ARTICLES

Some Reflections on Codification and Case Law in the Twenty-First Century

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INTRODUCTION

Force majeure prevented me from attending the Davis symposium on codification in the twenty-first century. The program was full of interest; I look forward to reading the papers when they are published. The brief remarks that follow, prepared at the Law Review's request, are intended to serve as a short, general introduction to codification's place in the Western legal tradition. How did the dichotomy between codification and case

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law arise? Why has codification been the hallmark of civil-law systems and case law the hallmark of common-law systems? As the twentieth century ends, are the differences between these contrasting traditions decidedly less marked than they were when the century began? And how are codification and case law likely to fare as working methods in the twenty-first century?

I. THE HISTORICAL UNDERPINNINGS OF CASE LAW AND CODIFIED LEGAL SYSTEMS

Codification and case law embody two contrasting, yet complimentary, principles of justice. Although each approach has much to offer, neither is without disadvantages. Case law views justice in concrete and fact-specific terms; codification operates at a higher level of generalization and abstraction to achieve efficiency, administrability, and coherence in the administration of justice. In every legal system, regardless of where it falls on the spectrum between a pure system of codified law and a pure system of case law, the principles of these two approaches are in tension. Historical, rather than philosophical considerations, however, explain why the legal systems of continental Europe were to codify their law while England did not.[1]

For roughly the first one-thousand years of western European history, there was no indication that the legal systems on the continent would develop differently from those in England. England was on the Roman frontier, but so were the northern parts of continental Europe.[2] Furthermore, the fall of the Roman Empire at the end of the fifth century and the rise of Islam in the course of the seventh century, led to similar and profound economic, legal, and social changes throughout western Europe. As the commercial civilization that Rome had built regressed to an essentially rural way of life, economic activity

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[1] The historical discussion that follows is drawn from ARTHUR TAYLOR VON MEHREN, LAW IN THE UNITED STATES: A GENERAL AND COMPARATIVE VIEW 3-6 (1988) and ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLEY, THE CIVIL LAW SYSTEM: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW 3-42 (2d ed. 1977).

[2] *See generally* HENRY PIRENNE, ECONOMIC AND SOCIAL HISTORY OF MEDIEVAL EUROPE (Clegg trans., 1937). A great deal of work has been done since Pirenne wrote on the economic and social history of medieval Europe; his generalizations still provide, however, a good general understanding of the period.

organized around land again became the basis of wealth and power. As the political order fragmented, so did the law.

The *Corpus iuris civilis* — the great compilation and systematization of Roman Law ordered by Justinian — although accomplished between 528 and 534 in Constantinople, was not of significance for western Europe until early in the second millennium.[3] The distinct systems epitomized by the contrasting codification and case-law approaches that are known today as the civil law and the common law, arose in large measure because of two events that occurred between 1066 and approximately 1200. The first was the Norman Conquest of England. The second was the rediscovery of the *Corpus iuris civilis* at the very end of the eleventh century, an event which led, first at Bologna and then at other continental European universities, to a legal education grounded on that complex and rich body of juristic materials.[4]

The Norman Conquest created conditions in England that made possible an effective, centralized administration of justice.[5] In the course of administering justice, the King's court could and, between the accession of Henry I in 1100 and the death of Henry III in 1272, did declare a law common to the whole realm. Several consequences followed that were of profound importance for the theory and practice of English law.

Within two centuries after the Conquest, the English legal order matured into a system that, until modern times, precluded English universities from participating in the development of the law to the same degree as continental European universities. The university study of *Corpus iuris civilis* that began at Bologna at the end of the eleventh century crossed the Channel to Cambridge and Oxford without difficulty, but had little influence on the emerging common law. By the close of the thirteenth century, English law was a practitioners' law and practitioners — lawyers and judges — firmly controlled the legal order and legal education.

The law declared by the King's court eventually satisfied, in large measure, society's needs and demands. Centralization of justice fostered a small, close-knit profession. Because the legal

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[3] *See* VON MEHREN & GORDLEY, *supra* note 1, at 7.

[4] *See id.* at 7-12.

[5] *See id.* at 12-14.

rules relevant for practice were largely a product of the courts' administration of justice, practitioners enjoyed a monopoly of the knowledge and skills required for the practice of law. This state of affairs had a significant consequence: practitioners provided legal education that concentrated upon the decisions of courts. The education of jurists addressed fact-specific problems. Practitioners had little concern for, or interest in, either the systematic or theoretical implications of the resolution of problems or the articulation of rules. By the end of the thirteenth century, practitioners' concerns and perspectives had decisively shaped England's legal education and legal order.

The dominance of the practitioner in English education continued until the twentieth century. Aspirant lawyers were trained as apprentices rather than educated as scholars. Legal education and legal thinking, at least so far as the law in action was concerned, were not the province of the university or the scholar. The legal science that developed from the twelfth century onwards in the continental European universities had no place on the English legal scene. English legal analysis was principally concerned with deriving precedents from decided cases, a process that places great weight on factual nuances. Written law was, for the most part, structured in terms of remedies. To the continental European jurist, English legal thinking appeared unsystematic, if not disorderly. However, the small, close-knit profession ensured a substantial measure of predictability, uniformity, and coherence in the application of law.[6]

By the close of the thirteenth century, England had developed a law common to the domain through a slow and organic growth. That law would for centuries maintain the characteristics described above. Had the legal systems of continental Europe achieved legal unity at roughly the same period, they would have surely exhibited similar characteristics.[7] For several reasons, including the slowness of economic and social change, in the twelfth century the West saw law as a declaration or articulation of community standards and practices rather than a means of

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[6] *See id.*

[7] Koschaker asserts that the Roman law would never have been received in Germany if there had been at the time a national legal system and a national private law. *See* PAUL KOSCHAKER, EUROPA UND DAS RÖMISCHE RECHT 235-36 (1947).

resolving actual or potential competing claims and interests; law emerged naturally in the course of resolving specific factual controversies. With the growing point of the law in the courts, in England, judges and lawyers dominated legal education and legal thinking.

On the European continent, legal unity developed slowly and was not achieved in France and Germany until the nineteenth century.[8] By then the intellectual and institutional setting differed profoundly from that which had shaped the English common law. Economic and social change was now proceeding at a much faster pace. Law was no longer "declared" but "made." In the universities, scholars had, moreover, developed from the twelfth century onwards a legal science rooted in the effort to make the *Corpus iuris civilis* understandable and useful for their economies and societies. The lack of legal unity in individual European legal orders resulted in the application of law in specific cases being of less interest and importance for society than in England. The practicing profession consequently enjoyed less prestige and influence, while the universities dominated legal education.

From the late twelfth century, the rediscovered *Corpus iuris civilis* provided the material on which the work of generations of jurists was largely based.[9] These materials were not only extensive and complex; they were also obscure. The *Corpus iuris civilis* had been developed for a society no longer extant that differed in many important respects from contemporary societies. Thus, the effort to exploit for contemporary purposes the *Corpus iuris civilis* ultimately led scholars to search for general underlying principles that might provide useful particular solutions.[10]

Other considerations reinforced the search for general principles. The law as actually administered was fragmented and undeveloped, particularly when compared with the *Corpus iuris civilis*. As such, there was little scholarly interest in the particularized solutions reached by contemporary law. Furthermore, the university environment naturally favored those aspects of the

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[8] *See* VON MEHREN & GORDLEY, *supra* note 1, at 14.

[9] For examples of Roman law sources out of which the continental European law of contractual obligation was to grow, see *id.* at 18-29.

[10] *See id.* at 29-42.

study of law generally associated with the scholar rather than the judge or lawyer: the love of system, structure, and generalization. Although no simple model can capture the complexity and variety of the court systems that emerged on the European continent, rough generalizations can be made with respect to the relationship between judge and university. From at least 1300 onward, university graduates in law were increasingly appointed as judges in both seignorial and royal courts. Furthermore, in some parts of Europe, the personal accountability of judges for erroneous decisions led to another form of reliance on the university scholar: the judge solicited the scholar's advice on the law as a means of self-protection.

When the moment came for legal unification on the European continent, the setting differed profoundly from that in which England had achieved legal unity. Centuries of university legal study had created a legal science well suited to the task of creating a uniform national law; moreover, economic, political, and social change were now advancing at a rapid pace. For both philosophical and sociological reasons, by the end of the eighteenth century, law could no longer be regarded as "declared"; law was "made." Nor did the political thinking of this period permit the view that law should be a judicial creation; lawmaking was within the purview of the legislature or the executive. Indeed, quite aside from political and philosophical considerations, the sheer pace and depth of change meant that neither France nor Germany could hope to develop a common law by gradual accretion through the work of the courts.

When France, Germany, and other continental European nations were finally in a position to establish legal unity, the situation was such that some form of codification was inevitable. The legal science developed in the universities had accustomed the societies of the European continent to aspire to generalized, systematic statements of legal rules and principles. The legislature considered such an approach both manageable and congenial. The private laws of England, France, and Germany thus reflect, in their form and theoretical assumptions, the epoch in which the societies they serve first achieved legal unity.

II. MODERN APPLICATION OF THE PRINCIPLES OF CASE LAW AND CODIFIED LEGAL SYSTEMS

As a means of establishing and maintaining a just and effective legal order, codification and case law each offers advantages and disadvantages. The efficacy of each is, moreover, affected by social and economic circumstances. In addition, when carried to dryly logical extremes, each creates substantial pressure for according greater recognition to the opposing principle.[11]

The high tide, historically speaking, of the codification principle was perhaps in Germany between 1900, when the German Civil Code, Bürgerliches Gesetzbuch ("BGB"), came into force and 1914, when World War I began. The concept of codification held by the drafters of the BGB seems perverse to the late twentieth-century jurist. The Code was largely based on the proposition that the positive law of a given society and period constitutes a self-contained whole, embodied in codes and taken to contain, in the form of logical principles inherent in its structure, its own method of development. Codes were, in short, to "be enlarged out of [themselves], out of the system of justice (*Rechtssystem*) [they] contain. . . . "[12] The legal order was logically complete, a *logische Geschlossenheit*.[13] Drafted in a time when university legal science was highly developed and the social order was seen as relatively stable by thinkers who aspired to the objectivity and predictability that the natural sciences were

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[11] The discussion that follows is drawn from VON MEHREN & GORDLEY, *supra* note 1, at 1127-61.

[12] 1 MOTIVE ZU DEM ENTWURFE EINES BÜRGERLICHEN GESETZBUCHES FÜR DAS DEUTSCHE REICH 16 (1888).

[13] *See* VON MEHREN & GORDLEY, *supra* note 1, at 1137.

> [The] . . . assumption [of a proponent of natural law] . . . is that the positive law is not complete. By this . . . [is meant] that this law sometimes has no answer to questions that are decisive legal questions, that it is silent as to the questions: Is this or that action legal or illegal? And what legal consequences . . . does it have? Is this or that relationship forbidden by law (Recht) or is it, on the contrary, recognized by the law? And what legal consequences flow therefrom? And so on. [Proponents of natural law] assert[] . . . that the public, the judge, and whoever else has occasion to desire information as to matters not contained in the positive law should seek this information in the ideal law, and, of course, in the particular ideal law that the writer favors. But the assumption is false: the positive law has no gaps at all . . . .

KARL BERGBOHM, JURISPRUDENZ UND RECHTSPHILOSOPHIE 372-73 (1892).

achieving, German theory and practice had little respect for fact-specific case law.

During roughly the same period, American jurists also tended to see their case-law system as more logical and conceptual in nature than had their predecessors. To this extent, the American system substantively, though not formally, could be seen as taking on characteristics of a codified system. As Roscoe Pound wrote in 1923,

> the strict [common-law] theory of the last century . . . [conceived] the judicial function to begin and end in applying to an ascertained set of facts a rigidly defined legal formula definitely prescribed as such or exactly deduced from authoritatively prescribed premises. Happily, even in the height of the reign of that theory, we did not practise what we preached.[14]

With World War I and its aftermath, nineteenth-century Europe came to an end. In Germany, a so-called jurisprudence of interests (*Interessenjurisprudenz*)[15] emerged that caused the German legal system, at least substantively speaking, to take on certain characteristics of a case-law system. In the United States, the rise of sociological jurisprudence[16] and the realist school[17] provided an antidote to the formalistic codification thinking that had emerged in American juristic method towards the end of the nineteenth century.

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[14] Roscoe Pound, *The Theory of Judicial Decision III: A Theory of Judicial Decision for Today*, 36 HARV. L. REV. 940, 940 (1923).

[15] *See generally* THE JURISPRUDENCE OF INTERESTS (M. Magdalena Schoch ed. & trans., 1948) (containing writings discussing and exemplifying new school of German legal thinking that emphasized importance of teleological considerations and functional analysis in application of statutory law).

[16] *See generally* Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591, 611-19 (1911) (describing sociological jurisprudence and American adoption of it). The sociological theory grew from applying social sciences to the philosophical theory of law. *See id.* at 618; *see also* Morgan Cloud, *Law in Theory, Law in Practice, in* THE GREEN BAG 73 (2d Series 1997) (discussing how sociological jurisprudence succeeded over formalism); Niel Duxbury, *The Narrowing of English Jurisprudence*, 95 MICH. L. REV. 1990, 1998-99 (1997) (commenting on early application of jurisprudence to social benefits).

[17] *See* JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 2-8 (1995) (describing American adoption of legal realism in early twentieth century). Legal realism was an unscientific, more subjective approach to the law. *See id.* at 2; *see also* Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 274 (1997) (noting that realism theorizes that judges attempt to reach fair decisions based on case facts).

III. THE CONVERGENCE OF CASE LAW AND CODIFIED LEGAL SYSTEMS IN THE TWENTIETH CENTURY

As the twentieth century wore on, case-law systems, especially as represented by the United States, and codified systems, in particular the mature legal orders of continental Europe, began to converge in conception and practice. A quest for greater coherency, comprehensibility, and administrability caused the former to take on qualities traditionally associated with codified systems. At the same time, juristic thought in civil-law systems became more teleological in nature and greater attention was given to the claims of fact-specific justice. This is not to suggest that the legal cultures of codified and case-law systems do not still, or will soon cease to, differ in significant respects. It is true, however, that in many fields codified systems have become much more fact-specific in their approaches than they traditionally were. Conversely, case-law systems have become more aware of the advantages and importance of structure, coherence, and predictability in the administration of justice.

Fact-specific thinking today enters codified systems most obviously through so-called general clauses couched in terms such as "good faith" and "contra bonos mores."[18] More important, however, is the broad acceptance of a teleological approach to the understanding and application of legal rules and principles.[19]

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[18] For a discussion of this approach, see Max Rümelin, *Developments in Legal Theory and Teaching During My Lifetime*, *in* THE JURISPRUDENCE OF INTERESTS 1, 17 (M. Magdalena Schoch ed. & trans., 1948):

> The [German] Civil Code was drafted and enacted in a period when jurists still believed in the plenitude of the civil law system and in the possibility of establishing a corresponding system through legislation . . . . Utilizing the general concepts developed by civil law theory, they sought to lay down abstractly formulated rules, couched in terms of rigidly defined concepts and comprising as many individual solutions as possible, which [were] to be binding on the judges. Still, they had sufficient insight into the variety and variability of life-situations to insert in the Code a number of blanket concepts modeled after the *bona fidei interpretation* and the *boni mores* of Roman law, such as "good faith" (Treu und Glauben), "good morals" (gute Sitten), "fairness" (Billigkeit), and the like, which left some leeway for judicial law-finding.

[19] *See generally* ERNST ZITELMANN, LÜCKEN IM RECHT (1903); PHILIPP HECK, BEGRIFFSBILDUNG UND INTERESSENJURISPRUDENZ (1932); FRANCOIS GÉNY, METHODE D' INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF 487-92 (Louisiana State Inst. trans., 2d ed. 1963) (1901) (discussing how social values dominate law).

All this occurs, moreover, against the background of codifications whose drafters lived in a world very different from that of the late twentieth century. The development of new technologies, the dramatic increase in cross-border social and economic activity, and the increased contact with jurists from other legal cultures have drained certainty and appropriateness from many code provisions. But, for reasons that are unlikely to change, new codifications are, as the French learned after World War II, very hard to achieve.[20] Nor could a late twentieth-century codification lay claim to logical completeness.

If the mature civil-law world has felt the need to take on certain qualities of case-law systems, the later have responded in considerable measure to a contrary impulse. This is particularly true for the United States. Indeed, American jurists have at times been strongly attracted by the codification ideal. A movement for codification, led by David Dudley Field, a distinguished New York lawyer, emerged around the middle of the nineteenth century. Although his efforts had relatively little success in New York, some thirty states, including New York, adopted his civil procedure code; sixteen adopted his penal code; and five, including California, adopted his civil code.[21]

These adoptions did not signify, however, that the codification ideal had taken root in at least some American states. Field's civil code came to be looked upon in California as a compilation and systematization of common law rules and principles with some revisions and improvements.[22] Nor does one find in later legislation, such as the Uniform Commercial Code,[23] the systematic and organic structure and the relatively high degree of generalization typical of codes in civil-law systems. Contemporary American juridical thinking still resists viewing codes as systematic and comprehensive fresh starts; rather, they are seen as compilations and medium-level systematizations of judicially established propositions. There are, however, other routes by

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[20] *See* Léon Julliot de la Morandière, *Preliminary Report of the Civil Code Reform Commission of France*, 16 LA. L. REV. 1, 2-19 (1955); Roger Houin, *Reform of the French Civil Code and the Code of Commerce*, 4 AM. J. COMP. L. 485, 496-505 (1955); VON MEHREN & GORDLEY, *supra* note 1, at 53.

[21] *See* VON MEHREN, *supra* note 1, at 19.

[22] *See id.* at 20-21.

[23] U.C.C. §§ 1-9 (1989).

which the style and intellectual premises that characterize codification have attained considerable influence over, and importance for, American juristic thinking.

The American federal system, with its diversity of private law, has given impetus to what can be seen as an unofficial form of codification: the Restatements of the Law. These have, of course, only persuasive authority; yet they significantly influence the administration of justice.[24] They set out rules and principles in comprehensive, generalized, and systematic terms. In doing so, the Restatements have encouraged forms of analysis that are rather similar to those associated with codification.

A development in common-law systems of an even more fundamental importance for the style of legal thinking and analysis has been the shifting of legal education from the practicing profession to the universities. The movement began earlier in the United States than in other parts of the common-law world. After World War II, the movement accelerated; as the century nears its close, especially in the more advanced common-law countries, the university scholar has largely replaced the practicing attorney and the judge as the mentor of aspirant lawyers. An inevitable consequence is that the scholar's penchant for coherence, generalization, and structure have affected the nature of the starting points for legal reasoning with which lawyers and judges work.

Common-law jurists still place, however, less emphasis on coherence, generalization, and structure than do university scholars of continental Europe. Nonetheless, in contemporary common-law systems case law is structured and formulated in significantly more abstract terms than when the century began.

CONCLUSION

A tension will always exist between the claims of system and structure, on the one hand, and of just, fact-specific solutions, on the other; each has a contribution to make to a wise and humane system of justice. Institutional arrangements, traditions, and many other factors will influence the balance that a given legal order strikes between the codification and the case-law

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[24] *See* VON MEHREN, *supra* note 1, at 21-22.

ideal. The relative importance that a given society's legal order gives to the values that inhere in codification and in case law is determined by various factors, including the style of legal education, the psychology of those charged with the administration of justice, and the organs of government that carry in practice responsibility for adapting and adjusting the rules and principles that guide and control social and economic conduct.

The experience of the twentieth century makes clear that, as societies and economies become increasingly complex and interrelated, legal orders need to draw on both the civil-law and the common-law traditions in thinking about law and its administration. At the level of method and style, the differences between legal orders in the codification and those in the case-law tradition have diminished and, at the same time, have become more complex. The twenty-first century will doubtless witness a continuation of this tendency. Ultimately, indeed, perhaps only legal historians will find useful the contrasting categories of common-law and civil-law systems.