Codification and the Common Law

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Abstract

This article examines the relationship between codification and the common law. The author sets out codification experiences within the USA, UK and Israel to show the opportunities and limitations of codification in the common law world. The author concludes that codification and common law are not *per se* incompatible and could result in effective and creative law-making.

A. Introduction

This paper examines the relationship between codification and the common law. Is codification truly anathema to the common law mind?[1] Or are there opportunities for successful co-existence?

I will seek answers to these questions against the backdrop of codification experiences in common law jurisdictions, with a particular focus on the United Kingdom (UK) and the United States of America (US), and the mixed jurisdiction of Israel. These case studies offer valuable lessons about the opportunities and limitations of codification in the common law world.

My thesis is that modern ideas of codification are not incompatible with the methodology or the substance of the common law. Indeed, as the national case studies will demonstrate, the two ideas together offer the potential for effective and creative law-making, bearing out Lord Wilberforce's prediction that "codification intelligently done could revive the spirit of the common law."[2]

To place this issue in context, section B of this paper will discuss the relevance and implications of codification in contemporary common law jurisdictions, define some key terms, and describe the apparent obstacles to codification within the Anglo-American legal system. Section C will outline the details of actual codification experiences within common law and mixed common law-civil law systems. And section D will explore how the obstacles to codification have influenced codifying efforts, and what techniques have been used to overcome them or attenuate their effect.

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1 As described by P. LeGrand, *A Diabolical Idea*, *in* A .S. HartKamp *et al.* (Eds.), Towards a European Civil Code 245 (2004).

2 During the debates on the Law Reform Commissions Act 1965: H.L.Deb. Vol. 264, columns 1175, 1176.

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B. The Issue in Context

I. The Relevance of Codification

The idea of codification has appealed to law reformers and legal theorists in the common law world for centuries. In as early as the 16th century, English jurists sought to formulate an authoritative statement of the law which would reconcile conflicting case law and discard obsolete sources.[3] And the idea has been taken up in various forms ever since.

Ideas of codification continue to resonate in modern common law thinking. A review of academic literature from the past 2 years reveals calls for codification in such diverse areas of English law as bailment, judicial review, commercial law, evidence and criminal law.[4] The possibilities of codification are very much a modern concern.

Codification is also significant as the principal tool for law reform. Section 3 of the *Law Commissions Act 1965* recognizes the special role of codification as a reforming mechanism.[5] The potential and limitations of codification within the Anglo-American tradition are therefore directly related to the quality and scope of law reform activities in common law jurisdictions.

Moreover, codification is frequently invoked in the debate over European legal harmonization.[6] And although a European Civil Code may be a long way off[7], the dynamics of codification within the common law system highlight some of the differences between the two principal European legal traditions. And a better understanding of these differences may lead to more balanced efforts at integration in the future.

Common law legislators have also been urged to study the potential of codification as a means of influencing the development of regional and international law. With its disparate nature, the common law may be unfit for export. By failing to explore the possibilities of codification, common law jurisdictions could be missing an opportunity to make meaningful contributions to global legal development.[8]

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3 J. H. Baker, An Introduction to English Legal History 217 (2002).

4 Examples include: P. Omar, *Lessons from French Experience: the Possibility of Commercial Law in the U.K.*, 7 ICCLR 235 (2007); G. McBain, *Modernizing and Codifying the Law of Bailment*, 1 Journal of Business Law 1 (2008); and R. Toulson, *Forty Years On: What Progress in Delivering Accessible and Principled Criminal Law*, 27 Stat. L.R. 61 (2006).

5 The Law Commissions Act 1965, s. 3 describes the duty of the Law Commissions to review the law with a view to its systematic development and reform, including in particular the codification of the law.

6 For example, *in* R. van Caeregem, Europe in the Past and Future (2002), at 39, the author argues that the most significant distinction between the common law and the civil law is the absence of a code. By contrast, O. Kahn-Freund, *Common Law and Civil Law Imaginary and Real Obstacles to Assimilation, in* M. Cappelletti (Ed.), New Perspective for a Common Law of Europe 137 (1978), the author suggests that codification is irrelevant to assimilation.

7 H. Beale, *European Civil Code Movement and the EU Common Frame of Reference*, 6 LIM 4.

8 Omar, *supra* note 4; and R. Goode, *Removing the Obstacles to Commercial Law Reform*, 123 LQR 123 (2007).

Codification has even been described as a human rights issue, particularly in light of a body of decisions of the European Court of Human Rights recognizing a right to clarity and accessibility in the law.[9] In the same vein, codification may have an important role in enhancing the rule of law.[10]

Given these considerations, a better understanding of codification's prospects within the common law tradition is vital. But before turning to an evaluation of those prospects, it will be useful to define some key terms that appear in this paper.

II. Definitions

1. Common Law

The term 'common law' has several meanings. Generally, it describes the system of law developed first in England and transplanted to her colonies. In this sense the expression is often used synonymously with the term "Anglo-American" law.

The common law is characterized by its incremental approach to the formulation of rules. Judges make decisions by analogizing from previous cases, and legal norms and principles emerge slowly from an accumulation of decisions. 'Common law' is therefore also used synonymously with the term 'judge-made' law, as distinct from statute law.

Depending on the context, this paper will use the term "'common law' both as a descriptor of the system of law prevalent in the UK, the US and many former British colonies, and in the sense of being primarily judge-made law.

Although the Anglo-American system clearly has a place for both judge-made law and statute law, it is the relative importance of these two legal sources in the common law tradition that distinguishes it from other legal families. Common lawyers view judge-made law as the primary source of law. Statutes are derogations from judge-made law and are therefore to be drafted in detail and strictly construed. Interpreters will look to judge-made law unless a statute specifically and expressly provides the answer to an interpretive problem.[11]

This feature of the Anglo-American tradition is critical to an understanding of the relationship between the code, a form of statute, and the underlying judge-made law.

2. Codification

The definition of codification bears significantly on the analysis in this paper. At its broadest, codification signifies the act of recording an idea or rule in writing.

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[9] E. Steiner, *Codification in England: The Need to Move from an Ideological to a Functional Approach*, 25 Stat. L. Rev. 209 (2004).

[10] R. Goode, *Codification of Commercial Law,* 14 Monash U.L.Rev. 135 (1988).

[11] B. Donald, *Codification in Common Law Systems,* 47 Australian Law Journal 160 (1973).

Such an expansive definition would encompass all legal writing, and render meaningless a discussion about the compatibility of codification and the common law.

Codification is not a term of art in the common law vocabulary. The Oxford Dictionary defines a code as a set of systematic rules on a particular subject.[12] Academics in this field offer a multitude of definitions which reflect a common agreement that a code is an enacted, organized statement of law in a particular field. But they offer no consensus as to the drafting style, level of comprehensiveness or exclusivity required to make an instrument a code.

Moreover, there is great diversity in the types of legal instruments that are labelled codes. These range from consolidations which do no more than gather existing statutes in one instrument, to enactments that purport to be comprehensive and exclusive statements of the law superseding all pre-existing law.

The *French Civil Code* of 1804 is an important example of codification. This Code was intended as a comprehensive and exclusive set of principles governing the entire field of civil law. It was drafted in simple and concise terms and organized around concepts rather than specific rules.[13] Perhaps because it was among the first modern codifying instruments, the *French Civil Code* is often advanced as the prototype of codification.

But this belies the great diversity of codes that exists even within the civilian tradition, and it would greatly oversimplify the exercise to label as codes only those instruments that match the *French Civil Code* in content and style.

For the purpose of this paper, a code is defined as an instrument enacted by the legislature which forms the principal source of law on a particular topic. It aims to codify all leading rules derived from both judge-made and statutory law in a particular field. And codification is the process of drafting and enacting such an instrument.

A code by this definition is distinct from an ordinary statute because it is designed to be a comprehensive and coherent presentation of the law. Thus it has an organizing and indexing role that an ordinary statute does not share. A code is also intended to provide a framework for the law's development into the future, and is not a temporary legislative measure.

This proposed definition assembles the features of codification about which there is most agreement in the academic literature, and is sufficiently broad to capture a wide range of instruments, while excluding ordinary statutes.

Although it is not the direct purpose of this paper to evaluate the merits of codification, a complete understanding of the term requires an appreciation of its principal aims and perceived drawbacks.

For proponents of codification, a code is an instrument that provides structure and coherence to the law where before there was a chaos of conflicting, inaccessible

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[12] The Concise Oxford Dictionary (8th ed) (1990) defines a 'code' as a "systematic collection of statutes, a body of laws so arranged as to avoid inconsistency and overlapping; a set of rules on any subject …"

[13] Steiner, *supra* note 9.

norms set out in judge-made law and piece-meal legislation. Overall, those in favour of codification emphasize its potential for improving the accessibility of the law.[14]

For the opponents of codification, a code is an inflexible instrument that stifles or distorts legal development.[15]

With these considerations in mind, this paper defines a successful code as an instrument that permits organic legal development while also achieving its codifying objectives, whether those are accessibility, harmonization or law reform.

III. Obstacles to Codification

Those opposed to codification argue that its requirements are incompatible with several important features of the common law system. The perceived obstacles to codification in common law jurisdictions will be described under 3 broad categories: methodological obstacles; substantive obstacles; and practical obstacles.

1. Methodological Obstacles

The most familiar argument against codification in common law jurisdictions is that the methodology of the Anglo-American tradition is incompatible with the demands of codification.

In the past, this argument has often centred on the contrast between the common law's detailed legislative drafting and strict statutory construction and the generalized, purposive approach of the codified civilian jurisdictions. The gist of this argument is that the application of common law methods to the drafting and interpretation of a code would inevitably arrest law's development.[16]

Most contemporary commentary, however, notes that these differences in methodology are not as pronounced as they were once thought to be, and have begun to collapse further still.[17]

The more significant methodological concern is the potential of codification to disrupt the traditional hierarchy of legal sources in common law reasoning. This arguably goes beyond mechanical differences in methodology and speaks to a fundamentally different conception of the law.

The difficulty arises in cases where the code's text does not provide the answers to a dispute arising within its field of operation. The traditional common law approach in such instances is to search for the answer in the underlying judge-made law.

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[14] E. Clive, *Thoughts from a Scottish Perspective on the Bicentenary of the French Civil Code*, 8 Edin. L.R. 415 (2004).

[15] A. Forte, *If It Ain't Broke, Don't Fix It: On Not Codifying the Commercial Law*, *in* H. MacQueen (Ed.), Scots Law in the 21st Century 92 (1996).

[16] H. Hahlo, *Here Lies the Common Law*, 30 M.L.R 211 (1967).

[17] J. Beatson, *Common Law, Statute Law and Constitutional Law*, 27 Stat. L.Rev. 1 (2006).

But in order for a code to retain its primacy as a source of law, interpreters should look for answers within the code's text. Recourse to the underlying case-law would quickly result in judge-made law overtaking the code as the principal legal source, undermining many beneficial effects of codification.

This fundamental interpretive problem has been described as the principal obstacle to codification within the common law tradition.[18]

In civilian methodology, the technique of reasoning by analogy from the code's text offers one solution to this problem. Thus, a court will apply principles derived from the text to a case falling outside of the code's purview. The code remains the primary source of law even in instances where its text does not specifically address the circumstances before the court.[19]

But in common law jurisdictions, the orthodox view of statute as derogating from judge-made law precludes reasoning by analogy from the statutory text. In the Anglo-American tradition, legislation is not conceived as a source of guiding principles that can be applied outside the purview of the text.[20]

And although purposive interpretation has become the norm, its aim is solely to give effect to the legislator's purpose in enacting the code. It does not alter the fundamental Anglo-American conception of the primacy of judge-made law.

There are related concerns that reasoning by analogy from the statute compromises the doctrine of legislative supremacy. Using statutes to produce results that were not intended or addressed by the legislator may confer unacceptable law-making authority on the judge.[21]

Thus the main methodological hurdle to codification within the common law tradition is finding effective and acceptable ways to preserve the code's relevance in a system dominated by case-law.

2. Substantive Obstacles

The substantive obstacles focus on the difficulty of codifying principles and norms derived from judge-made law, and on the rigidifying effect of codification.

In brief, the argument is that the imposition of a code's logical analytical structure on the complexity of judge-made legal norms will distort the substantive law and impede legal development, regardless of what methodological techniques are adopted.[22]

In this context, commentators have compared the process of codification to an attempted map of an ever-changing landscape.[23]

In the context of this argument, the complexity of judge-made legal norms is deemed to derive from two related characteristics of the common law.

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[18] A. E. Anton, *Obstacles to Codification*, 15 Jurid. L. Rev. 27 (1982).

[19] K. Helmholz, *Continental Law and Common Law: Historical Strangers or Companions?*, 40 Duke L.J. 1207 (1990).

[20] G. Letourneau & S. Cohen, *Codification and Law Reform: Some Lessons from the Canadian Experience*, 10 Stat. L.Rev. 183 (1989).

[21] P. Atiyah, *Common Law and Statute Law*, 48 M.L.R. 1 (1985).

[22] P. LeGrand, *Strange Power of Words: Codification Situated*, 9 Tulane European and Civil Law Forum 213 (1994).

[23] G. Samuel, *Can the Common Law Be Mapped?*, 55 UTLJ 272, at 288 (2005).

The first is the intimate relationship between substance and methodology in the Anglo-American tradition.[24] Substantive judge-made norms are elaborated and given effect through the common law method of analogizing from cases. Substance and form are intimately connected in this system and they arguably cannot be explained or understood independently.[25]

The second characteristic follows from the first: the dynamic interaction of method and substance results in a continual shifting and re-shifting of substantive norms.

Similar arguments have recently been made in the context of the academic debate over a proposed taxonomy of English private law.[26] Critics of the proposed scheme argue that categories of substantive law display significant overlap and that the doctrinal foundation that notionally separates individual fields is continually evolving. By way of example, they remind us that *Donoghue v. Stevenson*[27] began as a contract case and resulted in the creation of the modern tort of negligence.[28]

The taxonomy debate also raises questions about what descriptive elements should appropriately form the basis for a manageable system of classification. Judge-made norms evolve from individual decisions, each one of which is influenced by a multitude of factors including legal rights, equitable principles, remedies and facts. Selecting one descriptor as the basis for classification necessarily excludes others, emphasizing only one aspect of a fluid and multifaceted system.[29]

A similar point could be made of the codifying process which necessarily involves setting the boundaries on a doctrinal field and imposing a logical structure on a fluid set of norms. And these concerns are all the more significant in the context of codification, which has a prescriptive and normative force that the proposed legal taxonomy does not.

In sum, the argument is that a code distorts the true nature of fluid substantive judge-made law by fitting it uneasily within a fixed logical structure. And worse, the structure itself imposes a pre-ordained logic onto the reasoning process, thereby impeding an organic, dynamic development of the law.[30]

3. Practical Obstacles

Quite apart from theoretical considerations, commentators have also identified important practical obstacles to codification.

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[24] Hahlo, *supra* note 16, at 217: "… substance and form go together … once the common law is codified it will cease to be the common law, not only in form but in substance."

[25] S. Waddams, Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning (2003).

[26] P. Birks (Ed.), The Classification of Obligations (1997) wherein the authors propose a categorization of private judge-made law into contract, tort, unjust enrichment/restitution and other causative events.

[27] [1932] A.C. 562

[28] Samuel, *supra* note 23.

[29] J. Dietrich, *What is Lawyering? The Challenge of Taxonomy*, 65 CLJ 549 (2006).

[30] R. Van Caraegem, The Birth of the English Common Law 89 (1973): "the tradition of case law and empiricism makes very poor soil for codification …"

The most significant of these is the argument that legislative procedures in all systems of representative government, whether parliamentary or presidential, are ill-suited to the enactment of major codifying legislation.[31]

The first practical hurdle to codification is finding space on the legislative agenda. Parliamentary time is scarce and legislation must be prioritized. Not only is law reform through codification unlikely to attract voters' attention, but the legal profession is famously opposed to the idea of codification. In the face of indifference and hostility, legislators are often unwilling to make time for major codifying legislation.[32]

Once the codifying legislation is before the legislature, there is the further problem of facilitating its passage through the intricate and rigorous legislative process. Time constraints alone would likely prevent Parliament from considering a major comprehensive codifying instrument in one sitting, not to mention the many political factors which could impede a code's progress.

Moreover, the legislative process itself risks compromising important features of the code. Clause-by-clause scrutiny and amendments inevitably undermine the integrity and coherence of a codifying instrument.[33]

The legislative process might also have a chilling effect on codification as a vehicle of law reform, as codifiers are tempted to leave out substantive and worthwhile changes simply to facilitate enactment.[34]

C. Examples of Codification in Common Law and Mixed Jurisdictions

This part of the paper will examine the experience of codification in common law and mixed jurisdictions with a view to evaluating how the obstacles identified in section B play out in practice, and what methods are effective at overcoming them.

The particular focus of this paper will be on the experiences of the UK and the US, and on the mixed jurisdiction of Israel.

The UK and the US are the largest and most influential of common law jurisdictions and they offer the opportunity to evaluate the fate of codification in both a parliamentary non-constitutional system of government, and in a presidential constitutional environment. Yet they are sufficiently similar in legal

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[31] S. Hedley, *How has the Common Law Survived the 20th Century?*, 50 NILQ 283, at 293 (1999).

[32] P. Roberts, *Philosophy, Feinberg, Codification and Consent: A Progress Report on English Experiences of Law Reform*, 5 Buffalo L.Rev. 173 (2002).

[33] For a description of the negative effects of legislative process on codification in a mixed jurisdiction *see* A. N. Yiannopoulos, *Requiem for a Civil Code*, 78 Tulane L. Rev. 379 (2002-2003).

[34] F. Bennion, *Codification of the Criminal Law Part 2: The Technique of Codification*, 1986 Crim. L.R. 295, at 300: "Those with practical experience of our legislative process know full well that if there is to be any hope of enacting a code … no amendments of substance are to be contained in the Bill."

culture that their collective experience permits some general conclusions about codification and the common law.[35]

I. Codification in the United Kingdom

The first legislative instruments to qualify as codes in the UK were enacted at the end of the 19th century.

The *Bills of Exchange Act 1882*, the *Sale of Goods Act 1893* and the *Marine Insurance Act 1906* are the only pieces of UK legislation to contain the word codify in their long titles.[36] They were drafted in response to widespread concerns that commercial law had become inaccessible, with the volume and diversity of legal sources needlessly complicating both commercial and legal practice.

In their style, these Acts are closer to a common law statute than to a code of the continental type. They do not purport to be exclusive sources of law, expressly preserving the application of common law rules in their savings clauses.[37]

But their scope and objectives are codifying in the sense that they restate judge-made law in comprehensive terms and specifically over-rule parts of the common law that had become obsolete.

These codes transformed English commercial law, which was previously governed by judicial precedent.[38] Moreover they have had a permanent influence, providing a workable framework for the development of commercial law for over a century.[39] It is significant that these codes' provisions have directly formed the basis for modern re-statements, attesting to their lasting value.[40]

Perhaps most interesting is the judiciary's reaction to these codifying statutes. Early on, the courts showed a willingness to treat codifying legislation differently from ordinary statutes. [41]

The classic pronouncement is that of Lord Herschell in *Vagliano v. The Bank of England*:[42] "The proper course is to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any consideration derived from the previous state of the law."

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35 Codification was used extensively in the process of British colonization in the 19th century, to the extent that some commentators refer to India as a codified common law jurisdiction: *see* Bennion, *supra* note 34. This paper will not explore the colonial codes in depth because their unique context makes it difficult to draw from them any legitimate conclusions about codification in the contemporary common law world.

36 M. Arden, *Time for an English Commercial Code?*, 56 Cambridge L J 516 (1997).

37 For example, s. 61(2) of the Sale of Goods Act 1893, c.71 provides: "The rules of the common law save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts for the sale of goods."

38 Arden, *supra* note 36.

39 Arden, *supra* note 36.

40 For example, the Sale of Goods Act 1979 is substantially a reproduction of the Sale of Goods Act, 1893, *see* Goode, *supra* note 8

41 L. J. Scarman, *Codification and Judge-Made Law: A Problem of Co-existence*, 42 Indiana Law Journal 355, at 360 (1966).

42 [1891] A.C. 107, at 144.

This approach signals a departure from the classic common law theory of statutory interpretation, although it by no means recognizes the codes as the exclusive sources of commercial law.

1. The Arbitration Act 1996

The first contemporary UK codification occurred with the enactment of the *Arbitration Act 1996*. Its drafters intended the Act to be a clear, logical exposition of the main principles of the English law of arbitration. It restated and reconciled principles and rules found in statute and judge-made law, and attempted to clarify issues that were previously so deeply embedded in English case-law that they were effectively unknown.[43]

Fashioned to some degree after the UNCITRAL Model Law,[44] the Act is a code in both style and content. It restates nearly all the important principles derived from statute and judge-made law, leaving out only provisions relating to confidentiality which were deemed too unsettled to be codified.[45]

The Act exhibits some novel drafting techniques including a statement of purpose, a provision prescribing a purposive interpretation, extensive guidelines to assist in the exercise of arbitral discretion and parenthetical cross references to other sections of the Act.[46]

Although the Act is silent as to its relationship to pre-existing legal sources, its drafting team hoped that practitioners would consider the Act to be a fresh start and would have no need to refer to case-law.[47]

And the judiciary has followed the drafters' lead in this regard.

In *Lesotho Highlands Development Authority v. Impregilo Spa and others*[48] the House of Lords specifically rejected the notion of relying on pre-existing case law in the Act's interpretation. The decision expressly states that the statute is the principal source of law and that its overall purpose and scheme should form the basis for the interpretation of its provisions.

The Act is also noteworthy for its drafting process which, at that time, involved the most comprehensive professional and public consultation for any bill of its kind. The process included not only extensive consultation with interested parties, but also involved the judiciary and senior members of the bar in the drafting exercise.[49]

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43 L.J. Saville, *The Arbitration Act 1996: What We have Tried to Accomplish*, 13 Construction Law Journal 410 (1997)

44 UNCITRAL Model Law on International Commercial Arbitration (1985), www.uncitral.org.

45 Saville, *supra* note 43.

46 For a complete discussion of the drafting techniques employed in the Act, *see* A. Samuels, *How to do it Properly: the Arbitration Act 1996*, 18 Stat .L.Rev. 58 (1997).

47 F. Davidson, *The New Arbitration Act: A Model Law?*, 1 J.B.L. 101 (1997).

48 [2006] 1 AC 221

49 J. Gill, *Statutory Construction: the Arbitration Act 1996, Halki Shipping v. Sopex Oils Ltd.*, 2 International Arbitration Law Review 94 (1998).

The Act has been hailed as "an exceptionally good Bill"[50] and a "masterful piece of drafting and scholarship."[51] And it has significantly enhanced London's attractiveness as a centre for national and international arbitration, which was one of its express purposes.[52]

2. The Tax Law Rewrite

The legislative results of the UK's Tax Law Rewrite project also display some important features of codification.

In response to widespread frustration over the complexity of tax legislation, the Tax Law Rewrite project was initiated in 1995 with the goal of rewriting direct tax primary legislation in more clear and simple language. The scope of these rewrites was to exceed mere consolidation, which was not considered a sufficient tool to address the complexity of the tax law, but to fall short of major substantive revision of fiscal policy.[53]

The legislature has passed a series of discrete rewritten Acts in such areas as capital allowance, earnings and pension income, and the more comprehensive *Income Tax Act 2007*. In addition to consolidating and improving the form of the existing law, the new Acts codify principles derived from judicial decisions and extra-statutory concessions. The *Capital Allowances Act 2001*, for example, contained 66 minor changes in the substantive law.[54]

The Tax Law Rewrite legislation contains many significant elements of codification.

In their style, the Rewrite Acts are clearly aimed at improving the clarity and simplicity of tax legislation. They are drafted in plain language, use headings extensively and contain general overviews of the legislation and of specific parts.

They also go beyond consolidation, and attempt to recast all of the main rules governing the discrete areas of tax law in which they operate.[55]

The project is particularly remarkable for its pre-parliamentary process and for the special parliamentary procedures that have been devised for effective passage of the rewritten Bills.[56]

Inland Revenue is responsible for the project, which is conducted under the auspices of three related bodies: the project team, the consultative committee and the steering committee. These bodies all consist of public and private sector

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50 Davidson, *supra* note 47.

51 W. Park, *The Interaction of Courts and Arbitrators in England: the 1996 Act as a Model for the US?*, 1 Intl. Arb. L. Rev 54 (1998).

52 According to a report of the International Financial Services London City Business Series (January 2003), nearly 80% of all commercial international arbitrations worldwide were conducted in London in 2002: www. ifsl.org.uk.

53 D. Greenberg (Ed.), Craies on Legislation, (2004).

54 K.Gordon, The Chartered Institute of Taxation, *Tax Law Rewrite* (2002), available at www.tax.org.uk/showarticle (accessed 24 August 2008).

55 *Id.*

56 The process is described in detail in D. Salter, *Towards a Parliamentary Procedure for the Tax Law Rewrite*, 12 Stat. L.Rev. 65 (1998).

experts in tax policy and law, accounting and legislative drafting. Moreover there is wide public consultation, with multiple exposure drafts circulated for comment before the Bill is finalized. This system represents a novel, formalized pre-parliamentary consultative process.[57]

A joint committee of both houses review the Tax Law rewrite legislation, thereby avoiding clause-by-clause scrutiny and debates about wider tax policy issues.[58] Naturally, this process is premised on the expectation that the Tax Law Rewrite legislation will not introduce any significant reforms to the substantive law.

3. The Companies Act 2006

The most recent codification in UK law is the *Companies Act 2006*, which received royal assent in 2006 and came into force in October 2007. The motivation for the Act was a perceived need to modernize company law, which was largely based on 19th century foundations, and to keep pace with other jurisdictions.[59]

At 1600 sections and 8 schedules, the Act is the longest and most comprehensive statute in United Kingdom legislative history. In its scope and objectives, it is a code by any measure. Unlike previous Company Acts, it aims to set out all of the main principles and rules of company law derived from both statutory and judge-made sources.[60]

The final report of the Steering Committee for Company Law Review unequivocally describes the rationale for codification and the intention of the drafters:

> […] Reform has been left to piecemeal engineering. This has left us with a body of law which lacks coherence and does not respond to today's needs … the objective is to enact major reforming legislation … and to clarify and make company law more accessible.[61]

The section codifying directors' duties in sections 170 to 177 illustrates the drafters' approach. In broad principled language, the code sets out directors' duties which were previously found only in judge-made law. The Act also effects a dramatic change in the law, broadening the concept of shareholder profit to include values benefiting society at large.[62]

Sections 170 (3) and (4) of the Act appear to expressly preserve the significance of judge-made law in the Act's interpretation. Those sections direct the courts to have regard to corresponding common law rules and principles in the interpretation of the codified director's duties.

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57 Tax Law Review Committee, Parliamentary Procedures for the Enactment of Rewritten Tax Law, Institute of Fiscal Studies (1996).

58 Salter, *supra* note 56.

59 Steering Committee for Company Law Review, Modern Company Law for a Competitive Economy: Final Report (2001), ch. 12.

60 A. Keay, *Section 172(1) of the Companies Act 2006: an Interpretation and Assessment*, 28 Company Lawyer 106 (2007).

61 Steering Committee, *supra* note 59.

62 C. Nakajima, *Whither Enlightened Shareholder Value?*, 28 Comp.Law. 353 (2007).

It is too early to know what approach the courts will take to the interpretation of the *Companies Act 2006* in general, and to the provisions relating to directors' duties in particular.

But the parliamentary debates on the Act offer a clue to the legislators' intent in that regard. The debates reveal an expectation that the Act will be the primary source of law with respect to directors' duties. The legislative intention behind sections 170(3) and (4) is not so much to preserve the authority of judge-made law in relation to directors' duties, but to ensure that the statutory provisions develop in an integrated fashion with related areas of law.[63]

As in the case of the *Arbitration Act 1996*, the Act's drafting history is remarkable for the scale of involvement of business and the professions, not only in a consultative capacity but in the drafting process as well. [64]

4. Canada's Evidence Code

The dramatic failure of the Evidence Code of 1978 is one noteworthy case study from Canada's experience of codification.

The draft Evidence Code was the first product of Canada's, now defunct, Law Reform Commission, and was drafted in response to a general belief that the Canadian law of evidence was in need of reform.[65]

The Evidence Code was intended to be a comprehensive, systematic and exclusive statement of the major rules of evidence, expressed in general principle-styled language. It expressly prescribed a purposive interpretive approach. The Code's drafters did not contemplate a significant role for judge-made law in the interpretation of its provisions.[66]

The Code provoked a mixed reaction. The academic world considered it to be a legislative product of the highest quality, with Sir Rupert Cross describing it as "the best code of evidence in the common law world."[67]

By contrast, the Canadian bench and bar were overwhelmingly hostile, fearing that codification would eliminate the doctrine of precedent.[68]

Unlike the successful contemporary models of codification discussed above, the Evidence Code was drafted by a small team of legislative and subject matter

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[63] Lord Goldsmith, HL Debates, Column 244 (2006): "Although the duties have developed in a distinctive way, they are often manifestations of more general principles … it is intended to enable the courts to continue to have regard to the development in common law rules applying to these other types of fiduciary relationship."

[64] This process is described in detail in Goode, *supra* note 8.

[65] N. Brooks, *The Law Reform Commission of Canada Evidence Code*, 16 Osgoode Hall L.J. 241 (1978),

[66] N. Brooks, *The Common Law and the Evidence Code: Are They Compatible?*, 27 UNBLJ 27 (1978).

[67] As quoted in K. Chasse, *Canada's Evidence Code*, 2006 The Advocate, No. 3, at 14; and Letourneau, *supra* note 20.

[68] Chasse, *supra* note 67; Letourneau, *supra* note 20.

experts, without significant outside consultation. It was presented in a Report to Parliament that included no notations or references, adding to the confusion of its intended audience.[69]

The draft Code was introduced to parliament in 1978 but was abandoned one year later.

II. Codification in the United States

American legislative history offers an alternative view of codification in the common law world. Despite some early rudimentary codifying legislation and a political desire to break away from the legal system of the old world, American legal culture was firmly anchored in the English common law tradition by the 19th century.[70]

1. The Field Codes

The first real codes to appear in the US legal landscape outside of Louisiana were the Field Codes of the late 19th century, named for their drafter David Dudley Field. Deploring the confusion and proliferation of legal sources, Field drafted 5 comprehensive codes covering the wide doctrinal fields of procedure, civil law, penal law and public law.[71] They represent one of the few attempts to enact an instrument matching the breadth of the prototypical civilian code in the history of the common law.

In their style of drafting, these codes were a mid-way point between the civilian code and a common law statute. They were primarily intended to codify judge-made law, although Field's Civil Code introduced new legal terms and concepts borrowed from the civilian tradition.[72]

The most significant characteristic of the Field Codes was their complex theory of interpretation. The Codes did not aim to displace the common law entirely. Each had saving clauses preserving the principles of judge-made law unless specifically supplanted by the Code's text.

The Codes contained no express hierarchy of sources, and Field's own view of interpretation was permissive. In the event of an un-provided for case, Field contemplated one of three possibilities: the interpreter could reason by analogy from the code, resort to pre-existing common law rules and principles, or reach a decision on the basis of the principles of natural justice.[73]

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69 Letourneau, *supra* note 20.

70 A. von Mehren, *Some Reflections on Codification and Case Law in the Twenty-First Century*, 31 U.C. Davis L. Rev. 659 (1997-1998).

71 G. Weiss, *The Enchantment of Codification in the Common Law World*, 25 Yale J.Intl.L 435 (2000).

72 D. Morriss, *Codification and Right Answers*, 74 Chic-Kent L.Rev. 355 (1999).

73 M. Rosen, *What has Happened to the Common Law?*, 1994 Wis. L.R. 1129.

The Field Codes were not adopted in the eastern states where their opponents feared they would replace judge-made law. But in western jurisdictions, the Codes were viewed as a means of importing a well formed body of law that could be put to immediate use.[74]

The State of California adopted all of the Field Codes, but their fate in that jurisdiction is telling. The Codes' novel terminology and the ambiguity surrounding their proper interpretation led to the development of a judge-made rule that the Code provisions could not be interpreted and applied on their own. An interpreter was required to consult both the Code and the underlying common law in the decision-making process. Accordingly, the Codes lost their status as an authoritative source of law and did not significantly influence California's legal development.[75]

2. Contemporary Codes

In the last 60 years, partial codifications of discrete areas of law have become pervasive in the US. Most states now have evidence codes, procedural codes and penal codes, and the enactment of codifying statutes similar to the *Companies Act 2006* is ubiquitous.[76]

While displaying an assortment of drafting techniques, these instruments are closer in style to a common law statute than to the prototypical civilian code. But they are codifying in the sense that they aim to be a primary source for all of the main principles of law in their discrete fields.

Many US commentators refer to these instruments as perpetual index codes whose role is to refine and quality legal norms, and assemble them in concise form.[77]

The *Federal Rules of Evidence* is an example of modern US codification. The Rules were intended to assemble and present all of the principal judge-made rules of evidence. They were drafted using broad, generalized language and organized around 11 Articles, each one representing a subset of evidence law.[78]

The Rules do not expressly preserve the common law, and their first article specifically contemplates an interpretive approach based on analogy from the Rules.

The Rules govern proceedings in Federal Court, but they have been adopted in some form in more than 30 states. They have been subject to a variety of interpretive approaches, but are generally construed in light of their stated purpose which is to secure fairness and facilitate the search for the truth in the litigation process.

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74 Weiss, *supra* note 71.
75 Morriss, *supra* note 72.
76 Von Mehren, *supra* note 70.
77 G. Weissenberger, *Evidence Myopia*, 40 Wm & Mary L. Rev. 1547, at 1558 (1998-1999).
78 Rosen, *supra* note 73.

3. The Uniform Commercial Code

The instrument that offers the most scope for discussion in the American context is the *Uniform Commercial Code*. Described by some as "one of the finest pieces of lawmaking in the history of the common law world", this code merits closer inspection.[79]

The *Uniform Commercial Code* is a uniform law drafted under the joint sponsorship of the American Law Institute and the National Conference of Commissioners of Uniform State Laws. The Code is divided into 11 substantive articles with hundreds of sections and subsections within each article. Article 1 is in the nature of a general part and includes interpretive directions and definitions that are used throughout the Code. The articles govern a wide range of private commercial transactions.

The Code is drafted for enactment by state legislatures and all 50 states have now adopted the Code in some form. The original goal of the *Uniform Commercial Code* was to provide uniformity of commercial law across state lines and to clarify and improve the accessibility of commercial law.[80]

The Code shows a diversity of drafting approaches. Some provisions are famously concrete and detailed, while others are drafted in broad conceptual terms. There are grants of judicial discretion where appropriate, and a combination of permissive and mandatory provisions.[81]

Although the Code is often criticized for failing to replicate the cohesion and elegance of the prototypical civilian code, there is a discernible effort at organization.

Article 1-102 directs interpreters to adopt a purposive approach and invites judges to reason by analogy from the code. Article 1-103 specifically preserves the principles of law and equity as interpretive tools.

Read together, Articles 1-102 and 1-103 reflect some ambiguity as to the intended hierarchy of sources, and the relationship of the Code to the underlying common law. This has led to significant academic debate about whether the Code is secondary to judge-made law in the hierarchy of sources.[82]

Despite this apparent ambiguity, empirical evidence suggests that the Code is the sole source of law in over 50% of cases which interpret its provisions. And over 80% of decisions use the Code as the primary source, relying on case law only for clarification.[83]

The Code reflects a somewhat novel technique in its use of official commentaries which appear after many provisions. These commentaries are published with the

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79 Goode, *supra* note 10.

80 These characteristics of the Code are all described in Rosen, *supra* note 73 and Weiss, *supra* note 71.

81 S. Herman, *Llewellyn the Civilian: Speculations on the Contributions of Continental Experience to the Uniform Commercial Code*, 56 Tulane Law Review 1125 (1982).

82 S. Nickles, *Problems of Sources of Law Relationships under the Uniform Commercial Code*, 31 Arkansas Law Review 1 (1977).

83 Mark Rosen examined a random sample of 200 decisions interpreting provisions of the Uniform Commercial Code and described the results in his article cited at note 73. The statistics cited in this paper are derived from his work.

Code but are not enacted as law. The commentaries include references to case law and set out distinct and, occasionally, conflicting lines of reasoning with respect to particular provisions.[84]

The Code's influence on the development of commercial law in the US is renowned, and it is an important model for those seeking to codify commercial law in other common law jurisdictions.[85]

As with other successful common law codifications, the Code is the result of a broad consultative drafting process. Hundreds of practitioners and academics participated in the original drafting of the Code, and continue to be involved in its revision through a Permanent Editorial Board.[86]

III. Codification in Israel

As a mixed jurisdiction with a strong Anglo-American tradition, Israel's experiences of codification offer an interesting illustration of the dynamic relationship between codes and the common law.

Israel's unique background as a mixed jurisdiction is significant. Unlike most mixed common law-civil law jurisdictions, Israel did not begin as a civilian system with common law superimposed at a later date. Rather, it began life in 1948 as a predominantly common law jurisdiction, adopting civilian concepts and methods later in its history.[87] As such, its experience is particularly relevant to common law jurisdictions contemplating codification.

Starting in the 1960s, Israel began to systematically codify many aspects of its private law, with a view to eventually adopting a comprehensive civil code. Contract law was reduced to two principal statutes, one covering substantive rules of contract law, and the other governing contractual remedies. Judge-made principles of tort law were also codified in a comprehensive statute.[88]

This evolution towards a more civilian system may have flowed from the orientation of many of Israel's leading jurists, who had received their training in continental Europe.[89]

Israel's codification was motivated by a desire to free contract and tort from the intricacies of judge-made law. The statutes were codifying in style, treating

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[84] R. Hyland , *The American Experience: Restatements, the UCC, Uniform Laws and Transnational Experience*, *in* S. HartKamp *et al.* (Eds.), Towards a European Civil Code 59 (2004).

[85] For example, every Canadian province has adopted Article 9 of the Uniform Commercial Code, regarding security in personal property, in its entirety.

[86] The process is described in detail in S. Mentschikoff, *The UCC: An Experiment in Democracy*, 36 A.B.A.J. 419 (1950).

[87] S. Goldstein, *Chapter 8: Israel*, *in* V. Palmer, Mixed Jurisdictions Worldwide The Third Legal Family (2002).

[88] G. Shalev & Y. Adar, *The Law of Remedies in a Mixed Jurisdiction: The Israeli Experience*, 12(1) EJCL (2008).

[89] Goldstein, *supra* note 87.

each subject in a systematic and exhaustive manner, using short comprehensive provisions. Substantively, these statutes contain both common law and civil law provisions.[90]

Despite the codification of large tracts of private law, the prevailing Israeli legal methodology remains rooted in the Anglo-American tradition.[91]

The contract and tort codes set out a hierarchy of sources in their text, with primacy given to the code itself. The drafters' intention was that they should be interpreted without reliance on external sources.

And the courts adopted this method at the outset. But, in the words of one of Israel's leading jurists, "this interpretive approach began to seem rather formal."[92] It was replaced with a more eclectic approach which sees courts analogizing from the codes and from case-law, often in the same decision.

Even those Israeli jurists most closely associated with the codification movement recognize the role of case-law in offsetting inevitable defects in the law and bringing the code closer to the exigencies of real life.

And although the codes are by no means the sole source of law in private disputes, they are valued for their contribution to the organization and clarity of legal doctrine.

Jurists also highlight the flexibility of the codes, pointing out that the codified tort regime has adapted and recognized new duties of care, including the tort of negligent misstatement which was enunciated in Israeli courts a full decade before it appeared in English jurisprudence.[93]

In testament to their resiliency, the contract and tort codes form a starting point for the forthcoming comprehensive Israeli civil code which itself should offer new insight into the challenges and opportunities of codification.[94]

D. Analysis: Do the Obstacles Prevent Successful Codification?

Section B of this paper outlined a number of apparent obstacles to codification in common law jurisdictions. Section D of this paper will revisit these obstacles in light of real experiences of codification in both common law and mixed jurisdictions.

The objective is to evaluate the impact of the apparent obstacles to codification on real codifying experiences, discuss techniques to overcome these obstacles and draw some conclusions about both the potential and the limitations of codification in common law jurisdictions.

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90 Shalev, *supra* note 88.
91 Goldstein, *supra* note 87.
92 A. Barak, *The Codification of Civil Law and the Law of Torts*, 24 Isr. L.Rev. 629 (1990).
93 Barak, *supra* note 92.
94 Shalev, *supra* note 88.

I. Methodological Obstacles

Methodological arguments centre on the idea that Anglo-American methods are not suited to the requirements of codification.

But the case studies confirm that the stereotypical common law methods of detailed drafting and strict statutory interpretation are not significant obstacles to codification. Indeed, these methods are not present to any significant degree in modern common law codifications.

There is a variety of drafting styles present in all of the modern common law codes. This reflects a pragmatic approach to drafting which adapts the level of generalization of a particular provision to suit its objectives.[95] Moreover, common law jurisdictions have largely embraced a purposive approach to interpretation, together with an increasing reliance on extra-statutory materials to aid in the construction of codes.[96]

But the primacy of judge-made law in the Anglo-American hierarchy of sources does present a legitimate obstacle to codification in the common law tradition. The case studies confirm that methodological techniques must be devised to prevent case-law from overwhelming the code in this environment.

The fate of the Field Codes in California is a vivid illustration of the capacity of judge-made law to undermine the relevance of a code. And this is all the more challenging where, as is usually the case in common law codification, the code's text expressly preserves the ongoing significance of judge-made law.

The case studies reveal a range of possible responses to the challenge of defining the relationship between the code and judge-made law, and how the deployment of drafting and interpretive techniques can reinforce the significance of the code as a source of law.

1. Drafting Techniques

Drafting techniques have an important role in reinforcing the intended relationship between the code and the underlying judge-made law, and enhancing the code's centrality in the law-making process.

For example, provisions which specifically prescribe the proper interpretive approach serve to reinforce the code's relevance as a source of law. Such provisions are present in the *Arbitration Act 1996*, the US *Federal Rules of Evidence* and the *Uniform Commercial Code*. These instruments are not only a source for substantive norms, but also for the proper methodological approach to their interpretation. Thus there is no need to look outside of the text for guidance in interpretation.[97]

The nuanced drafting of the *Arbitration Act 1996* and the *Uniform Commercial Code* also enhance those instruments' importance in the law-making process. A combination of permissive and mandatory provisions provides a comprehensive frame of reference for all disputes falling within the codes' areas of operation.

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95 *See* the discussion in Scarman, *supra* note 41; and Brooks, *supra* note 66.

96 Goode, *supra* note 8

97 Herman, *supra* note 81

The mandatory provisions set normative limits, while the permissive provisions allow for flexibility at the level of details. The very flexibility of these schemes forecloses the need to look outside of the code.[98]

Likewise, both the *Arbitration Act 1996* and the *Uniform Commercial Code* demonstrate a degree of structural organization around principles and concepts, and use generalized language where appropriate. Both of these techniques help to ensure the primacy of the code as a legal source. The articulation of concepts and the breadth of language permit the codes to become a source of analogy for the interpreter, and allow for legal development within the purview of the code's text.

The use of official comments and guidelines in the *Arbitration Act 1996* and the *Uniform Commercial Code* also reinforce the centrality of those instruments. This technique places the code's provisions in a broader context, reducing the interpreter's need for recourse to the underlying judge-made law.[99]

2. Interpretive Techniques

Finding an interpretive approach that balances the relationship between judge-made law and the code is critical to successful codification.

A complete break with judge-made law is not a realistic option, as the experience of Canada's draft Evidence Code so vividly illustrates. The Canadian Code's drafters clearly intended to exclude the common law so far as possible, and this extreme approach was not acceptable to the profession or to the legislature.

Elaboration and application of the code through judicial decision-making is inevitable. Successful codification therefore depends on recognizing the significance of judge-made law, and, at the same time, preventing it from obscuring the advantages of the code.[100]

The case studies suggest that it is also critical to formulate and articulate a theory of interpretation in advance of the code's promulgation. A failure to do so allows interpreters to refer back to judge-made law at the first opportunity, as occurred with the Field Codes in California.[101]

In a more contemporary example, sections 170(3) and (4) of the *Companies Act 2006* are somewhat ambiguous as to the Act's relationship with the underlying common law. As a result, many commentators have suggested that uncertainties in the new law can only be resolved through an accumulation of judicial precedent.[102]

Israel's contract and tort codes, by contrast, clearly set out the intended hierarchy of sources in the law, emphasizing the primacy of the codes. Although

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98 Park, *supra* note 51.

99 J. McDonnell, *Purposive Interpretation of the UCC: Some Implications for Jurisprudence*, 126 U.Pa.L. Rev. 795 (1978).

100 S. J. Stoljar, *Codification and the Common Law*, *in* S. Stoljar (Ed.), Problems of Codification (1977)

101 Weiss, *supra* note 71.

102 *See* C. Nakajima, *Whither Enlightened Shareholder Value?*, 28 Comp. L. 353, at 354 (2007): "… until sufficient case law is available, debate and confusion are likely to continue in regard to the interpretation of the provisions relating to directors' duties."

this prescribed hierarchy is not strictly observed in practice, it may nevertheless reinforce the codes' relevance and contribute to their survival as significant sources of law.

The challenge for codifiers and interpreters is therefore to both devise and articulate an interpretive theory that achieves an effective balance between code and case-law.

The following section will examine the interpretive approaches which emerge from the case studies with reference to three related factors: the role of pre-code case law, the role of post-code case law; and the practice of analogizing from the code.

II. Pre-Code Case Law

The case studies show an evolution in the approach to the role of pre-code case law in the interpretation process.

The view first articulated by Lord Herschell in *Vagliano* marked a clear departure from the traditional common law attitude to statutory interpretation. In *Robinson v. Canadian Pacific Railway Company*,[103] the Lords endorsed and extended Lord Herschell's approach, finding that an appeal to earlier law and decisions for the purpose of interpreting a statutory code can only be justified on some special ground.

More recently, Lord Steyn expressly recognized the *Arbitration Act 1996* as the primary source of law in its field, and declined to refer to pre-code case law in its interpretation unless a solution cannot be found within the Act.[104]

This evolution shows increasing judicial acceptance of a hierarchical approach to the interpretation of statutory codes. This approach begins with the application of the language of the code. If the code's text provides no answer, recourse should be had to its underlying purposes and policies. If this last step provides no guidance, the court may draw on pre-code case law.[105]

A hierarchical interpretive approach can be expressly set down in the code itself, as in the case of Israel's codes. It can be implied and reinforced by the drafters' use of provisions prescribing a purposive approach, commentaries and guidelines, as in the case of the *Uniform Commercial Code* and the *Arbitration Act 1996*. Or it can be elaborated through judicial decision-making as has largely occurred in the UK.

Whether the intended interpretive approach is expressed or merely implied, successful common law codification seems to depend on a principled theory of construction which defines the interaction of code and pre-code case-law, and preserves the centrality of the code as a source of law.

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[103] [1892] A.C. 481.

[104] In Lesotho, *supra* note 48.

[105] This approach is articulated in Goode, *supra* note 10.

III. Post-Code Case Law

The role of post-code case law is more problematic.

An accumulation of decisions interpreting the code's provisions risks undermining the significance of the text itself as a source of law. This is particularly true in a system based on the doctrine of *stare decisis*, where judicial precedent, and not the code, determines future interpretations.[106]

The *Uniform Commercial Code* suggests a possible solution to this problem. Its drafters specifically contemplated a loosening of the principle of *stare decisis*. Their preferred approach would recognize the persuasive authority of a subsequent line of decisions, rather than adhering to a system of binding precedent. This idea is similar to the theory of *jurisprudence constante*, more familiar in civilian systems.[107]

Although the drafter's intention in this regard is not expressly articulated in the text, the Code has guided jurists in that direction on the strength of its comprehensiveness, nuanced drafting and official comments. Empirical evidence suggests that in the majority of cases, post-code case law is used only for clarification and elucidation, and not as binding precedent.[108]

Lord Goldsmith's remarks on the *Companies Act 2006* suggest a slightly different approach.[109] In his view, the intention behind the saving provisions of sections 170(3) and (4) was to permit courts to have regard to developments in other related fields of law when construing the Act's provisions. The saving provisions allow for integrated legal development, but do not necessarily contemplate a strict application of *stare decisis*.

Successful codification thus requires some loosening of the doctrine of *stare decisis*, which itself is not incompatible with recent legal developments in the common law world. Section 3 of the *Human Rights Act 1998* , for example, now requires English Courts to interpret statutes to conform with the principles of the *European Convention of Human Rights*, so far as possible. In light of this requirement, most experts agree that a strict doctrine of precedent is no longer appropriate in the construction of statutes.[110]

IV. Analogizing from the Code

As discussed in Section B of this paper, the technique of reasoning by analogy from its text can significantly reinforce the code as a source of law. But the technique is largely unknown in the common law tradition for reasons related to the hierarchy of sources and the doctrine of legislative supremacy. It goes

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106 G. Nicholson, *Codification of Scots Law: A Way Ahead or a Blind Alley?*, 8 Stat. L.Rev. 173 (1987).

107 Herman, *supra* note 81.

108 Rosen, *supra* note 73.

109 Goldsmith, *supra* note 63.

110 Beatson, *supra* note 17.

beyond a consideration of the legislator's purpose, which is now commonplace, and extends the principles embodied in the legislation to circumstances falling squarely outside of its purview.

The case studies confirm that common law judges rarely rely on analogy from the code as their sole interpretive technique. Although analogizing from the code often provides a solution to the interpretive problem, judges prefer to confirm such solutions with reference to the language and purpose of the code and the underlying case-law. This is true even in the case of the *Uniform Commercial Code* and the *Federal Rules of Evidence*, which specifically contemplate the expansion of their provisions to cover new or unanticipated situations.[111]

The case studies therefore confirm that common lawyers are uncomfortable reasoning by analogy from the code. But they also demonstrate that this methodological incompatibility is not an insurmountable obstacle to codification.

Analogizing from the text is an important technique for reinforcing the code's centrality as a source of law, but it need not be the only method available to decision-makers. Even when used in combination with other interpretive approaches, the technique can enhance the code's significance. The continued relevance of the American and Israeli codes confirms that an eclectic interpretive approach need not jeopardize the benefits of codification.

Moreover there are reasons to believe that the technique could become more wide-spread in common law jurisdictions in the future.[112]

First, many commentators have made the point that reasoning by analogy from a code involves identical skills to those employed when reasoning by analogy from cases in the more traditional common law fashion. In one instance, the judge looks to analogous sections of the code as a source of principle, and in the other she looks to analogous cases. But the thought process and required judicial skills are not unfamiliar in the common law tradition.[113]

The *Human Rights Act 1998* may also be paving the way for a wider use of analogy from statute as a technique of interpretation. In this regard, some experts argue that American courts should be more familiar with the method of analogizing from statute than are their British counterparts, because constitutional jurisprudence in the US results in a greater degree of judicial interpretive latitude and more judicial scrutiny of legislative activities.[114]

This argument is somewhat belied by the evidence of American judges' reluctance to analogize from the *Uniform Commercial Code* and the *Federal Rules of Evidence.* But the more interesting point is that the *Human Rights Act 1998* has now blurred this distinction significantly.

Section 3 of the *Human Rights Act 1998* has caused the English judiciary to pay more attention to the principles embodied in legislation. Courts have recognized

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111 Rosen, *supra* note 73; Weissenberger, *supra* note 77

112 Analogizing from statute is becoming an accepted technique in the common law jurisdiction of New Zealand, for example. *See* G. Gunasekera, *Judicial Reasoning by Analogy From Statute: Now An Accepted Technique in New Zealand*, 19 Stat.L.Rev.177 (1998).

113 For example Donald, note 11

114 Atiyah, *supra* note 21.

that section 3 requires a careful consideration of the essential principles and scope of the legislation being interpreted, rather than its particular linguistic features.[115]

This is a significant departure from the more traditional common law interpretive approach, which did not recognize a statute as a source of essential legal principles.

Section 4 of the *Human Rights Act 1998* further requires the Courts to make declarations of incompatibility where the principles embodied in a statute conflict with *Convention* norms

UK Courts are thus becoming accustomed to stretching the language of legislative instruments, probing them for their underlying rationale and commenting on their compatibility with higher principles. And these judicial practices may eventually facilitate the technique of analogizing from statute.

Moreover, UK jurisprudence reflects an increasing use of the technique. Lord Steyn seemed to endorse the practice in *Malik v. Bank of Credit and Commerce International S.A.*[116] where he remarked: "in the search for the correct common law principle, one is not compelled to ignore the analogical force of statute."

In another instance, Lord Wilberforce found that the analogical use of statute had a liberating effect on the common law, enabling the court to avoid a strained construction and improving certainty in the law.[117]

And even those who oppose the practice of analogizing from statute acknowledge that it can result in more principled and predictable decision-making, if employed within proper limits.[118]

Thus there are indications that analogizing from the code could become a more acceptable interpretive tool in common law jurisdictions in the future.

But strict limits are necessary to ensure that analogizing from the code is not taken too far. The practice raises legitimate constitutional concerns about the propriety of judicial law-making.

An express articulation of the limits to be placed on the practice might go some way to reconciling it with the doctrine of legislative supremacy.

The *Uniform Commercial Code*, for example, expresses such limits in the official commentary to article 1-102, which prohibits analogy from the code unless there is a sufficient rational analogous connection between the code's provision and the case to be decided.

In sum, the case studies reveal a wide range of techniques serving to reinforce the code's relevance in a case-law dominated system. There are the beginnings of a consensus about the appropriate role of pre-code and post-code case-law, and even the technique of analogizing by statute may become more acceptable over time and within limits.

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[115] *Ghaidan v. Godin-Mendoza*, [2004] UKHL 30, per Lord Rodger at para 122: "… the key lies in a careful consideration of the essential principles and scope of the legislation being interpreted …"

[116] [1998] A.C. 20

[117] *Alisa Craig Fishing Co.Ltd. v. Malvern Fishing Co.*, [1983] 1 W.L.R.964 at 966, per Lord Wilberforce.

[118] Atiyah, *supra* note 21.

Far from presenting an insurmountable obstacle to codification, common law methodology has demonstrated a flexible ability to enhance the role of the code in the law-making process.

V. Substantive Obstacles

While the discussion in the preceding section focused on the compatibility of common law methods and codification, this section will focus on arguments about the effect of codification on the substantive common law.

Put succinctly, the substantive argument against codification is that a code cannot capture the complexity of judge-made law. It cannot adequately explain the law or act as a reliable predictor of outcomes. Worse, it has the potential to disrupt and arrest legal growth.

And although these arguments could be levelled against codification in any legal environment, they are particularly cogent in the Anglo-American tradition where substance and form are so closely connected, and where fluidity and adaptability are the hallmarks of the legal system.

The case studies confirm that these arguments are not without substance, and that would-be codifiers in common law jurisdictions must be mindful of ways to attenuate the rigidifying tendencies of codification.

1. The Code's Potential for Rigidity

The case studies suggest two ways in which codification can limit legal growth.

The first is by cordoning off discrete doctrinal fields for the purpose of codification. Aside from the Field Codes, no common law codification has attempted to comprehensively set out the entire field of civil or criminal law. In every other example, the drafters have made a decision about the parameters of the area of law to be codified.

The exercise of deciding what goes into a code sets boundaries on the user's expectations about the fundamental characteristics of that field of law, and conditions future decisions about its scope and application.[119]

The *Federal Rules of Evidence* illustrates the problem. The Rules primarily address questions of admissibility, but ignore other critical aspects of evidentiary law such as the drawing of inferences, the process of proof and the respective obligations of the judge and jury in the trial process.

As a result, the bulk of contemporary American judicial and academic attention focuses on admissibility. Case-law has elaborated rules about other evidentiary issues in a haphazard and piece-meal manner. Commentators have attributed this development directly to the content of the *Federal Rules of Evidence*. [120]

The process of identifying areas for codification also reinforces the idea of there being discrete, immovable areas of law, thereby masking the significant

[119] Rosen, *supra* note 73.
[120] Weissenberger, *supra* note 77.

overlap between doctrinal fields. Thus, Israel's contract and tort statutes imply a strict distinction between these two categories, despite significant overlap in practice.[121]

A second way in which codification can distort legal growth is by imposing a particular logical structure on to the complex reality of the law. In many respects, codes are artificial constructs. Drafters can structure the code around any organizational principle they choose.[122]

This is particularly true where the code goes beyond simply codifying judge-made law and is used as a vehicle for law reform. In such cases, drafters are less tied to the organizational principles suggested by the underlying common law and enjoy more liberty of design.

Inevitably, an organizational scheme will emphasize some issues, and de-emphasize others. Thus, for example, some tax experts believe that the structure of the rewritten *Income Tax (Earnings and Pensions) Act 2003* obscures the fundamental tenet of income tax law that earnings must have employment as their source in order to be taxable.[123]

Codification also groups concepts together, conditioning interpreters to see these provisions as comparable or related. And, in time, the chosen organizational scheme may become engrained in legal thinking and begin to direct behaviour and decision-making.[124]

There is a multitude of organizational schemes that could apply to nearly any area of law for the purpose of codification. Thus, although the *Federal Rules of Evidence* is structured around the admissibility of evidence, academics have demonstrated how the law of evidence could accommodate several different but equally effective organizational schemes.[125]

Likewise, a recent article suggests that reformed corporate tax legislation could be organized around its political dimensions, rather than the more traditional economic structure of corporate tax law.[126]

The variety of useful organizational schemes is a manifestation of the many public policy concerns that are always operative in a legislative instrument, and the diverse factors that influence legal decision-making. There are inherent dangers in selecting just one, as the experience of the *Federal Rules of Evidence* confirms.

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[121] Shalev, *supra* note 88.

[122] R. Allen, *The Explanatory Value of Analyzing Codifications by Reference to Organizing Principles Other than Those Employed in the Codification*, 79 Northwestern U. L. Rev. 1080 (1985).

[123] M. Jones, *Legislative Comment: Locating the Source Principle in the Income Tax (Earnings and Pension) Act 2003*, 2008 British Tax Review 99.

[124] Rosen, *supra* note 73.

[125] Allen, *supra* note 122.

[126] J. Snape, *Corporation Tax Reform - Politics and Public Law*, 2007 British Tax Review 374.

2. Minimizing the Code's Potential for Rigidity

Many of the methodological techniques discussed in the previous section can alleviate the rigidifying tendencies of codification. The use of principled language and a purposive interpretive approach, for example, help to direct legal development away from the strict language and structure of the text.

But for some critics, these methodological tools do not address the fundamental incompatibility between codification and the substantive common law.

The case studies reveal three important ways in which the structure, contents and administration of the code itself may attenuate codification's rigidifying effect.

The *Uniform Commercial Code,* for example, illustrates how the structure of the code can encourage a more fluid approach to legal reasoning.

The *Uniform Commercial Code* has been criticized for its minute particularization and its breakdown of categories into further and further sub-groupings. But this technique may reflect a conscious effort on the drafter's part to adopt a structure based on smaller and more meaningful categories. This structure mimics the fluidity of common law reasoning by providing more mobile classifications that can cut across larger conceptual groupings.[127]

In this respect it is not insignificant that the Chief Reporter for the *Uniform Commercial Code* was also the leading interpreter of American legal realism. At the risk of over-simplifying, one of the principal realist methods was to classify law in narrow functional categories that closely approximated real-life experience.[128]

Seen in this light, the extensive sub-division of the *Uniform Commercial Code* is a technique designed to bring the code's provisions closer to everyday experience and combat the rigidity of codification.

In its use of official commentaries, the *Uniform Commercial Code* illustrates a second strategy for attenuating the rigidity of codification. These commentaries often present opposing views about the meaning of a particular provision, thereby de-emphasizing the normative force of the black-letter rule. The text becomes a starting point for discussion, but is not presented as the single rule that will explain and justify all outcomes.

In this way, the commentaries help to direct the interpreter's thinking away from the specific content of the rule and the structural organization of the code, and towards a variety of relevant extra-codal considerations.[129] The same might be said of the Guidelines contained in the *Arbitration Act 1996*.

The extensive consultative and participatory drafting process that characterizes so many successful common law codes also has a role in overcoming the rigidifying tendencies of codification. This process ensures that decisions about the code's contents and organizational scheme reflect diverse views.[130] The result

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[127] H. Dagan, *Legal Realism and the Taxonomy of Private Law*, *in* C. Rickett & R. Grantham (Eds.), Structure and Justification in Private Law 224 (2008).

[128] W. Twining, *Two Works of Karl Llewellyn*, 30 M.L.R. 514 (1967).

[129] Hyland, *supra* note 84.

[130] Mentschikoff, *supra* note 86.

is a broad consensus about the major doctrinal fields that are apt for codification, and the most appropriate organizational structure for the legislative instrument.

In this regard, it is significant that the *Federal Rules of Evidence* is the instrument most criticized for its rigidifying tendencies. The Rules were drafted by a small group of subject matter experts and judges, without extensive outside consultation. A broader-based drafting approach might have ensured early identification and accommodation of competing views about the instrument's content and structure.

Most significantly, the case studies highlight the need for a rigorous, ongoing revision process to ensure law's continued development in a codified system. Only a regular, systematic re-assessment of the code's structure and content will allow it to accommodate the fluidity of changing legal norms and assumptions.[131]

In sum, the case studies show that concerns about the inflexibility of codification are not entirely unfounded. The example of the *Federal Rules of Evidence* confirms the potential of a codifying instrument to distort legal development, and the need to develop ways of overcoming these rigidifying tendencies.

VI. Practical Obstacles

Section B of this paper identified a number of practical obstacles to successful codification in common law jurisdictions, focusing on the rigours of the legislative process.[132]

In some respects, practical concerns dominate the debate in common law jurisdictions, reflecting a pragmatic understanding of codification as a fundamentally political matter.[133]

And the case studies confirm that legislative procedures need not impede codification if the political will is present. Both the *Arbitration Act 1996* and the *Companies Act 2006*, for example, were subject to ordinary parliamentary procedures including a clause-by-clause scrutiny of their provisions.

The specific features of a jurisdiction's legislative process can also bear significantly on successful codification. The *Federal Rules of Evidence*, for example, illustrates how the American theory of the separation of powers facilitated the codification of the rules of evidence. Because they operate only in Federal Court, the Rules involved a legislative process quite different from that of ordinary US statutes, and unfamiliar in the parliamentary system. The Rules were drafted by the judicial branch of government, and the role of congress was limited to passive review and ratification.

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[131] Many commentators see systematic monitoring of the code as vital to its success in common law jurisdictions: Arden, *supra* note 36; Goode, *supra* note 10; Nicholson, *supra* note 106.

[132] These concerns were less significant in the mixed jurisdiction of Israel, where senior members of the judiciary and the legislature were active promoters of codification.

[133] Toulson, *supra* note 4, at 72: "It is ultimately a political matter, and I will end on a political note."

Significantly, several codes of evidence proposed at the state level have not survived the scrutiny of the state legislature, despite being modelled almost directly on the Federal Rules.[134]

This suggests that practical obstacles to codification should be evaluated in light of a jurisdiction's specific constitutional legislative arrangements, and forecloses the argument that all legislative process is inimical to codification.

Finally, the case studies highlight a critical factor in overcoming practical obstacles that is common to all successful common law codification: an extensive consultative and participatory drafting process.

The successful contemporary examples of codification in the UK and the US all reflect a drafting procedure that includes extensive public and professional consultation and participation.[135] This process is an important tool for overcoming practical obstacles to codification in a number of respects.

First, a consultative and participatory process is effective at obtaining the buy-in of the interested parties at an early stage and developing a groundswell of support for the legislation. This may counteract the indifference and hostility of those opposed to codification in principle.

The extensive involvement of subject matter experts at the drafting stage also allows for a better appreciation for the field of law as a whole, resulting in a more comprehensive instrument.[136] Some have also suggested that drafting by consensus produces clearer legislation, as the end product must be understandable to diverse stakeholders.[137] Overall, these advantages in comprehensiveness and clarity could facilitate the instrument's passage through the legislature.

A thorough, rigorous and wide reaching pre-legislative process may also be relevant to the subsequent level of legislative scrutiny. In the context of the Tax Law Rewrite, the Select Parliamentary Committee on Procedure made this connection expressly: "… where a thorough and objective pre-parliamentary procedure is in place, Parliament has shown itself willing to expedite its procedures."[138]

On the strength of its rigorous pre-parliamentary process, the Tax Law Rewrite project was accorded a specially-tailored parliamentary procedure that by-passes clause-by-clause consideration of its provisions.

And while this procedure would not be available for codes that purport to effect substantive legal change, a rigorous consultative and participatory drafting process may nevertheless serve to increase the legislators' confidence in the instrument's quality.

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[134] For a description of the fate of New York's proposed evidence code *see* B. Salken, *To Codify or not to Codify that is the Question: A Study of New York's Efforts to Codify the Law of Evidence*, 58 Brooklyn L. R. 641 (1992).

[135] The UK Government's 2006 Review of Links with Large Business: November 2006 (Sir D. Varney) (HMRC, London 2006), expressly recognizes the importance of a wide-spread consultative and participatory process for corporate tax law reform.

[136] The effect of the non-participatory drafting process on the quality of the Federal Rules of Evidence was discussed in the preceding section.

[137] F. Miller, *The View from Experience*, 52 Hastings L.J. 621, at 627 (2001): "… participation produces a better and more enactable statute."

[138] *Supra* note 132, at 15.

Finally, a broad participatory process at the drafting stage also allows the experts in the field to confirm an identifiable need for codification. The case studies suggest that this is vital. All of the successful codifications described in Section C of this paper responded to an identifiable commercial or legal need. Thus the *Companies Act 2006* responded to a need for modernization with a view to securing investor protection.

The Arbitration Act 1996 was drafted with a specific view to increasing London's profile and attractiveness as a centre for international and domestic arbitration. And the *UCC* responded to a need for uniformity in commercial law across state lines.

These examples all support a general proposition that codification can only succeed in common law jurisdictions when it responds to a genuine need. Common law codification focuses on specific objectives and practical outcomes, and requires a pragmatic approach.

VII. The Need for a Pragmatic Approach

The discussion in the preceding section suggests the need for a pragmatic approach to codification in common law jurisdictions. Ideological positions and unrealistic expectations can mask the potential of the code as a tool for meeting real needs, presenting a further obstacle to successful codification.

1. Ideological Positions

The academic literature about codification reveals a widespread tendency to assume that a code must exhibit all of the features of the prototypical civilian code of the 19th century.[139] Thus, arguments against codification in modern common law jurisdictions are often derived from the characteristics of codes that were enacted in other times and for other reasons.[140]

These arguments are defective in many respects.

First, they ignore the great diversity of codes that exists within the civilian and common law traditions, suggesting the need for a more comparative understanding of the issue. Interestingly, some commentators draw a direct connection between the success of codification and the level of comparative study that precedes it.[141]

Moreover, these arguments fail to recognize the importance of the political and social context of codification. To succeed, codification must be a product of its time and its environment.[142] All the successful codes examined in Paragraph C

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[139] *See, for example*, M. Damaska, *On Circumstances Favouring Codification*, 52 Re. Jur. U.P.R. 355 (1983).

[140] H. Kotz, *Taking Civil Codes Less Seriously*, 50 Modern Law Review 1 (1987).

[141] Steiner, *supra* note 9, at 212: "A closer look at the foreign legal experiences followed by a thorough preliminary enquiry as to the nature and aims of various codification techniques used by other countries would have served to more effectively promote the criteria that the Law Commission had itself set as justification for the codification project."

[142] D. Barak-Erez, *Codification and Legal Culture in Comparative Perspective*, 13 Tulane European and Civil Law Forum 125 (1998); C. Varga, Codification as a Socio-Historical Phenomenon (1991).

reflect contemporary needs and accommodate the particularities of the common law tradition in which they are situated. The circumstances that gave rise to the *French Civil Code* no longer obtain, making it an inappropriate model for contemporary codification.

Opponents of codification also frequently argue from an idealized version of codification. Many civilian jurists recognize that even the prototypical *French Civil Code* was never a truly comprehensive, exclusive source of law.[143] The drafter of that Code himself acknowledged that it would erroneous and impossible for a legal system to cut itself off from the past that had nourished it.[144]

The characteristics of the prototypical code are also not present in any uniform degree in modern civilian codes, which display a vast diversity and for which ideas of exclusivity have long been abandoned.[145]

Thus, arguments about codification often take on an ideological tone, and fail to recognize the real diversity of codifying instruments in both the civilian and common law worlds. This ideological position typically views codification and the common law as mutually exclusive, and even inimical. [146]

The example of the *Canada Evidence Code* illustrates the danger of attaching a misplaced ideological significance to codification. Experts have legitimately argued that the *Canada Evidence Code* failed because it was marketed as a code, and not as a statute. The word itself had become so weighted with ideological significance that its association with the project doomed it to failure.[147]

Israel's example provides a more pragmatic model which focuses on the goals of codification as a method. Israeli jurists judge their system's success on the basis of results, rather than its fidelity to legal sources.[148] Although the Israeli codes did not maintain their intended status as exclusive statements of the law, they are valued for enhancing the accessibility of the law and contribute significantly to legal development in that country.

A pragmatic approach to codification could thus be the key to its success and resilience.[149]

2. Unrealistic Expectations

Efforts at codification can also be defeated by the unrealistic expectations of its proponents.[150]

In some instances, codification does not simplify the law or enhance legal certainty. Indeed, many of those in favour of codification concede that these are

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143 Kotz, *supra* note 140.
144 Portalis quoted *in* Goode, *supra* note 10.
145 Weiss, *supra* note 71.
146 S. Hedley, *How Has the Common Law Survived the 20th Century?*, 50 NILQ 283, at 293 (1999): "The Law Commission … poses a threat to the common law."
147 Letourneau, *supra* note 20.
148 Goldstein, *supra* note 87.
149 Steiner, *supra* note 9.
150 D. Tallon, *Codification and Consolidation of the Law at the Present Time*, 14 Is. L. Rev. 1 (1979).

simply not virtues that can realistically be expected of a code.[151] The law cannot be made simpler than its subject matter allows, and attempts to mask the complexity of a subject could result in increased confusion and uncertainty.

Although not examined in detail in this paper, the experience of New Zealand's Tax Law Rewrite project is relevant in this regard. New Zealand's Tax Law Rewrite was recently the subject of an empirical study measuring readability and accessibility of the rewritten texts. That study confirmed that despite marginal improvement in readability, there was no overall indication that the law had become clearer or less complex.[152]

A more realistic assessment of codification's limitations could lead to a more rational discussion about its potential. Thus, while it may be true that codification cannot always simplify the law, it can strive to ensure that complexity derives from the law's content and not from the presentation of its rules. Likewise, the inherent complexity of legal norms should not foreclose codification as a means of improving accessibility.

Finally, an unrealistic assessment of the down-side of codification can also affect its successful implementation. In their enthusiasm for the advantages of codification, its proponents may ignore its potential dangers and neglect to adopt the measures necessary to ensuring a code's ongoing viability as a framework for dynamic legal development.

Experience confirms that only a realistic assessment of codification's merits and limitations can secure its survival in the common law world.

E. Conclusion

This paper set out to determine whether codification is fundamentally incompatible with the common law tradition.

Codification is a central feature of many projects of law reform and efforts at regional legal harmonization. It also has continuous appeal as a method for improving the accessibility of the law in the face of a mounting accumulation of statute and case-law. Its compatibility with the methods and substance of the common law is therefore of significant importance.

The examples of successful codification in the common law world and in the mixed jurisdiction of Israel confirm that there are no insurmountable obstacles to codification in the Anglo-American tradition. Indeed, the examples of the 19th century commercial codes, the *Arbitration Act 1996* and the *Uniform Commercial Code* show that codifying instruments can have a lasting and important influence on the law's development in the common law system.

The principal methodological obstacle to codification in the common law system is the traditional Anglo-American view of the hierarchy of sources. But

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[151] J. Gordley, *European Codes and American Restatements: Some Difficulties*, 81 Columbia L.R. 140 (1981); and A. Smith, *Codifying the Criminal Law: the Case for a Code*, 1986 Crim. L.R. 285.

[152] S. Sawyer, *New Zealand's Tax Rewrite Program: In Pursuit of the Elusive Goal of Simplicity*, 2007 British Tax Reporter, No. 4, at 405.

examples of successful codification illustrate how drafters and interpreters alike have developed techniques for enhancing the role of the code in the law-making process, which is critical to obtaining the benefits of codification in a tradition dominated by case-law.

Codification also has its limitations, and the case studies confirm that concerns over its rigidifying tendencies are not unfounded. The common law method offers some techniques for overcoming this inflexibility. And the structure, content and administration of the codes themselves can also help to ensure their ongoing adaptability.

Most specifically, the case studies highlight the need for a broad-based consultative and participatory drafting process and systematic revision to ensure a code's ongoing relevance in the face of changing legal norms.

Finally and perhaps most importantly, the case studies underscore the need for a functional, pragmatic approach to codification. Understanding the code as a method and not an ideology cannot help but ensure a more productive dialogue about its future in the common law world.