

# The Challenge of Codification in English Legal History

June 12, 2009

■ Speaker: **David Lieberman**

Jefferson E. Peyser Professor of Law,  
University of California, Berkeley, School of Law



**The effort to codify areas of British and European law has gained new urgency under the efforts towards legal unification in Europe. Professor Lieberman at UC Berkeley made a presentation at RIETI on English legal history during the 17<sup>th</sup>-19<sup>th</sup> centuries to explore earlier proposals for the codification of law. In trying to explain the failures of previous attempts to codify England's law, Dr. Lieberman pointed out the importance of political obstacles rather than purely legal considerations.**

English law has always been divided into two principal component parts: common law or “lex non scripta” (unwritten law) and statute law or “lex scripta” (written law). The former comprised the legal “custom” of the kingdom, which had been refined and adapted over the centuries under the professional leadership of the common law courts. The latter was the legislation enacted by the sovereign authority of Parliament.

Common law and statute law were conceived as two distinct and separate branches of the legal system even though jurists observed many important ways in which their histories and functions were intertwined. Such a benign vision of the relationship between common law and statute was all but submerged by a professional orthodoxy that celebrated the achievements of the common law by measuring them against the failures of statute.

The case for common law's primacy drew in part upon the blunt reality that most of the leading parts of England's law, such as the rules and doctrines governing property and

obligations, were plainly the handiwork of the common law courts and not the sovereign legislature. The principal claims concerned the qualitative superiority of the common law. In contrast, the episodic record of legislative enactments had produced a large, confused and often redundant body of statute law. The case against the statute law operated on many levels, though the core presumption was that common law would continue to supply the basic form of law for England in the future.

The program for legislative reform favored by English jurists like Francis Bacon, frequently termed “statute consolidation,” followed directly from this diagnosis of the strengths of common law and the defects of statute law. Legislative consolidation addressed the legal uncertainty created by verbose and disorganized legal sources. Bacon's statute consolidation program constituted an expressly restricted exercise in legislative reform where the scheme's primary objective concerned the verbal expression and organization of English legislation. The scheme was not to be used as a vehicle for transforming unwritten common law into Parliamentary statute. He dismissed the latter approach as a “perilous innovation” that threatened the law's greatest strengths.

Over the course of the 19<sup>th</sup> century, major structural changes were made to the organization of English courts and to common law process through the vehicle of parliamentary legislation. The future Lord Chancellor Henry Brougham's six-hour speech on law reform to the House of Commons in February 1828 provided a convenient marker for the new ambition and publicity that attended the issue. Only a

few years earlier Home Secretary Robert Peel had secured legislation to repeal and modify many of the most extreme examples of excessive penal severity in the statute book, thereby realizing a reform objective that had been agitated in Parliament since the 1810s.

The remarkable survival of the native tradition of “statute consolidation” had as much to do with British politics as with historical continuities. For its opponents, codification was reinforced as a radical and foreign reform program at odds with the traditions of English jurisprudence. In contrast, “statute consolidation” offered a way to embrace legislative reform that acknowledged the need to order and compress the statute law while shielding the common law from parliamentary interference.

By the early decades of the 19<sup>th</sup> century, Britain had acquired its own native voice for systematic legislative codification in the jurisprudence of Jeremy Bentham. In explicit contrast to the conventional project of statute consolidation, Bentham’s code was designed to reform both the content as well as the form of the law, and to codify the entire legal order, thereby turning common law into legislation. The lawyers and judges zealously defended common law because the complexity of customary law, its arcane terms and cumbersome procedures, all served professional power and self-interest. The untrained community at large could never acquire satisfactory knowledge of an unwritten law and therefore was left to the mercy of lawyers and judges to discover what the law demanded.

By the 1820s, Bentham had become an ardent and controversial advocate of radical democratic reform. In his reform writings of this period, he linked codification to the project of fundamental democratic transformation of the social and political order. The uncodified common law, he argued at the time, figured as but one institutional element in a system of corruption in which hereditary and professional elites advanced their “sinister interests” through institutions and practices that frustrated the welfare of the general community.

The complex political and institutional considerations attending English law reform can be illustrated in the fates of two different 19<sup>th</sup> century efforts at criminal law reform. The more ambitious of the two was the 1833 Royal Commission on the Criminal Law., which operated for over a decade and produced eight voluminous Reports. Whereas the First Report of 1834 emphatically endorsed the codification goal to unify existing common and statute law into a single legislative enactment, the Seventh Report in 1843 revised this initial priority, emphasizing the greater coherence and sophistication of the common law treatment of crime compared with the statute law, and the need in

any legislation to preserve the superior achievements of the common law.

The second example of criminal law reform was the slightly earlier legislative efforts from 1826-1830, when Parliament enacted a series of Criminal Law Amendment Acts. The legislation moderated the capital sanctions created by previous statutes for many property offenses and achieved significant consolidation of the statute law. Home Secretary Robert Peel made the case for this critical “consolidation of the criminal laws” in a lengthy Parliamentary address in 1826 in which he invoked the testimony of Francis Bacon and emphasized the restrictive features of the proposed reform.

In summary, it is safe to say that legislative reform in England was never solely the story of the failure of one important legislative program: codification. It was additionally the story of the successful realization of an alternative, older and more limited legislative project: statute consolidation.

## Question & Answer Session

- **Q.** Japan has introduced a jury system as of April 2009. What is your feeling on this development? The Japanese system is based on the U.S. version, which uses a common law system.
- **A.** It is a difficult question because the “jury system” contains so many elements. Historically, there has been a succession of jury systems. Before the late 18<sup>th</sup> century, English jury trials in criminal cases were very rapid and (by modern standards) quite informal. One jury would deliberate over two to three days and decide dozens of cases. The common law jury was part of a larger system that relied on many unpaid and legally untrained officials —jurors as well as justices of the peace, constables, coroners, and so on.

The major change in the creation of the modern criminal jury trial is the dominance of the proceedings by professional counsel and the importance of the law of evidence and burden of proof. This version of the jury trial can require extreme amounts of time for individual cases. The wealth of the parties and the amount of resources and legal expertise they can bring to a case has a powerful impact on its outcome.

When it comes to the introduction of the jury systems in Japan and elsewhere, I feel the juries themselves are not the issue. The issue is whether the change in procedure will lead to extremely lengthy and lawyer-dominated trials, in which the relative wealth of the parties has a powerful impact on the outcome of disputes.