TOWARD A CIVIL LAW SYSTEM IN THE UNITED STATES? A GLANCE AT RECENT TRENDS

David L. Bosco
David L. Bosco is a lawyer practicing in Washington, D.C.
He was a Fulbright Scholar in Chile in 2001-2002.
david_bosco@post.harvard.edu

Abstract
La diferencia entre los sistemas de *common law* y *civil law* (o derecho continental) se presenta a menudo en términos inflexibles: el primero confía en la ley hecha por el juez y está en continuo desarrollo; el segundo se centra en un código rígido y escrito. En la práctica, la distinción entre ambos sistemas legales pocas veces es tan dramática. Estados Unidos, un heredero de la tradición legal inglesa, es considerado un país basado en el *common law*, aun cuando el sistema de *civil law* haya tenido incidencia en varias áreas del país y ámbitos del derecho. Este breve análisis tratará sobre el actual estado del "*common law*" en el sistema legal estadounidense. Se trata sólo de la revisión de algunas tendencias recientes y no de un análisis acabado o de un nuevo planteamiento teórico. El artículo da cuenta de ciertos cambios en tres áreas importantes del derecho en este país: agravio (*tort*), responsabilidad contractual, y derecho penal. Finalmente, se aborda el papel de los jueces habituados a este sistema en un medio que tiende cada vez más a la codificación.

The difference between common law and civil (or continental) law systems has often been presented in stark terms: a common-law system relies on judge-made law that continually evolves while a civil law system is centered on an inflexible and written code. As the legal historian Lawrence M. Friedman has written in his classic study of American law: "In Continental Law, all law (in theory) is contained in the codes. In common law many basic rules of law are found nowhere but in the recorded opinions of judges."[1] In practice, of course, the difference between the legal systems has rarely been quite this dramatic. The United States, an heir to the English legal traditions, is considered a common law country, though the civil law has had some effect in various areas of the country and sectors of the law. This brief analysis will discuss the state of the "common law" today in the U.S. legal system. This article will not attempt a comprehensive presentation of the issue. Nor will it propose a new theory or historical approach. Rather, it will discuss some recent trends in U.S. law and recent developments in the scholarship on this question.

Legal historians have debated for many years the extent to which the law in the United States is derived from the English common law. Some historians argue that U.S. law is almost entirely derivative of the English common law; other historians see much more local influence. It is beyond dispute, however, that the United States developed what was, in essence, a common law system, broadly based on the English common law.

---

[1] Lawrence M. Friedman, *A History of American Law* (1985) 22.

Any discussion of the common law in the United States, however, must make at least a brief excursion to the southern state of Louisiana. Purchased from Napoleon in 1803, Louisiana had a legal history distinct from most other areas of the growing nation. With its Spanish and French training, the legal establishment in Louisiana defended the civil law against attempts to impose the majority common law. Over time, many aspects of the common law have been adopted. "Separated from its parenting source by geography, time, and culture, Louisiana civil law has become an ill-defined civilian entity that, in reality, is more of a common law process with civil law trappings."[2] Nonetheless, the civil law persists in Louisiana. That state is not alone as an example of a mixed civil law-common law jurisdiction within the U.S. The territory of Puerto Rico also still shows the signs of a civil law tradition.

These exceptions notwithstanding, the Continental civil law tradition has had limited historical impact in the United States. Still, most observers agree that in important respects U.S. law has been moving from the common law to a statutory system that is closer to the civil law.

Toward Codification

This section provides a brief outline of some changes in three important areas of the law: torts, contract law, and criminal law. It is important to recall that most of the law in these areas is state law, rather than federal law. When national codes are discussed below (like the Uniform Commercial Code and the Model Penal Code), they do not refer to federal law that is superior to the state common law. Rather, they are legal reform projects that come into legal force only when individual state legislatures adopt them. When the law discussed is federal, this will be made clear.

Torts

The field of torts -non-criminal wrongs for which an individual may seek redress- has experienced important codification over the past several decades. The area of workmens' compensation, for example, once governed by the common law, is now covered by statute in almost all states. There are important differences between the common law and the statutory arrangements. In most states, for example, workers' compensation statutes impose limits on the amount of compensation that may be recovered from an employer; at the common law, there was no limitation on what could be recovered.[3]

Even more recently, there has been pressure for "tort reform" more broadly. This movement is a diverse one, but in large part it is based on the view that it has become too easy to sue in the United States and that jury awards in tort cases have become exorbitant. Politically speaking, tort reform movements are often supported by conservatives and by major industries and are opposed by consumer advocates and associations of trial

[2] Thomas E. Carbonneau, *The Civil Law in North America: The Survival of Civil Law in North America: the Case of Louisiana*, 84 Law Library Journal 171 (1992).
[3] Richard A. Epstein, *Cases and Materials on Torts* (1995) 1035.

lawyers. Seeking to limit the judgments that can be granted under the common law of torts, many states have, by statute, adopted limitations on damage awards and other changes to the tort system. In general, the effect of tort reform is to limit the rights of plaintiffs. Frequent targets of the tort reform movement have been punitive damages and frivolous lawsuits.

In some states, the courts have ruled that tort reform legislation is unconstitutional. Some scholars see in these rulings an attempt by the judicial branch to protect its domain from the legislature. In Ohio and Illinois, for example, the state supreme courts ruled that recent tort reform measures violated the state constitutions. Tort reform remains an active political issue in many states and at the national level.

Contract Law

Since the 1950s, contract law in the United States has been governed both by the common law and, in an increasing number of states, by different versions of the Uniform Commercial Code (UCC), which many states have adopted into law. The UCC was the product of a group of academics that came together in an effort to rationalize and make more uniform contract law in the U.S. It was their hope that the Code would be adopted by state legislatures and would thereby provide legal uniformity for commercial law. The relationship between the common law on contracts and the UCC has not always been clear. One scholar described the relationship this way:

> While [the UCC] is obviously a statute, and may even claim to be a code, it relies heavily upon the common-law models. Sometimes it follows these models slavishly, and sometimes it modifies them creatively, but common law has remained at the foundation of the vast majority of the Code's provisions.[4]

So the UCC can be seen as both a product of and an amendment to the common law. Where the Code and the common law differ, difficult questions of interpretation arise for courts. Section 1-103 of the UCC provides that "unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions." But courts in the U.S. have reached very different conclusions about how the common law and the UCC should coexist. Some courts have held that the common law survives unless the UCC specifically addresses the point at issue in the case; other courts have said that the UCC prevails over the common law even if it does not address the specific situation at issue. Fundamentally at issue is whether the UCC is a code in the civil law sense or merely a supplement to the common law on contracts. As the UCC has developed in the U.S., it is perhaps most accurate to describe it as a hybrid of common law and civil law traditions.

---

[4] Edward L. Rubin, "*Consumer Protection and the Uniform Commercial Code*", 75 Wash. U. L. Q. 11 (1997).

Criminal Law

The codification process in the U.S. common law has probably been most advanced in the criminal realm. In the early 20th century, however, criminal law was still a common law realm with very few written codes. "This long neglect revealed itself in a substantive criminal law that was often archaic, inconsistent, unfair, and unprincipled, and was saved from disaster only by the sensible exercise of discretion by prosecutors and judges."[5]

Just as the Uniform Commercial Code attempted to inject uniformity into contract law, so did the Model Penal Code (MPC) attempt to provide states with a guide for the codification and rationalization of criminal law. First published in 1962, the MPC has been adopted, in whole or in part, in many states and has had an impact on the criminal law in many more.[6] Even many states that chose not to follow the MPC's suggestions have moved to codify and rationalize their criminal law; the publication of the MPC sparked a wave of criminal law codification in the country. Judges in states that have not adopted the MPC will still often refer to it as persuasive authority.

At the federal level, the Congress has generally proceeded by passing limited criminal statutes in response to perceived needs. There have been several attempts but no sustained effort to produce a federal criminal code. For some observers, the lack of a coherent code is a major shortcoming: "A clear, comprehensive body of criminal law, defining the boundaries of tolerable relationships among citizens, is a prerequisite to liberty in part because it is a prerequisite to public respect for law."[7] One scholar has argued that Congress has passed vague federal criminal statutes that must be interpreted extensively by judges and thus, in effect, created a federal criminal common law.[8]

In recent years, the codification trend in the criminal law has extended to the sentencing process, long an area of discretion for judges. At the federal level, sentencing guidelines have been passed which provide judges with a matrix for determining the appropriate punishments in criminal cases. The idea of many reformers who supported the Federal Sentencing guidelines was that it would limit the discretion of judges and ultimately reduce prison sentences. As public fear of crime rose, however, the guidelines at times have had the effect of requiring judges to impose what sometimes seemed to be draconian punishments.

Interestingly, the area of constitutional criminal procedure -governed by a complex web of Supreme Court decisions- is one area that still appears to be defined and to develop in a manner akin to the common law. While the Supreme Court is interpreting the Constitution in laying down criminal procedure guidelines, much of constitutional criminal procedure is in essence judge-made law. The famous "Miranda warnings" that

---

[5] Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 Calif. L. Rev. 943 (1999).
[6] See, e.g., Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 Buff. Crim. L. R. 45 (1998).
[7] Gainer, *Federal Criminal Code Reform*.
[8] Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 Sup. Ct. Rev. 345.

must be read to every criminal defendant are the product not of a statute (indeed Congress expressed its opposition to the Miranda requirements) but of a Supreme Court decision interpreting the Constitution.

Common Law Judges in a Changed World

It is clear then that in recent decades the trend toward codification in U.S. law has accelerated. While common law techniques are still alive and well, both federal and state law are increasingly statutory. One state court judge recently described the modern American system this way:

> Yet despite the continued vitality of the common law, it is clear that "common law judging" now takes place in a "world of statutes." In my court, like other state courts, the ratio of strictly common-law cases unquestionably has declined, and even in traditional common-law fields like torts, contracts, and property we often confront statutes that affect our decision making. This ubiquitous web of statutes, combined with more political concerns about "judicial activism," may in fact have caused state judges to feel that our role as common-law judges, cautiously and creatively developing the law in ways appropriate to a changing society, has been circumscribed.[9]

The movement of the U.S. legal system in the direction of the civil law has important implications for how judges carry out their duties. The common law historically has given judges the important role of adapting the law to the changing needs of society. A civil-law conception of the judge's role would be much more limited-the interpretation of codes and statutes. The debate as to the proper role of judges is playing out now at the highest levels of the U.S. political system. Conservative politicians tend to argue that liberal judges are "creating law" rather than interpreting it. Others skeptical of this viewpoint argue that judges have no choice but to interpret statutes, which inevitably leave gaps and contain ambiguities, and in this process there can be no avoiding the role of the judge.

The increasing importance of interpreting statutes has given new prominence to old debates about exactly what tools judges should use in that endeavor. One Supreme Court Justice, Antonin Scalia, has waged a campaign against the technique of interpreting based on the legislative history of statutes (the reports, hearings and debate that preceded passage of a statute). For Scalia, excessive use of the legislative history allows judges to find interpretations of statutes that the text itself does not support. His arguments have had an impact on the Supreme Court, the decisions of which tend to cite legislative history less frequently than in the past.

---

[9] Judith S. Kaye, "*Common Law Courts Reading Statutes and Constitutions*" 70 N.Y.U.L. Rev. 1 (1995).

At a broader level, the tension between common law and civil law approaches raises important questions about the advantages and disadvantages of allowing the law to evolve gradually through the judiciary. Some historians and political philosophers have argued that the evolutionary nature of the common law has been an important element in the economic vitality and social cohesion of the countries that use it. Certain legal academics have argued that the common law has been surprisingly efficient from an economic perspective, while others believe statutory schemes can be far more rational and efficient. As the evolution of U.S. law proceeds, these debates will continue and intensify.