In Praise of Uncertainty

The Constitutional Court's PSPP Decision

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04.06.2020 doi: 10.17176/20200605-013346-0

Europe and the Common Law Tradition

One of the themes I've pursued in my work as a comparative law scholar is the appeal that the discipline's old classification of so-called "legal families" should be abandoned. Rather than fitting the world's legal systems into a handful of closed categories, I have tried to embrace H. Patrick Glenn's teaching. Glenn urged us to flip the analysis and take a functioning and extant legal system (whether national or otherwise) as the given starting point of our research in order to excavate the ways in which various "legal traditions" strive for relevance within that system. It is true that Glenn's proposed catalogue of legal traditions mirrors the most commonly invoked taxonomy of legal families. But the inverted use of these taxa – from the exogenous to the endogenous – renders the repurposed legal traditions more dynamic and discursive. The legal traditions vying for relevance within a legal system interact with one another. They influence and reshape one another in an iterative process that is neither static nor exclusive.

The heated debate around the German Federal Constitutional Court's PSPP decision has me thinking once again of the value of this upturned comparative law enterprise. I say this because many of the responses to the Court's judgment neglect the reality that the EU legal system also is the site of a dynamic process of discourse between different legal traditions, especially the civil law and common law traditions. The encounter between these traditions in the European legal order is in part a product of the half-century the United Kingdom and Ireland have spent in the Union. Both are deeply marked by the common law tradition and their involvement in the EU legal order has had a transformative effect. But the common law's relevance in European law has broader sources. How else might we imagine the meaning of European law's general lack of codification, on one hand, and the outsized political and policy role played by the CJEU's judges, on the other hand. It is understood, for example, that the CJEU defined the nature of the EU legal order. In fact, that role for and vision of judicial authority is defended by the critics of the Constitutional Court in this debate. It was the CJEU that established EU law's primacy. But it must also be said, that Court's role and style displays an attitude about "the way law is or should be made, applied, studied, perfected, and taught" that is far closer in structure and style to the common law tradition than it is to the civil law tradition. I know there is room for much conversation about this foundational assumption in my argument. This isn't the place to pursue that conversation, although I would love to do that in other contexts if there is interest in doing so. For my purposes in this essay it will have to be enough to say that I see the EU legal system as a meeting point between the civil law tradition and the common law tradition (and, no doubt, other traditions). It is, what one commentator called "the mega-mix."

The presence of a common law orientation in the European legal system is relevant to the PSPP debate because critics of the Constitutional Court's ruling, and the dissonance it risks injecting into the system, have made exaggerated claims for the importance of European law's uniformity. Their demands are tied-up in the priority the civil law tradition places on legal coherence and certainty. As Merryman and Pérez-Perdomo explained: "Certainty is, of course, an objective in all legal systems, but in the civil law tradition it has come to be a kind of supreme value, an unquestioned dogma, a fundamental goal."

The insistence on European legal uniformity and certainty, achieved via the CJEU's unassailable supremacy, underestimates the significance of the common law tradition's role in the European legal order. The common law emphasizes procedural rules over substantive norms, the latter of which have to be discovered anew in every legal contest. The common law, Glenn explained, is best understood as a "secret substantive law." The rule of decision on the merits is only barely knowable in the common law, and it might be anything that the jury or the judge decide on any given day. The common law is rooted in and responsive to the diverse communities it hopes to govern, and for this reason it is a legal tradition necessarily open to dissimilarity. This is what Glenn refers to as the "notion of change in the common law tradition." In the common law tradition, uniformity and certainty play a lesser role than they do in the civil law tradition.

The Constitutional Court's ruling may be a betrayal of the civilian strain in European law. But it also may be a triumph of the common law strain. Glenn wouldn't have it any other way. If it is true that the common law's less uniform and less certain demands for jurisprudence are part of the European legal culture, then the dis-uniformity and the ambiguity threatened by the Constitutional Court's PSPP judgment need not be seen as an existential threat to the legal order. Instead, as a natural expression of the common law *mentalité*, the resulting cacophony might be embraced as an opportunity for the kind of evolution and adaptation for which the common law is so often celebrated.

Those of us trained in legal systems over which the common law tradition has considerable influence understand that a legal system can function effectively and perhaps even thrive despite glaring inconsistencies and patent uncertainty in the law. Here, let me describe some examples of American legal dissonance (and these days we are called on to think of so many of them!) none of which have produced the legal disintegration predicted by the critics of the Constitutional Court's PSPP judgment.

Federal Circuit Splits

"Circuit splits" or "circuit conflicts" are an example of the dis-uniformity with which the American legal system has learned to live.

The American federal government's judiciary functions on a vast, continental scale that encompasses immense social diversity. To respond to the challenges that project naturally entails, the federal courts have been scattered across the land. The first-instance federal courts (District Courts) are assigned to jurisdictions that coincide with the fifty states' sub-sovereign jurisdictions. But there is no legal or administrative overlap between the federal and state authority on this basis. That is mostly an administrative and geographic convenience. These far-flung federal District Courts are grouped in twelve regions, or circuits, over which twelve separate second-instance federal appellate courts (Circuit Courts) preside. In many cases, appeal from the District Courts to the assigned Circuit Court is by right. And atop the Circuit Courts in this pyramid sits the U.S. Supreme Court in Washington, D.C. It is well known that the Supreme Court has discretionary jurisdiction. For the most part, it can freely choose which cases it will hear on appeal from the Circuit Courts.

If the Supreme Court declines to take an appeal from the Circuit Court, then the Circuit Court's articulation of the law – including interpretations of the constitution, federal statutes, or treaties – is final. *Stare decisis* makes that interpretation the binding law for all future cases in the circuit, both in the District Courts and in the Circuit Court itself.

As a consequence of this decentralized federal judicial architecture, the twelve Circuit Courts often hear similar cases involving the same normative foundation. And from time to time they reach contradictory conclusions about the meaning of the controlling federal law. These "circuit splits" are identified by the Supreme Court's rules as the main reason for that court to grant *certiorari* and accept a case for review. The idea is that the Supreme Court should definitively resolve conflicts in the lower federal courts' interpretation of federal law. After all, uniformity and certainty

matter in a legal system. Without the Supreme Court's role in settling these "circuit splits," different versions of the same federal law would have controlling force in different parts of the country.

Except that there are quite a few "circuit splits," many touching immensely important issues such as constitutional basic rights. And the Supreme Court takes very few cases each year. A significant number of "circuit splits" go uncorrected by the Supreme Court with the result that there is a patch-work of federal law applied from one region to another. One study found that, in one year the Supreme Court declined to hear and resolve up to 270 "circuit splits." A third of these neglected conflicts involved variations in the interpretation of federal law that would impose significant harm in the form of legal uncertainty for multi-circuit actors and produce opposing outcomes in similar cases arising in different circuits. The "circuit split" phenomenon has been studied closely. We know, for example, that if a "circuit split" is going to be resolved by the Supreme Court, it is more likely to happen very early in the conflict's lifespan and more often if there is a large number of deviating circuits involved. In these circumstances the Supreme Court seems to allow a "circuit split" to percolate in the lower courts for a manageable period of time so that the justices in Washington have the benefit of deep and diverse appellate court reasoning when they turn their attention to the issue. But we also know, as one study concluded, that the "proportion of conflicts that go unresolved is extremely high." Some "circuit spilts" are never resolved. This means that constitutional rights, especially including Fourth Amendment privacy protections, can and often do vary based on geography. One commentator summarized things this way: "the Court regularly fails to reconcile … conflicts, ensuring that the divergent outcomes endure and multiply with the passage of time."

None of this dis-uniformity and uncertainty has brought the American legal system down in rubble. To the contrary, it is possible to understand these lingering, regional deviations in the application of a supposedly singular normative regime as beneficial. On one hand, "circuit splits" may be a profound way of managing social difference across a diverse, continental republic. On the other hand, "circuit splits" may provide a mechanism for jurisprudential experimentation and refinement, allowing learning across the circuits to operate as an iterative process of legal change. But even if there was no utility in it, the common law jurist wouldn't recoil at so much dissonance and variation in the law. That's just the way the law is sometimes.

Unprecedenting Stare Decisis

"Circuit splits" are partly a product of the common law principle known as *stare decisis*. This principle holds that that the determinative rules in litigation are identified according to precedent, that is, the controlling law is the rule established in a previous case by the deciding court or by a court superior to the deciding court in the same jurisdiction. It is said that these previous decisions are "binding." *Stare decisis* is the common law's way of achieving a little certainty amidst its variability and contingency. The Supreme Court has explained that precedent promotes the even-handed, predictable, consistent development of law. The Court also has insisted that precedent fosters the actual and perceived integrity of the judiciary because it is possible to know what a legal outcome will be by divining the rule that has been announced by the highest court in a particular jurisdiction. The result in a case should not be the product of a judge's whim or ideology. *Stare decisis* ensures some uniformity and certainty within a federal circuit when the presiding Circuit Court rules on an issue. But because each of the twelve Circuit Courts only articulate precedent for their respective circuits and exercise no precedential authority over one another, they are free to go their own way until the Supreme Court intervenes to settle a "circuit split."

But I don't want to give false hope for the uniformity *stare decisis* might bring to the American legal system. That's because there is widely-varying understanding of the principle among American jurists and that introduces yet another possibility for uncertainty into the system. The irony in this hasn't eluded me: the very instrument meant to promote stability and

coherence in the law itself has succumbed to disputes about its stability and coherence. I told you common law lawyers are accultured to dynamism, change, and uncertainty. The dis-uniformity in the understanding of stare decisis suggests that the common law thrives on uncertainty.

The old debate over the role of *stare decisis* in American legal culture has resurfaced at the Supreme Court in dramatic fashion in the last years. One side of the debate has argued for a strict application of precedent and would tolerate the rejection of controlling caselaw only if the present court can point to a "special justification." The other side of the debate has argued for a less strict application of precedent and would tolerate the rejection of controlling caselaw merely because the present court concludes that the issue had been "wrongly decided" by the previous court. It will surprise no one that the fate of the Supreme Court's precedent-setting ruling in *Roe v. Wade*, in which the Court announced a woman's fundamental constitutional right to an abortion, is driving this debate. *Roe* survived its last major test at the Supreme Court, in *Casey v. Planned Parenthood* (1992), only because three justices voted to sustain *Roe's* "core holding" out of fealty to *Roe's* status as controlling precedent. The opponents of abortion rights understand that their path to victory lies through weakening the grip *stare decisis* has on American legal reasoning.

Stare decisis never produced the kind of certainty in the United States that it did in England. Fletcher and Sheppard explain that "the U.S. Supreme Court has displayed considerable willingness to overturn precedent, … the House of Lords was much more likely to adhere to precedent." The Supreme Court expressed this understanding by insisting that *stare decisis* is not an "inexorable command." This is particularly true for precedential interpretations of constitutional law, as opposed to precedential interpretations of statutes. The Court reasoned that flawed or problematic constitutional precedent cannot be corrected except by overruling the controlling case or through the near-impossibility of constitutional amendment. Statutory precedent, however, can be changed through the relatively easy process by which ordinary law is enacted and amended. In an opinion he contributed to a recent case involving the debate over *stare decisis*, Justice Kavanaugh documented more than a dozen of the Supreme Court's most prominent and celebrated decisions that involved overturning constitutional precedent. He also pointed out that every member of the current Supreme Court had voted to overturn constitutional precedent on several occasions. The point of all this is to demonstrate that, even before the current debate over *stare decisis*, American jurists had to live with a remarkable degree of constitutional uncertainty. A mere five justices of the Supreme Court might seize on the following factors and decide to announce a new rule to replace old doctrine: the poor quality of the controlling case; the controlling case's inconsistency with related jurisprudence; the difficulty in applying the rule announced by the controlling case; the controlling case's poor fit with legal or factual developments; and the lack of extensive reliance on the rule announced by the controlling case.

Some justices now want even greater freedom to abandon precedent. That prompted Justice Breyer, in a stinging dissent, to wonder "which cases the Court will overrule next."

Stare decisis is supposed to give the common law some measure of uniformity, stability, and certainty. In American law it instead serves as an invitation to advocacy and change – even about the principle of stare decisis itself. This hasn't made American law unworkable or dysfunctional. A permissive approach to precedent has provided flexibility in the joints – especially in constitutional law – for aligning the law with the social reality and for pursuing justice. It also helps motivate a prevailing majority to support its judgment with the soundest possible reasoning and strongest possible social resonance because they know that stare decisis alone won't entrench the rule they announce. It turns out, a little uncertainty might do the law good.

Diversity Jurisdiction

"Diversity jurisdiction" is another vehicle for introducing uncertainty in the American legal system. It raises some remarkable similarities to the inter-court, inter-

jurisdictional "dialogue" at play in the Constitutional Court's PSPP case.

The framers of the constitution feared that the citizens of one state who were sued in the courts of another state might face bias and suffer injustice. It's hard to imagine today that that state loyalty and state identification might reach such a degree, but it seemed obvious in the founding era, for example, that North Carolinians would harbor malignant suspicion and resentment for New Yorkers. To allay this, the constitution empowered Congress to enact a statute granting the federal courts subject matter jurisdiction over these "diverse" state law cases. The idea was that, by taking the state law dispute out of the hands of one state's judiciary and placing it in the hands of another sovereign's courts, the out-of-state litigant might hope for a greater measure of objectivity and fairness. Congress established federal "diversity jurisdiction" and it turns out that this still is a common basis for litigation in federal courts. That's the case despite the obvious way in which diversity jurisdiction strains the federalist balance of power between the states and the federation.

One of the big questions that plagued diversity jurisdiction from its origins in 1789 was: What substantive law should apply? Should it be the law of the state in which the case might have proceeded if there hadn't been a chance to remove the matter to a federal court? Or should it be federal law, perhaps even necessitating the development of a parallel body of federal common law? In *Erie Railroad Co. v. Tompkins* (1938) the Supreme Court definitively ruled for the former arrangement. In diversity cases the federal courts apply the relevant state law. The Court explained that the intricacies and delicacies of federalism demanded this concession to the state sovereigns' legal authority. It's a regime not unlike the European legal system, but turned on its head: the federal legal apparatus is called on to interpret and apply the law of the member state.

As European lawyers know very well – after all, it is the sensational point of the PSPP case – one sovereign should be modest when engaging with another sovereign's law. For that reason, similar to a member state court's referral of a European legal issue to the CJEU for definitive resolution, America's diversity jurisdiction scheme permits the federal court to "certify" a state law issue to the highest court of the relevant state for a definitive answer. This exposes another difficulty with diversity certification. The regime authorizes federal courts to seek an answer on state law from the relevant state high court. But the federal court is not required to solicit the state court's views. And if the federal court asks, the state high court is not obliged to give an answer. The discretionary nature of diversity certification infuses the practice with some opacity. To put it another way, there is room for uncertainty and dis-uniformity. If the federal court declines to certify a question for resolution by the state high court and choses instead to offer an "*Erie* guess" about the interpretation of state law, then there is a risk that the federal court's understanding of the law could diverge from the interpretation it would be given by the courts of the state whose law is at issue. It might be impossible to quantify this phenomenon, not the least because it requires trying to count, something that the federal courts don't do. But research reveals that it happens a lot in diversity cases and that it is not uncommon for a state high court, in later proceedings, to disagree with the federal court's "*Erie* guess" about that state's law. So there it is: one law, two sovereigns, and two rules.

That isn't the only way in which diversity jurisdiction introduces an element of uncertainty into the law. In fact, federal courts only rarely certify questions to state high courts in diversity cases. But when they do, there is some debate about whether the federal court is bound to follow the state high court's clarification of state law in a diversity case. Not to put too sharp a point on things, but this raises a question that must sound familiar to European lawyers: Should the state high court's interpretation of state law bind the federal court exercising diversity jurisdiction over the case? In perfect common law fashion, there is no definitive answer to that question. No decisive precedent has established that, upon certification from a federal court, a state high court enjoys controlling superiority and that its interpretation must be bind-

ing. A consensus has emerged among the Circuit Courts suggesting that state court answers to certified questions are binding. But there are times when this consensus can look strained. The Fifth Circuit, for example, demurred that "*ordinarily* … an answer to a certified question is final and binding." What about the extraordinary cases? A minority of circuits have expressed similar doubts about the bindingness of state high court answers to certified questions from the federal courts.

The reasons for those doubts will sound familiar to European jurists.

One concern is with the nature of the decision through which the state high court provides its answer to a certified question. These answers look to many like an advisory opinion. There is general suspicion for advisory opinions in American law. The life of the common law, as Justice Holmes reminded us, is experience. But the answers to these certified questions, as resolved by the state high court, are too abstract and generalized. They are not the product of a proper case in controversy and for that reason they are not limited and contoured by the facts and interests of a tangible dispute. To underscore this concern, some state constitutions prohibit their courts from issuing advisory opinions. That might extend to the answers they give to federal diversity certifications. The risks of allowing the state high court to proceed in this manner are high. Once the court's interpretation of the rule has been announced and handed off to the federal diversity court, then there would be an argument that this interpretation also is controlling for the state courts despite the fact that the lower state courts will have been by-passed in the development of the new interpretation altogether.

Other reservations about granting state court certification answers binding authority are rooted in federalism and the jurisdiction allocated to the federal and state courts. Some federal courts have consented to the state courts' superiority in the diversity context as a matter of "courtesy" or "comity." But other federalism concerns counsel against granting the state court's certification answers precedential status in a federal diversity case. Doing so naturally erodes the federal courts' autonomy and it might disrupt the force and logic of well-settled federal precedent. The federal courts might balk at being made the ventriloquist mouth piece of problematic state law justice and policy outcomes. This is what motivated the Fourth Circuit to restrict its courts' resort to certification to those instances in which the state law "is clearly insufficient."

That's a lot of painstaking detail about a curious backwater of American federal civil procedure. But the insights to be gained from federal diversity jurisdiction and question certification should be clear. First, the regime involves a reversed version of something like the intersection of law and jurisdiction between the CJEU and the BVerfG that was at stake in the Constitutional Court's PSPP case. Second, there is nothing like existential worry about the uncertainty over how authority is to be assigned between the federal and state courts in diversity cases, even as that can produce not-insignificant uncertainty about what the controlling law is. All of that doubt about the law is just a natural way of being in the common law tradition.

Conclusion

The Constitutional Court's PSPP decision will have immense consequences. I have no reason to doubt the alarm raised by so many informed and respected commentators. In that sense, there is so much more I might have wanted and needed to say about it.

But here's one small thing that has been lost in the debate so far. The Court's decision to go its own way on a question of European law might be seen as evidence of the influence of the common law tradition in the European legal system. That's no bad thing, and it's probably unavoidable in any case. I have offered several examples of legal dissonance and divergence in the American system as evidence of the common law tradition's tolerance for uncertainty. That's the way the common law does it. And it doesn't mean the end of things. In this way, the Constitutional Court's PSPP judgment provides an opportunity to embrace the common law tradition's profound role in the life of the European legal system. That, in turn, is a summons to accepting and accommodating a degree of dis-unifor-

mity and uncertainty in law that is unfamiliar in the civil law tradition. The common law tradition sits more comfortably with doubt and dissonance. But uncertainty also creates some chances. Chances for justice still unrealized. Chances for advocates to return to the fray and make their claims anew, but better and stronger and more persuasive this time. Chances for flexibility across a diverse federalist framework. Chances for the law to draw nearer to the mood of the people it is meant to govern.

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