cope with increasing unemployment rates and provide due protection of the environment. The legal aspects of these issues are dealt with in common-law and civil-law countries quite differently: The common-law jurisdictions show an increasing reliance on statutory enactments, called "modern social legislation", which means the legislature is increasingly involved in the law-making.[21] In civil-law jurisdictions, to the contrary, the courts have had to be active and invent solutions which cannot be found in the ageing codes.[22] These tendencies are, as said before, very different, yet they lead to increasingly similar legal systems and may be rendered showing "convergence of the systems".[23]

The paramount importance of statutes in the common-law world, at least nowadays and in some areas of law, is highlighted in altogether three passages of de Cruz's and Cook/Creyke/Geddes/Hamer's texts:

> Historically, common law statutory canons were developed originally for "special statutes", in other words, statutes passed by the legislature to cope with specific urgent problems of the day, and these statutory maxims were, therefore, limited to specific problems.[24]

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21 For civil-law jurists, this sentence might sound odd, but the role of the law-maker, in common-law countries, is traditionally exercised by courts – and indeed not by the legislator. See on this Waller/Williams "Criminal Law" para 1.3 who state expressly that not only the legislature but also the courts are common-law law makers. On the "modern social legislation" see Zweigert/Kötz, above n 1, p 201; see also Corkery, above n 20, p 117.

22 See Zweigert/Kötz, above n 1, p 208.

23 This term is being used by de Cruz, above n 1, pp vii, 41. There are, however, some scholarly statements, which deny the existence of a convergence process. On this see in detail below ch 5.

24 De Cruz, above n 1, p 266.

> ... whether the area of law concerned is seen as essentially regulated by statute law, as in child law, mental health legislation, town and country planning, licensing law or rent restriction Acts.[25]

> [T]he need for speedier amendment of the law, for the comprehensive treatment of a subject, or for radical change, has meant that legislation has become the most common source of new rules of law.[26]

Another current challenge for a part of the mentioned European countries and particularly the English, Welsh, Northern Irish and Irish common-law jurisdictions is their membership in the European Union. The European Union laws render inconsistent national laws invalid ("principle of supremacy").[27] That principle naturally affects the written as well as the unwritten national laws. However, for the purpose of this thesis it is not necessary to discuss the example of the influence of European-Union law on common-law member states.

Inherent and non-inherent features of individual jurisdictions

The title of this thesis shows the goal of examination of individual jurisdictions, both common-law and civil-law jurisdictions. The examination is aimed at showing whether the traditional categorisation of jurisdictions and their classification as members of legal families is reasonable or not. It is necessary upfront to underline the difference between, on the one hand, individual jurisdictions and, on the other hand, groups of supposedly similar jurisdictions, the legal families. Individual jurisdictions are for example

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25 Ibid, pp 277–278.

26 Cook/Creyke/Geddes/Hamer "Laying Down the Law" p 151. See also ibid, p 152.

27 Steiner/Woods "Textbook on EC Law" pp 65, 66–67. Also de Cruz, above n 1, p 282. See on the terms "EU" and "EC" also below n 313.

the English, the Australian (or – more detailed – the Queensland, the New South Wales or the Victorian), the French or the German jurisdictions; legal families are for instance the common-law and the civil-law family. This difference appears to be simple; it has, however, to be constantly observed, when individual common-law and civil-law jurisdictions and the differences between those individual jurisdictions will be exercised in order to find out about the reasonableness of their categorisation into legal families.

Though individual jurisdictions might turn out to be distinct, even very distinct from each other, the differences may not justify the traditional categorisation of individual jurisdictions into legal families. It is, of course, an important question whether differences are based on features appearing only in jurisdictions belonging to one legal family or in more than one legal families. From the author's point of view, differences may justify the categorisation only if the differences are specific and characteristic for member jurisdictions of a certain legal family and can be said to be "inherent". Mainly features occurring only in member jurisdictions of the same legal family can be distinguishing factors. There can as well be differences, even huge differences, between individual jurisdictions which are not specific nor characteristic for member jurisdictions of their legal family and are non-inherent differences. These "non-inherent" differences may exist and may well exist between jurisdictions traditionally classified as member jurisdictions of different legal families – non-inherent differences can, however, not justify the traditional categorisation into legal families.

The term "inherent" cannot be found – as far as the author is aware – in any comparative-law text. The whole idea that there are some differences between individual jurisdictions which do not have to do anything with their common-law or civil-law origin

cannot be found elsewhere either. On the other hand, this notion cannot be rendered trivial or self-evident, as it is mainly non-inherent features which are discussed in length – as will be shown in course of this thesis. The notion has to be named somehow – and the term "inherent" seems appropriate, as features of, for example, common-law jurisdictions can be either naturally (inherently) present in a common-law jurisdiction or just accidentally (non-inherently).

The term "inherent" does not carry the implication of exclusivity and is therefore appropriate. The inherent features are specific and typical for their legal family. Whether they are as well exclusive features of one family, is the question in issue. Often this is not the case, so that these features cannot be distinguishing factors.

This notion is original to this thesis, and the results of the thesis will be based on this notion. Therefore it should be briefly re-considered. From the author's viewpoint, it appears to be a matter of pure logic that only features present in member jurisdictions of only one legal family can justify the distinction. If there is a feature which might be more prevalent in members of one legal family but appears also in the other, then it seems hardly convincing to see this feature contributing to the distinction of legal families. However, if it does, if there is, in other words, a distinction being made based on such features, this is problematic, because it incorrectly elevates insignificant differences to fundamental differences and distinguishing factors.

There are many statements on common-law and civil-law characterisations like the following: "[J]urists on the European Continent think scholastically and deductively … while English jurists think inductively on a case-by-case basis".[28] Such statements have

[28] Bogdan, above n 17, p 84.

to be thoroughly analysed; the terms "deductively" and "inductively" characterise *prima facie* attitudes of civil-law and, respectively, common-law lawyers. Yet they are mainly concerned with the presence and absence of codification in the systems. In the absence of relevant statutes, "inductive" thinking is required. Such statements, thus, are in fact primarily concerned with the available sources of law considered in Chapter 1 and only secondarily with the resulting attitudes of lawyers. Furthermore, these statements are of course subject to the issue of inherent and non-inherent differences.

Jury trials as an example of a non-inherent common-law feature

The picture of Common Law held by a civil-law lawyer is considerably influenced by jury trials and perhaps by – in a US-American manner – vigorously performed cross-examination. In the common-law tradition for the Criminal Law, juries (usually comprising a group of 12 laypersons) participate in trials and decide questions of fact (as opposed to the legal issues, which are dealt with by the judge). In Queensland's criminal-law system, for example, jury trials occur in cases of alleged indictable offences which are the more serious offences and are tried before the Supreme Court and the District Courts.[29] Jury trials therefore are a prominent example of a feature of common-law systems. However, the question regarding jury trials is whether these are inherent features of the common-law family.

Only inherent features can be relevant in making a sharp distinction between Common Law and Civil Law. Features occurring in both systems cannot be distinguishing factors. If such features would be labelled as factors distinguishing legal families, this was

[29] See Colvin/Linden/McKechnie "Criminal Law in Queensland and Western Australia" paras 1.21, 1.22, 22.3. Nowadays jury trials are not as prevalent as they were; in Canada for example they almost disappeared. See on the declining importance of jury trials also in Australia: Findley "Problems for the Criminal Law" pp 187, 188–189.

not correct. It would obscure the fact that these differences are merely due to differences in various national jurisdictions. National jurisdictions naturally show huge differences between them – and this is regardless of whether they are of common-law or of civil-law origin. Regarding this, it has to be noted that jury trials – though more prevalent in the Common Law – occur also in the civil-law system of France, at least in a few instances, namely the trial of the most serious offences.[30] The occurrence of jury trials may be a prominent feature of common-law proceedings; yet jury trials are not common-law inherent. The occurrence of jury trials merely reflects different national traditions. Such features of the individual legal systems cannot justify the distinction between Common Law and Civil Law. And this is important as well regarding other differences between common-law and civil-law jurisdictions. Differences, even if they are fundamental, between a common-law and a civil-law jurisdiction do – if non-inherent – not justify making the distinction.

The jury example should only illustrate the theory entertained in this thesis: A feature of a legal system cannot be a distinguishing factor if it occurs as well in the other family. The example, thus, is not taken further by asking for the uniqueness of the way the common-law jury trial is culturally and constitutionally entrenched.

Macro-comparative approach of the thesis

When comparing two or more legal systems, one can restrict the field of examination to a particular issue, which might be handled this way in one system and a different way in another. This method is called "micro-comparison", and is opposed to "macro-

[30] Western Australian Law Reform Commission (WALRC) "Advantages and Disadvantages of the Adversarial System …" in "Review of the Criminal & Civil Justice System" Consultation Drafts (1999) pp 69 at 75.

comparison", which means a comparison of whole legal systems, showing a wider focus and aiming at reaching a rather general conclusion.[31] This thesis will compare common-law and civil-law systems on the macro-comparative level and reach a general verdict about differences between these systems. However, the examples which will be given in the thesis are examples mainly from the Criminal Law. This focus is not due to the importance of this area of law. The Criminal Law rather is the area of law with which the author is most familiar, in the sense that he is able to provide relevant examples and to be confident of the non-existence of counter-examples. The given examples are merely vehicles for the purpose of comparing the two kinds of systems.

The question in issue is whether there are differences between common-law and civil-law jurisdictions which justify their classification into legal families. This question deals with jurisdictions in their entirety, not only with specific areas of law and is thereby macro-comparative. The answer to this question should be a general statement about the classification of entire jurisdictions, even though the conclusion will be derived mostly from criminal-law examples. During in-depth research on the topic, the author did not come across either any suggestion or even an indication that different areas of law are to be considered separately for the purpose of systematic comparison. As its aim therefore is a general statement, the title of the thesis does not confine the discussion to Criminal Law.

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[31] These terms can be found in Zweigert/Kötz, above n 1, pp 4–5; also in Cole/Frankowski/Gertz, above n 5, pp 17–18; de Cruz, above n 1, pp 213, 227. On the other hand, Bogdan, above n 17, pp 48, 49, suggests that foreign legal systems always have to be considered in their entirety.

Queensland as relevant example

Most of the provided examples, as far as they are from Common Law, will concern the situation in Queensland. This Australian state, without a comprehensive but a very detailed codification of Criminal Law, provides an excellent example of the current development of common-law jurisdictions. Queensland cannot anymore be said to be a pure common-law system, and yet that does not prevent it from being typical. Worldwide, there cannot be found a single pure common-law jurisdiction. Even England, unquestionably a common-law family member, is no longer a pure common-law country.[32] Consequentially, if looking for an appropriate example of a common-law jurisdiction, one can consider a jurisdiction like Queensland.

Present use of the terms "Common Law" and "Civil Law"

Though perhaps self-evident, it should be very briefly mentioned that the terms both "Common Law" and "Civil Law" are being used in their broader sense encompassing the entire law of the respective jurisdictions. Both terms are sometimes also used in a narrower sense, describing only a part of the legal systems ("Common Law" as opposed to "Equity" and "Civil Law" as opposed to "Public Law")[33], but that is not the present terminology.

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[32] This will be shown below pp 117–118.

[33] Cf Zweigert/Kötz, above n 1, p 188, and de Cruz, above n 1, p 44, respectively. Also Graw, above n 1, para 1.3.2. Corkery, above n 20, pp 120–121, lists two further distinct meanings of the term "Civil Law" ("*ius civile*" contrasted with "*ius gentium*" and "Civil Law" contrasted with "Canon Law"). See also below pp 116–117 on one further meaning of the term "Common Law".

Overview of the following chapters

In the present thesis, the differences between common-law and civil-law systems and thereby the justification for differentiating between these legal families will be examined. The issue has at least two aspects; these two aspects are distinct from each other, yet there is a possible causal link between them. The first of these aspects – dealt with in Chapter 1 – is the different sources of law, with common-law systems traditionally relying heavily on previous court's decisions ("case law") making limited use of statutes, while civil-law systems traditionally make extensive use of statutory enactments ("written law"). This first aspect is a rather formal one, as it does not necessarily concern the result but just the basis of the decision-making processes.

A borderline issue is the common-law doctrine of binding precedent, which means the common-law judges are potentially bound by previous decisions of other judges: This issue provides for the available sources of law; yet thereby it can also inform the outcome of the judges' decisions. Nevertheless, it is justifiable to put the topic to the formal aspect as it, at first, just determines the basis for the present decision and whether the present judge can possibly disregard previous judgments. If he can, the issue remains an entirely formal one. Only under specific circumstances does it inform the eventual outcome of decisions and will become a substantive matter.

The second chapter starts the discussion of the different decision-making processes, which is the substantive, most important and – in Chapters 2–5 – by far most extensively discussed aspect. It deals with the possibilities of a more literal interpretation of statutes (that is more confined to the words of the rules) by common-law judges and a more liberal interpretation of the law by civil-law judges. It will be mainly concerned

with the judges' decisions, as it is the judges (neither the Members of Parliament nor of course the Executive's civil servants) who ultimately decide about the validity and interpretation of laws. These issues have a direct impact on the results of the decision-making process.

Now, the decision-making processes in Common Law and Civil Law could be different – just consequentially – because of the different available sources of law, and this is the aforementioned possible causal link between the two aspects of the distinction. However, maybe the decision-making processes are different because of other reasons; for example, because common-law and civil-law judges adopt generally distinct styles in performing their judicial role.

In order to resolve this issue its various parts will be discussed separately: The traditional view on whether or not judges in common-law systems literally adhere to the rules and civil-law judges adjudicate in a more liberal style will be covered, particularly the issue of analogical reasoning (in Chapter 2). There will be a special chapter on the criminal-law situation (Chapter 3). Whether the traditional categorisation of common-law and civil-law jurisdictions is plausible or implausible will then be discussed as to the important role of terminology (Chapter 4). There is, furthermore, an obvious development of different jurisdictions tending to resemble each other's features; the different systems may be said to be converging. Thereby, the categorisation of jurisdictions into legal families may become less justified. This topic will be considered in Chapter 5.

Thereafter, there can be found, in Chapter 6, the view of the author that the concept of legal families is misleading and should therefore not be used – at least not when refer-

ring to today's situation. Chapter 7 deals with the proposition how to conduct Comparative Law facing the misleadingness of the concept of legal families.

1 Sources of Law

This chapter is concerned with the sources of law. As discussed in the Introduction, Common Law allegedly consists of a web of courts' decisions and Civil Law of various statutes. This distinction is a central part of the descriptions of the two kinds of legal system presented in the Introduction ("body of rules founded on unwritten customary law" vs "notions of codification")[34]. These descriptions should provide a good starting-point for the examination of the distinction between the systems. In terms of the decisiveness only of inherent differences, it has constantly to be observed whether or not the individual differences between the different individual jurisdictions are inherent and justify the categorisation into legal families.[35]

It should – in advance – be mentioned that the term "code", which is used frequently in this chapter, does not mean anything more than a special kind of statute, a statute intended to regulate a certain area of law comprehensively and exhaustively, but still a statute.[36] The author does not think there is any other distinction between statutes and codes than the intended comprehensiveness of codes. It is true that the great European codes, because of their intended completeness, swept away most of the pre-existing non-enacted bodies of law;[37] nothing comparable happened to the Common Law.

This, on the other hand, is a matter of legislator's plans. If legislators plan to abolish all existing law, they are theoretically free to do so. Yet legislators' mentalities will have

34 Cf the descriptions above p 1.
35 See on the definition of the terms "inherent" and "non-inherent" above pp 6–9.
36 For the definition see "Butterworths Concise Australian Legal Dictionary" p 71. De Cruz, above n 1, p 265, sees differences between the common-law and the civil-law terminologies regarding subordinate legislation, which, however, do not matter in the present context.
37 See "Butterworths Concise Australian Legal Dictionary" p 71.

> changed over the last two centuries; legislators nowadays, of course, face a more developed law – for its place stemming from sophisticated modern legislators. There is today not much room for a sweeping-away mentality. Thus, this difference can be explained as typical for the different eras, in which there was creation of the great European codes and enactment of common-law codes. Today, it is obviously unimaginable to sweep away most pre-existing law.

The intended comprehensiveness, though, leads in fact to codes being typically longer than statutes.[38] At least in Germany, it seems to be somewhat accidental if a statute is called just "statute" (*Gesetz*) or "code" (*Gesetzbuch*).[39] In addition, the criminal-law enactments in common-law jurisdictions do not show terminologically identical names; different versions of the so-called Stephen Code are named "Criminal Code" in Canada yet "Crimes Act" in New Zealand.[40]

Traditional view

According to the traditional view common-law and civil-law systems are very different because they use different sources of law. This traditional view is reflected in the following passage from Zweigert/Kötz's textbook (though the authors also point out differences on this matter "have generally been exaggerated"):

> [T]he Germanic and Romanistic families are marked by a tendency to use abstract legal norms … The tradition of the English Common Law has been one of gradual development

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38 See Cook/Creyke/Geddes/Hamer, above n 26, p 193: Codes "draw together both [previous] statute and case law on a topic". However, it has to be doubted, whether this was an exclusive feature of codes and did not occur in statutes as well. Cf Colvin/Linden/McKechnie, above n 29, para 1.12, with several examples of "consolidating statutes". See also Bogdan, above n 17, p 129, who calls these statutes "codifying acts".

39 In fact, there are merely historical reasons for this.

40 Cf Colvin/Linden/McKechnie, above n 29, para 1.14.

> from decision to decision; historically speaking, it is case-law, not enacted law … On the Continent lawyers, faced with a problem, even a new and unforeseen one, ask what solution the rule provides; in England and the United States they predict how the judge would deal with the problem, given existing decisions.[41]

Or, as de Cruz puts it:

> Where cases have formed the primary source of the common law, statutes and codified law have been the civil law counterparts. ... [C]ases have been the primary source of law in the English common law tradition, but have at best been regarded only as a secondary source of law in the civil law tradition.[42]

De Cruz also quotes the 19th century English Judge Pollock who said, "Parliament generally changes law for the worse", and the role of the English judge was to keep the resulting "mischief" of parliamentary interference within the "narrowest possible bounds".[43]

According to these authors existing decisions traditionally play the central role in common-law problem-solving; whereas the central role is traditionally played by statutory rules in civil-law. This view is perhaps the best-known characterisation of the two legal families. However, it does not take into account current developments, in particular the "modern social legislation" in the Common Law and changes in the treatment of judgments in the Civil Law.

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41 Zweigert/Kötz, above n 1, pp 69, 71. According to ibid, p 70, the differences can be attributed to the Continental and English mentalities. The suspected reasons for the different mentalities, however, strike the reader as being fanciful and anachronistic.

42 De Cruz, above n 1, pp 38 and, respectively, 243. See also ibid, pp 40, 43, 244.

43 De Cruz, above n 1, pp 265–266. See also Bogdan, above n 17, p 128.

This is not an original argument of this thesis. Many scholars are aware of the inappropriateness of the traditional view in describing the contemporary situation of Common Law and Civil Law.[44] This awareness is, for example, reflected in the following extract from Zweigert/Kötz:

> One must avoid putting undue stress on this difference. We shall see … that in many areas of law on the continent legislated rules are either non-existent or inconclusive, and that in actual practice there is as much judge-made law as in England. Conversely, too, the idea that enactments are simply islets in an ocean of case-law is no more than a nostalgic anachronism even in England, let alone in the United States.[45]

There is also a perceived difference between the positions of scholarly writing as a possible source of law. Scholarly writing might be highly valued in civil-law jurisdictions while it is quite irrelevant in common-law jurisdictions. Yet scholarly writing will not be considered a real source of law in civil-law jurisdictions either.

As has been said, the current developments both of Common Law and of Civil Law are not taken into account by the traditional view. The traditional view therefore can be said to be too simplistic and not up to date.

Impossibility of complete codification

Complete codification is not easy. Codification, after all, has to regulate future situations in advance, which means the drafters of codification have to predict and to consider all possibly occurring situations.[46] Almost inevitably there will be unpredicted

44 Cf de Cruz, above n 1, pp 40, 41, 103, and the following reference.
45 Zweigert/Kötz, above n 1, p 70.
46 Cf de Cruz, above n 1, p 270; Zweigert/Kötz, above n 1, pp 89–90. Also Corkery, above n 20, p 160, who quotes P Conolly.

situations, which will lead to incompleteness of codification. Without much fantasy, therefore, one can imagine the practical problems of attempting to codify everything in a particular area of law. In each area of law, there is a huge number of possible situations requiring regulation.

An example might be the criminal-law area of stealing and fraud (in Queensland ss 391 and 408C of the Criminal Code, respectively). The exact drawing of the borderline between these two offences is not unproblematic, and there are lots of situations in which it is unclear if the wrongdoing of a person fulfils the elements of stealing or of fraud. Consider for example the wrongdoing of refuelling a car at a petrol station without afterwards paying the due amount: There can be cases in which the relevant person acted with the intention of not paying and others in which he/she just forgot to bring enough cash or his/her credit card. In the latter type of case, the person may have noticed the absence of cash or credit card beforehand or only after he/she filled petrol in the tank. It can also be that he or she realises only that his/her money is probably short or even possibly short. And the question can arise of whether the relevant person owns or merely drives the refuelled vehicle.

These are just examples of the variety of situations that can occur at petrol stations. Even these examples show there are too many different forms of wrongdoing to predict them all. Now, it could be thought that different wrongdoings – for example, those at a petrol station and at a supermarket – normally do not have to be regulated differently, because they will have relevant features in common. However, the differences might be substantial. For example: the situations at petrol stations and supermarkets are distinct

from each other, as the petrol, unlike the selected supermarket goods, cannot be handed back at the checkout.

This difference is relevant to the issue of criminal liability: The offence of stealing can, in the relevant form of taking property, ordinarily not be committed where the victim has agreed to transfer ownership.[47] The agreement to the transfer of ownership will, in case of the customer at a petrol station, occur when the petrol is being filled in the tank and mixes with the fuel already there. Therefore it will happen before payment – and also before the customer would turn out not to have (enough) money. In order to create criminal liability when the customer drives off without paying, the provision of s 391 (2A) Criminal Code (Qld) deems the taking of something "not identifiable" (like mixed fuel) to occur fraudulently. Only because of s 391(2A) Criminal Code can the situation of taking away petrol without paying the due amount be regarded as stealing.[48]

Another example of the difficulties of complete codification concerns the borderline between attempted offences and mere preparation. It is difficult to fully codify the issue of criminal liability for attempted offences if there is to be no liability for mere preparatory acts. It seems obvious that a person just buying a gun, still inside the shop does not yet attempt to kill the victim even if the purpose of the purchase might be later to kill another person with the gun. On the other hand, it also seems obvious that a person who fires a gun at another person, performs (if not killing the other) an attempt to kill him or her. However, that is only *prima facie* correct. The used firearm could happen to be an air gun, which would kill a human only after hitting him/her a couple of times. Then the one shooting cannot simply be characterised as an attempt to commit homi-

47 Colvin/Linden/McKechnie, above n 29, para 7.9.
48 Ibid, para 7.11.

cide. It could be argued that the completion of only one of a series of acts intended altogether to bring about the criminal result amounts in itself to a criminal attempt.[49] However, that is not obvious from the relevant criminal statutes.

The criminal codes of the civil-law jurisdictions of France and Germany are almost silent about the issue of defining the borderline between attempted offences and preparatory acts. According to § 22 of the German Criminal Code (*Strafgesetzbuch* or *StGB*) an attempt requires a "subjective directness of the perpetrator's act" (translated from the German "*nach seiner Vorstellung von der Tat ... unmittelbar ansetzt*"). Article 121-5 of the French *Code Penal*[50] similarly only states the element of "beginning of execution".

The expressions of "subjective directness" and "beginning of execution" do not amount to clear-cut definitions identifying all the situations that are criminal attempts to commit particular offences. Consider, for example, the aforementioned fact situation of targeting a human being with an air gun. The question of whether this is a criminal attempt to commit homicide can neither be answered simply by using the German code, which requires the "subjective directness" of the act, nor the French one, requiring the "beginning of execution". The courts have, in such cases, to make a decision about whether a fact situation represents a criminal offence or a mere preparatory act. The courts therefore have to find the particular borderline between these two situations and thus make judge-made law – even if they are judges within comprehensively codified civil-law systems.[51]

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49 See *R v White* (1910) 2 KB 124 at pp 129–130.

50 See <www.legifrance.gouv.fr> with an English translation.

51 Zweigert/Kötz, above n 1, p 14, point out that there is in civil-law jurisdictions "as much judge-made law as in England".

Another limit of codification arises from the limited foreseeability of future developments. De Cruz puts it the following way: "Codes formulated in the 19th century could not possibly envisage developments in the 20th century."[52] Hence, the drafters of the civil-law codes – for example the drafters of the French *Code Civil* before 1804 and of the German Civil Code before 1896 – could not take into account petrol stations and supermarkets.

The French drafters were generally aware of the incompleteness of the *Code Civil*. This awareness is expressed by Zweigert/Kötz and by de Cruz:

> The draftsmen clearly realized that even the most ingenious legislator could not foresee and determine all the possible problems which might arise and that therefore room must be left for judicial decisions to make the law applicable to unforeseen individual cases and suited to the changing circumstances of society.[53] The theory ... is that it would not have been possible for the legislature to have considered all the possible future applications.[54]

10 years earlier, the drafters of the Prussian Land Law[55] of 1794 attempted to introduce really complete codification with its approximately 17,000 sections.[56] This code intended to give the judge a precise answer to every question and to render statutory interpretation unnecessary, thereby depriving judges of any creative power.[57] As the exer-

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52 De Cruz, above n 1, pp 29, 246. This limitation is also expressed in Zweigert/Kötz, above n 1, pp 90–91.

53 Zweigert/Kötz, ibid, p 90.

54 De Cruz, above n 1, p 270.

55 It could be argued that "General Law" is a more appropriate translation of the medieval term *Landrecht* than "Land Law". Yet the term "Land Law" represents a somewhat settled usage, cf Zweigert/Kötz, above n 1, p 89. Moreover, this translation is easy to memorise and, thus, should not be readily relinquished. From the author's point of view, it is preferable to adhere to the usual terminology.

56 Zweigert/Kötz, ibid.

57 See ibid, with the quote of the Prussian King, who "forbade the judges to indulge in any arbitrary deviation, however slight, from the clear and express terms of the laws, whether on the ground of

cise of judicial creativity is an issue of interpretation, an issue also of the possible results of judges' decisions, it will not be discussed here but below. What can, however, be said here is that really comprehensive and complete codification is not possible. Even the comprehensive civil-law style of codification can take into account only foreseeably occurring situations. There can be gaps in the codes, consciously left open by the drafters.[58] Altogether, that means the codes leave scope for judges' individual decisions and therefore for judge-made law. Judge-made law, thus, is not only a feature of Common Law but naturally as well Civil Law. The occurrence of judge-made law may not be an inherent feature of the systems. In conclusion, there is, up to this point, no evidence for a substantial difference between Common Law and Civil Law regarding the available sources of law.

The common-law doctrine of "binding precedent"

One of the paramount features of Common Law is the doctrine of "binding precedent" (or, in Latin, *stare decisis*)[59]. This doctrine means a court deciding a current case is – under specific circumstances which are discussed below – bound by previous courts' decisions.[60] The doctrine of binding precedent requires "the material facts" of the present and previous decisions to be identical.[61] Complete identity of two cases is never possible, as they will show, for example, different parties, different locations of the respective fact situations etc.

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some allegedly logical reasoning or under the pretext of an interpretation … of the statute".

58 With respect to the French *Code Civil* Zweigert/Kötz, above n 1, p 90.

59 The complete Latin term "*stare decisis et non quieta movere*" literally means "let the decision stand and do not disturb the calm": Cook/Creyke/Geddes/Hamer, above n 26, p 76; de Cruz, above n 1, p 215.

60 De Cruz, ibid, p 103; Zweigert/Kötz, above n 1, pp 259–260.

61 Bogdan, above n 17, p 115. Regarding this thesis's purpose, it is not necessary to explain the meaning of "material identity" and thereby to go into the terms "*ratio decidendi*" and "*obiter dictum*".

Moreover, the doctrine of the bindingness of precedent is limited insofar as only previous decisions of superior courts are binding on the present court. Traditionally also its own previous decisions were binding on the present court, at least as far as higher courts were concerned. However, the latter practice ceased following decisions of the English House of Lords and the High Court of Australia.[62] The fact that nowadays only decisions of superior courts are binding implies that only decisions of courts of the same hierarchy can be binding,[63] as only those courts are to be characterised by an inferiority-superiority notion. A judge in the Magistrates' Court in Southport, Queensland, for example, can be bound by decisions of the Queensland Supreme Court but not by those of the New South Wales Supreme Court, though *prima facie* one could think of the New South Wales Supreme Court being superior to the Southport Magistrates' Court.

Naturally, there are not only "materially identical" cases of superior courts but also cases which are different from the present one. Previous cases can seem to be similar but turn out to be in a relevant aspect different and therefore not "materially identical". These cases will be "distinguished" by the present judge, which means he asserts the material differences as justification for not applying the previous decision's *ratio*.[64] This is a recognised aspect of applying the doctrine of binding precedent. However, there can also be cases where the judge considers a binding decision and deliberately disregards it for being – from his viewpoint – unjust or for some other reasons wrongly

62 See the Practice Statement of the House of Lords from 1966. The High Court of Australia did already in 1913 conclude not to be bound by its own decisions [*Australian Agricultural Co ... v Federated Engine-Drivers and Firemen's Association ...* (1913) 17 CLR 261 at p 279].

63 Cook/Creyke/Geddes/Hamer, above n 26, p 75; Zweigert/Kötz, above n 1, p 259.

64 Cf Cook/Creyke/Geddes/Hamer, above n 26, p 75; de Cruz, above n 1, pp 104, 285.

decided.[65] This way of handling the doctrine of binding precedent is criticised by several authors:

> [J]udges permit themselves considerable liberties in distinguishing High Court decisions on very narrow grounds.[66] [J]udges "can find a distinction to avoid … almost any prior line of precedent".[67] The ease with which judges can distinguish, and hence avoid, previous decisions leads critics to argue that the system of precedent is a fiction … .[68] [A] judge can find support for almost any position.[69] If an English judge did not wish to follow a previous decision, he has the option of "distinguishing" it (that is, decide it's not applicable) on the basis of its facts, or law, or both.[70]

The corresponding civil-law situation

In theory, the absence of a doctrine of binding precedent in civil-law jurisdictions means a judge of a lower court deciding a present case can decide independently. Independently here means the decision can be made without being dictated by possible higher courts' decisions on a similar matter; even if such a precedential decision exists, it does not require the present, lower-court judge to decide according to it. This judicial freedom, however, has some limitations:

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65 See the following five footnotes.

66 De Cruz, above n 1, p 285; Heydon, above n 17, p 84.

67 Caldarone, "Precedent in Operation: A Comparison of the Judicial House of Lords and the US Supreme Court" (2004) Public Law, pp 759 at 765, with the quote being from K Llewellyn.

68 Corkery, above n 20, p 134. A reason for inappropriately distinguishing precedential decisions can be the present judge puts "politics over law"; see ibid, pp 140–141; cf also Heydon, above n 17, p 92.

69 Bogdan, above n 17, p 119.

70 De Cruz, above n 1, p 104. De Cruz's statement is to be seen as a critical statement, too, as it points out the judge would have an "option" to distinguish, if he does not "wish" to follow a precedential decision. The expressions used show that this is not the required way of applying the bindingness doctrine.

There are, firstly, a few expressly regulated possible exceptions. De Cruz's textbook, for example, lists situations in which decisions of German courts have binding force. These situations are some previous decisions of the German Federal Constitutional Court (*Bundesverfassungsgericht* or – abbreviated – *BVerfG*) and of the German Federal Supreme Court (*Bundesgerichtshof* or *BGH*), both under a set of specific circumstances.[71] The examples, of course, are not incorrect; however, if a statute is declared void by the Federal Constitutional Court according to the relevant procedural statute, § 31 *BVerfGG*[72], that has – as a matter of pure logic rather than of actual bindingness – a bindingness-like consequence. After all, the lower court cannot decide with respect to the – officially void-declared – statute. It therefore does not need any exceptional provision of actual bindingness of the Constitutional Court's decision.

Additionally, all of the given examples concern exceptional situations following decisions of only the highest German courts. The examples merely reflect the special role of those courts inside the German courts' hierarchy and the consequential importance of their decisions. The Constitutional Court's decisions must be published in the legislative gazette like legislation, which makes them further different from other rulings.

The situation in Italy seems to be identical. Art 136 of the Italian Constitution provides analogically for the authority of the decisions of the highest Italian courts, having materially the same content as § 31 *BVerfGG*.[73] Additionally, there is an exception in place in France and in Spanish-speaking countries, which requires the courts to follow an existing consistent line of precedential decisions.[74] These cases can only be interpreted as

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71 De Cruz, ibid, pp 245 and 255.
72 The abbreviation meaning *Bundesverfassungsgerichts-Gesetz*.
73 De Cruz, above n 1, p 245.
74 Ibid.

showing there is no general bindingness of previous decisions of superior courts.[75] Altogether, the examples from Germany, Italy, France, Spain etc merely prove the general rule of non-bindingness of precedential decisions in civil-law jurisdictions.

However, there are also several practical reasons why the – officially not bound – civil-law judges may nevertheless decide their present cases in accordance with existing superior courts' judgments. They are listed by de Cruz:

> Subordinate courts have tended to follow superior courts' decisions … for the following reasons:
>
> (a) … where there has been a gap in the law which is not covered by the Codes or ancillary legislation, judges have had to consider whether to indulge in some kind of "law making" or law creating process;
>
> (b) it promotes certainty and predictability in the law;
>
> (c) it has been regarded as a means of promoting equality of justice;
>
> (d) it has been seen as convenient and efficient to do so;
>
> (e) judges do not like being reversed or overturned on appeal;
>
> (f) as members of a hierarchy with a tradition, the practice of following cases has been seen as a form of judicial co-operation.[76]

This list shows that considerations of predictability and equality are among the factors inclining civil-law judges to follow precedential decisions. There are also several reasons internal of the judiciary why civil-law judges usually decide according to an existing precedent of a superior court. Of these internal factors the *inter alia* mentioned increased efficiency of doing so is noteworthy. The increasing workload of judges makes

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[75] This would be an example of the Latin maxim "*Expressio unius est exclusio alterus*": If there is statutory provision for bindingness in a particular situation, there cannot be general bindingness.

[76] De Cruz, above n 1, p 246. See also Zweigert/Kötz, above n 1, p 262.

some compliance with precedential decisions inescapable. The pressure to decide a case in a not too time-consuming manner has the natural consequence of judges not being able to take the necessary time-effort for an independent and personal judgment. For these reasons, it can be said that in civil-law jurisdictions, there is not a formal bindingness but a strong practical tendency of judges to comply with previous higher courts' decisions. This is the reason for which it is said that "[p]recedents play a very significant role" also in Continental legal systems[77] and there is in civil-law jurisdictions "as much case law as in England".[78]

The tendency of judges to comply with precedents is a dynamic one. Previous courts' decisions may not have been very important in the past; however, they are increasingly important in modern civil-law systems. De Cruz puts it the following way:

> It has become axiomatic to say that common law courts refer to case law, or precedents, to assist in interpreting the statute, whereas civil law courts do not. Yet, various recent studies ... reveal that, in modern times, nearly all systems ... utilise precedents, particularly if these have already interpreted the legislation in question. ... [79]

However, this formulation has to be carefully interpreted. It has to be emphasised that it is concerned with the aforementioned pressures sometimes only permitting a hasty decision. De Cruz does not point out there was a formal doctrine of *stare decisis* existing in civil-law jurisdictions. After all, he also states that, in some civil-law countries, it is "almost" mandatory practice to follow precedential decisions, whereas in others, the entire matter is "purely discretionary".[80] Similar to de Cruz, Cook/Creyke/Geddes/

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77 Bogdan, above n 17, p 114.
78 Zweigert/Kötz, above n 1, p 14.
79 De Cruz, above n 1, p 285.
80 Ibid.

Hamer point out, "Nearly all legal systems (including civil law systems) apply some form of doctrine of precedent, although with differing degrees of formality and strictness."[81] This statement, like that of de Cruz, does not refer to a formal civil-law bindingness doctrine but merely to existing practical pressures.[82]

Thus, the practical operations of common-law and civil-law systems do not fit their respective theoretical starting-points on matters of precedent. The common-law situation with the doctrine of binding precedent is in practice less rigid than it seems, as the doctrine only works inside the same courts' hierarchy and as the judges are able to distinguish undesired precedential decisions. On the other hand, the civil-law freedom from a doctrine of bindingness has in fact only a limited impact, as lower-court judges tend to follow the precedents and, in fact, cannot do much more than act in this way.

Besides all practical similarities, there is the formal presence of the common-law doctrine of binding precedent and the absence of such a doctrine in Civil Law. The occurrence of a formal doctrine of bindingness of common-law precedents still represents a difference between the systems. However, it can be said to be a non-inherent difference. There is, as has been found out,[83] a formal bindingness doctrine in place also in civil-law jurisdictions, at least regarding a few instances. Non-inherent differences can never amount to distinguishing factors which could only justify the sharp distinction between Common Law and Civil Law.[84]

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81 Cook/Creyke/Geddes/Hamer, above n 26, p 74.

82 There is, however, a statement which renders a civil-law doctrine of binding precedent existing; see the heading in Baade "Stare Decisis in Civil-Law Countries …" in: Birks/Pretto (eds) "Themes in Comparative Law" pp 3 at 19.

83 Above pp 27–28.

84 See above pp 6–9.

The conclusion of this part of the thesis, therefore, has to be that the common-law doctrine of binding precedent does not amount to a distinguishing factor. It is – admittedly – a significant feature of the Common Law. However, it merely reflects the potential differences which exist between different national jurisdictions.

Importance of fundamental legal concepts

Fundamental legal concepts are important in comparing sources of law.[85] One should imagine a civil-law criminal-code provision stating ten requirements and the parallel common-law statute provision only five. This would mean that, in the civil-law country, there is a different concept in place which requires ten elements to be met, instead of only five under the common-law concept, and this is reflected in more elements being stated. Differences in the degree of codification are possibly mere reflections of different legal concepts and do not necessarily prove a generally higher or lesser degree of codification in the respective jurisdiction. The differences between the codifications can be possibly completely put down to the respective fundamental legal concepts. The following examples should clarify this.

The first is the example of innocent agency, that is, using another person to commit a crime, assuming it is a situation where the perpetrator does more than just using the other as an aider or procurer. It could be that the perpetrator forces another person to commit a wrongdoing (for instance threatens the other person with killing him/her, if he/she does not assault the victim). Those situations are dealt with in § 25(1) of the German Criminal Code. This provision just states that the perpetrator can act both

[85] The term "fundamental legal concepts" is used by Bogdan, above n 17, p 41.

"himself and through another" (translated from the German "*selbst oder durch einen anderen*").[86] The Queensland counterpart is s 7(4) Criminal Code:

> Any person who procures another to do or omit to do any act of such a nature that, if the person had done the act or made the omission, the act or omission would have constituted an offence on the person's part, is guilty of an offence of the same kind, and is liable to the same punishment, as if the person had done the act or made the omission …

The Queensland common-law codification example shows much more detail for the topic than the German civil-law example. There are fact situations which are provided for in the allegedly comprehensive Civil Law just rudimentarily. In those matters the more detailed common-law codification can be more directly applied by the judge. This is perhaps not typical. However, it shows the sources of law in comprehensively codified civil-law systems may be even less detailed than those in common-law jurisdictions and need to be supplemented by more precise judge-made law.

All jurisdictions should provide for the criminal liability of somebody using another person like a tool, for example by forcing him/her. The criminal liability for such a conduct should be distinguished from the liability for using someone who just aids and from the fact situations of counselling or procuring another's offence.[87] The concepts underlying the provisions, thus, are the same. Just because of the identity of the fundamental concepts underlying the rules it made sense to compare the different modes of codification and to reach the conclusion of atypically higher degree of codification in

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[86] Germany, as Australia, is a federal state. However, the whole Criminal Law of Germany, unlike the Australian, belongs to the legislative powers of the Federation (in German: "*Bund*"). There are no implied powers to regulate particular fact situations (regarding, for example, their own property) vested in the German States ("*Länder*"). Consequentially, there is only one criminal jurisdiction in Germany.

[87] Tröndle/Fischer "*Strafgesetzbuch (Kommentar)*" § 25 para 11.

Queensland compared to Germany. If the fundamental concepts were different, however, the different mode of codification could possibly be put down to the different concepts and would not mean more than a reflex of those.

Another example supports, at least on first sight, the traditional view of a more detailed codification in Civil Law and the less detailed common-law codification: the definitions of murder. § 211(2) of the German Criminal Code, for instance, stipulates alternative fact requirements, which characterise a homicide as murder:

> Murderer is who kills another person [1] motivated by lust to kill, [2] to satisfy sexual drive, [3] motivated by greed or [4] otherwise for base motives, [5] treacherously, [6] cruelly or [7] using a weapon dangerous to the public or [8] with the intention of facilitating or [9] concealing another offence.[88]

The Queensland counterpart is s 302(1) Criminal Code which states:

> … a person who unlawfully kills another under any of the following circumstances, that is to say
> (a) if the offender intends to cause the death of the person … or if the offender intends to do to the person … some grievous bodily harm;
> (b) if death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life …
> is guilty of "murder". …

[88] Translated from the German: ... *Mörder ist, wer aus Mordlust, zur Befriedigung des Geschlechtstriebs, aus Habgier oder sonst aus niedrigen Beweggründen, heimtückisch oder grausam oder mit gemeingefährlichen Mitteln oder um eine andere Straftat zu ermöglichen oder zu verdecken einen Menschen tötet*.

From those very different murder definitions, it can be seen there are two different concepts in place in Germany and in Queensland, which can be summarised as follows: In Germany, homicide is murder if performed under one of nine prescribed circumstances. In Queensland it can be either with intent to kill or to cause grievous bodily harm or with another intentional wrongdoing if the killing is unintentional (and a likely deadly injury is caused). Now, one could – *prima facie* – argue the German Criminal Code was more detailed, because it specified different motives and other circumstances. On the other hand, the Queensland Criminal Code stated only the requirement of intentional killing or other intended offences accompanying the killing, without any detailed specification. This observation would fit the traditional view of a more detailed civil-law codification and the less detailed common-law codification.

However, the fundamental concepts behind the rules also have to be considered. The difference of the codifications could be possibly completely put down to the different concepts. An inference as to the respective degree of codification would then be inappropriate. The German concept of murder, which traditionally relied on the concept of premeditated killing equalling murder, was changed in 1941 (the amendment following a Swiss concept and not reflecting Nazi ideology). The new provision is still in force as the current § 211 of the German Criminal Code; it encompasses a detailed list of various motives and other circumstances and does not anymore equate premeditated killing with murder. Queensland, on the other hand, shows a different concept with the two major alternatives of intentional killing and non-intentional killing where another wrongdoing is intended. The different definitions of murder merely reflect different concepts of liability for murder.

This complicates the comparison between the Queensland and the German Codes. The different definitions of murder reflect different criminal concepts and therefore have grounds which cannot easily be discerned just relying on the literal meaning of the common-law and civil-law rules. The respective rules therefore are not the only objects which are to be considered in order to discuss the respective degree of codification. It is as important to find out about the fundamental legal concepts. If the concepts are different the rules naturally are different as well – in this case there cannot be any conclusion regarding the degree of codification in the systems. Only if the fundamental concepts are the same, as they are in case of criminal liability for using an innocent agent, does it make sense to compare the different modes of codification and to reach the conclusion of in this instance a higher degree of codification in Queensland compared to Germany.

When comparing the rules of two different jurisdictions, for example of a common-law and a civil-law jurisdiction, it is therefore not sufficient to consider just the rules themselves. It is as well necessary to examine the concepts underlying the rules. If these concepts are different, that must be taken into account, and that complicates any conclusion as to the different degrees of codification significantly. The conclusion in those cases could be that the differences in codification merely reflect the different concepts.

The differences between the Queensland and the German concepts of murder stem from different views about “intention to kill”, and whether or not intent to kill is required and sufficient for murder. In Queensland, every homicide committed with the intent to kill the victim is murder. In Germany, however, not every intentional killing equals murder. Instances of such conduct outside the nine elements of § 211 *StGB* will

be mostly cases in which the perpetrator was provoked, lost his self-control and killed the other person. Such intentional killing does not amount to murder but to manslaughter (§ 212 *StGB*).[89] Moreover, there are non-intended killings, which in Germany do amount to murder, for example mere reckless killings if treacherous or cruel.

The criteria for murder under the German Code are much more complicated than the Queensland distinction between intentional and non-intentional conduct. On almost all of the nine German murder elements, there is a discussion in place; these discussions generally seek to constrain the scope of these elements and to avoid the mandatory sentence of life imprisonment which is imposed in cases of murder.[90] The discussions actually show the German codification is not detailed enough to provide the necessary clarity. The Queensland codification with the simple distinction between intentional and unintentional conduct actually is detailed enough, while the German codification with nine complicated elements seems not sufficiently detailed. The civil-law codification in Germany therefore is only at first sight more detailed than Queensland's common-law provision. It appears more detailed if a simple comparison is made of the respective number of requirements. Materially however, the different definitions of murder reflect the different legal concepts and cannot simply be compared numerically. In other words: Greater complexity of particular codification, as in case of the German definition of murder, does not automatically equal greater completeness.

There are also discussions in Germany about a possible revision of the murder provision and perhaps the reintroduction of the distinction between premeditated and non-

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89 It even represents an expressly less serious form of manslaughter (§ 213 *StGB*); however, there are specific additional requirements.

90 Tröndle/Fischer, above n 87, *Vor* §§ 211 *bis* 216 para 1.

premeditated conduct.[91] Mostly, these discussions circle around the *mens rea* requirements attached to various current murder elements. For instance, as to the murder element of treacherous conduct, there is the argument about whether the perpetrator must have acted in a concealing fashion or if he even has to have abused the victim's trust.[92] As to the element of cruel conduct, it is arguable that the perpetrator must have been mentally brutal.[93] These additional requirements as to the perpetrator's *mens rea* show the incompleteness of the codification in § 211 of the German Criminal Code. It is questionable whether the *prima facie* very detailed codification is really sufficiently detailed to answer most of the questions which arise.

Interchangeability of unwritten and written rules

In this thesis, the term "written law" is being used – as by everyone in Comparative Law – synonymous to statutory law and does not comprise case law (courts' decisions). Strictly seen, however, courts' decisions will also be literally written law. Drawing the borderline between written and unwritten rules, thus, is not easy; moreover, written and unwritten rules are easily interchangeable.

The current codified or uncodified status of a particular area of law is not necessarily long-lasting. In fact, the status can change quickly, as new statutory law is enacted to cover previously uncodified areas of law; it does not happen that the legislator abolishes existing statutory rules and releases an area. It has been mentioned that in the Common Law, there can be found a type of statute which merely codifies the pre-existing unwritten rules and does not add anything for its part; these enactments are called

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91 Ibid.
92 Ibid, § 211 para 21.
93 Ibid, § 211 para 23a.

"declaratory statutes".[94] The enactments belonging to "modern social legislation" are different. These intend to put particular measures in place to respond to societal problems. So they have to replace the existing unwritten law with written statutes which are different from the old case law. Therefore the enactment of modern social laws is never just declaratory.

An example of the interchangeability of unwritten and written rules is the Law of Evidence, which regulates the proof of facts in litigation and the grounds on which courts can disregard relevant material.[95] Up to 1995, the Law of Evidence in Australia consisted of various common-law principles on the topic and partially of older statutes [like the Evidence Act 1977 (Qld)]. In 1985 the Australian Law Reform Commission (ALRC) proposed – to overcome the variations between different jurisdictions in the federation – the enactment of uniform legislation throughout Australia.[96] However, up to now only the Commonwealth, New South Wales and Tasmania have enacted uniform Evidence Acts. Queensland has not yet passed new legislation on the topic and the "old" Evidence Act 1977 (Qld) does not encompass the whole Law of Evidence. Therefore the New South Wales example is more appropriate to be considered.[97]

New South Wales enacted the Evidence Act 1995 in accordance with the ALRC proposal. The Act contains rules on firstly different sorts of evidence like witnesses and documents, secondly on the admissibility of evidence including the matters of rele-

94 "Butterworths Concise Australian Legal Dictionary" p 116: "Declaratory statute: A statute that does not amend an existing statute, but merely explains or clarifies its meaning … enacted to set aside judicial interpretations of statutes or statements of the common law that Parliament deems incorrect". See also Cook/Creyke/Geddes/Hamer, above n 26, p 195.

95 Forbes "Evidence Law in Queensland" p 1; Palmer "Principles of Evidence" p 1.

96 McNicol/Mortimer "Evidence" para 21.2.

97 This part of the thesis is on the interchangeability of statutory and case law; the case of New South Wales's Evidence Act 1995 is an example. The Queensland situation does not fit, yet it does not represent a counter-example. After all, it has to be shown only that, if there is a shift from unwritten to statutory law, it shows the interchangeability. It is not the conclusion that such change actually occurs in all common-law jurisdictions.

vance, hearsay, opinion, credibility, character, identification etc and lastly on proof. These matters, of course, had each been dealt with already under the previously relevant law. Some of the matters were dealt with according to the relevant common-law principles; others fell under older evidence statutes. Mostly, the older statutes did not intend to regulate the topic comprehensively but merely provided modifications to the Common Law.[98]

Therefore, in New South Wales before the enactment of its uniform Evidence Act 1995, there was a comprehensive body of (written and unwritten) rules in place. The Act did not primarily intend to modify particular aspects of these rules but mainly aimed at achieving uniformity throughout the Australian Commonwealth.[99] Regardless of the ultimate aims, the introduction of acts according to the uniform model introduced a comprehensive codification of the Law of Evidence. Therefore New South Wales has comprehensively codified law, whereas Queensland – due to the incompleteness of its older Evidence Act 1977 – relies to a large extent on the Common Law. The situation in Law of Evidence, thus, is *vice versa* the situation in Criminal Law – New South Wales's Evidence Law is more comprehensively codified than Queensland's. As far as the term "declaratory statutes" is concerned, it has to be noted the new uniform Evidence Acts intended mainly to unify the law in place in various Australian jurisdictions and therefore not just to clarify and modify the existing common-law principles. This is a slightly different meaning of the term "declaratory statutes" from that quoted above.[100]

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98 Palmer, above n 95, pp 1–2.
99 McNicol/Mortimer, above n 96, para 21.2.
100 Above n 94.

Another example of the interchangeability of unwritten and written rules is the United Kingdom enactment of the Human Rights Act 1998. The Act is relevant as it shows the process of codifying the pre-existing, previously uncodified rules of the European Convention on Human Rights (ECHR). The ECHR of course is a document, so *prima facie* one could think of a pre-existing codification. However, the ECHR has nothing to do with the European Union (EU), more precisely European Community (EC), the law of which may be directly applicable in the EU member states.[101] The ECHR, on the other hand, is part only of the international law, which binds the United Kingdom externally,[102] that is only in its relation to other states, but not internally, that is in the relation to its people. The ECHR never was part of the hierarchy of laws in force in the United Kingdom. The human rights entailed in the ECHR accordingly had not been codified in the United Kingdom Human Rights law before 1998. The enactment of the Human Rights Act 1998 incorporated the rights and freedoms of the ECHR into British Law. The enactment effectively introduced a Bill of Rights into the law of the United Kingdom, including for instance right to life, prohibition of torture, right to a fair trial, freedom of thought and religion, freedom of expression and freedom of assembly and association.[103] As for the term "declaratory statutes", the Human Rights Act 1998 introduced the pre-existing rights and freedoms of the ECHR into United Kingdom law. However, this was not just "declaratory", since the ECHR was previously not part of the national United Kingdom laws.

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101 Cf above n 27: EU law is even supreme, which means it must be also directly applicable. See also below n 313 on the usage of the name EU instead of EC.

102 Klug "The Human Rights Act: A General Overview" in Butler (ed) "Human Rights for the New Millennium" pp 49 at 56.

103 Carter "A Guide to the UK Legal System" <http://www.nyulawglobal.org/globalex/United_Kingdom.htm>.

The issue of codification or non-codification seems to be to some extent accidental. The existence of "declaratory statutes", which do not substantively affect the existing legal situation, shows there is not much difference between a codified and a non-codified situation. These situations are easily interchangeable and do not represent a significant difference. Furthermore, Parliament in each common-law country has the power to override any common-law position which it thinks is not desirable. That may have been different in the past.[104] Presently it is made clear expressly or impliedly by the relevant Constitutions that Parliament has an unlimited legislative power to cover all areas of law comprehensively with its statutory enactments.[105]

Conclusion

With respect to the sources of law, there is currently not much difference between Common Law and Civil Law left. It is not an original argument of this thesis that Common Law and Civil Law nowadays do not anymore show their original and typical distinctive features. Both in the past and nowadays, as has been shown, codification has never been really comprehensive and has to be supplemented by judge-made case law – in common-law as well as in civil-law jurisdictions.

The higher degree of codification is not civil-law inherent. There is plenty of codification in common-law jurisdictions as well. The greater importance of judge-made law is not common-law inherent. Judge-made law is a part also of civil-law reasoning. The common-law doctrine of binding precedent cannot be seen as an inherent feature of Common Law either. The same doctrine exists as well in a few civil-law jurisdictions and can thus not be qualified as a distinguishing factor.

104 Cf de Cruz, above n 1, p 281.
105 Ibid. Also Cook/Creyke/Geddes/Hamer, above n 26, p 154.

Fundamental legal concepts can heavily influence the issue of codification of particular rules. The differences between fundamental concepts may not be clearly visible, yet they necessarily mean different codification. Fundamental legal concepts may explain why there are differences in the codification, for example more detailed codification in civil-law jurisdictions in some areas and less detailed codification in common-law jurisdictions – and, in some instances, *vice versa*. Because these differences may exist just consequentially, just namely because of the fundamental concepts, they are not typical of the systems, not specific and, therefore, not inherent. Some only inherent-appearing differences may thus turn out to be indeed non-inherent. The remaining differences do not justify a sharp distinction between the common-law and the civil-law legal families.

2 Literal vs Liberal Interpretation of Rules

Whereas the preceding chapter was concerned with the different available sources of law, this one deals with the question how the relevant sources of law, once identified, will be interpreted. Law often needs interpretation by judges. The question to be examined is how the task is approached in the two kinds of legal system. It could be that there is, in one type of system, a more literal interpretation of statutes and, in the other, a more liberal interpretation. If there are in fact differences, then the question arises whether or not they represent inherent, ie specific and typical, features of the jurisdictions.[106]

The exact scope of this chapter has to be precisely considered. This results from the existence of different sources of law as presented in the last chapter: firstly legislation, which is law made by parliament, and secondly decisions of previous courts, which is judge-made law. This chapter is concerned firstly with the interpretation of statutes. The reason for this focus is there are many comparative-law statements on this topic but less on the interpretation of previous courts' decisions.[107] Perhaps this reflects the opinion that rules laid down by previous judges are crystal-clear and do not need any explanation. However, there is also the contrary opinion that statutes state the law more clearly than case law.[108] In fact case law and statutory law both need interpretation. The

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106 In detail on the term "inherent" see above pp 6–9.

107 Corkery, above n 20, p 160. Bogdan, above n 17, p 114, presents a chapter "Interpretation of Precedents", which, however, deals exclusively with the doctrine of binding precedents. See on this above pp 24–26.

108 See Cook/Creyke/Geddes/Hamer, above n 26, p 208: "To the extent that the rules in legislation are in fixed verbal form, the interpretation of legislation is less problematic than the interpretation of case law". It can, however, be said that also case law is in form of fixed and written courts' decisions.

judges' task in the field of case law, namely when they have to find a decision without any statute available, is very similar to their work on statutory interpretation, namely their decisions using a relevant statute.

There is, admittedly, a clear distinction drawn between the binding nature of precedents and "the Common Law judge's technique of approaching the case law and extracting its rules and principles".[109] The doctrine of binding precedent, on the one hand, has been dealt with in the preceding chapter.[110] The common-law judge's method of applying case law, on the other, follows the general rules of statutory interpretation. Consequentially, the author did not come across any indication that judges show different attitudes when interpreting on the one hand statutes and on the other previous decisions of superior courts.

This can be seen through two classical cases presented by R Dworkin to illustrate the jurisprudential aspect of judges' work. Firstly the case of *Riggs v Palmer*, in which a potential heir had murdered his grandfather from which he would have inherited. The judge in this case decided that the murderer could not inherit from his victim, as nobody should profit from his own wrong. There was neither a statute in place nor a relevant court's decision which had permitted or even required such decision. There were a number of detailed statutory exceptions in the relevant succession laws, but nothing covered the particular situation. The rules seemed to state that even the heir's murderer could inherit from his victim.

The second is the case of *Henningsen v Bloomfeld Motors Inc.*, in which the purchaser of a new motor vehicle had signed a contract which drastically limited the manufacturer'-

[109] Cf Zweigert/Kötz, above n 1, pp 263–264.
[110] See above pp 24–26.

s liability in case the automobile was defective.[111] In this case, it was decided the limitation of manufacturer's liability for defects could not be enforceable, for the manufacturer is under a special obligation in connection with the construction of cars which, after all, are necessary means of private transport.[112]

Explaining these cases, the decisions in the absence of statutory provisions (or at least in the absence of statutory provisions justifying these decisions) may sometimes appear to be easy. The decision, for example, that the murderer should not inherit from his victim appears to be almost natural and not to need any complicated reasoning. There was a statute on succession which, however, did not include an exception for the murdering beneficiary. Yet it seems to be comprehensible that the judge sought an exception beyond the relevant statute.

On the other hand, a just decision in case of limitation of vehicle manufacturer's liability is not that easy, considering that its obvious consequence are rising automobile prices. Dworkin's argument has been that considerations of principle take priority over policy in judicial reasoning and that it has been not feasible for the judge to justify his decision simply on grounds of policy. The judge has to be creative in this sort of cases. Judges, therefore, do not only have to be creative in the interpretation of statutes but also in the absence of statutes. There are, after all, situations in which there is no applicable statute and no precedential decision yet.

The same would have to be said if there was a statutory provision present which did *not* permit the present decision. This means there could be an available statute; yet this

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111 *Riggs v Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889), *Henningsen v Bloomfeld Motors Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), cited according to Dworkin "Taking Rights Seriously" p 23.

112 Ibid pp 23–24.

statute provided only a general rule pointing in an undesired direction. In such situations it can be that the present judge thinks the correct decision would have to be to the contrary of the relevant general rule and he has to invent a solution which cannot be found in previous judgments.

Some arguments can be listed which additionally influence this chapter's scope:

(1) Above it has already been mentioned that there is academic writing dealing with "Interpretation of Precedents".[113] Yet this is concerned mostly with the doctrine of binding precedents, which here was put to the discussion of the sources of law. The whole bindingness doctrine is, from the author's point of view, a matter rather of finding the basis for the judicial decision than of judges' attitudes in finding their decision.

(2) There is a growing amount of new case law in common-law areas where there are new statutory enactments. After all, the new statutes have to be interpreted by judges. Yet this new judge-made law is entirely deduced from these statutes and only a second-degree primary source of law; it is therefore completely different from pre-existing case law, which is a first-degree primary source of law.[114] In civil-law jurisdictions, on the other hand, judge-made law is made only to supplement the existing statutes; there is no judge-made law independent from statutes.[115] Because of these different characters, a comparison of judge-made law from the two systems could be inaccurate. A pre-existing statutory provision could necessitate a particular decision. Judges then would

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[113] See above n 107. See also the statement in the introduction that the bindingness doctrine is a "borderline issue" (above p 13).

[114] This issue is dealt with in detail later; see below pp 118–120, also with respect to the terms "first-degree" and "second-degree primary source of law".

[115] That can be said also on cases of analogical reasoning, where there is a gap in the relevant statute. Insofar one could say there is no statutory basis for a judgment. However, there must be some statutory provision, which is being applied analogically, and this situation therefore is no case of pure judge-made law. See on analogies in detail below pp 60–65.

have to simply apply this provision, without being creative at all. The decision would actually not reflect judges' creativity. It would be incorrect to draw an inference from this purely deductive work to general attitudes of judges.

(3) Moreover, conclusions about statutory interpretation can often also be useful in the context of case-law interpretation. The conclusions on statutory interpretation may entail not only specific information dealing with statutes but also information on judges' attitudes in general. Insofar it may be possible to use statements on statutory interpretation also in the broader context of judges' attitudes in general. Therefore the examination of statutory interpretation can further this thesis' aim of reaching a general conclusion on common-law and civil-law judges' attitudes, in particular as to their respective degrees of literacy and purposefulness.

Traditional view

The traditional view on sources of law is that Civil Law is based on comprehensive statutory law, whereas Common Law is based on a network of courts' decisions.[116] The existence of statutes in the Civil Law naturally means there are prescriptions in place, which do not exist in the traditional Common Law.

The easy conclusion would be that common-law judges enjoy a larger amount of judicial freedom. Their civil-law counterparts' work is constrained by statutes which have to be obeyed and which prevent them from enjoying much judicial freedom. That would be a comprehensible notion of differences between common-law and civil-law judges' attitudes. In fact though, the traditional view on judicial attitudes to statutory

[116] See above pp 17–19. This is only the traditional view of Common Law and does not take into account modern developments.

interpretation is *vice versa*: Common-law judges are said to be rather conservative in their approach towards statutory interpretation whereas civil-law judges are said to have a rather liberal attitude.[117]

Common-law judges, who are said to have a traditionally literal approach towards statutes, have, in former times, regarded statutory enactments as not being helpful at all. The traditional attitude in particular of English judges to statutes can be described as "somewhat negative"; statutes have been seen as "necessary evil".[118] Indeed until the 19th century the English regarded legislative activity as necessary only in order to counteract some specific social or economic mischief and regarded it as dangerous and unnatural to prescribe the outcome of cases in advance.[119]

Because of this negative attitude, statutory enactments were often construed as narrowly as possible; this meant a statute's scope was limited as much as possible in order to minimise the alleged negative impact of the statute.[120] The traditional character of Common Law as pure case law therefore informs also the traditional mode of statutory interpretation. There is in fact a link between the sources of law and the mode of interpretation – however to the contrary of what could be expected on first sight.

Literal Approach in Common Law

There are scholarly statements asserting the traditionally restrictive interpretative approach of common-law judges to interpretation, that is, the traditionally observed

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117 De Cruz, above n 1, p 271.
118 Cf the quote from Pollock J, according to whom "Parliament generally changes law for the worse", in de Cruz, above n 1, p 265, and in Zweigert/Kötz, above n 1, p 265.
119 Zweigert/Kötz, ibid, p 273.
120 De Cruz, above n 1, pp 265–266 (quote from Pollock J).

strong adherence of common-law judges to the literal meaning of statutes.[121] Mostly these are based on judges' own statements in their decisions. Many decisions promote a literal approach towards statutory interpretation; this approach is called "Literal Rule". What the "Literal Rule" means, is expressed by Lord Reid:

> It is a cardinal principle applicable to all kinds of statutes that you may not for any reason attach to a statutory provision a meaning which the words of that provision cannot reasonably bear. If they are capable of more than one meaning, then you can choose between those meanings, but beyond that you cannot go.[122]

An example of a literal approach and of adherence to statutory language, even if the adherence leads to a questionable result, is the case *Cridland v FCT*.[123] The fact situation involved an Engineering student who was buying a small interest in a farming scheme and therefore becoming involved in primary production – at least in a remote sense. According to the relevant taxation provision the student was to be considered a farmer and to enjoy a considerable tax deduction – this was the consequence of construing the relevant taxation statute literally. In *Cridland v FCT* the High Court of Australia held the language used had to be adhered to.[124] The enactments of the legislature could not be replaced by the judges' own inclinations, which in *Cridland v FCT* must have been contrary to the literal outcome of the case. It seems to be clear that the judges considered mere shareholding as not sufficient to enjoy a tax deduction made for genuine farmers (nor did the legislator)[125].

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121 De Cruz, ibid, p 271.
122 *Jones v DPP* [1962] AC 635 at 662.
123 *Cridland v FCT* (1977) 140 CLR 330.
124 Ibid, at 330–331. See also the comment of Corkery, above n 20, p 164.
125 *Cridland v FCT* (1977) 140 CLR at 330–331.

The language of the relevant statute thus is the most important guideline for its interpretation. The statement of Lord Reid, "If they [the words of the provision] are capable of more than one meaning, then you can choose between those meanings …",[126] must be considered carefully. It does not mean there is generally much of freedom; the judge can only choose if there is an ambiguity in the words used, a fairly exceptional situation. Only if the judge finds an ambiguity, can he choose. However, even then, the restriction to the words used is emphasised by Lord Reid ("… beyond that [the words of the provision] you cannot go").[127]

The following statement of Higgins J as well expresses the literal approach towards statutes:

> The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable.[128]

At first sight, this statement, which emphasises the important role of Parliament's intent, may not seem to support the literal approach. However, the statement makes clear that Parliament's intention is only relevant as far as it is expressed in the statutory language.

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126 See above n 122.
127 Ibid.
128 *The Amalgamated Society of Engineers v The Adelaide Steamship Company …* (1920) 28 CLR 129 at 161–162.

Purposive approaches in Common Law

The above examples suggest that common-law judges adhere to the literal meaning of relevant statutes as far as possible. However, there are also cases in which the decisions cannot be put down to the literal meaning of the relevant statute but are obvious results of a different approach. Traditionally a distinction is drawn between two non-literal approaches, called the "Golden Rule" and the "Mischief Rule".

The meaning of "Golden Rule" is expressed by Lord Wensleydale, one of the judges in the classical case *Grey v Pearson* from 1857. In *Grey v Pearson* the relevant words of a will seemed unacceptable. Lord Wensleydale said he always supported a literal approach towards statutory (and wills') interpretation, but would under particular circumstances depart from it:

> I have been long and deeply impressed with the wisdom of the [literal] rule, now, I believe … that in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is [to be] adhered to, unless that would lead to some absurdity … in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity … but no farther.[129]

This excerpt shows that in a case of absurdity of statutory words the courts can deviate from the ordinary meaning. The fact situation of *Adler v George* provides an example of an obvious absurdity. A person got into an Army station and obstructed a soldier. According to s 3 of the Official Secrets Act 1920 (UK) there was liability for obstructing officials only "in the vicinity of any prohibited place" – but not actually inside such a place. In *Adler v George*, the judges were confident that the legislator had not con-

[129] *Grey v Pearson* (1857) 10 ER (HL) 1216 at 1234.

templated obstructive conduct inside a prohibited place and accordingly omitted conduct inside the place. Including only conduct in the vicinity of a prohibited place, and not the even worse obstructive conduct right inside the place, resulted under a literal approach in an obvious absurdity. So the court's decision was the words "in the vicinity" were to be read as "in or in the vicinity".[130]

On the one hand, it cannot be doubted that removing this absurdity by way of interpretation gave effect to Parliament's intention. On the other, though, a criminal sanction was imposed probably without an existing rule stating the required elements of the criminal conduct. This is problematic, as it does not comply with the fundamental criminal-law principle of legality, which is dealt with separately and in detail below.[131]

The "Mischief Rule" permits deviation from the statutory language if the lawmakers' intention is known but the words would – literally construed – lead to a different result. The "Mischief Rule" (also called "Purpose Rule"[132]) presupposes a known intention of the legislator to deal with and ideally to remove a specific mischief. This is the purpose of the statutory enactment and, according to the "Mischief Rule", has to be given effect in construing the enactment. The "Mischief Rule" was expressed in *Heydon's case* from 1584, the origin of the rule:

> … four things are to be discerned and considered … 1st. What was the common law before the making of the Act … 2nd. What was the mischief and defect for which the common law did not provide … 3rd. What remedy the Parliament hath resolved and appointed to cure the disease … 4th. The true reason of the remedy … and then the office of

130 *Adler v George* [1964] 2 QB 7 at 7.
131 The basis of this principle being the Latin maxim *nulla poena sine lege*, meaning there cannot be sentence without its legal prescription. See below pp 70–74.
132 See Corkery, above n 20, p 165.

> all Judges is always to make such … construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief … and to add force and life to the cure and remedy, according to the true intent of the makers of the Act …[133]

The "Golden Rule" and the "Mischief Rule" have in common the deviation from the literal meaning of a statute. However, the "Golden Rule" and the "Mischief Rule" are different. The "Golden Rule" only permits avoidance of absurdity. In case of the "Mischief Rule", on the other hand, it is not necessary that the difference between intent of the legislator and language of the statute makes the statutory language absurd. The legislative intent must be given effect in any case.

Some of the presented cases are very old – like *Heydon's case* with more than 400 years. There are also more recent cases which represent a literal approach and others which represent a rather purposive approach towards the interpretation of statutory law.[134] However, the famous older cases are used by all scholarly authors and are therefore appropriate for discussion. Moreover, in order to make the discussion easier to understand, it is preferable to present old and well-known cases instead of newer but unknown ones. Another argument is that the age of a particular reasoning underlines the courts follow a certain precedential line already for a long time – for example the "Mischief Rule", which according to *Heydon's case* had been introduced already in the 16th century.

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133 *Heydon's Case* (1584) 76 ER (King's Bench) 637 at 638.

134 *Westralian Farmers Co-op v Southern Meat Packers* [1981] WAR 241, with the Supreme Court of Western Australia embracing a purposive approach. In *Jones v Bartlett* (2000) 176 ALR 137, the High Court employed a rather literal approach. These cases are remarkable because they concern the same provision from Western Australian law, which is construed diametrically differently in these decisions.

Altogether, the different cases show a variety of interpretative approaches, not only strictly literal approaches but also purposive approaches which allow the deviation from the statutory language. Common-law judges thus cannot have a fully literal attitude towards statutory enactments. It is also characteristic of their attitudes that common-law judges are permitted to deviate from the statutory words under specific circumstances.

Incompatibility of interpretation rules

The three aforementioned interpretation rules do not seem to be compatible. They arguably are not a homogenous group which could be applied each at one and the same time without inconsistencies. The three rules do not supplement each other but point in different directions. The Literal Rule demands adherence to the wording of the statutes, even if the legislator intended a different outcome. The Golden Rule does – in the absence of an ambiguity – the same. Yet in case there is an ambiguity, the Golden Rule lets the judges deviate from the words of the statute. The Mischief Rule permits the same, that is, deviation from the statutory words – and it is not confined to ambiguities. That, altogether, means that virtually every outcome of given cases may be justified through the application of one of these rules. Additionally, the three rules do not represent a development from one of them to another. All three rules are currently still operative.

A famous case, *Fisher v Bell*, shows why the application of the three different interpretation rules can lead to striking results.[135] In that case, the Queen's Bench Division of the High Court in London had to decide whether a shopkeeper "offers [an offensive

[135] See *Fisher v Bell* [1961] 1 QB 394.

weapon] for sale",[136] if he displays a flick knife in the shop window with an attached price label. The judges held the term "offer for sale" must be given the meaning from "the ordinary law of contract". Accordingly, display of the knife in the shop window represented a mere invitation to treat and not yet a binding offer. The mere display in the shop window thus could not fulfil the requirement of "offer to sale" and was not prohibited – unlike for example the actual sale of a particular knife thereafter.[137]

This case, as the decision entails the words "ordinary" and "meaning", might be viewed as instance of a literalistic approach, but it appears to be questionable whether this is really a correct literal interpretation of the relevant provision. After all, "literal meaning" of a statute is used synonymously to "plain meaning"[138]. The plain meaning of offering an item in a shop window will likely be that of an offer to sale. It seems odd to rely on legal jargon to find out what the "plain meaning" or, this expression is also used, the "ordinary meaning" of a term is. This was conceded by Lord Parker CJ, who nevertheless did not dissent ("At first sight it seems absurd … but …").[139]

Another questionable point is the limitation of all interpretative approaches to ambiguous statutes. In theory, as has been stated above, an interpretation by way of applying, for instance, the Golden Rule has always paid regard to the statutory language and has resolved only pre-existing ambiguities. The occurrence of such ambiguities has even been said to be "fairly exceptional".[140] However, the courts are the ones who ascertain if a statute is in fact ambiguous. Many absurdities of a statute can function, in a sense, also as ambiguities, because in many cases it can be doubted if the statute really has

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136 Criminal according to s 1(1) of the Restriction of Offensive Weapons Act 1959 (UK).
137 *Fisher v Bell* [1961] 1 QB 394.
138 Cook/Creyke/Geddes/Hamer, above n 26, p 210.
139 *Fisher v Bell* [1961] 1 QB 395.
140 See above p 50.

this absurd meaning or just needs extensive interpretation. If the courts see an absurdity in the relevant statute, they will be inclined to categorise this as an ambiguity, unless the text is obviously unequivocal.[141]

The literary construction of the statute in question would also lead to an absurdity. Giving effect to the intention of parliament could as well be seen as removing this absurdity. Therefore the Golden Rule would facilitate exactly the same outcome as does the Mischief Rule. This shows in some cases the Golden and Mischief Rules arguably are readily interchangeable.

Acts Interpretation Acts

Nowadays, the trilogy of Literal Rule, Golden Rule and Mischief Rule, in common-law jurisdictions, is no longer the only guideline to be considered by judges. This is mainly due to the fact that there are all over the common-law world Acts Interpretation Acts, which statutorily regulate the mode of statutory interpretation in the relevant jurisdictions. There are, in Australia, for instance, the Commonwealth Acts Interpretation Act 1901 and the Queensland Acts Interpretation Act 1954.

These acts unambiguously state that Parliament's intention has to be given effect in interpreting any enactment.[142] For instance, s 15AA of the Commonwealth Acts Interpretation Act provides:

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[141] Corkery, above n 20, p 165, quoting Williams "Learning the Law" p 107. See as an example of this the case *Adler v George* above pp 52–53.

[142] The original acts may be older; however, they were amended to this end (in Australia during the 1980s).

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

This means that nowadays the courts are obliged not to adjudicate only regarding the actual wording of statutes (this would be according to the Literal Rule). The courts are also obliged to give effect to the legislator's intention not only to avoid absurdities (this would mean according to the Golden Rule). The courts have to adjudicate giving paramount importance to the legislator's intention (as the Mischief Rule demands). The pattern of statutory interpretation suggested by the three rules is, thus, not anymore correct. This perhaps is the reason, because of which some textbooks do not categorise Golden Rule and Mischief Rule separately but together as instances of a "purposive approach".[143] On the other hand, other textbooks still adhere to the traditional pattern.[144]

The Acts Interpretation Acts also make clear which extrinsic material can be used in interpreting statutes. This means that only listed material can be used, so the acts stipulate that the scope of each historical interpretation is a strictly limited one. For example s 15AB of the Commonwealth Act entails such a limiting list.

Regarding the Acts Interpretation Acts, it is even less justifiable to label common-law judges as literal compared to their civil-law counterparts.

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143 Cf Cook/Creyke/Geddes/Hamer, above n 26, p vii (Contents).
144 See, for example, Corkery, above n 20, p viii (Contents).

Similarity of common-law and civil-law interpretative patterns

The common-law interpretation methods seem not to present an exhaustive guideline for judges applying statutes. As argued in the preceding parts of the thesis, they appear to be incompatible with each other and to some extent to facilitate different decisions of one and the same case. Therefore it makes sense independently from the three traditional interpretation rules to list the various criteria which judges may in fact consider when interpreting statutory provisions.

According to Vogenauer's German-language dissertation, as reflected in Lücke's English-language review article, all judges, no matter if in Common Law or in Civil Law, apply five different interpretative criteria: (1) the statutory language, in particular the grammatical implications; (2) the genesis of a provision; (3) its context within the particular statute and within the legal system as a whole; (4) its purpose; (5) extra-legal values.[145] De Cruz provides a more detailed list with eleven criteria of statutory interpretation in common-law systems,[146] which, nonetheless, can be put together in groups. After categorising them, it becomes clear that de Cruz's criteria almost equal the aforementioned criteria of Vogenauer. De Cruz's list, however, does not entail anything suggesting extra-legal values play a role in judicial reasoning. Yet while "extra-legal" values may be an important factor in judges' decision-making processes, they do, as their name suggests, not form part of "legal" reasoning. Therefore, the difference between Vogenauer and de Cruz may simply be due to whether extra-legal matters are included or excluded.

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145 Lücke "Review Article – Statutory Interpretation: New Comparative Dimensions" (2005) 54 ICLQ 1023 at 1026.

146 De Cruz, above n 1, p 286.

Civil-law interpretation methods, indeed, can be put down to this listing. For instance, in Germany there are four different methods of statutory interpretation, (1) considering literally the language used in the statute (*wortlaut-orientierte Auslegung*), (2) considering the context of the provision in the legal system, most notably in the rest of the relevant statute (*systematische Auslegung*), (3) considering the genesis of the provision (*historische Auslegung*) and (4) considering its purpose (*teleologische Auslegung*). Statutory interpretation in other civil-law jurisdictions follows a similar pattern: De Cruz lists – parallel to his common-law listing and apparently based on the French situation – civil-law interpretation methods, which are substantively identical with the aforementioned.[147]

The common-law and civil-law *historical* interpretation methods seem to be different from each other. For example de Cruz sees the historical approach "pursued very much more in civil law countries than in common law jurisdictions" and links this statement to the weight of governmental or administrative views.[148] It has to be said that historical interpretation of statutes in the civil-law family member state Germany is strictly limited, as only those legislative views which have been expressed in the legislative process are supposed to be considered in the process of interpretation. Governmental or administrative views are irrelevant there, too; paramount are the literal and the systematic approaches, in other words approaches which are focused on the express terms of the present statute and its statutory context. Altogether the historical interpretative approach is strictly limited also in civil-law systems, and a purely historical approach will

147 De Cruz, above n 1, pp 267–270. De Cruz's category "logical interpretation" means construction "within the context of the entire ... legal system", see de Cruz, ibid, p 268, so that it is the same as the systematic approach.

148 De Cruz, above n 1, p 269.

be applied only in a few situations, in civil-law as rarely as in common-law jurisdictions.

The civil-law interpretation pattern seems to be very similar to that of the three traditional common-law rules. Civil-law interpretation therefore is no clearer than the common-law interpretation rules. Also the civil-law interpretation rules are actually incompatible to each other, as they can point into different directions in one and the same case. Combined with each other, they as well lead to ambiguities.

In concluding this part of the thesis, it can be suspected that judges in both kinds of systems are able to adjudicate relatively freely. That is because the three classical common-law interpretation methods point into all possible directions. In fact common-law judges use all of the five interpretative criteria mentioned above. It has to be supposed that also the four typical civil-law interpretation methods can be put down to the pattern of five criteria. Moreover, it can be shown the civil-law methods may, at first sight, differ from the common-law methods. In fact though, there are surprisingly little differences and there is, even in detail, similarity.

Analogical reasoning in Civil Law

Civil-law judges are said to be, as has been stated above, rather liberal in their mode of statutory interpretation.[149] They allegedly do not adhere to the literal meaning of the relevant statutes, at least not to the same extent as their common-law counterparts. The literal approach to statutory interpretation is traditionally said not to be vigorously pur-

[149] Cf above p 47. To the *common-law* attitude towards the concept of analogical reasoning see below pp 65–68.

sued in Civil Law; instead, a "teleological" approach is entertained.[150] The term "teleological" here means something like "being focused on the goal", deriving from the Greek word "telos", which translates as "ultimate end". The translation suggests that the "teleological" interpretation is fairly independent from the literal meaning of the statute.

The allegedly liberal civil-law approach towards statutory language also seems to be the basis for the analogical application of statutes. Analogies take statutory interpretation a step further. In theory, analogies enable the civil-law judges even in the absence of a statutory provision to come to the conclusion they would have reached if there were a statutory provision with certain content.[151] The concept of analogical reasoning can thus be the remedy for civil-law judges in the event that even an extensive interpretation of the statute does not give effect to the legislator's intent. What this does and thereby, even more important, what this does not mean will be shown using the following examples.

The first is the compensation for acquisition of property in Germany: Art 14(1) of the German Constitution entails the guarantee of property as a right, and Art 14(3) provides for compensation of citizens in case of acquisition of property, equivalent to s 51 (xxxi) of the Australian Constitution. However, there are infringements of citizens' property rights by the State other than through acquisitions, for example through accidental use of property (like building a road without knowing about the ownership of the land used). Such an accidental use of land, according to the German courts, never

150 De Cruz, above n 1, p 270.
151 Cf ibid, p 269.

amounts to an acquisition.[152] As the provision for acquisitions therefore does not fit those cases, there is no provision in current German law providing for compensation. However, the abovementioned Prussian Land Law 1794, in §§ 74 and 75 of its Introduction, acknowledged compensation claims in case of situations in which property was acquired merely accidentally.[153] The German courts apply those outdated provisions analogically and grant due compensation.[154]

This example illustrates a limitation to the analogical application of statutes. There must be a gap in the statutory law ("*Regelungslücke*"); in the example it is the non-existence of a compensation right in case of acquisition-like but accidental acts of the state. Only if there is an objective gap in the statute, can this gap be filled out by applying another provision analogically.[155] Analogical reasoning thus does *not* mean civil-law judges can arbitrarily decide according to their own ideas as long as there is no express statutory provision to the contrary.

A second example is from the German Administrative Law, where special courts deal exclusively with administrative-law issues. There is, in the relevant German procedural statute, provision for review of administrative action, notably § 42 of the *VwGO* (abbreviation for *Verwaltungsgerichts-Ordnung*, which means Administrative Courts *Ordinance*, though the *VwGO* is a parliamentary statute). This provision, however, is limited in its scope insofar as it only concerns actions with respect to *specific* administrative acts (so-called "*Verwaltungs-Akte*"). There is no provision which would generally

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152 *BVerfGE* 58, 300 at 331 (The abbreviation meaning the official reports of decisions of the Federal Constitutional Court).

153 The Prussian Land Law 1794 was mentioned above p 21.

154 The author does not understand why it is not anymore up to date to analogically apply Art 14(3) of the Constitution, which after all was also previously applied not directly but – knowing its requirements were not exactly met – only analogically.

155 *BVerfGE* 58, 300 at 331.

provide for actions with respect to all sorts of administrative conduct. Nevertheless, actions against non-specific administrative conduct are possible. The courts in those cases rely on the specific provisions like §§ 42 or 43 of the *VwGO* and apply them analogically to permit also those actions.[156]

This example again shows the liberty of civil-law judges is limited. Civil-law judges cannot without a present statutory provision decide what they personally find suits the situation. The judges can only apply an existing provision, the requirements of which admittedly are not exactly met and which therefore does not precisely cover the present situation. Required therefore is a gap in the relevant laws, which has been accidentally left open by the legislator, who did not envisage this situation and consequentially did not provide for it.

Moreover, it has to be emphasised that analogical application of provisions to situations uncovered by rules takes place only in exceptional situations in Civil Law.[157] Usually the civil-law courts will adhere to the Latin maxim *expressio unius est exclusio alterus*, meaning they will treat the mentioning of only one term in a statute as exclusive, in the sense that not-mentioned terms are excluded from the statutory provision.[158] Usually the omission of a specific term will be the result of a deliberate decision by the legislator not to include it; in other words, the legislator has deliberately omitted a phrase. In these situations the analogical application of another phrase is of course not feasible. The deliberateness of the legislator's omission is the crucial factor. If the omission of

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156 As with other analogies, the courts, after many years of purely analogical reasoning, are able additionally to justify the application of those provisions as customary law.

157 Lücke, above n 145, p 1030.

158 This Latin maxim has an identical impact on Common Law, see Corkery, above n 20, p 169.

the legislator was deliberate, the analogical approach is not possible; only in case of it being accidental is the analogical application of another provision possible.

Parliament's view therefore is paramount and, in particular, superior to judges' opinions on which is the best of the available interpretations. It has to be added that Parliament has the option of enacting a clear-cut statutory provision to suppress any undesired analogical application of provisions. The German Parliament, for example, could have enacted an express provision that an accidental infringement of property rights by the state does not trigger a compensation claim, which would prevent the courts from an analogical reasoning using §§ 74 and 75 of the Introduction to the Prussian Land Law.[159] In case of the other example, the legislator could make statutory provision excluding actions with respect to non-specific administrative acts. Such a provision would have to state expressly that only actions against specific administrative acts are admissible, so that there would be no general remedy against all forms of administrative conduct.[160]

The fact that the legislator has not enacted such provisions shows that the existing courts' decisions which are reached by way of analogical reasoning are in line with the legislator's views. Both the courts and the legislator think there should be compensation for citizens in cases of accidental infringement of property rights. Both do not think actions against administrative conduct should be admissible only in case of a specific administrative act. Therefore the legislator does not think it is necessary to enact

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[159] It is a separate question whether such a provision would be constitutionally valid. Arguably it would be unconstitutional, as Art 14 of the German Constitution guarantees property rights and thereby prohibits their infringement, regardless if deliberate or accidental.

[160] Again, the constitutionality of such a provision would be at least doubtful. Art 19(4) of the German Constitution guarantees the right to judicial review of administrative action, and it does not differentiate between various sorts of administrative action.

amendments. Consequentially, the analogical reasoning becomes more and more entrenched and, after a certain time-span, may become even customary law.

The examples presented in this part of the thesis are examples from Constitutional Law and from Administrative Law. Criminal Law does not provide clear-cut examples of analogical reasoning. There are several reasons for this. Firstly, there is a prohibition on analogical reasoning in Criminal Law, as far as it would be to the detriment of the accused.[161] Secondly, the completeness of Criminal Law may leave few gaps accidentally open in the relevant statutes. Thirdly, civil-law courts are generally very reluctant to engage in analogical reasoning; they try to resolve most occurring problems with an extensive and sometimes maybe too extensive interpretation of statutes. Consequentially, there are not very many instances of analogy and accordingly very few criminal-law examples.

The situation in Common Law

It is said that analogical reasoning traditionally does not take place in Common Law at all or is, at least, very rare.[162] Filling gaps in statutory provisions is seen as usurpation of a legislative function.[163] The existing interpretation rules, however, support analogical reasoning in common-law cases. After all, accidentally left-open gaps in statutes usually represent absurdities and can therefore, according to the Golden Rule, be removed. This would have to be done by filling out the gap. For example, it seems to be questionable whether the decision in the case *Adler v George* can be explained as mere instance of statutory interpretation. It arguably should be categorised as something dif-

[161] See on this in detail below pp 70–74.
[162] De Cruz, above n 1, p 286 and also p 277; Lücke, above n 147, p 1030.
[163] *Magor and St Mellons Rural District Council v Newport Corporation* [1952] AC 189, p 191, per Viscount Simonds LJ.

ferent.[164] The view taken by that decision that the words "in the vicinity" encompass conduct actually "in" the place appears to be more than merely interpreting the words of the statute. It seems to be reading something in the statute which is not yet there and thereby filling a gap. Thus it is actually similar to the civil-law concept of analogical reasoning. Moreover, the Mischief Rule supports the analogical application of statutory provisions in Common Law, as the mischief which was to be removed by the statute can be remedied by the analogical application of the actually inapplicable statutory provision.

Therefore, it is doubtful whether analogical reasoning really is a civil-law peculiarity and does not occur in common-law jurisdictions. Perhaps it is used in common-law systems but under the label of interpretation. The label of interpretation seems more acceptable to a common-law court than overtly displaying a law-making function.[165] Under the label of interpretation, it may be seen as acceptable not only to use existing statutory words and to give them a certain meaning but also to read non-existing words into a statutory provision by filling in its gaps.

This view is also supported by Lord Denning who stated, "We sit here to find out the intention of ... Parliament and carry it out, and we do this better by filling in the gaps and making sense of the enactment".[166] Resorting to the concept of analogical reasoning does not appear to be necessary if the idea of statutory interpretation is, according to Denning's suggestion, widened enough to encompass situations where literally not applicable statutory provisions are applied.

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164 See on the case *Adler v George* above pp 51–52.

165 De Cruz, above n 1, p 277. See also the words used by Viscount Simonds LJ in *Magor and St Mellons Rural District Council v Newport Corporation* [1952] AC 189, p 191: "... naked usurpation of the legislative function under the thin guise of interpretation ...".

166 This statement actually stems from the (preceding) Court of Appeal stage of *Magor and St Mellons Rural District Council v Newport Corporation*; cf the preceding footnote.

A test is needed to decide whether an actual construction is just an extensive kind of interpretation or amounts to analogical reasoning. A possible test could be focused on the question whether this construction lies inside the widest-possible meaning of the statutory words. If it does lie inside this possible meaning, it can still be considered statutory interpretation. If it, on the other hand, goes beyond even the widest-possible meaning of the statutory words and reaches a result which the statutory words cannot anymore bear, it would have to be considered an analogy. In the situation of *Adler v George*, for instance, it should be quite obvious that the statutory words of conduct "in the vicinity" of a prohibited place could not possibly be stretched enough to permit an interpretation including the conduct not in the vicinity but right inside the place. This interpretation would lie beyond the widest-possible meaning of the words. This does not mean the particular interpretation was not feasible; it only classifies this kind of reasoning as analogy.

Again: Whatever lies beyond the widest-possible meaning of the statutory words can only be embraced analogical application, not extensive interpretation. This test does actually not ignore the fact that at least Australian and English judges are now committed to purposive rather than literal interpretation.[167] This could be seen as implying that going beyond the words simply in the name of interpretation must – sometimes – be possible. Purposive interpretation, of course, may lead to results which seem to be far away from the statutory words and their meaning. However, if the result of purposive interpretation does not contradict the words of the statute, it does not lie – from the author's point of view – beyond their widest-possible meaning. The existence of pur-

[167] See above pp 56–57.

posive interpretation, therefore, does not present a definitive objection to the test defined above.

Conclusion

Common-law and civil-law judges do not seem to employ different attitudes towards statutory interpretation. Those who describe common-law judges as being rather focused on the literal meaning of statutes do not provide any proof for their view. Their view seems to be inconsistent with the trilogy of Literal Rule, Golden Rule and Mischief Rule, which suggests statutory interpretation in common-law jurisdictions follows a more chequered pattern; Golden Rule and Mischief Rule permit the judges to deviate from the literal meaning of the words used in the statute. If judges can deviate from the literal meaning of the statute, it can hardly be said that they entertain a literal approach. Judges are also obliged to apply the Acts Interpretation Acts which prescribe the judges to decide according to the legislator's intention.

These considerations are actually to be distinguished from the arguments of jurisprudentialists Dworkin and Hart on judges' discretion.[168] These arguments concern the area of law in which there is uncertainty as to how judges should decide – because it is the area of law not regulated by rules; the judges in those cases have discretion. The question is whether this discretion is, as Dworkin says, limited by relevant principles or, as Hart points out, unlimited in the sense that judges have to be seen as infallible.[169] As to judges' discretion in other cases: in these other cases, something like judges' discretion may arise out of the fact that there are various rules, from which the judge

[168] Dworkin, above n 111, pp 31–39; Hart "The Concept of Law" pp 141–147.

[169] Dworkin, above n 111, p 33; Hart, above n 168, p 144. However, Hart, ibid, pp 145–146, points also out "this does not make the judge … the 'lawgiver' competent to decide as he pleases".

chooses the proper one. However, that is actually no discretion at all but the judges' duty to apply the (proper) binding rule.

Moreover, the discussion in this chapter has been, as to common-law judges, centred on the three rules on statutory construction and the Acts Interpretation Acts. From the author's point of view, these standards presuppose, to some extent, a theory of law which limits the latitude judges enjoy. As far as the Acts Interpretation Acts are concerned, a limitation of liberties is an impact these Acts indeed have on judges' task. This, on the other hand, is actually not anymore the issue of judges' attitudes.

Furthermore, also in terms of this thesis' aim, the search for inherent differences between common-law and civil-law jurisdictions, that is, for differences between both systems which are specific and typical, focussing on jurisprudential discussions at this stage seems not helpful. It would require at least one difference to be discerned and then to be examined under different jurisprudential aspects. However, there is up to this part of the thesis no evidence for a difference in judges' attitudes in the common-law and in the civil-law worlds.

3 THE CRIMINAL-LAW SITUATION

Criminal Law is special. Criminal-law sanctions bear particularly grave consequences. Moreover, in the present context, namely the interpretation of statutes, Criminal Law is very different from other branches of law; the reasons for this will be discussed in the following section. Because of the differences, it has been thought appropriate to present constitutional-law and administrative-law rather than criminal-law examples to show general interpretative concepts.

The focus of this chapter is not tantamount to a narrow frame of reference and to limiting the scope of the examination. Criminal Law is an example used in order to test the general theses. The conclusion aimed at is not limited to Criminal Law but a general one.

It has been mentioned that it is problematic if a criminal sentence is issued without the required elements of criminal conduct being stated on an existing statutory or other basis. The sentence, in this case, may not comply with fundamental criminal-law principles, particularly not with the principle *nulla poena sine lege* as part of the principle of legality.

The principle of legality (*nulla poena sine lege*)

The principle of legality as part of the rule of law contains, *inter alia*, the Latin maxim *nulla poena sine lege*. This literally means there cannot be punishment without legal prohibition of the sanctioned acts. Criminal charges must not concern conduct which

was legal at the time of the conduct. The principle of legality reflects the notion that each person should have a fair warning of which behaviour is legal and which illegal. For a crime like murder, it will be obvious that it is illegal and will not be tolerated by the community but instead tried. However, there are as well less obvious cases.

It is said that the principle *nulla poena sine lege* nowadays "is accepted as just and upheld by the penal codes of virtually all modern democracies".[170] Lord Atkin defined Criminal Law in a way which acknowledged the existence of the legality principle in common-law systems:

> Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the state. The criminal quality of an act cannot be ascertained by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences?[171]

This statement primarily illustrates the need for penal statutes in case of modern regulatory offences in areas such as road traffic, customs and taxation.[172] Other, more traditional crimes such as murder and stealing may be rather easily discernible as moral wrongs. Still, in those and in all other cases "[t]he criminal quality of an act cannot be ascertained intuitively" but a "prohibit[ion] with penal consequences" is necessary. Thus this statement is one also on the legality principle.

In medieval times, the principle of legality was hardly adhered to as "[i]n early days of English law criminal cases were dealt with largely … except for spasmodic interven-

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170 Cf <http://en.wikipedia.org/wiki/Nulla_poena_sine_lege>.

171 *Propriety Articles Trade Association v Attorney-General (Can)* [1931] AC (Privy Council) 310 at 324.

172 See Colvin/Linden/McKechnie, above n 29, paras 1.2–1.3.

tions by Parliament … from case to case."[173] A case-to-case application of criminal-law statutes, however, means similar situations may happen to be treated differently. This is something which the principle *nulla poena sine lege* should prevent, and pure case law, thus, has natural difficulties complying with the principle. After all, pure case law cannot guarantee identical situations are always treated alike, as courts will be less aware of all potentially relevant previous courts decisions than they would be of only one statutory provision.

Naturally, there are differences between civil-law and common-law jurisdictions as to the details of the principle, which can be put down to differences in the respective available sources of law. In civil-law systems, with a comprehensive codification, the principle requires that for every offence there is a statute which states the requirements of the offence and the sentence in detail.[174] The Common Law, on the other hand, traditionally consists mostly of courts' decisions and does only to a lesser extent rely on statutory law. The principle *nulla poena sine lege*, as it is understood in civil-law systems, thus could not be adhered to in common-law jurisdictions. The principle consequentially must have a specific common-law meaning.

Lord Atkin, in his above quoted statement, requires the prohibition under "appropriate penal provisions by authority of the state". This could comprise even courts' decisions, the role of which in Common Law is an important one. Courts' carry "the authority of the state"; their decisions contain general rules (altogether they form the network of which the whole Common Law consists); these rules are "penal provisions". If a court,

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[173] Waller/Williams, above n 21, para 1.7. On the other hand, there was, in medieval times, already a notion of the rule of law, see Corkery, above n 20, p 10.

[174] Here the term "statute" definitely only comprises parliamentary enactments and not the non-parliamentary by-laws.

for example, decides that non-payment after filling petrol in the tank of a vehicle at a self-service petrol station is stealing rather than fraud,[175] then there is a rule to this effect, a rule which requires similar cases to be decided accordingly. Yet the issue stays problematic, as there is, before such a case arises for the first time, no rule at all.

There is still the question of the meaning of the term "appropriate", which is used by Lord Atkin. A possible suggestion as to its meaning and thereby to the common-law meaning of the *nulla poena sine lege* maxim could be the requirement that the elements of an offence must be stated in the best-possible form available. The best available form has been usually the enactment of a statute. Accordingly, in common-law jurisdictions, nowadays, all criminal offences are statutorily stated [including in jurisdictions without a Criminal Code, which rely on definitions in their Crimes Acts, for example, the definition of murder in s 18 of the Crimes Act 1901 (NSW)].

There is another important aspect of the legality principle, which again results from the ground that there should be a fair warning for the accused, who has to have been able to know that he engages in punishable conduct.[176] It is of crucial importance whether a certain statutory interpretation bears a positive result for the accused person. As long as the accused would be favoured by an interpretation which does not focus on the actual words of the provision, he obviously does not need a warning.

A related but separate question is whether criminal-law statutes or other criminal-law sources of law have, if the principle *nulla poena sine lege* is adhered to, to be interpreted differently from legal sources in other areas. It is usually asserted that criminal laws have to be interpreted literally, in other words excluding any purposive approach

[175] The example was used already above p 20.
[176] Cf above p 71.

towards their interpretation.[177] It is however the question if this requirement is necessary also if the borderline between extensive purposive interpretation and analogical reasoning is strictly obeyed.[178] After all, decisions like *Adler v George* (where the statute penalised conduct "in the vicinity", yet also conduct "inside" the relevant place was held to be criminal), which cannot be explained as pure interpretation of existing statutory words, could be seen not as examples of purposive interpretation but of analogical reasoning.[179] Then these cases would actually not prove that purposive interpretation is questionable, when it comes to Criminal Law. They would rather show that analogical reasoning is a problematic approach in Criminal Law.

Consequences for the application of criminal-law statutes

For the application of the Criminal Code (Qld) and other criminal-law statutes the principle *nulla poena sine lege* normally means judges cannot introduce additional elements of an offence by way of statutory interpretation – unless this favours the accused. The introduction of additional elements favours the accused if these stipulate additional requirements, namely requirements which must be met *cumulatively* together with the explicitly stated elements. The accused would be acquitted if he did not meet the additional requirement. On the other hand, if additional elements stipulate *alternative* requirements – for instance in *Adler v George* the option of conduct right inside the prohibited place – they work to the detriment of the accused. Because of the newly introduced element, the accused would be convicted if he only fulfilled the additional requirement.

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177 Pearce/Geddes "Statutory Interpretation in Australia" para [9.25]. The book refers to taxation-law and expressly to criminal-law provisions.

178 See above p 67.

179 See above p 67.

The *nulla poena sine lege* principle also means that an extensive interpretation of existing criminal-law provisions beyond their original scope is problematic, as there is a fine line between extensive interpretation and analogy. To avoid undesired consequences, it can be necessary to deviate from the statutory language. The majority view on interpretation of criminal-law statutes says, however, Criminal Law and Taxation Law are legal areas in which the literal approach to the interpretation of relevant statutes should be strictly adhered to.[180] No purposive interpretive approach should therefore be entertained when it comes to criminal-law (and taxation-law) statutes.

Accordingly, the introduction of an additional criminal element should not be admissible. However, as long as the accused is favoured, nothing can be said against a purposive interpretation of the relevant criminal-law statute. The adherence to the literal meaning of a statute provides a safeguard that is not necessary if a deviation would only favour the relevant person. As long as there is no detriment to the accused, every interpretation is possible, including extensive interpretation not grounded on any literal basis, according to the purpose of the relevant statute.[181] Only if the interpretation goes beyond the possible meaning of the statute in issue and becomes an analogy, is the result problematic. Yet in such a case, it would be nothing else but the very principle *nulla poena sine lege* which counteracted the result. The ultimate question therefore in all cases has to be the question of whether the statute would adversely affect the accused person.

An example regards the availability of the justification of self-defence in Queensland's Criminal Law. Section 271 of the Criminal Code (Qld) prescribes the requirements for

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[180] Above n 177.

[181] See to the difference between mere interpretation of a present statute and analogical reasoning to overcome lack of an applicable statute above p 67.

the use of force to defend oneself against an assault. In general, there must be an unlawful assault and the force used against it must be "reasonably necessary" [s 271(1) of the Criminal Code (Qld)]. The use of the term "reasonably necessary" on the one hand may indicate that the calculation of what is necessary is not expected to be objectively precise but only a rough measurement.[182] After all, the word "reasonably" must be given some meaning. On the other hand, it cannot readily be assumed the attacked person is permitted to error and to misjudge the necessity. Therefore, an interpretation which does permit the attacked person to imprecisely and thereby possibly incorrectly measure the necessity means a considerable relaxation of s 271 of the Criminal Code and a certain amount of flexibility. This example shows a rather liberal approach towards the wording of a criminal-code provision. However, in this situation, the liberal interpretation does not impact negatively on the perpetrator but may even lead to his acquittal – because he was attacked and did not precisely measure his response.

Another example concerns the occurrence of an assault, against which self-defence might be permitted according to s 271 of the Criminal Code (Qld). This provision permits, under certain circumstances, defence against an assault, which means the defensive act must be conducted in response to the assault. This suggests that an assault must still be continuing at the time of the defensive act or, as it is sufficient that the offender threatens he will apply force against the defender, that the threat might be carried out at the time of the defensive act. However, in a decision dealing with a similar provision, the Northern Territory Supreme Court held that a "continuing assault" in form of a threat could be sufficient even where the assailant was temporarily unable to carry the threat out at the time of the defensive act. The court said that the offender must "pres-

[182] Colvin/Linden/McKechnie, above n 29, para 14.10.

ently be able to put his threat into place at the time he threatens to do so".[183] This is another instance of a highly flexible interpretation of a criminal-code provision. However, the liberal interpretation, again, does not impact negatively on the perpetrator – as he acted under an ongoing threat, he can be acquitted.

A further situation concerns the concept of provocation. In Queensland, an assault committed by the provoked person may be excused [ss 268–269 Criminal Code (Qld)]. Additionally, according to s 304 of the Criminal Code (Qld) a provoked homicide may not be murder but mere manslaughter. For the defence of provocation to be allowed, the provocation must (1) actually cause the provoked person to lose self-control, this is the "subjective test", and (2) also be likely to cause an ordinary person to lose self-control, that is the "objective test".[184] These two requirements are expressly stated with respect to assault in s 268 but not with respect to murder in s 304. Nevertheless, an objective test, similar and in particular referring to the ordinary person, has been read also into s 304.[185]

In this case the liberal interpretation of the code provision bears a negative impact on the accused – the defence of s 304 of the Criminal Code (Qld) may not be available because the ordinary person, facing the same provocation, would not have lost self-control. This sort of flexibility, thus, is problematic; yet the present purpose is just to show the creativity employed by common-law judges – even when it is in the area of Criminal Law and when it does not favour the accused person.

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183 Cf *R v Secretary* (1996) 86 A Crim R 119 at 122, 127. See also Colvin/Linden/McKechnie, above n 29, para 14.6.

184 See Colvin/Linden/McKechnie, ibid, para 15.7–15.8. *Likelihood* of lose of self-control is required in case of assault, whereas for the defence to murder, it is required that the provocation is *sufficient* for the loss of self-control.

185 See ibid, para 15.9.

There are some older cases on bigamy which further illustrate the consequences of the principle "*nulla poena sine lege*" and show the sometimes fine line between criminal guilt and innocence. These cases, though not Queensland cases, concern the difficult distinction between mistakes of fact [which in Queensland can be material according to s 24 of the Criminal Code] and mistakes of law [which are according to s 22 usually immaterial]. There is firstly the (English) case of *Tolson* in which the mistaken belief in being unmarried, a mistake of status, was based on the belief in the death of an earlier spouse and was therefore classified as a mistake of fact.[186] Secondly, there is the (South Australian) case of *Kennedy* where there was a mistaken belief about whether an earlier marriage was invalid because it was with a first cousin.[187] It is comprehensible that the courts deemed the first mistake a material mistake of fact and the second an immaterial mistake of law. On the other hand, there is the (Victorian) case of *Thomas v The King* in which a mistake about whether the earlier marriage had been terminated by a divorce decree was held to be a material mistake of fact, which seems to be inconsistent with the decision in *Kennedy*.[188] Be that as it may, it has to be seen that ignorance of law is always based on some kind of factual mistake, and the borderline between material and immaterial mistakes, therefore, is rather tight.[189] In the present context, this is important as in a bigamy case, the court's decision holding a mistake for immaterial, the resulting conviction could be said to take the accused, not aware of the illegality of his conduct, by surprise and infringe the legality principle.

The requirement of awareness of the illegality has to be distinguished from mere awareness of the criminal statute prescribing the criminal conduct. Awareness of the

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186 *Tolson* (1889) 23 QBD 168.
187 *Kennedy* [1923] SASR 183.
188 *Thomas v The King* (1937) 59 CLR 279.
189 This is made clear by, for instance, the decision in *Ostrowski v Palmer* (2004) 78 ALJR 957.

actual criminal provision is of course not necessary [which is the principle contained in s 23 of the Criminal Code (Qld)]. Meant is rather the awareness that the actual conduct is not tolerable. If this awareness were absent, the relevant person would be taken – in an unfair way – by surprise.

Discussion of statements on the criminal-law prohibition of analogy

There are some statements on the principle *nulla poena sine lege* (prohibition of analogical reasoning in Criminal Law)[190] which seem to point in a different direction. Firstly, there is the statement of Lücke, who in his English-language review article states the analogous application of statutes was accepted practice also in Common Law in medieval times. Lücke asserts, "Statutes creating very serious criminal offences were not applied by analogy, but less serious offences were dealt with more liberally". After presenting a historical example, he continues, "English and Australian courts are no longer as far removed from such thinking as they once were".[191]

Lücke presents, however, no decisions which could prove such a tendency of common-law courts. Therefore the basis of this statement is unclear. In particular it seems to be questionable whether the difference between extensive interpretation and analogical application of a statute has been precisely paid regard to;[192] possibly the tendency of common-law judges to deviate from a strictly literal approach to criminal-law interpretation concerns merely the interpretation issue and not the analogy issue. Lücke's statement, in that event, would not contradict the finding of a criminal-law prohibition of analogy in common-law countries.

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190 See in detail above pp 70–74.
191 Lücke, above n 145, at 1025.
192 On this distinction see in detail above p 67.

There is also the theory of Sax, a German criminal-law scholar, who is mentioned in the review article by Lücke. Sax's theory of interpretation "treats all extensions by analogy as based upon interpretation" and thereby, according to the review article's author, "would define … [analogy] out of existence".[193] The statement is correct, because the difference between mere interpretation of the present statute and analogical reasoning without an applicable statute is important. The present thesis has argued that, in Common Law, extensive purposeful interpretation is possible, even if the result deviates from the literal meaning of the statute. On the other hand, analogical reasoning, as far as it is disadvantageous to the accused, is not permitted. This distinction should not be relinquished by any attempt to produce a unifying theory of statutory interpretation. Thus Sax's statement which over-simplifies the interpretation issue is not helpful.

The third statement is on a hypothetical posed by St Thomas Aquinas and adopted by Christopher St Germain.[194] Suppose a regulation makes it a criminal offence "to open the city gates before sunrise". The situation is somewhat outdated, with city gates being a purely historical facility; there are, however, reasons for using such outdated examples.[195] The question in issue in this situation is whether a citizen who opened the gates at night to help other citizens (who are fleeing from the enemy) would be guilty of the offence. Adherence to the literal meaning of the regulation would lead to an obvious absurdity, because the purpose of the regulation, protection against enemies, even requires the opening in this situation. According to Lücke, in this case a "purposive reduction" (in civil-law terminology) or "consideration of the subject matter" of the provision (in common-law terminology) should take place.[196]

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193 Lücke, above n 145, at 1031.
194 This situation is also used as an example by Lücke, ibid, at 1027–1028.
195 Cf above p 53.
196 Lücke, above n 145, at p 1028.

However, one could also think about resolving this situation by looking for an available defence. If there were no available defence, the provision would be, for example in the civil-law jurisdiction Germany, unconstitutional and void.[197] Therefore, this example seems to be questionable. It purports to prove the need for a purposive interpretation also in Criminal Law. However, a defence which allows a balancing of the conflicting interests, would be sufficient. In case of an occurring conflict, the strict regulation in issue could be relaxed to provide for emergency situations.

When looking for the proper defence, it has to be seen that, in Queensland (as in all other common-law jurisdictions), defence of another person, according to ss 271, 273 Criminal Code (Qld), provides a justification only to assaults and murders. The defence situation, in Queensland, is different from Germany, where, according to § 32 of the Criminal Code, self-defence and defence of another person may – under a number of specific circumstances – justify committing each offence.[198] In Queensland, this defence could not be invoked in case of the opening-gates-at-night scenario. Rather, there would be the defence of emergency according to s 25 of the Criminal Code (Qld); this is sometimes called defence of necessity, as is the recognised residual common-law defence.[199]

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197 From the author's point of view, the unconstitutionality could not be removed by interpretation (so-called *verfassungskonforme Auslegung*) but would require indeed a "purposive reduction".

198 Apparently to the same effect as in Germany, Art 122-5 of the French *Code Penal* (<www.legifrance.gouv.fr> with an English translation) negatives each form of criminal liability in case of an attack.

199 Colvin/Linden/McKechnie, above n 29, para 16.1.

The requirement of a criminal degree of negligence

Queensland's Criminal Code does not state which degree of negligence is actually required in criminal-law cases. The Code is not completely silent on the issue of negligence. Section 23(1) stipulates that:

> Subject to the express provisions of … [the] Code relating to negligent acts and omissions, a person is not criminally responsible for – (a) an act or omission that occurs independently of the exercise of the person's will; or (b) an event that occurs by accident.

This provision shows that the Queensland Code presupposes a general requirement of negligence for criminal culpability in cases where the relevant provision does not expressly require a higher fault element. Therefore it can be said that negligence is the minimum fault element for any criminal liability. There is, however, the question about which degree of negligence will suffice. The Code does not include any provision which could help in determining this. In Private Law, in particular in the Law of Torts, any departure from the standard of behaviour of a reasonable person would be sufficient to attract liability.[200] This can be justified because liability in the Law of Torts usually is a matter of distributing financial losses and a "mere matter of compensation".[201] In Criminal Law, on the other hand, liability is a matter of potentially grave sanctions and the particular stigma resulting from a criminal conviction.

Criminal negligence must, thus, have represented a "substantial departure" and a "serious deviation" from the standard of conduct of a reasonable person and must have shown "such a disregard for the life and safety of others as to amount to … conduct de-

200 Ibid, paras 1.13, 4.19.
201 The quote being from *Bateman* [1925] 19 Cr App R 8 at 13.

serving … punishment".[202] These ideas on criminal negligence seem sensible. Therefore, the requirement of a higher degree of fault necessary in criminal cases has to be supported; gross negligence is required rather than normal negligence.

However, this requirement is not visible at all from the actual wording of the Queensland Criminal Code. There is no textual basis in the statutory language which would permit the courts to imply the higher standard of negligence into the relevant code provisions. The Queensland Supreme Court found that the Code was, in this respect, ambiguous and that this ambiguity could be resolved by way of the required implication. As has earlier been said, the Golden Rule permits removal of a statutory ambiguity, and thus the idea can be said to be, at least *prima facie*, not incorrect.

However, where a statute is silent on some issue, it arguably cannot be said there was ambiguity. The absence of a provision cannot simply be treated as if it were the same as ambiguity in a provision. This was the problem in *Adler v George*, where the relevant statute only mentioned conduct "in the vicinity" of a prohibited place but not inside this place.[203] It is not an ambiguity of the statutory words "in the vicinity" of a place that they do not encompass conduct inside a place. Similarly, it does not represent an ambiguity in the Queensland Criminal Code that it does not stipulate the requirement of a certain degree of negligence; this requirement is simply absent.

The requirement of a higher degree of negligence, namely of gross negligence, is taken from Common Law. There is a widely accepted common-law principle that a higher

[202] Cf Colvin/Linden/McKechnie, above n 29, para 4.19, citing *Bateman* [1925] 19 Cr App R 8 at 13.
[203] See to the facts of *Adler v George* above pp 51–52.

degree of negligence is required in order to trigger criminal liability.[204] This requirement is, on the other hand, not embraced in all common-law jurisdictions.[205]

Australian courts require a higher standard of negligence, namely gross negligence, in criminal cases, because of a decision of the High Court of Australia.[206] This decision is, for the reasons stated above, correct. On the other hand, it is not consistent with the mode of interpretation of criminal legislation the courts usually entertain.[207] In Queensland, as in other Australian jurisdictions with a Criminal Code, courts normally insist that codification marks a break from the past and that the interpretation of statutory provisions should not be unduly influenced by common-law principles.[208]

The requirement of a higher degree of negligence in criminal cases is, in the author's view, not the result of a purposeful interpretation of the Queensland Criminal Code. As there is no existing provision of the Code which could be the object of such interpretation, it actually represents something more than mere purposeful interpretation: something rather like reasoning by analogy. It could be an analogy with established common-law rules on criminal negligence. After all, each analogy requires, because of the meaning of the term itself,[209] another provision which is not directly applicable yet applied analogically.

The introduction of the element of "gross" negligence is, as has been said above, similar to the issue in the case of *Adler v George*.[210] The issue in *Adler v George*, on the

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204 Colvin/Linden/McKechnie, above n 29, para 4.19.
205 Cf two New Zealand cases, cited in *Callaghan v The Queen* (1952) 87 CLR 115 at p 121.
206 Ibid at p 124.
207 Colvin/Linden/McKechnie, above n 29, para 4.20.
208 See ibid, para 1.19.
209 "Oxford Advanced Learner's Dictionary" p 49.
210 See above p 83. Cf on *Adler v George* above pp 51–52.

other hand, was highly problematic because the introduction of an additional element did not favour the accused as it does in case of the introduction of the element of "gross" negligence. After all, a person acting negligently, but only with a normal degree of negligence and not grossly negligent, will not be convicted after introducing the standard of "gross" negligence – but the person could be convicted if regard is given only to the wording of the Code. Again, an analogy does not present a problem under the principle *nulla poena sine lege*, if it merely favours the accused.

The concept of criminal negligence in Queensland involves an obvious departure from the language of the Criminal Code. Thereby, it also illustrates the non-literal approach of common-law judges to interpretation. Common-law judges, even in the area of Criminal Law, embrace a rather liberal interpretative approach towards statutory enactments where this seems, from their point of view, appropriate.

Intention as element of assault

There are several offences under the Criminal Code (Qld) which are based on committing an assault, notably common assault (s 335), assault occasioning bodily harm (s 339) and various forms of serious assaults (s 340). All these provisions presuppose the meaning of the term "assault" and its elements. "Assault" is defined in s 245(1) of the Criminal Code (Qld):

> A person who strikes, touches, or moves, or otherwise applies force of any kind to, the person of another, either directly or indirectly, without the other person's consent, or with the other person's consent if the consent is obtained by fraud, or who by any bodily act or

> gesture attempts or threatens to apply force of any kind to the person of another … is said to assault that other person …

Nowhere in this definition can be found any express requirement about a certain state of mind of the perpetrator. It is clear without mentioning it in s 245 that both a threat and an attempt to apply force require the perpetrator's intention to threat or, respectively, to attempt to apply force. After all, it does not amount to a *threat* in the sense of the plain meaning of the word if someone inadvertently tells someone else something intimidating. Similarly, there clearly cannot be an *attempt* to apply force without the intention of the perpetrator to actually do so.[211] On the other hand, it is *prima facie* possible to commit an assault by actually applying force to another person unintentionally.

Thus, the wording of s 245 of the Criminal Code (Qld) also does not impliedly presuppose *intention* as requirement for all forms of assault. However, the Western Australian Supreme Court, in relation to the identical provision of the Western Australian Criminal Code, held that assault generally requires intentional conduct in its common-law meaning, and that this meaning applies even in the context of the Code provision.[212] This is not only the view of the courts; it is fully understandable that some terms in the Criminal Code, sometimes terms not used at all in day-to-day language, acquire the particular meaning they had before the enactment of the Code. The common-law view that an assault requires, in all variants, intentional (or possibly also reckless) conduct is therefore generally accepted also in States with a code which is silent in this respect.

The implementation of the requirement of intentional (or at least reckless) conduct is understandable. There are technical terms, terms that have a certain meaning in legal

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211 Colvin/Linden/McKechnie, above n 29, para 5.12.
212 *Hall v Fonseca* [1983] WAR 309 at pp 311, 314–315.

language, which have to be interpreted in light of their pre-codification meaning. On the other hand, this kind of interpretation is obviously far from being strictly literal. It cannot be called literal if an element which is actually not stated in a statutory provision is introduced by way of exploring technical meanings of existing statutory elements. This approach is to be supported but it cannot be overlooked that it is based not on the literal meaning of statutory words.

This, again, shows common-law judges do not in all situations strictly adhere to the literal meaning of statutes – even in the area of Criminal Law. As to the *nulla poena sine lege* principle, there is no problem, since the introduction of the additional *mens rea* requirement works purely in favour of the accused person.

4 The Important Role of Terminology

Whereas "language" is rather general the style of speaking or writing, "terminology" is the particular set of technical words or expressions used in a particular subject and the particular meanings of these words.[213] Legal terminology uses many terms with precisely defined meanings, which can be different from the ordinary meaning of these terms.[214] That makes these terms legal jargon and difficult or impossible to understand for everyone who does not happen to be a Law graduate. As legal terminology is difficult to understand even in the context of only one jurisdiction, it is not surprisingly very important when comparing different jurisdictions. There is an obvious link between language skills and understanding of legal terminology, as different jurisdictions often feature different languages.

Language in Comparative Law

Hence the importance of language for Comparative Law has been acknowledged unanimously. De Cruz quotes Gutteridge, who wrote that "differences in the language of the law constitute not the least of the barriers which separate the various legal systems of the world". This is why Gutteridge believed that "the pitfalls of terminology are the greatest difficulty and danger which the student of comparative law encounters …".[215]

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213 See for both "Oxford Advanced Learner's Dictionary", p 1583. Therefore, language is the basis for a particular terminology.

214 Bogdan, above n 17, p 50, who shows this using the example of the English term "attempt". Cf also the example of meaning of displaying an item in a shop window above pp 54–55.

215 See de Cruz, above n 1, p 214, quoting Gutteridge "The comparative aspects of legal terminology" 1937–38 Tulane Law R 401, and referring to two further statements from 1975 and 1990.

There is today a fairly extensive literature acknowledging the importance of language as a factor in Comparative Law.[216]

Language skills admittedly are of vital importance for any comparison of different legal systems. However, understanding of the relevant terminology does not always suffice, for even identical terms may have a completely distinct meaning in different jurisdictions. As de Cruz puts it: "[H]omonyms may have different meanings ... although the terms may be identical, their substantive content ... may be quite different.[217]

Two completely different problems have to be distinguished: There is, firstly, the issue of different languages using different terminology. Different Terminology indicates different fundamental legal concepts. In a regular case, the legal concepts are different and this is clearly visible because of terminological differences. It may, on the other hand, be an irregular case in which only the terminology used is different (and one would therefore suspect as well conceptual differences), but the fundamental legal concepts are in fact not that distinct from each other; in such a case, as Markesinis stated, "[f]oreign law is not very different from ours but only appears to be so".[218]

Secondly, there is identical terminology. It is not only conceivable that the identical terms reflect identical fundamental legal concepts. It is also possible that, despite identical terminology, the fundamental legal concepts in the relevant jurisdictions are different.[219] Because this is not easily visible, this situation is rather dangerous. Therefore

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216 Cf de Cruz, above n 1, p 214. See Bogdan, above n 17, pp 41, 43, 50, who devotes a whole chapter to "Translation Problems".

217 De Cruz, above n 1, p 214.

218 Husa "Book Review of Esin Örücü, The Enigma of Comparative Law …" vol 9.3 Electronic Journal of Comparaive Law (October 2005), <http://www.ejcl.org/93/review93.html> cites Markesinis ("Foreign Law and Comparative Methodology: A Subject and a Thesis" p 41).

219 Cf Bogdan, above n 17, p 50.

it is always necessary to consider those fundamental concepts which may be independent from the meaning of relevant legal terms. This is what the de Cruz's statement is about. Knowing that a term from a foreign language would be translated to a certain term in one's own language could therefore lead to a wrong conclusion.

Translation of "conspiracy"

A good example might be the term "conspiracy". The English term "conspiracy" means a secret plan by a group of people to do something harmful or illegal.[220] Accordingly, Queensland's Criminal Code, in ss 541–542, renders a conspiracy to commit an offence (and even certain other wrongs, s 543) criminal. The underlying concept reflects the traditional common-law scope of conspirers' liability, which is nowadays not anymore adhered to in some common-law jurisdictions.[221] In case of conspiracy therefore, whatever the plan of the conspirers might be, there is criminal liability. If the planned offence is a crime, the conspirers are liable up to seven years of imprisonment [s 541 of the Criminal Code (Qld)], if it is not a crime but another wrongdoing, up to three years [ss 542, 543].

For comparing this with, for instance, the German concept, it is not sufficient just to consider the translation of the term "conspiracy". The German translation of "conspiracy" is "*Verschwörung*";[222] yet "*Verschwörung*" is actually not the term normally used for this kind of criminal liability. The concept of criminal liability for conspiracies is

220 "Oxford Advanced Learner's Dictionary" p 325. The term "conspiracy" is slightly differently defined in "Butterworth's Concise Australian Legal Dictionary", p 88, where it is rendered necessary that "it is intended that an offence be committed".

221 See Colvin/Linden/McKechnie, above n 29, para 19.19. The issue of differences between various common-law concepts is not important regarding the present purpose. This thesis is rather concerned with the terms "conspiracy" itself and "crime". Insofar, however, there are no differences between individual common-law jurisdictions.

222 "Collins German–English/English–German Dictionary", p 872. This dictionary does, but only in its larger "Desktop Edition", give also the translation "*Verabredung*" (agreement).

known to the German Criminal Law as well; however, the used term is actually "*Verabredung*" ("agreement"). According to § 30(2) of the German Criminal Code, the agreement to commit a *Verbrechen* (crime) is criminal, which differs from the Queensland situation insofar as it is material which kind of offence is planned. Only if this planned offence is a *Verbrechen* (crime), the agreement to commit this offence is punishable.

The situation is complicated by the fact that the German term "*Verbrechen*" does not completely equal the common-law term "crime", though it is the ordinary translation of it. *Verbrechen* (like "crime") is the most serious category of offences. However, the underlying concepts are not identical: An assault occasioning bodily harm, for example, is a crime in Queensland but does not reach the minimum punishment of *Verbrechen*. This is due to different sentencing schemes in place in Germany and in Queensland, with the German penalties significantly lower than the Queensland ones, at least as far as the latter are expressly stated by the Code. However, even these – largely numeric – aspects are not easy to compare, as the German Code usually states minimum penalties, whereas the Queensland Code usually states maximum penalties and there are different methods of sentencing in place in Queensland and in Germany, in particular as to so-called head-sentences and non-release periods.[223]

This example clearly shows that it is dangerous in the comparative-law context to rely solely on the linguistic translation of legal language, without considering also the fundamental concepts of the compared systems. The linguistically correct translation of

[223] See § 12(1) of the German/s 3 of the Queensland Codes for the categorisation of offences, further § 223 of the German/s 339 of the Queensland Codes for the offences of *Körperverletzung*/assault occasioning bodily harm. For the sentencing principles in Queensland see Colvin/Linden/McKechnie, above n 29, paras 31.33 and 31.34.

"conspiracy" provides, as has been shown, a dangerous starting-point, as it may prevent full consideration of differences in the area of conspiracy.

This is probably what de Cruz means when he points out several times:

> Any form of translation runs the risk of overlooking the conceptual differences between languages. Such conceptual differences must, first, be understood if the comparatist is to make sense of what he is comparing. The question arises as … to the consequences of translating a legal institution into a different language.[224] There are … difficulties in translating alien legal concepts, since an authentic translation demands more than mere linguistic accuracy … Even if a term is translated faithfully and related to a comparable legal institution … there is always the danger of being unaware of ambiguities of language …[225]

However, de Cruz does not illustrate these statements with examples, at least not with examples from jurisdictions using different languages. Therefore, the meaning and extent of this finding, particularly its meaning as to the issue of translation, remain somewhat unclear. De Cruz's main example regards the US and the English common-law jurisdictions, which both adopted the Latin term *stare decisis*.[226] The extent to which courts are, according to the doctrine of *stare decisis*, bound by previous decisions, apparently differed significantly between the US and England (insofar as lower US courts were, unlike English courts in former times, not bound to follow their own decisions).[227] This might have been a terminological issue; consequentially, however,

[224] De Cruz, above n 1, p 214.
[225] Ibid, p 215.
[226] A second example refers to the term "equity", see de Cruz, ibid, p 216. See on the term *stare decisis* in detail above p 24.
[227] De Cruz, ibid, p 215. The assertion, that also lower English courts would have been bound by their own decisions, however, is somewhat inconsistent with previous findings: cf above pp 24–26. De Cruz probably means a rather informal bindingness which would have been largely a matter of persuasiveness.

each dispute between two litigating parties could be rendered terminological. This does not mean the same as terminological problems resulting from translation.

Different criminal-law concepts of "intent"

Another difference between Common Law and Civil Law regards the construction of the term "intent", which occurs in many criminal-law provisions. In Queensland, for instance, s 302 of the Criminal Code contains the definition of intentional murder and its distinction from mere manslaughter. In Australian jurisdictions, "intent" usually is thought to encompass both the so-called "purpose intent" (the purpose to achieve the particular result) and the so-called "knowledge intent" (mere knowledge that the particular result will occur, though it might be unwanted).[228] This broad interpretation of the term "intent" is also, for instance, laid down in s 5.2(3) of the Commonwealth Criminal Code.[229] Consequently, in the example of murder, there would be intent to kill either if the accused wanted to cause the victim's death or if he/she knew that the victim's death would be the consequence of his/her wrongdoing.

On the other hand, Australian courts cannot be said to be unanimous about the meaning of intent. There are several judgments of the Queensland Supreme Court (Court of Appeal) which suggest intent must be equalled with purpose, so that mere knowledge does not suffice.[230] Queensland's Criminal Code does not entail a definition of intent, so that the adoption of the narrower definition would be permissible. Nevertheless, the relevant passages of the court's decisions are only *obiter dicta*, which means these deci-

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228 Colvin/Linden/McKechnie, above n 29, para 4.4. But see the next paragraph to the discussion in Queensland on this point.

229 It is also the position according to the English House of Lords (*R v Woollin* [1998] 3 WLR 382).

230 *R v Willmot* (1985) 18 A Crim R 42 at 46, 47; *R v Ping* [2005] QCA 472; *R v Reid* [2006] QCA 202.

sions do not bindingly lay out the law in Queensland. Furthermore, the view that only a particular purpose would equal intent, might not be viable for some offences. For example, the offence of stealing, under s 391 of the Queensland Criminal Code, requires the intention of the perpetrator to permanently deprive the legal owner of the object taken (or converted), s 391(2)(a). A thief, in almost every case, will not act because he wants to deprive the legal owner; he will normally act in his own interest. He does, thus, not have the purpose to deprive the legal owner.[231] A view which renders purposeful conduct necessary in order to establish criminal liability for stealing can therefore in the end not be viable.

However, the Queensland Court of Criminal Appeal's approach could be viable in situations where the required intention does, on the one hand, not represent the offender's ultimate goal but, on the other, a necessary intermediate step on the way to this goal. In those cases, though his ultimate goal and thereby his motivation might be different, he also wants this intermediate step to occur because, without it occurring he cannot reach his ulterior goal. The necessary intermediate steps on the way to his goal, thus, are also important for the offender, regardless whether his actual motivation is different.

This notion could as well satisfy the Queensland Supreme Court. The words of Connolly J in *Willmot* could as well be seen as supporting this idea:

> … what is involved is the directing of the mind, having a purpose or design. The notion of desire is not involved as the learned judge rightly held. A person may do something, fully intending to do so, although he does not in the least desire to do so … Should there

[231] Colvin/Linden/McKechnie, above n 29, para 7.14.

> be direct evidence of the accused's awareness that death or grievous bodily harm was a probable result of his act, they [the jury] may properly be directed that if they accept that evidence, it is open to them to infer from it that he intended to kill or do grievous bodily harm …[232]

The desire to kill, according to this excerpt, is not required and is to be distinguished from mere purpose to kill.

It has been necessary to deal with this problem in considerable detail, because it also underlies the different interpretations of the term "intent" in common-law and in civil-law jurisdictions.

The meaning of the term "intent" in Germany (German translation "*Absicht*") is fundamentally unclear. The German Federal Supreme Court ("*Bundesgerichtshof*" or [abbreviated] "*BGH*") tends to insist on a – from the German viewpoint – traditional interpretation, which equals "intent" and "purpose" (and excludes, therefore, mere knowledge).[233] However, the majority of academic scholars in Germany think in most instances the term "intent" effectively comprises both purpose intention and knowledge intention.[234] Thus, even inside only one civil-law jurisdiction, there cannot be found one unanimous view about this problem. It would be impossible to identify a uniform civil-law position on "intent".[235]

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232 Connolly J in *R v Willmot* (1985) 18 A Crim R 42 at 46, 47.

233 *BGHSt* 13, 219 at 219. The abbreviation means the Federal Supreme Court's criminal-law decisions.

234 Cf Tröndle/Fischer, above n 87, § 15 para 6. These scholars say that the required mental state comprises of both intention and mere knowledge, so that, technically, they also do not equal mere knowledge with intent.

235 But see Cassese "International Criminal Law" p 164 with the generalising assertion "'Knowledge' is not a notion familiar to civil law countries, where it is not regarded as an autonomous category of *mens rea*". This is hardly convincing, as in Germany "knowledge" equals "*direkter Vorsatz*" ("*dolus directus*"), which is a principal form of *mens rea*.

Additionally, whatever a civil-law judge might decide about the meaning of "intent", even if it differed considerably from the common-law interpretation, would not necessarily matter very much: The crime "murder", for example, in Germany does not require intentional conduct. § 211 of the German Criminal Code does not mention such a general requirement. Intent is stated as an element of only two forms of murder.[236] However, in these cases it is not intent to kill that is required. Rather it is required that the offender intends to conceal or to facilitate another offence by way of killing the victim (for instance, a hit-and-run accident, in which the driver of a motor vehicle does not help the victim who consequentially dies).

In France, Art 221-1 of the Penal Code provides that wilful causing of the death of another person is murder.[237] In France, therefore, intent to kill is not necessary for murder either. The French situation, however, is more complicated, with the even more serious offence of assassination, which is murder committed with premeditation (Art 221-3 of the French Penal Code). In France, assassination attracts, unlike murder (30 years), a sentence of lifelong imprisonment. The same lifelong imprisonment is the sentence in a case of murder committed under any of ten distinct circumstances named in Art 221-2 and 221-4 of the French Code. However, "intent to kill" is not one of the expressly stated elements of these more serious forms of murder. Premeditation, though, seems to be connected with intent, in the sense that premeditated murder will normally be intended murder. Arguably premeditated murders can be unintended, for example, if the premeditating perpetrator "just" plans to seriously injure the victim. Yet the author

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[236] Cf above p 33. The elements of § 211 of the German Criminal Code referred to above as eighth and ninth elements entail the requirement of intentional conduct.

[237] See <http://www.legifrance.gouv.fr> with an English translation; "wilful" being the translation of "*volontairement*".

does not have any detailed knowledge of French Criminal Law, but it seems to be possible to say intent to kill is not a requirement of either murder or assassination.

There may be of course other civil-law jurisdictions which follow the distinction between intentional conduct as murder and non-intentional as mere manslaughter. However, in these jurisdictions, an act committed knowing that it will kill another person, though the death of this person might not be wanted, will be murder. Otherwise the claim of unwanted killing, which is difficult to disprove, would always be a good defence for the perpetrator. Therefore, in these jurisdictions, there must be, for example, a broader interpretation of the term "purpose" to render the conduct intended and achieve an acceptable outcome.[238]

The compensation phenomenon

The very different concepts of "intent" which are entertained in various common-law and civil-law jurisdictions are balanced out by other different factors. These factors lie outside the term "intent" yet are somehow related to it. A jurisdiction may employ a strict approach as to which mental states are actually included in the term "intent". The effect which this strict approach bears, however, can be balanced out by the fact that individual rules in this system actually require or do not require intended conduct. Legal terms can be originally different or they can be interpreted with a different result. They may also be situated in different contexts, that is, different rules or different concepts in place in the relevant jurisdiction. The different contexts may inform the impact different terminology has on the eventual outcome of cases. It is therefore necessary to con-

[238] For instance, an interpretation which renders each intermediate step on the way to the ultimate goal of a person purposeful; cf above p 94.

sider not only a particular legal term itself but also its relevant context (for example whether the term "intent" is a requirement for a particular offence).

This consideration is necessary because of the "compensation phenomenon". There may be clear differences between jurisdictions on a particular point, and these differences might even be inherent differences (for example, the respective meaning of the term "intent" is different). However, there may be as well other differences, which limit the effects and thereby "compensate" for the first difference. Bogdan explains this notion the following way:

> … "compensation phenomenon" … means that substantial differences between the legal systems on a certain point are often compensated for by means of other differences on other points, so that the differences "cancel each other out". This compensation phenomenon underscores again the importance of the principle that a foreign legal system should be studied in its entirety. Discovery of important differences in a certain field should stimulate the comparatist to investigate the conceivable compensation possibilities before he expresses himself on the actual differences …[239]

In terms of the aim of this thesis to find inherent differences between common-law and civil-law systems it has to be said that if there were differences which would turn out to be inherent, the following would have to be examined: It had to be found out, whether there is another (second) difference between the systems, perhaps not in the same area of law but somehow related to the first difference. This other (second) difference could neutralise the first difference and provide thereby for a similar outcome of cases. The

[239] Bogdan, above n 17, p 98.

first differences, though potentially inherent, could in the end not present a distinguishing factor.

Different notions of "equality"

There is a terminological problem with the term "equality", the meaning of which is not at all identical in various jurisdictions. In Germany, there is a fundamental constitutional right that all people may be treated equally (Art 3 of the German Constitution). Also the Canadian Constitution, after the introduction of a Bill of Rights in 1982, nowadays entails the right to be treated equally (Art 15 of the Canadian Constitution).

The United Kingdom does, as has been mentioned earlier, not have a written constitution. However, by incorporating the European Convention on Human Rights (ECHR) into domestic law by the Human Rights Act 1998 (UK), the United Kingdom also adopted the fundamental rights and freedoms entailed in this document including, for instance, right to life, prohibition of torture, right to a fair trial, freedom of thought and religion, freedom of expression and freedom of assembly and association.[240] The European Convention also encompasses a prohibition of discrimination (Art 14). This prohibition of discrimination is limited, as only discriminations concerning the exercise of another right under the Convention are prohibited. (There is an additional protocol which expands the prohibition but has not been signed by the United Kingdom). However, it has to be noted that the United Kingdom law has a strong equality-notion with the prohibition of discrimination as part of the ECHR.

[240] See above p 40.

Australia does not have a Bill of Rights; the Commonwealth Constitution does not provide a guarantee of equality before the law.[241] The introduction of extended basic freedoms into the Commonwealth Constitution has even been rejected by referendum in 1988. Nevertheless, there is a constitutional notion of equality in Australia as well. This notion of equality is part of the constitutional doctrine of the rule of law. The rule of law means, according to Dicey, *inter alia*:

> … equality before the law, or the equal subjection of all classes to the ordinary law … the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals …[242]

As the High Court pointed out in *A v Hayden [No 2]*, government officials are therefore not exempt from generally applicable duties. The fact situation in *A v Hayden [No 2]* was an exercise of employees of the Australian Security Intelligence Service (ASIS) who entered the Sheraton Hotel Melbourne wearing masks and were equipped with firearms while hotel staff were not warned of the exercise. The authorities were, according to the High Court, not capable of dispensing their civil servants from obedience to laws[243] (for example the prohibition of trespassing hotels). In terms that are more general does this equal Dicey's concept of equality which just requires all classes of citizens to be subjected to the ordinary law. The notion of equality prevalent in Aus-

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241 Keyzer "Constitutional Law" para 1.20. However, some High Court judges in *Leeth v Commonwealth* (1992) 174 CLR 455 suggested the existence of an implied constitutional right of equality before the law, whereas the majority of the court rejected this argument.

242 Keyzer, above n 241, para 1.3, quotes Dicey "Introduction to the Study of the Law of the Constitution" pp 202–203. Dicey represents a classical English approach, nowadays not anymore correct with respect to the English law but applicable to the Australian situation.

243 *A v Hayden [No 2]* (1984) 156 CLR 532 at 580.

tralia, hence, is very limited compared to the aforementioned constitutional guarantees. This will be in detail shown below.

In the United States, the Federal Constitution does encompass a Bill of Rights in form of amendments to the original document. Yet the American Bill of Rights does not entail the principle of equality. There is, in the United States, consequentially, only the possibility of implied equality-rights which would guarantee, inside the scope of a particular express right or freedom, equality as to this right or freedom. For example, this could mean in case of the freedom of religion, guaranteed by the First Amendment, that there would be a constitutional right to equal treatment of members of different religious groups. The extent to which such an approach is in fact feasible in the US has not to be ultimately elaborated. The present purpose is only to show "equality" is a widespread notion around the world.

There is, therefore, a constitutional or at least statutory right to equality in most jurisdictions. But, as the German and the Australian examples show, the content of the term "equality" is arguably very different. The Australian idea of equality, after all, is obviously limited. This has practical consequences that should be demonstrated using a hypothetical example of a parliamentary statute granting something to only a part of the population. A statute could provide, for instance: "All men are entitled to a payment of 100 $."

In Germany, this law would have to be examined applying Art 3 of the Constitution. This article provides that equal things are not supposed to be treated differently, whereas different things are not supposed to be treated alike. Accordingly, any discrimination as to sex, for example, is prohibited [this is expressly stated by Art 3(3) of

the Constitution]. The statute from the example, granting a particular amount of money only to male persons, would clearly discriminate against women. If there is no justification for this discrimination (as it lacks in the example which does not state any ground at all), this law would be automatically void.

In Australia, such a statute could be treated as constitutionally valid. There is, as has been said, a constitutional notion of equality in Australia as well. This is, however, different from an anti-discrimination guarantee. The Australian concept of equality just requires all people to be treated according to the (same) ordinary law.[244] In case of a statute discriminating against females, the statute in question would meet the equality requirement if it just discriminated all females alike. Unconstitutional in Australia could be just the actual application of this statute: If one man did not get 100 $, though the law did require it, this would be discriminating against him.

An even more drastic example is presented in Keyzer's textbook (the example for its part being from an 1882 publication):

> [T]he power of imposing laws is dependant upon the instinct of subordination, which is itself limited. If a legislature decided that all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal; but legislators must go mad before they could pass such a law, and subjects be idiotic before they could submit to it.[245]

This is an example of a clearly immoral law. Admittedly the High Court of Australia pointed out, in the case *Kruger v The Commonwealth*, that the constitutional validity of a law, in the absence of constitutional safeguards, has nothing to do with its morality.

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[244] See Dicey's formulation of the rule of law above p 100.
[245] Keyzer, above n 241, para 1.7, quotes for this example Stephen "Science of Ethics" p 143.

The fact situation on which the High Court had to decide were Aboriginal children who were – until the 1950 years – separated from their parents and detained in institutions or reserves as part of a misguided policy of assimilation.[246] Under these circumstances the High Court upheld, retrospectively, the relevant ordinance from 1918. However, the law ordering all blue-eyed babies to be killed would be distinguishable from the fact situation in *Kruger v The Commonwealth* on several grounds. Courts could render the order to kill babies a violation of fundamental principles and an infringement of the rule of law.

The example gives – because of its extremeness – even rise to the jurisprudential question whether such a statute should have to be obeyed by the subjects. Though enacted by parliament according to the prescribed procedure this statute could exceptionally be regarded as illegal law. This is exactly what the argument between positivists and non-positivists is about. From a non-positivistic standpoint such a statute was, just on grounds of morality and therefore because of extra-legal standards, invalid – and this also in a legal sense.[247] This aspect is not discussed in Keyzer's textbook. However, it seems to be possible that the example which is from 1882 would have to be seen in a different light today. After all, the theories rejecting a purely positivistic approach towards enacted statutory law came into existence not until the end of World War II. Therefore, a non-positivistic theory of law could function as a limitation for drastically immoral laws and could thus render at least the most scandalous discriminations illegal – even in the absence of a constitutional guarantee of equality.

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246 *Kruger v The Commonwealth* (1997) 190 CLR 1.

247 Cf MDA Freeman "Lloyd's Introduction to Jurisprudence, pp 124–129 (on Fuller's "The Morality of Law"). It is, however, said that also a positivistic approach could render extremely unjust laws invalid, see ibid, p 123.

This is, in the author's view, not a too fanciful idea. It is a common-law standpoint that a statute violating the rule-of-law principle can be constitutionally invalid.[248] So if there was a law which grossly discriminated against a certain group (as does the statute ordering all blue-eyed babies to be killed), this law could be said to infringe the rule-of-law principle and therefore be rendered unconstitutional.

Beyond the scope of extraordinary examples, the situation in Australia is dominated by the fairly limited approach of the doctrine of the rule of law. The principle of equality contained in this doctrine is actually something very different from the notion of equality in place in other jurisdictions, for instance the German civil-law jurisdiction. However, the ready conclusion that there was a difference in the notions of equality of, on the one hand, Common Law, and, on the other, Civil Law, would not be correct. In fact, the different equality guarantees of member jurisdictions of the (same) common-law family are even very distinct from each other. For example, the Canadian Constitution, the Constitution of a common-law jurisdiction, entails in its Art 15 the guarantee of equality with a very different idea of equality from the Australian (and a rather similar notion to the German guarantee). Equality according to Art 15 of the Canadian constitution guarantees, again, non-discrimination. The provision prohibits differential treatment caused by law which has a discriminatory effect.[249]

There are, therefore, huge differences in the concepts underlying the same term "equality", used in different jurisdictions. Identical terminology thus can lead to a very different outcome. This is what had to be shown. Additionally, it has been found out that the

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248 Keyzer, above n 241, para 1.4, cites the case of *Australian Communist Party v The Commonwealth* (1951) 83 CLR pp 1 at 193.

249 *Law v Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497 (quoted as available online under <http://scc.lexum.umontreal.ca/en/1999/1999rcs1-497/1999rcs1-497.html>).

differences do not follow the distinction between Common Law, on the one hand, and Civil Law, on the other, but that there appear differences even between jurisdictions forming part of the same legal family.[250]

Criminal liability for omissions

Criminal liability for omissions presents an example different from the examples of the terms "intent" and "equality". The latter are, throughout various common-law and civil-law jurisdictions, identical (or, more accurately, their respective translations) and merely interpreted to be very different. Yet with regard to criminal omissions, on first sight, there appear to be very different concepts in place in common-law and in civil-law jurisdictions. This issue actually does not concern the term "omission" but the whole concept of criminal liability for omissions incorporated in various provisions. The question of criminal liability for omissions arises when the perpetrator does not act actively, does – for example – not actively kill the victim with a gun but just does not prevent another person from shooting the victim. Or he does not help the shot victim who then bleeds to death.

In common-law jurisdictions, the general principle is that there is no criminal liability for mere omissions.[251] Only under special circumstances is there a duty of care, which may lead to criminal liability for an omission in breach of this duty. Section 285 of the Criminal Code (Qld), for instance, requires people in charge of a helpless child (for example the parents) to provide the necessities of life. If they fail to provide necessities, they are held to have caused any resulting harm.[252] Consequently, they can be crimi-

250 This phenomenon is also being observed by Bogdan, above n 17, p 86.
251 Colvin/Linden/McKechnie, above n 29, para 3.9.
252 Ibid, paras 3.10, 3.13.

nally liable up to the lifelong imprisonment for murder. Another important provision is s 289 of the Criminal Code (Qld). According to this provision, a person who is in charge of a dangerous thing, for example a gun or motor vehicle, has to exercise care in regard to this thing. If the person omits to prevent the use of either gun or motor vehicle by another, his/her omission may be criminal.

Yet there is no provision in the Queensland Criminal Code, neither s 285 nor s 289 nor any other section, which states expressly that, in case of a breach of a duty of care, criminal liability can occur for the omission. Nevertheless, though not expressly stated, there is no doubt about the principle of criminal liability for omissions in case of a breach of a duty of care. The principle is, on the other hand, not visible from the Code alone. In other words, there is the general principle of no liability for omissions, yet the Code is silent on it.

In civil-law jurisdictions omissions generally can be criminal conduct as well as active acts. In Germany, for example, § 13(1) of the Criminal Code provides: "A person who omits to prevent a certain result from occurring is criminally liable according to this statute … in case he is legally responsible for this result not occurring …".[253] According to this provision, omissions can indeed be criminal. § 13(2) of the German Criminal Code provides that the sentence can, on the court's discretion, be lessened; murder, for example, if committed by omission, does not attract mandatory lifelong imprisonment, but an imprisonment of three years or more [§ 49(1) of the German Code]. However, arguably the most important feature of § 13 of the German Criminal Code is the requirement that the perpetrator "is legally responsible for [the] result not occurring"

[253] Translated from the German: "*Wer es unterläßt, einen Erfolg abzuwenden, der zum Tatbestand eines Strafgesetzes gehört, ist nach diesem Gesetz nur dann strafbar, wenn er rechtlich dafür einzustehen hat, daß der Erfolg nicht eintritt ...*".

(see the quote above). This is seen as requiring the perpetrator to owe the victim a so-called guarantor's duty (*Garantenpflicht*). Only if there is such a guarantor's duty, can there be criminal liability for an omission. That is clear according to the express wording of § 13(1) of the German Criminal Code.

This requirement sounds very similar to the duty-of-care requirement in common-law systems (regardless of whether a code or a pure common-law jurisdiction). In Germany, there must be a breach of an existing duty by the perpetrator if he/she omits criminally. Moreover, in Germany, merely being in charge of a dangerous thing, for instance a gun or motor vehicle, even does not trigger such a duty. It is therefore in any event required that there was a pre-existing relation between the perpetrator and the victim or that the perpetrator put the victim into a dangerous situation (the latter is the so-called *Ingerenz*).[254]

There are only a few exceptions from this principle. The best-known is § 323c of the German Criminal Code which states that in case of emergency, there is a general duty of providing help. This rule operates without the usual duty requirement.

The question of criminal liability for omissions, thus, is yet another example of the dangers of a solely linguistic approach to foreign jurisdictions, as even a linguistically flawless translation of foreign statutes does not guarantee that the meaning of the translated provisions is clear. A solely linguistic approach would find express provision for criminal liability for omissions in the German Code and could assert that there was

[254] Tröndle/Fischer, above n 87, § 13 para 5a. The above (p 96) presented example of a hit-and-run accident is an example of *Ingerenz* (therefore it does not matter that there is no duty of care arising out of mere possession of the – dangerous – car).

general liability for omissions, whereas in fact, the liability is limited even in a stricter way than it is in Queensland.

The fundamental legal concepts underlying a particular provision are sometimes difficult to find and yet of paramount importance. With regard to criminal liability for omissions there is no criminal liability in common-law jurisdictions unless there is a duty of care, whereas in the civil-law jurisdiction Germany, according to § 13 of the Criminal Code, there is criminal liability but only if there is a "guarantor's duty". This produces a surprisingly similar outcome of cases in which there is an omitting perpetrator, but this similar outcome is not predictable from the literal meaning of the Queensland and the German Criminal Codes.

The psychological dimension of terminology

Terminology has a psychological dimension apart from the mere facts that identical terms suggest an identical legal meaning and different terminology suggests different fundamental concepts. This psychological dimension means there are certain legal terms which have connotations without a legal basis and thus of an extra-legal nature. For instance, the term "equality" connotes the notion of fairness and the suggestion that each jurisdiction which guarantees a right to equality also guarantees a certain standard of fairness. Yet also in a country like Australia, a jurisdiction without any express statutory right to equality, people arguably will have some sort of conception that a right to equal treatment is in place and discriminations do not occur.

The term "code" attracts plenty of connotations. Codification as a typical civil-law feature is seen as something foreign to common-law jurisdictions; it is approached with a

somewhat negative attitude. In response to this attitude, the title of a recent publication suggests pursuing a "functional approach" towards codification instead of an "ideological approach", which this publication identifies as "misconceptions associating codification with the Napoleonic era".[255] These misconceptions are said to be based on the civil-law codification and the common-law situation typically without codes.[256] It has been shown that this characterisation is not anymore correct. In addition, there is, from the author's point of view, in fact not much difference between codes and statutes.[257]

There is a scholarly article with the title "Here Lies the Common Law: Rest in Peace" which stated that "once the common law is codified it will, of necessity, cease to be the common law, not only rather obviously in form, but also in substance".[258] This statement over-emphasises the effects of codification by way of dramatisation and thereby appeals to purely psychological reservations. This illustrates what makes an opinion psychology-focused rather than focused on legal issues. Some even link the term "code" with the Napoleonic codes of the beginning of the 19th century, when "associating codification with the Napoleonic era" or stating a code "is a remnant of the authoritarian world of Napoleon".[259] This is an incorrect approach, as it compares possible future common-law codes with outdated civil-law codes from the beginning of the 19th century instead of the current ones. The codes in civil-law countries have been

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255 Steiner "Codification in England: The Need to Move from an Ideological to a Functional Approach – A Bridge too Far?" (2004) Statute Law Review 25(3), pp 209–222, at 209. Steiner's observation is based on an article in "The Independent" on Sunday, 3 September 2000, p 14, and on Legrand "Against a European Civil Code" 60 MLR (1997) 44 at 59.

256 Steiner, above n 255, p 210.

257 See above pp 16–17.

258 Steiner, above n 255, p 215, cites Hahlo, "Here Lies the Common Law: Rest in Peace", MLR (1967).

259 Steiner, above n 255, pp 215, 214 with n 17. Steiner, ibid, cites Legrand "Against a European Civil Code" 60 MLR (1997) 59.

heavily amended, so that they are, nowadays, largely different from what they used to be.[260]

The argument which renders codes inconsistent with general common-law ideas also overlooks that there are, as well in common-law jurisdictions, codes like Queensland's Criminal Code. This code entails the vast majority of Queensland criminal offences and for each of them a definition with all required elements. The Criminal Code (Qld) encompasses not only the elements constituting the *actus reus* (the elements describing the criminal conduct) but also the elements forming the *mens rea* (the mental fault elements). Other Australian states, the so-called common-law states, as well have a statute regulating criminal behaviour. These statutes are mostly called Crimes Acts. They are partly similar to codes, in that they stipulate the elements of offences in detail. There is, however, a fundamental difference between the Crimes Acts and Criminal Codes insofar as the former do not purport to be comprehensive. The former Commonwealth Crimes Act, in s 4, even expressly stated that it is to be interpreted according to the general principles of the common law.[261] There are, in all code jurisdictions, courts' decisions to the same effect.[262] This shows the different aim of these statutes not intended to regulate the area of Criminal Law comprehensively and codes intended to do so. On the other hand, this does not represent a fundamental difference between codes and statutes. Moreover, there are as well other examples of common-law codes, for instance the United States Uniform Commercial Code (UCC).[263]

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260 Zweigert/Kötz, above n 1, p 95, with the formulation, "almost nothing is left of the unrestrained freedom to conclude and determine the content of contracts which so appealed to the draftsmen of the [French] Code civil".

261 Colvin "Interpretation of Criminal Legislation and Codes" in "Australian Laws" 9.1 para [164].

262 Ibid, para [163]. For instance, the High Court's decision in the case *He Kaw Teh v R* (1985) 157 CLR 523 at p 528 per Gibbs CJ.

263 Steiner, above n 255, p 212.

Another problematic point is the use of the phrase "codes and statutes" by all comparative-law textbooks.[264] This phrase suggests codes and statutes are different; otherwise it would not be necessary to constantly use both terms. Codes and statutes actually are not different; in fact codes are nothing more than a special kind of statutes.[265] § 13 of the German Criminal Code shows the similarity between the terms "code" and "statute". This provision, part of a code, already quoted above,[266] expressly calls the German Criminal Code "statute".[267] It therefore shows that, at least in civil-law systems, it is recognised that codes are nothing else but a special kind of statutes.

The psychological threshold produced by the mentioned statements is probably one reason why, in the United Kingdom, there has not been the introduction of any code since, in 1965, the Law Commission was put under a duty to draft various codes.[268]

Conclusion

As the examples presented in this chapter show, argumentation on the basis of legal terminology is problematic. On the one hand, there are many situations in which different jurisdictions use different terms, terms which are still different after an accurate translation into one's own language. This can produce an inaccurate picture of a foreign jurisdiction, since it lets this foreign jurisdiction appear very different. More problematical, on the other hand, is the use of identical terms throughout various jurisdictions, which make them appear to be similar. This was shown for the terms "intent"

264 De Cruz, above n 1, passim; Zweigert/Kötz, above n 1, passim.
265 See on this above pp 16–17.
266 Above p 106.
267 Translated from the German "… *nach diesem* Gesetz …", which means "according to this *statute*".
268 See Steiner, above n 255, p 212. However, also in England, there is a tradition of codifying acts such as the Sale of Goods Act 1893 or the Children Act 1989; these are just said to be too limited to deserve the label of codes: ibid, p 216.

and “equality”, which both label very different concepts with the same terms. It is thus problematical in the comparative-law context solely to rely on translated legal language without considering also the fundamental concepts behind this language, by which differences can be compensated for (“compensation phenomenon”).

It is, of course, a simple truism that in the light of similar outcomes, differences in approach are of little consequence. Yet from the author’s point of view, traditional comparative-law doctrine usually points to differences in the particular legal rules in order to explain different outcomes. When, for example, there are statements as to the handling of criminal omissions in common-law and civil-law jurisdictions (general duty-of-care requirement or, respectively, no general duty-of-care requirement)[269], the different approaches are of interest mostly because of (supposedly) different outcomes. If the outcomes are not so different but instead similar, even huge differences in approach and on the way to the outcomes indeed can become, in a sense, less interesting.

[269] Cf above, pp 105–108.

5 The Process of Convergence

Law is always changing. Moreover, the situations in common-law and civil-law jurisdictions are changing in ways which may affect conclusions as to their differences and similarities. It has been mentioned before that developments are taking place in both kinds of legal systems.[270] Common-law jurisdictions have widely enacted new statutes (so-called "modern social legislation") and therefore moved towards a higher degree of codification.[271] Civil-law systems, on the other hand, do not show the reverse tendency of repealing their existing, all-embracing statutory law. However, civil-law jurisdictions show a tendency towards making precedential decisions of courts practically, albeit not formally, binding.[272] The views about whether this process means indeed a higher degree of similarity of the systems and thereby a process of convergence are not unanimous. These diverging views are, *inter alia*, discussed in this section.

Relevance of the convergence issue for all parts of the thesis

The notion of a steady movement and development of legal systems affects, regardless of the argument whether the development in fact amounts to a convergence process, all statements made in this thesis. The categorisation of jurisdictions into legal families is temporary, "as legal systems may shift from one cluster to another …"[273] In particular Chapter 2 with its focus on the respective sources of law in the legal systems shows the tendency to statutory law becoming the paramount source of law in common-law juris-

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270 See above pp 5–6.
271 See above pp 5–6.
272 See above pp 26–31.
273 E Örücü "Family Trees for Legal Systems …" in: van Hoecke (ed) "Epistemology and Methodology of Comparative Law", pp 359 at 360.

dictions and the practical bindingness of civil-law precedents. These developments raise a question about the existence of a convergence process. However, the findings about attitudes to interpretation that are generally characteristic for common-law and civil-law judges are also affected. One certain point is that common-law judges may show, contrary to traditional conceptions, a clearly liberal attitude to interpretation – an attitude as liberal as their civil-law counterparts'. Therefore the broader issue is dealt with here.

The issue of convergence was not dealt with earlier for reasons of greater clarity and readability of the previous discussions. It is important to make the discussion in the thesis easily comprehensible. It therefore has been thought appropriate not to point out with every finding that it may be affected by the convergence issue. Where the convergence issue is especially important, as it was as to the sources of law and the introduction of “modern social legislation” in Common Law, it has been discussed already before. The broader issue, however, is examined here. If this discussion turns out to in fact support the existence of a convergence process, the previous findings would be underlined and strengthened by an additional argument.

Differences between various common-law jurisdictions

The concept of legal families is widely accepted.[274] The use of the term “family” indicates a deep-rooted similarity of member jurisdictions of the same legal family. Consequently, one could expect each legal family to be a homogeneous category, without its member jurisdictions showing major differences. That is particularly so in case of the Australian Federation. The different Australian State jurisdictions form part of the

[274] On this see above pp 1–3.

same Federation and should therefore be very similar to each other. Differences between them could therefore raise doubts about the accuracy of the family concept.

The Australian Federation, called the Commonwealth of Australia, consists of six member States.[275] Section 51 of the Australian Constitution provides for the distribution of legislative power between, on the one hand, the Australian Commonwealth and, on the other, the States. As can be seen from s 51 of the Constitution with its 39 subsections, a large part of the legislative power is vested in the Commonwealth. However, the underlying idea is that of an enumeration of the Commonwealth's powers, with vast residual powers remaining in the hands of the States. Yet s 51 of the Constitution does not mean the Australian Commonwealth's power is strictly limited, as there are wide implied and incidental powers of the Commonwealth expanding the literal scope of s 51(xxxix) of the Constitution.[276]

The Australian States are still powerful enough to be addressed, each of them, as different jurisdictions. Section 51 of the Commonwealth Constitution, for example, does not mention Criminal Law; Criminal Law therefore is largely a state matter.[277] Because it is largely a state matter, the States have acted in the area of Criminal Law each according to its own ideas and therefore quite differently. In Queensland, for instance, there is a Criminal Code; so too in Tasmania, Western Australia and in the Northern Territory.[278] Section 302 of the Queensland Criminal Code, for example, provides in detail for the

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275 Namely New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia. Besides them, there are various territories, of which the Australian Capital Territory and the Northern Territory are by far the most prominent. See on this Keyzer, above n 241, paras 3.25, 3.26.

276 Keyzer, ibid, para 1.26.

277 Though not completely, as the Commonwealth has the power to enact, for instance, Criminal Law related to its own property and to international and inter-state trade (as an example of the latter, the Commonwealth offence of importing narcotics. See on the division of Commonwealth and state offences in this area Colvin/Linden/McKechnie, above n 29, para 8.1; Kenny "An Introduction to Criminal Law in Queensland and Western Australia" para 16.1).

278 Colvin/Linden/McKechnie, above n 29, para 1.11.

definition of murder (and thereby for the borderline between murder and mere manslaughter). On the other hand, the remaining States have not enacted comprehensive statutes like a Criminal Code. In New South Wales, for example, the elements of murder are to be determined by reference not only to s 18 of the Crimes Act 1900 (NSW) but as well to the Common Law, that is courts' decisions. The elements of murder will be similar to those of s 302 of the Queensland Criminal Code but not necessarily the same. However, even if the elements were identical, they would have to be found in a different way, in the case of New South Wales in previous courts' decisions and in the case of Queensland in the Criminal Code.

The aforementioned Crimes Act 1900 (NSW) is a consolidating statute, drawing together various common-law rules and principles. Other Australian jurisdictions have similar enactments.[279] This legislation is, however, not exhaustive, not even intended to be so, and therefore different from a Criminal Code. There are two different structures for criminal-law concepts in the Australian states. In the area of substantive Criminal Law New South Wales is an example of an Australian jurisdiction with clear common-law focus. This is the reason why States like New South Wales are, when categorising the States inside the Australian Commonwealth, even called "common-law states".[280] South Australia, Victoria and the Australian Capital Territory have the same common-law focus. The term "common-law jurisdiction" is opposed to the term "code jurisdiction", which describes States like Queensland, which have Criminal Codes.[281] This is to be emphasised: some States inside the Australian Commonwealth are seen as "common-law states", others consequently must be something different. This is a further ex-

279 Crimes Act 1958 (Vic); Criminal Law Consolidation Act 1935 (SA); see Colvin/Linden/McKechnie, above n 29, para 1.12.

280 Ibid, para 1.10; Kenny, above n 277, para 1.1.

281 Colvin/Linden/McKechnie, above n 29, para 1.10; see also Colvin, above n 261, paras [164], [165]; Kenny, above n 277, para 1.1.

ample of a slightly different meaning of the term "Common Law", obviously comprising only those jurisdictions which show, in a particular area of law, some statutory rules but no comprehensive codification.

The situation in the law of criminal procedure is – admittedly – more complicated. On the one hand, the area of criminal procedure is dealt with in, for example, Queensland's statutory law in as much detail as is the substantive Criminal Law. There are several distinct statutes, such as the Police Powers and Responsibilities Act 2000 which provides for police powers in criminal investigation. On the other hand, however, all of the other States, for example New South Wales with its Criminal Procedure Act 1986, nowadays have some statutory law in the field of criminal procedure.

The example of England, the original common-law jurisdiction, might be presented here. England forms, together with Scotland, Wales and Northern Ireland, part of the United Kingdom of Great Britain and Northern Ireland. Though consisting of those distinct parts, the United Kingdom is not regarded as being a federal but a centralised unitary State. Scotland, Wales and Northern Ireland each have their own legislative assemblies and are able to partially regulate their own affairs. However, the United Kingdom retains unlimited legislative power.[282] The United Kingdom, thus, can be said to be a State but not its constituent parts. England does not even have its own legislative assembly. However, the English Constitution could be said to be an essential part of the Constitution of the whole United Kingdom. The latter is not codified in a single, constitution-like document but consists of several statutes, conventions and case-law.[283]

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282 Aitken "What is the UK? …" <http://alt-usage-english.org/whatistheuk.html#ew>.

283 Carter, above n 103; Cole/Frankowski/Gertz, above n 5, p 48; de Cruz, above n 1, p 103; Ward "The English Constitution" p 1. Some of these authors refer to the English Constitution instead of the United Kingdom Constitution.

England traditionally relied predominantly on case-based law rather than statutory law. Statutory enactments in England traditionally took the form of a merely clarifying summary of the pre-existing common-law rules in a particular area of law. The already mentioned newer tendency towards the enactment of "modern social legislation" means even in England there are nowadays many important enactments. For instance, there has been the very important enactment of the Human Rights Act 1998, which incorporated the rights and freedoms of the European Convention on Human Rights (ECHR) into British Law.[284] Codes, however, which are statutes intended to regulate particular areas of law comprehensively and exclusively, are rarely found in England.[285]

This all means that the common-law jurisdictions are in fact not a homogeneous group of similar jurisdictions but represent, regarding the available sources of law and particularly the degree of codification, rather a heterogeneous category.

Creation of new Common Law through interpretation of new statutes

The issue of convergence of the systems is not affected by the "normal" *modus operandi* of Common Law. Common Law is created by the courts deciding cases and thereby – in the absence of statutory provisions – creating legal rules. These rules are, under certain specific circumstances, binding on certain other courts.[286] After the enactment of new statutes by parliament, there will occur legal arguments between two parties affected by the new statutory provision. These legal arguments eventually may be brought to court. The court will, by interpreting the new statutory provision, reach a conclusion as to how the case before it has to be decided. The only difference to the

284 Carter, above n 103.
285 Steiner, above n 255, pp 211–212. De Cruz labels – not using the criterion of extent as Steiner does – the Children Act 1989 as code (de Cruz, above n 1, p 46).
286 See to the details of the bindingness doctrine above pp 24–26.

previous situation is that the court has to obey the statute; the court, consequently, interprets the statute and thereby creates a rule how to interpret the statute in question. This rule can be, also in the absence of any statutory provision, binding on other courts, which have to interpret this provision.[287] Again, this means the court creates new judge-made law, just as it did in the absence of a statute. So it could be, *prima facie*, argued that actually nothing has changed, when a new statutory rule is enacted by parliament.

This is what Corkery points out in his book: "Today, most new law is statute law. But as they interpret these statutes, the courts create new 'common law' precedents."[288] The same idea is put forward by Bogdan: "It does not take long before the text of a new statute has been interpreted and applied by the courts, and it is these precedents rather than the text of statutes which in the practical legal life are seen as the real source of law, since the principle of *stare decisis* also applies to decisions interpreting the text of statutes."[289] H L A Hart states the same thought: "… and over the interpretation of that [legislation], courts will again have the same last authoritative voice."[290]

Indeed, the courts do create judge-made law in areas covered by new statutes. However, this is quite distinct from judge-made law in an area without any statute. Without any statute the judge-made law stands alone as the only source of law regulating the area at all. This judge-made law may therefore be called "solitary". On the other hand, there are courts' decisions which interpret an existing statute. These courts' decisions are not "solitary" in the aforementioned sense and are a different kind of judge-made law. They are as well binding and cannot be rendered "secondary" sources of law as,

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287 See the preceding footnote and Bogdan, above n 17, p 130.
288 Corkery, above n 20, p 117.
289 Bogdan, above n 17, p 130.
290 Hart, above n 168, p 145.

for instance, academic's writings can. Yet for they are different from the "solitary" judge-made law, they may be called "second-degree primary source of law".

This observation matches the words used by de Cruz to highlight differences between common-law and civil-law judgments: "[C]ases have been the primary source of law in the English common law tradition, but have at best been regarded only as a secondary source of law in the civil law tradition."[291] The common-law situation after the enactment of a new statute, thus, is practically not very different from the normal civil-law situation.

It is a feature of civil-law as well as common-law jurisdictions that disputes arise which have to be resolved through courts' proceedings. Fundamental in resolving a case is the relevant statutory provision, but this statutory provision is sometimes far from detailed enough to resolve the dispute in issue. A good example might be the borderline between criminal attempts to commit an offence and mere preparatory acts.[292] Statutes like the German Criminal Code and the French Penal Code, stating only the "subjective directness" and, respectively, "beginning of execution", have to be interpreted by courts in order to precisely be able to decide which conduct is criminal and which is not. The courts' decisions are judge-made law as are the common-law courts' decisions on a newly enacted statute. Yet both are dependent on the respective statute. Consequentially, the creation of new statute-interpreting case law is not an argument against occurrence of a convergence process.

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[291] De Cruz, above n 1, p 243.
[292] This example has already been discussed above pp 21–22.

"Contrastive" and "integrative" views

The phenomenon of convergence of common-law and civil-law jurisdictions is not acknowledged by all comparative-law scholars. Most emphasise similarities in outcomes in each legal system (called "integrative" views); yet others stress the differences between Common Law and Civil Law (called "contrastive" views).[293]

There is one contrastive publication which even claims in its title: "European Legal Systems Are Not Converging"[294]. The author of this non-converging theory, Pierre Legrand, suggests that "rules and concepts alone actually tell one very little about a given legal system and reveal even less about whether two legal systems are converging".[295] Instead, "habits and customs" should be distinguishing factors between different "legal cultures".[296]

Legrand concludes:

> Prior to understanding, there must exist (cognitive) commensurability. In the absence of shared epistemological premises, the common law and civil law worlds cannot, therefore, engage in an exchange that would lead to an understanding of the other, if only to a virtual understanding.[297]

Legrand does not back up his assertions with examples. So it is difficult to reject his suggestions. If "habits and customs" lead to different legal mentalities, then there should be clear-cut examples of those habits and customs. As far as these habits and

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293 See Steiner, above n 255, p 211. The same terminology is to be found in Örücü, above n 273, p 369.
294 Legrand "European Legal Systems Are Not Converging" ICLQ 45 (1996) pp 52-81.
295 Ibid, p 56.
296 Ibid, pp 60, 61, 62, respectively.
297 Ibid, p 76.

customs are of a merely social and extra-legal nature, they would, from the author's (this thesis's author's) point of view, be irrelevant for the distinction between legal systems. And as far as they are of a legal nature, they would usually be expressed in legal rules. It remains, therefore, unclear which habits and customs Legrand actually has in mind. The differences between Common Law and Civil Law which he observes, would, at least without any further argument, not represent an unbridgeable distinction between the systems, which even prevented "an exchange" leading "to an understanding of the other".

Legrand's observations are somewhat imprecise. For instance, he observes: "In all Continental countries there is to be found the notion that the government has the inherent power to govern." This might be the case in the civilian jurisdictions of Italy, France and The Netherlands, which Legrand primarily has in mind.[298] However, in Germany, ie another civilian jurisdiction, the situation is different, as Art 20(3) of the German Constitution expressly provides that government be subject to the laws.[299] This is interpreted as requiring an enabling act for all its acts ("*Ermächtigungs-Grundlage*").[300] This shows the existing differences do not follow the distinction between legal families; Germany straddles the divide between Civil Law and Common Law. These differences, thus, are not inherent and cannot justify making a sharp distinction between legal families, let alone the assertion of unbridgeable differences which are impossible to overcome.

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298 Ibid, pp 63, 74.

299 The German text originally says: "*... die vollziehende Gewalt ... [ist] an Gesetz und Recht gebunden*".

300 This key principle of German Constitutional and Administrative Laws is called "*Vorbehalt des Gesetzes*". It is concerned primarily with the executive arm of government; however, this is also the meaning of the terminology used by Legrand, as he contrasts government with legislature and judiciary, cf Legrand, above n 294, p 74.

Another contrastive statement is that of Smits who observes "several diverging tendencies within this [European] contract law" and concludes: "replacing national legal systems … will not lead to unification, but will most probably have the opposite effect. … This can only have adverse effects on legal certainty and legal unity …".[301] The diverging factors observed by Smits may, thus, represent obstacles for legal unification and, in particular, for the project of a European Contract Law. Yet these obstacles are stressed by Smits only as to European Contract Law.[302] They do not necessarily mean general differences between legal systems – with which this thesis is concerned.

The contrastive views, therefore, cannot be supported; rather, the integrative views have to be preferred. These integrative views are expressed by a number of authors: De Groot points out, "To observe that the legal systems of Europe are converging states the obvious", Markesinis has "no doubt that convergence is taking place", and Steiner observes "a blurring of the generally accepted classifications of legal families".[303] Also Vogenauer's thesis of fundamental unity of the legal families instead of fundamental differences, reported by Lücke's review article, has to be qualified as an "integrative" statement; as the review article itself which asserts an end of the era in which "differences between the civilian and the common law approaches to statutory interpretation could have been described as fundamental and well-nigh unbridgeable".[304]

Yet the fact that the "contrastive" views have to be rejected, while the "integrative" views are to be preferred, does not mean a clear-cut support of the "integrative" views

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301 Smits "Toward a Multi-Layered Contract Law for Europe" in: "An Academic Green Paper on European Contract Law" pp 387 at 393.

302 Ibid, p 387.

303 De Groot and Markesinis cited according to Legrand, ibid, pp 54–55. See also below n 316. Steiner, above n 255, p 216. Steiner, ibid, also quotes van Gerven who concludes "all modern legal systems are to some extent mixed legal systems".

304 For Vogenauer's thesis, see Lücke, above n 145, pp 1023, 1027; for the quote see ibid, p 1032.

either. The integrative theories emphasise the fundamental similarity of common-law and civil-law jurisdictions. Thereby they presuppose, in the author's view, the viability of the concept of legal families.[305] This concept, however, is at least doubtful.

"Post-modern" Comparative Law

"Post-modernist" legal doctrine also criticise the division of individual jurisdictions according to the concept of legal families. These legal doctrines are called "post-modernist" because they do not match with current comparative-law theory as stated in the available textbooks. These doctrines also impliedly purport that they are more up to date than the usual textbook theories on comparative-law concepts.

The term "post-modern" is concerned with the rejection and overcoming of conventional doctrine. Thus, for instance, Frankenberg, as already the title of his publication ("Critical Comparisons: Re-thinking Comparative Law") suggests, is a "post-modernist".[306] However, the term "post-modernism" usually refers to the late 20th century, which means it does not anymore label the latest doctrine.

Another potentially post-modern account is that of Esin Örücü in her monograph "The Enigma of Comparative Law …".[307] Örücü thinks the division of legal systems according to the "old" legal families approach is no longer satisfactory.[308] In her essay "Family Trees for Legal Systems …", Örücü promises a "fresh approach to the classification of legal systems … within which legal systems would be classified according to their parentage, their constituent elements and the resulting blend, and then grouped on the

305 See below p 141.
306 Husa, above n 218, p 5, cites Frankenberg "Critical Comparisons: Re-thinking Comparative Law" Harv Int'l Law Journal 26 (1985) 411.
307 Reviewed by Husa, above n 218.
308 Ibid, p 2.

principle of predominance".[309] This approach is expressly ("fresh" vs "old") opposed to the conventional approach of categorisation. Yet Husa in his book review does not see Örücü as a post-modernist; on the other hand, he acknowledges her approach is definitely distinct from traditional comparative-law doctrine.[310] Therefore, it is better to view Örücü's approach as post-modern.

It remains unclear who, apart from Örücü and from Frankenberg, could be called post-modernist. Husa mentions a recent fundamental debate between traditionalists and post-modernists but does not provide any names or quotes.[311] Apparently, the critical post-modern accounts do not provide any idea how to replace traditional comparative-law doctrine. It is of course easy to criticise the attempts at groupings that have been made, and it is much more difficult to come up with something better in their place.[312] In the latter respect, post-modern views apparently fail; it is unclear what exactly the post-modern authors are suggesting.

The ongoing development of European Union Law

Only a few common-law states are members of the European Union (EU);[313] yet many civil-law states are, including the ones which arguably form the core of the civil-law family. The European integration may well have an impact on the traditional classification; this is underlined by the fact that many of the above quoted statements are concerned with European integration. The EU is different from conventional International

309 Örücü, see above n 273, p 359.
310 Husa, above n 218, p 10.
311 Ibid, p 8.
312 Bogdan, above n 17, p 87.
313 The term "European Community" (EC) is being used instead of "EU" to more precisely to refer to only one yet the most important pillar of the EU. This thesis, the main concern of which is not European Law, may be permitted to refer to this law as EU Law.

Organisations – it is called "supra-national".[314] The main distinguishing characteristic is the power of the EU to exert governmental powers transferred to the EU by the member states and enact laws which are directly applicable in member states and may even enjoy superiority over domestic law – without any transformational act being necessary.[315]

That the development of EU Law has a heavy influence on the concepts of Comparative Law is demonstrated by the mentioned "integrative" statements; but even Legrand as the most prominent "contrastive" author acknowledges that "within the context of the European Community … the convergence argument is, in fact, supported".[316] Many of the above quoted statements are primarily concerned with European integration. Yet this thesis is not focused on the European situation or on EU Law.

Up to now, there has been no evidence for fundamental inherent differences between common-law and civil-law jurisdictions. There might be huge differences between individual jurisdictions. Yet it is largely accidental whether such differences occur between a common-law and a civil-law jurisdiction or between two common-law or two civil-law jurisdictions. This means that the concept of legal families is not very important; as to today's situation it does not mean anything. The European integration may heavily impact on individual member states' jurisdictions; it does, however, not impact

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314 "Butterworths Concise Australian Legal Dictionary" p 156.

315 Steiner/Woods, above n 27. That EU laws are directly applicable in member states, does not apply for all types of EU laws (for example usually not for "directives").

316 See above p 123 for de Groot's and Markesinis's statements. Markesinis ("Why a Code is not the Best Way to Advance the Cause of European Legal Unity" in: "Always on the Same Path: Essays on Foreign Law and Comparative Methodology II", p 103, 110) is skeptical towards the project of a European Civil Code. Yet this statement concentrates on only one particular project and, moreover, rather the consequences of convergence than the question whether there is convergence in the first place. See also the discussion of Smits's deliberations above p 123.

on the families' concept. This is the reason why European integration does *not* mean a substantial change for the concept of legal families.

6 Misleadingness of the Family Concept

The emphasis of the argumentation has been on formal aspects as opposed, for example, to legal culture and practices of lawyers. Yet in theory, there should not be a considerably large difference between the two. Lawyers should practise law adhering to the applicable sources of law; thereby, a legal culture following the aims of parliaments and courts should be formed. This is the reason for the author's view that a strict orientation on formal issues is required for examining law. An orientation on practice and culture, on the other hand, would run the risk of being inappropriately distinct from the law as it should be interpreted. Moreover, lawyers' perceptions can be altered, so that it is necessary to start the process of making new findings the conventional wisdom of comparative lawyers.

The thesis has resulted in the conclusion that there are no inherent differences between common-law and civil-law jurisdictions. There are of course differences between common-law and civil-law jurisdictions. (It would be astonishing, if there would not to be found any differences between various national jurisdictions.) Yet these differences are not typical and not based on specific features of the common-law and civil-law families and are therefore not inherent.[317] Making a systematic distinction between the common-law and civil-law families is therefore incorrect.

However, there is not one textbook of Comparative Law which does not base its entire structure on this incorrectly drawn distinction. The distinction is, as seen, incorrect, since there are no inherent differences between the common-law and civil-law families,

[317] On this term, see above pp 6–9.

which could justify the distinction. The few textbooks which exist on Comparative Law, namely the works of Bogdan, of de Cruz and of Zweigert/Kötz, all not only structure their books according to the family concept; they also distinguish the jurisdictions by reference only to the alleged distinguishing features of the families.[318]

All of these textbooks admit that nowadays the distinction is no longer clear-cut: Zweigert/Kötz state that "recently the attitudes of Common Law and Continental Law have been drawing closer" and that "any division of the legal world into families or groups is a rough and ready device … quite useful for the novice … but the experienced comparatist will … not use the device of legal families at all".[319] De Cruz emphasises "all systems now use both … cases or statutes [as] the predominant source of law", as "legal systems continue to resemble each other".[320] Bogdan stresses that "that the division of legal systems into families of law is a very basic pedagogical instrument, which should be used primarily to provide jurists with a quick overview" and, thus, concludes, "[i]n connection with more advanced and detailed studies, the division should be used with great care".[321] Yet, despite these doubts, the authors persist with the distinction.

The problem with the families concept is not only that it is incorrect. There are also many inferences drawn from it which rely on its accuracy. As the family concept is not accurate, the inferences drawn from it may also be inaccurate. The family concept, thus, is not only wrong, it is misleading, and this misleadingness can lead scholars to incorrect statements on foreign jurisdictions. This is easily conceivable even in theory.

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318 Bogdan, above n 17, pp iii–iv; de Cruz, above n 1, pp iii–iv; Zweigert/Kötz, above n 1, pp vii–viii.
319 Zweigert/Kötz, above n 1, pp 71, 74.
320 De Cruz, above n 1, pp 40, 41.
321 Bogdan, above n 17, p 86.

When something like a family concept is used, one may suppose without question that there is fundamental similarity between different individual jurisdictions which belong to the same legal family. On the other hand, one may suppose jurisdictions *not* forming part of one legal family to be quite different – just because of this concept.

But this problem does not only occur in theory but as well in practice. This can be shown by presenting examples of scholarly statements relying incorrectly on the very family concept.

Criminal procedural issues

One area of law which seems to be particularly receptive to this kind of misled notion is the Law of Criminal Procedure. Perhaps this is due to differences between, on the one hand, the adversarial judicial process, commonly linked with the Common Law, and, on the other, the inquisitorial process, the alleged civil-law mode of conducting trials.[322]

The terms are explained in Butterworths Concise Legal Dictionary:

> Inquisitorial system: A mode of dispute resolution in which the judge may assume responsibility for determining how the competing claims of the parties are presented by their legal representatives. The inquisitorial system is much more prevalent in European courts ("in the civil law system") than in those which follow the Anglo-Australian ("common law") tradition, which is usually described as adversarial. Adversarial system: A mode of dispute resolution in which the competing claims of parties to a dispute are pre-

[322] See above WALRC, n 30, p 69; though this text rightfully emphasises the existence of adversarial elements in inquisitorial trials. Also Jolowicz "Adversarial and Inquisitorial Models of Civil Procedure" ICLQ 52 (2003) 281.

> sented, usually by legal representatives who have no interest in the outcome of the dispute, to an impartial and disinterested third party.[323]

These definitions show that it is the judge's role which is different between inquisitorial and adversarial trials. Whereas in inquisitorial trials the judge will try actively and independently from the parties, to find out the facts of the case, in adversarial trials he will play a more passive role and will let the parties present the relevant facts to him. In an adversarial system the judge will treat the facts presented by the parties to him as basis for his judgment – independent from his personal view about these facts and aiming at ascertaining procedural truth rather than substantive justice.[324] There is not, however, complete congruence between the two kinds of legal systems and the two modes of trial, but merely a higher prevalence of inquisitorial trials in Civil Law and of adversarial trials in Common Law.[325] For instance, in the civil-law jurisdiction of Germany, it is mainly criminal trials which are conducted according to the inquisitorial model, whereas the private-law proceedings are more oriented towards the adversarial model.

With respect to the differences between criminal trials, there are several other misapprehensions. One concerns the hearsay rule. The hearsay rule renders inadmissible "statement[s] made to a witness by a person who is not himself called as a witness … when the object of the evidence is to establish the truth of what is contained in the statement".[326] In terms of the common-law and civil-law distinction, it is argued that, in civil-law jurisdictions:

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323 "Butterworths Concise Australian Legal Dictionary" pp 224 and, respectively, 15.
324 See Jolowicz, above n 322, p 291.
325 Ibid, p 281: "We must recognise that the most that can be said is that some systems are more adversarial – or more inquisitorial – than others".
326 Palmer, above n 95, pp 90–91; the classic definition of the hearsay rule.

> [t]he trial judge will largely base his or her decision upon the contents of the *dossier* [file]. Hearsay rules are unknown in the inquisitorial system … a judge in a civil-law jurisdiction will rarely conduct a vigorous examination at the trial, normally rather relying on the contents of the *dossier* [file] without much question, simply checking that there are no formal irregularities … [witnesses'] written depositions as they appear in the *dossier* [file] amounting to the full extent of their involvement in the process in most cases.[327]

The same idea about the civil-law attitude towards hearsay evidence is put forward by Spigelman and as well by Bogdan.[328] Other misapprehensions are the ideas that there is, in civil-law jurisdictions, no cross-examination and that a written document ("documentary file") plays an important role in the civil-law criminal trial.[329] Statements of this kind could make the reader believe that these are typical and specific features of civil-law jurisdictions, which occur in all civil-law jurisdictions. After all, these quotes do not distinguish between different civil-law jurisdictions but attribute certain features to civil-law jurisdictions in general.

None of these examples is correct as to the whole range of civil-law jurisdictions. They may be true of some civil-law jurisdictions but not of each of them. For instance, in Germany's criminal procedure there is a rule which prohibits the use of hearsay evidence; this is a very important rule in German criminal trials.[330] There is a fascinating similarity between the common-law rules on hearsay and the German rules, even as to the details.[331]

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327 Above WALRC, n 30, pp 73, 80, 84.

328 Spigelman "The Truth Can Cost Too Much: The Principle of a Fair Trial", (2004) 78 ALJ 29 at 39; Bogdan, above n 17, p 107.

329 Above WALRC, n 30, pp 74, 84; Jolowicz, above n 322, p 290.

330 § 251 *StPO* (the German code regulating criminal procedure) implies this principle.

331 See on the German situation and, in particular, to the permissibility of exceptions to the hearsay principle, Meyer-Goßner "*Strafprozessordnung (Kommentar)*" § 250 para 4.

§ 250 *StPO* (German Code of Criminal Procedure) renders this kind of evidence inadmissible. There are, however, situations in which hearsay evidence may exceptionally be admissible in Germany. It is only in these situations that hearsay evidence is not only admissible when the relevant facts constituted a criminal offence, but also when they serve as evidentiary support.[332] This is a ruling of the *Bundesgerichtshof (BGH),* the German Federal Supreme Court, in the case of a police officer giving evidence about facts witnessed by an undercover agent – a fairly special situation, as the undercover agent had to remain anonymous.[333]

The prohibition of hearsay evidence in France may be limited to oral hearsay. In Germany, however, the hearsay prohibition extends to documentary hearsay. It is (unless applicable narrow exceptions) not only inadmissible to call a hearsay witness for giving oral evidence; it is also inadmissible to presenting documentary hearsay evidence. Thus, there is no *dossier* in Germany; the *Ermittlungsakte* (investigation file) is a documentary file used by the prosecution just to collate the relevant documents but does not play for its part any relevant role in the proceedings.

Cross-examination involves questioning of witnesses both by prosecutorial and defence counsel. However, this occurs also in German criminal trials.[334] The resulting German examination of witnesses differs, of course, from the common-law model of cross-examination. Yet one very important feature of cross-examination is present in German trials, too. This is the fact that witnesses may be questioned not only by the judge but also by the parties or their counsel. This is very common in German trials in practice (§

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[332] Ibid.

[333] Cf *BGHSt* 17, 382 at 384. The abbreviation means the Federal Supreme Court's criminal-law decisions.

[334] § 240(2) *StPO* is expressly to this effect.

239 *StPO* even authorises cross-examination in a common-law fashion; yet this is almost never used in practice.[335]

A written document like the documentary file, which is prepared before the beginning of court proceedings and may substitute for evidence in the trial, does not exist in German criminal trials and would even contradict the fundamental doctrine of oral delivery of evidence (in German: *Mündlichkeits-Prinzip*).[336]

The presented general statements about the differences between criminal trials are apparently all based on French criminal trials.[337] This shows one aspect of why the categorisation of individual jurisdictions into legal families is misleading. Even legal scholars are obviously tempted to assume there is fundamental similarity between individual jurisdictions forming part of the same legal family. In fact, as the examples show, this is not the case; there are fundamental differences between those individual jurisdictions.

The family concept also suggests there are fundamental differences between individual jurisdictions forming part of different families. For instance, there should be, according to the family concept, huge differences between, for instance, France and England or between Germany and Australia. Again, there are scholarly statements which prove that the suggestion works well, as these statements point to differences which in fact do not exist.

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335 Meyer-Goßner, above n 331, § 239 para 1.
336 Meyer-Goßner, above n 331, § 261 para 7.
337 There is the use of French expressions (above WALRC, n 30, pp 73, 76, 82) or even express reliance on the French situation (Jolowicz, above n 322, p 290).

There is, *inter alia*, the assertion that propensity evidence, in the absence of strict rules excluding it, is used as an evidentiary means in civil-law jurisdictions.[338] Propensity evidence, or disposition evidence, is not allowed to be used in common-law trials. Now, it might appear to be different in civil-law criminal trials, for example in Germany. The criminal record of the accused is, at the beginning of the trial and together with his particulars, mentioned. This, however, has nothing to do with using the criminal history of the accused as evidence of any kind of criminal conduct or criminal mind. The label of "propensity *evidence*" is not correct under these circumstances.

These assertions should not discount how fundamental the objection in the common-law world is to prior convictions being revealed to the trier of fact. There must be, of course, a deep-seated scepticism in relation to the trier of fact's ability to ignore aspects of character. Yet it seems to be an explanation that in the civil-law world, where the trier of fact usually is a judge, the scepticism may be less clear than in the common-law world, where the trier of fact usually is a jury. This could mean that differences in the approach to this kind of evidence are understandable given the different environments in which previous convictions are being revealed.

Another alleged difference concerns the presumption of innocence of the accused unless and until proven guilty; this is an outstandingly important principle in common-law proceedings ("better ten guilty acquitted than one innocent convicted").[339] Yet it is of course also an equally paramount feature of civil-law criminal proceedings;[340] for example in Germany it is enshrined in the Latin maxim *in dubio pro reo* (or the German

338 WALRC, n 30, pp 75, 80.
339 It is part of the right to a fair trial; see Spigelman, above n 328, pp 31–32.
340 See WALRC, n 30, p 74.

expression *Unschuldsvermutung*; § 261 *Strafprozess-Ordnung* or *StPO* implies this principle).

Substantive criminal-law matters

There are also some substantive criminal-law matters which show how misleading the concept of legal families can be. There is, for instance, the meaning of the term "intent", which has been discussed already above.[341] It also has been mentioned that Cassese sees the different interpretations of the term "intent" as a civil-law/common-law inherent issue – according to him, the common-law meaning of the term includes mere knowledge of a result occurring, whereas the civil-law concept only includes purposeful conduct.[342] This is actually not correct; as has been discussed in quite considerable detail, there is, in common-law jurisdictions, an argument about what is required by the criminal element of intent – and there are, in civil-law jurisdictions, discussions about whether knowledge should be sufficient for the requirement of intent.[343] In fact, discussions occur in various jurisdictions, regardless whether of common-law or of civil-law origin, about which is the required state of mind of the perpetrator in cases where intentional conduct is required. That authors link these discussions with the issue of Common Law/Civil Law shows the misleadingness of the family concept.

Another instance is the, also already discussed, criminal liability for omissions. It has been said that common-law doctrine generally rejects liability for omissions, whereas the civil-law rules, on the contrary, make omissions criminal. However, it has been argued above that this division is questionable, as in Australia and Germany, for instance,

341 See above pp 93–97.
342 See above n 235.
343 See above, for the common-law situation, pp 93–95 and, for the situation in the civil-law jurisdiction Germany, p 95.

different concepts are in place. Yet these different concepts can lead to similar results. This phenomenon has been rendered "compensation phenomenon".[344] Therefore, linking this issue with common-law/civil-law differences additionally shows the misleadingness of the concept of legal families.

Other legal observations

General observations on the exercise of governmental power were mentioned in the course of the discussion of contrastive and integrative views on the potential for further convergence of the systems. Legrand says, in his contrastive essay, that the exercise of executive governmental power in civil-law jurisdictions, unlike in the common-law world, does not depend on the express conferment of this power (unlike the exercise of judicative power). It was argued earlier the statements on governmental inherent powers in civil-law jurisdictions[345] are not correct as to the situation in Germany.[346] In the present context, it must be said Legrand's statement also shows the misleadingness of the concept of legal families, as his assertions are expressly based on the French, Italian and Dutch situations[347] and his conclusions as to a common civil-law position on this point are questionable.

General observations as to the interpretation of statutes are apparently informed by the family concept. As has been said, the role of preparatory materials in interpreting legislative enactments is limited in common-law jurisdictions (for example, the consideration of a statute using the protocols of relevant parliamentary commissions).[348] The use

344 See on the "compensation phenomenon" above pp 97–99 and on criminal liability for omissions above pp 105–108.
345 See Legrand, above n 294, p 74.
346 Above p 122.
347 Legrand, above n 294, p 63.
348 See, for example, the passage on Acts Interpretation Acts above pp 56–57.

of preparatory materials is known to be much more relaxed in France; preparatory materials are even in English textbooks named with the French expression *traveaux préparatoire*.[349] But then, again, that cannot be seen to be a uniform civil-law position, with the German situation being about the same as the situation in common-law jurisdictions.[350] There is, thus, an obvious adverse impact of the concept of legal families in this field.

There are, therefore, many instances of the family concept being misleading. Every inaccurate and perhaps incorrect statement on legal matters brings the danger of further consequential mistakes by scholars/students who take the given information for granted. However, the consequences of the incorrectness of the concept of legal families yields arguably particularly grave consequences. This is because of the fundamentality of this concept which is a key concept of Comparative Law, according to which the whole subject is structured.

It has to be admitted that the assertions in this chapter are sometimes based on the observations of other authors about whether the situation in civil-law countries is uniform or varies from country to country. Sometimes, therefore, the legal situation in civil-law jurisdictions other than Germany is uncertain. Yet the approach is, in the author's view, still scientific, as the thesis' approach is actually the questioning of some positions alleged to be characteristic of civil-law jurisdictions. For this purpose, it is sufficient that *only one* civil-law jurisdiction, for example the German, is not in line with an alleged uniform civil-law concept. For instance, doubts remain about whether in the French criminal process there is indeed a lack of commitment to the accused's innocence un-

[349] De Cruz, above n 1, p 288.
[350] See above pp 59–60.

less proven guilty. This would mean the French jurisdiction would not have incorporated the Latin maxim *in dubio pro reo*; regarding the liberal traditions of French laws, this would not fit. Doubts obviously do not mean certainty as to the occurrence/non-occurrence of a particular feature. Yet it is possible that there are mere doubts as to individual civil-law jurisdictions as long as there is certainty that one jurisdiction shows rules different from the alleged civil-law position.

7 PROPOSITION

In course of this thesis, the differences which exist between common-law and civil-law jurisdictions have been scrutinised. In particular, differences have been characterised as mostly non-inherent; however, only inherent differences would justify the traditional categorisation of jurisdictions into legal families.

Recapitulation

The examination of sources of law (Chapter 1) has *not* shown that there were many differences between the systems: The traditional characterisation of common-law jurisdictions as being case-based and civil-law jurisdictions as consisting of written-law instruments represents – at least today – nothing more than an insignificant and non-inherent difference. The stereotypes of civil-law jurists asking, "What does the rule provide?", and common-law jurists asking, "What will the judge say?", does not represent two different things but rather two different aspects of the same thing. The common-law doctrine of binding precedent is not inherent either and thereby not a distinguishing factor. Furthermore, if there would be differences, they could possibly be explained as just reflecting "fundamental legal concepts".

Moreover, common-law and civil-law judges also do not employ generally different attitudes to statutory interpretation. In particular, it is incorrect to say that common-law judges are rather literally oriented, whereas civil-law judges are rather liberal (Chapter 2). The same has to be said of Criminal Law, with specific doctrines which, however,

turned out to be similar in common-law and civil-law jurisdictions (Chapter 3). Legal terminology is a potential reason for errors, when terms only appear to be identical but have a quite distinct meaning, because of different concepts in place in the systems. This is not yet the end of the comparison, as there may be other factors compensating for the difference ("compensation phenomenon"). The difference, as it was compensated for, could not justify the categorisation of jurisdictions into legal families (Chapter 4). The view that there is an ongoing process of convergence of the systems is correct; drawing a distinction between them becomes even less justified (Chapter 5).

Therefore, the distinction of common-law and civil-law legal families and the traditional categorisation of jurisdictions into legal families is incorrect. The author is opposing the contrastive views which hold various jurisdictions for different in an unbridgeable way.[351] After all, the differences which were found between individual jurisdictions are either non-inherent or they are compensated for. Yet the author does not support the integrative views either, which emphasise the fundamental similarity of individual jurisdictions from different (common-law or civil-law) background.[352] These views at least imply the approval of the concept of legal families, a view which the author thinks is inappropriate.

Incorrect legal statements always bear the risk of producing further mistakes as a consequence. With the concept of legal families, this risk is especially high. Only a few jurists will be able to find out about the incorrectness of statements. A check is often impossible because of the language barrier between jurisdictions. It is much more likely that mistakes will be discovered in a purely domestic context.

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[351] See above p 123.
[352] See above pp 123–124.

Not only is there a risk of being misled by the incorrect concept of legal families. There are, as has been shown, plenty of examples of scholars having been misled (Chapter 6). The conclusion of this thesis, therefore, is both the incorrectness and the misleadingness of the concept of legal families. The proposition must be to use the concept of legal families with care.

Structuring comparative-law texts (macro-comparative function)

The concept of legal families has a macro-comparative[353] function; the concept is used to structure comparative-law texts. All of the few available comparative-law textbooks are structured according to the concept of legal families.[354] This habit is firmly entrenched and not very likely to be changed. As the following statement shows, there are psychological reasons for adherence to the traditional classification:

> [A]part from its practical value, the "legal genealogy", i.e. the grouping of legal systems of the world into different families of law, appeals to the comparative legal scholar's sense for order and classification, just as a botanist receives satisfaction from classifying plants …[355]

Moreover, the habit of structuring the whole discipline according to the concept of legal families is, despite the weaknesses of the concept, not desirable to be changed. The concept might be incorrect as far as it describes the current situation. On the other hand, there remain of course differences between the historical development of common-law and civil-law jurisdictions. These historical differences cannot be set aside as

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353 See on the term "macro-comparative" above pp 10–11.
354 Cf above pp 128–129.
355 Bogdan, above n 17, p 82.

being non-inherent. Consequentially, grouping jurisdictions in the way they are currently grouped is justified.

Furthermore, it makes sense to have a basic structure underlying a comparative-law text. Apart from psychological reasons there are obvious advantages as to the readability and understandability of comparative-law texts, particularly when it comes to textbooks used by comparative-law students. This is explained by Bogdan: "The division's primary objective is normally … pedagogical, i.e. to facilitate studies of foreign law …".[356]

On the other hand, the purpose of conducting comparative research is often seen in a better understanding of one's own legal system. As Zweigert/Kötz write: "Comparative lawyers … must cut themselves loose from their own doctrinal and juridical preconceptions and liberate themselves from their own cultural context in order to discover 'neutral' concepts … it is precisely the broad principles which comparative law lets one see …"[357]

For these reasons, it is preferable to have a concept at hand to categorise jurisdictions – and it can of course be according to the historical origins which underlie the recognised legal families. Besides – there is no alternative envisageable to structuring according to common historical origins. Structure is necessary and adherence to the traditional structure has to be accepted.

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[356] Bogdan, above n 17, p 85. Zweigert/Kötz, above n 1, p 20, see a "general educational value" of Comparative Law.

[357] Zweigert/Kötz, above n 1, pp 4, 11.

Research in foreign jurisdictions (micro-comparative function)

On the other hand, Comparative Law has a micro-comparative[358] function, namely the purpose of facilitating research about foreign legal systems. It is, for instance, easily conceivable that a lawyer has to conduct research as to legal rights and obligations in a foreign jurisdiction. In such a situation, the results of the research have to be reliable and up to date. The lawyer will not be interested in common or different historical origins of jurisdictions. Moreover, the information in this situation must be accurate and not be based on misleading statements as to fundamentals of the target jurisdiction.

When used outside the basic structure of a comparative-law text, therefore, there must be always careful observation of the relevant context and avoidance of the risk of misleading concepts. To avoid this risk, it is necessary to point out – at least the first time the terms "Common Law" and "Civil Law" are used – that nowadays it is no longer appropriate but instead highly misleading to speak of legal families. This could be done by a warning that, although each legal family represents similarity of the historical development, this does not mean that there is anymore similarity of individual jurisdictions. For instance: if there is the assertion, "… the common law has acknowledged a further residual discretion to reject evidence, based on fairness per se"[359], that could, without providing the aforementioned warning, suggest – incorrectly and misleadingly suggest – that in civil-law jurisdictions, there is no such discretion or even no fair-trial principle at all.

The proposition must be always to bear in mind that the family concept is misleading.

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358 See on the term "micro-comparative" above pp 10–11.

359 Spigelman, above n 328, p 38. The present author is aware of the fact that this is an example of a generic use of the term "Common Law" including other common-law jurisdictions yet not specifically contrasting civil-law principles. However, this generic use is not obvious and therefore misleading.