LAW AND ECONOMIC DEVELOPMENT: COMMON LAW *VERSUS*. CIVIL LAW

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I.- INTRODUCTION

There is relatively ample literature based on the notion of demonstrating the superiority of common law over the civil law system. The main objective of this paper is not to offer a complete overview of this discussion, but rather to analyse economic development, based on market economy and industrialization, centred around the two major themes of private law: contract law and tort law. We will look at some of the most interesting features in the evolution of these two branches of the law in the United States and Spain, the former a common law country, the latter belonging to the civil law tradition.

The thesis put forward in this paper, based around the analysis of the aforementioned is the following: *Both* civil and common law systems have followed a parallel evolution, searching for similar objectives and adapting themselves to the ideas and dominant values present at historical moments in western society: *Moreover*, the Zeitgeist, and in many cases dominant values in a given society, conditioned legal evolution to a *larger* degree than internal structures present within a specific judicial system.

In accordance with this interpretation, neither the principle of freedom of contract nor the remaining legal institutions that have permitted economic development in the western world are specific characteristics of common law. And, more importantly, a common law system does not guarantee a sounder defence of free market principles than civil law. Put differently, there are no sound arguments that demonstrate that judge-made law better positions itself to defend the market economy than legislation passed by parliament or legislative assemblies.

In section II some ideas about the development of the civil and common law systems are presented. Section III deals with contract law in both common and the civil law. In section IV tort law and administrative regulation as instruments for industrialization are discussed. The article ends with a brief set of conclusions.

II CIVIL LAW AND COMMON LAW

Comparative analysis of the development of the administration of justice within the common law and civil law systems has received ample attention in the literature after some studies argued in favour of the superiority of the common law system over its civil law counterpart.[1] There are two basic arguments put forward to defend this idea. The first relates to what is considered the superiority of common law as an instrument for the defence of individual liberty and democracy. The second, alternatively, emphasises the supposedly superior capacity of common law in achieving economic efficiency. Although the literature offers numerous authors that have advanced one of the two above arguments, we will look at the work of two authors – Hayek and Posner – as proponents of these two arguments, respectively.

[1] For a good bibliography on this topic see Rubin (2000)

Hayek's opinions concerning common law and the role of judges in the England are interesting for numerous reasons: Firstly, few economists have shown such an interest in the role played by judicial institutions in the development of a free and prosperous society. Indeed Hayek was not just a great economist but also one of the leading legal philosophers of the 20th century. Secondly, Hayek himself was trained in the continental system; his enthusiasm for common law came from time spent in England and the discovery of a model of social institutions that was very different from what he had learned in his initial academic training in Austria. For Hayek, the foundations for superior freedom that British citizens enjoyed over their European continental counterparts were a result not of the separation of powers, as was thought by Montesquieu, but common law. In his opinion, the English institutional system was superior because common law had not been created by political volition and furthermore was administered by judges and courts that had acquired a high degree of independence from the political branch. In this system, not only is legislative power independent from government, but it is also limited by law over which it does not control.[2]

Common law fits well into Hayek's model of "abstract norms of behaviour". He asserted that common law is not just a collection of loosely bound cases, although this could be the interpretation of a continental jurist reading a work such as Blackstone's *Commentaries on the Law of England*. (Blackstone 1765-69). In his opinion, common law, rather, consists of a collection of general principles to be explained and developed by judges in their decisions. It is also interesting to note, that for Hayek the role of the judge was not to find efficient solutions to particular problems in the sense of maximizing social utility, but rather to ascertain whether or not behaviour corresponded with previously established legal principles[3].

However many lawyers and judges in the common law tradition would be quite skeptical about Hayek's ideas. From our point of view it is especially interesting to recall

[2] Hayek deffends the superiority of the common law in several of his works; but his most systematic analysis is in Hayek (1973), vol. 1, chapter 4, "The changing concept of law".
[3] Hayek (1973), 85-88

certain ideas about common law and the role of public policy formulated by Judge Oliver Wendell Holmes throughout his extensive career. Holmes is probably the most relevant North-American jurist in history. He not just made important contributions to resolving particular cases but also addressed the significance of common law *per se*. His interpretation of the role general principles play in common law was quite different from Hayek's. In Holmes' interpretation of common law, general propositions do not decide concrete cases and opinions are based more on a judgement or intuition than a general proposition.

Holmes was very interested in the economic effects of the law; and his view of the future of legal theory is well known, namely: "For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the master of statistics and the master of economics." Does this phrase have a meaning beyond the obvious necessity of having today some knowledge of economics in order to understand the law, or in Holmes' own words, that "every lawyer ought to seek an understanding of economics?"[4] In *The Path of the Law* (1897) Holmes established a clear relationship between the evolution of the law and the social problems that legal rules and judges should solve. He criticized judges for not recognizing their duty "of weighing considerations of social advantage". In fact he thought that law is no more than a concealed, half conscious battle on the question of legislative policy. The law, in his opinion, is open to reconsideration upon a slight change in the habit of the public mind. And some the basic principles of social and economic life –the principle of free competition, for instance- may vary in different times and places. [5]

R. Posner and some literature in the law and economics tradition also defend the superiority of common law, but their arguments are very different from Hayek's, since they are based on the idea of efficiency. In this approach the doctrines developed in the different fields of the common law induce people to behave efficiently by creating property rights, and

[4] O. W. Holmes, "The Path of the Law(1897). En Holmes (1992), 170 and 174
[5] O. W. Holmes , "The Path of the Law". En Holmes (1992), 167-168

protecting them through remedies. In a well known paper (Landes and Posner 1987) Landes and R. Posner tried to illustrate the efficiency of common law in terms of a well known concept of tort law, the Hand Formula. Accordingly, a person or company should be held liable for an accident if the cost of preventing it is less than the expected cost of the accident, that is the product of the damage and the probability that an accident would result. So this rule places liability on the party better able to prevent or minimize the damage. And contract law would do the same in the case of unforeseen contingencies that make the performance of a specific contract impossible. The superiority of common law would therefore be based on its assumed superiority in finding efficient solutions to some of the main questions involved in the development of private law.

There is however cause to doubt the soundness of the notion of superiority of common law from an efficency perspective. Bentham's criticisms regarding the legislative function of the courts and the stability of principles based on the system of "stare decisis" or the subjection of judges to precedent, are now more than two hundred years old (Bentham 1776). And to cite but another example as a means of demonstrating critical opinions regarding basic aspects of common law, one need only look at Roscoe Pound when he criticised the adversary system as having contributed to a "sporting theory of justice" and defended the idea that administrative courts would surely be more efficient than common law courts in the resolution of many types of cases (Pound 1906).

More recently it has been argued that in reality both systems have acted efficiently, allowing for the development of prosperous economies.[6] To wit, if the aim is to adapt the law to socially changing economic realities, it is not easy to say which of the two systems is superior. From our perspective it is necessary to emphasise the fact that, in civil law countries, the development of markets was precisely one of the main aims of codification. It was

[6] Some examples in Rubin (1990)

considered that if the supremacy of the code over local law and local judges could be affirmed, a double objective could be reached: On the one hand, an authentic national market could be created, a goal not easily reached without a general law superior to the local regulations which created distortions in the economic marketplace. On the other hand, a decisive advance could be made towards the principle of freedom of contract which had been hindered by the presence of local privileges of every type.

III CONTRACT LAW

One of the key features often put forward to support the view that common law is superior to civil law is the supposedly greater support it offers to the principle of the autonomy of contracting parties, or in other words, freedom of contract. To many continental lawyers, however, this view has always appeared somewhat surprising, given that the principle of freedom of contract served as a great inspiration for the wording of civil codes in Europe in the 19th century, beginning with the French Code Civil in 1804. This position is unmistakably manifest in later codifications, such as the Spanish civil code of 1889, where article 1255 establishes with clarity the principle of liberty of contract, establishing that contracting parties may create their own agreements, clauses and conditions as the parties see fit, as long as they do not run counter to either the law, morals or public order.

It is certain that if one analyses the evolution of legislation post-codification, one can bare witness to how, on the one hand (i.) the principle of contractual freedom has been losing importance, and how, on the other hand (ii) legal scholars and judges have discredited it as a the basic principle of the legal system. In reference to point (i), it makes sense to interpret a good part of the laws passed over the last century as a departure from the civil code and the principle of freedom of contract which inspired it. From laws that regulate labour relations to

those that seriously limit freedom on many different contracts, new regulations have been introduced as a means of social redistribution in favour of certain social groups. Individual volition is thus, to a large extent, substituted by collective interest principles.

In reference to the second point, it is sufficient to look at some of the books studied by lawyers and judges. The extensive work by J. Castán *Derecho Civil Español, Común y Foral* (*National and Regional Spanish Civil Law*), without doubt the most studied textbook on civil law ever in the history of Spain, may serve as an example. In his introduction to the analysis of contract law, Castán had no doubt in affirming "it must be confessed that civil law in many points concedes excessive respect to private conventions to the detriment of equality and moral demands."[7] Regarding what he considered to be the future of contractual agreements, he unsurprisingly suggested: "One need succeed the old individualist dogma of the autonomy of volition with the rule of the principle of intervention."[8] Moreover, Federico de Castro, surely one of the key specialists in civil law in Spain in the 20th century, argued that the principle of freedom of contract in the performance of services led to "scandalous extremes."[9] In his interpretation of the role played by the liberal Spanish jurists, dominant at the time of wording the civil code, he voiced the following: "the legal dogma that has been dominant up to now attempts to dry out legal precepts, depriving them of moral sap, putting them at the services of the calculative safety of traders and financiers."[10] This position was naturally compounded with the view that there is a need to abandon the individualist view of the law and substitute it with a version that favours the notion of "community".

One may make a similar evaluation of the decisions handed down by courts, which have recognized the loss in importance of contractual freedom. This can be seen, for example, in a decision handed down by the Supreme Court in 1946: "if one reviews legislation since

[7] J. Castán (1967), 375
[8] J. Castán (1967), 376
[9] F. de Castro (1968), 58
[10] F. de Castro (1968), 40

the passing of the civil code, one soon realises that legal evolution is commandingly moving down the path towards a greater infiltration of social and ethical elements, which in both a general and absolute manner discipline private law relations, imposing upon them a public character at the expensive of the principle of freedom of contract.[11]

There can be little doubt therefore that civil law systems, of which the Spanish may be considered representative, have been gradually moving away the position where decisions taken within markets are the principal means for allocating productive resources in an economy. But, is the historical experience of common law really different? According to Posner: "in setting in which the cost of voluntary transactions id low, common law doctrines create incentives for people to channel their… actions through the market."[12] But one can suggest that developments against the principle of freedom of contract also occurred in the common law system; and that the evolution of North American legal tradition in the past century, was quite similar to the European experience, bar differences in institutional settings.

American law witnessed, in the 20th century, an important change regarding freedom of contract. For an extended period of time the Supreme Court struck down numerous economic and social laws on the grounds that they ran counter to freedoms constitutionally protected by the Fifth and Fourteenth Amendments. Later, however, the Supreme Court abandoned this process of revising statutes, which in turn would lead to a serious restriction in many economic activities based on the principle of contractual freedom. Moreover, local, state and federal authorities could now regulate economic activity without any restriction other than discrimination or arbitrariness. The most representative defence of freedom of contract by the U.S. Supreme Court in 20th century is probably the case Lochner ***v.*** New York (1905). The Supreme Court in Lochner ruled that it was contrary to the constitution to limit the maximum working hours in the bakery sector to sixty hours a week and ten hours a day .

[11] Spanish Supreme Court, Decision of April 2, 1946
[12] Posner (1998), 272

In the final decades of the 19th century, however the Supreme Court accepted on various occasions the constitutionality of regulatory laws in economic activity. Although, one could cite previous cases, take the case of Munn *v.* Illinois 1876) where a Chicago based firm that refused to apply for a state license as a warehouse owner and accept its regulation lost its case in the Supreme Court on the grounds that there was a public interest in the warehouse sector.

Thirty years later Lochner constituted a reaffirmation of the principles of classical jurisprudence from the 19th century and for this reason was harshly criticised by those who considered this position to be unsustainable, given existing economic conditions and the changes that the North American economy had been experiencing. Holmes' dissenting vote in Lochner, perhaps the most famous dissenting vote in the history of North American legal history, would constitute an authentic manifesto for those in favour of what became known as the progressive approach to the problem. The liberty of a citizen to do as he likes as long as he does not interfere with the liberty of others to do the same–wrote Holmes- is interfered with by many laws and regulations, from school laws to every state or municipal institution that takes his money whether he likes it or not. Reducing freedom of contract was, therefore, not a new principle. "The Fourteenth amendment does not enact Mr. Herbert Spencer's Social Statics"[13]

Judges' and law professors' position would very much go along the same lines. Only four years after Lochner, Roscoe Pound published his famous article "Liberty of Contract". (Pound 1909). In this article Pound attacked the application of the principle of contractual freedom in U.S. courts from two standpoints: First because, in his opinion, this was not a traditional principle in U.S. law; second, because it assigned the false impression of equality between the parties in contractual relations. In his opinion, previous legal doctrine had exaggerated the relevance of the principle of freedom of contract and had, contrarily,

[13] O. W. Holmes, Dissenting vote in Lochner v. New York (1905). In Holmes (1992), 305-307.

downplayed the importance of public interest. Individualism should, accordingly, be surmounted by a more social vision of legal relations.

The specific circumstances and legal tradition were undisputedly different to those found in Spain and other civil law countries, but legal doctrines in both countries showed clear signs of convergence. Opposition to the principle of freedom of contract would accrue strength in the years following and the Supreme Court in the 1930s would further reel it in. In Nebbia *v.* New York (1934), for instance, the Supreme Court refused the right to sell some merchandise at a price agreed by buyer and seller, thus endorsing a law passed by the State of New York establishing a minimum price for milk, with the aim of helping farmers who had experienced a strong fall in the price of this product. Many other cases could be mentioned. In fact one can find in either system an evolution in both law as well as legal theory towards the reduction of contractual freedom in favour of regulatory ideas, presented as part of the path towards progress and modernity. Principles of freedom of contract fell subordinate to other principles based on ethics and moral values, thus reducing contractual freedom in favour of a redistribution of gains for the benefit of weaker contracting parties.

If contract law in civil law countries has been moving away in a general form from the principle of freedom of contract, there can be little doubt that labour relations specifically constitute one of the most highly regulated areas of economic activity. In this area, one can furthermore observe significant parallels between both civil and common law systems, particularly with regard to growing regulation, as well as the timeframe in which these regulations transpired. The Spanish civil code at the time of its introduction included a section referring to the regulation of the labour market. It was limited to only five articles (arts. 1583 to 1587). Of these, three regulated the relationship between master and servant and the other two were limited to prohibiting unfair dismissal in specific contracts before the termination of

the work. All other factors were to be governed according to the aforementioned principle of freedom of contract.

Attempts to regulate specific aspects of labour relations, such as the duration of a working day, were the object of discussion, being criticised by exponents of the principle of contractual freedom. But the tendency towards regulation began to assert itself with the passage of time. And what is more important, it was accepted that labour relations were of a unique nature, which demanded that they be regulated by specific laws, and could in no case be governed by the principle of freedom of contract as found in the civil code.

Legal evolution in common law countries was no very different. In the United States, labour relations also constituted one of the most important arguments for attacking the principle of freedom of contract. The idea that labour relations did not fit the same principles as the majority of contracts made also headway in the United States. Following a tradition started in continental Europe, the National Labor Relations Board (NLRB) was created in 1934 with the objective of arbitrating in collective agreements related to working conditions. With the Wagner Act in 1935, the position of the labour unions was reinforced, and being it written in the framework of the commerce clause, this law gave power to the Federal Congress to regulate labour relations. In the case NLRB v. Jones and Loughlin Steel Corp. (1937) the Supreme Court accepted – in a five to four decision – that "manufacturing" was "commerce" so the powers of Federal Government were reinforced in this field.[14] What in civil law countries was achieved through statutes passed by parliaments, in the US was made through the substitution of common law by statutes with the help of the Supreme Court.

[14] For a good analysis of the role of the Supreme Court in judicial review of social and economic legislation, see Siegan (1980)

IV.- TORT LAW

Throughout most of the Western World, the 19th century was the century of industrialization. And in this process, an important part was played by the legal body in the way of laws and regulations. After much controversy throughout the 1970's and 1980's, many economists and legal scholars think that the civil legal system during the 19th century in the United States clearly evolved in favor of the interests of industry. This transformation, however, was not achieved by means of a substantial modification of the laws that regulated industrial activity, but rather through a significant change of the legal interpretation of tort law. This concept is generally known as "Horwitz's theory" but it has, in fact, been developed and studied by numerous historians[15]. The main idea is that common law slowly stopped applying the strict liability rule, which prevailed in the period prior to industrialization, and started to examine claims for damages caused by industrial installations following the negligence rule. Under the strict liability rule the manufacturer who, for example, causes a fire accidentally in the land adjacent to his factory, or who causes losses in agricultural production in the farms bordering his property because of badly-controlled smoke emissions, should indemnify the injured parties. However, the legal decision would be quite different in a claim for damages in which the negligence rule was applied, since in this case the factory owner would only have to indemnify the injured parties if he had not taken reasonable precautions.

For those who defend the theory of the change in liability rules in the U.S. legal tradition, the judges were not neutral in the application of tort law but rather applied a utilitarian criterium which, in the language of welfare economics, allowed the external costs generated by a process of industrialization to be transferred partially to third parties. In other words, the American judges assumed a pro-industrial economic ideology in their interpretation of civil liability.

[15] See especially Horwitz (1977). An analysis of this theory can be found in Schwartz (1981) and Hovenkamp (1983)

Apparently the story was quite different in continental Europe, since economic policy in the civil law countries followed a stricter regulating, interventionist tradition than the one existing in Great Britain and the United States. It is not surprising, therefore, that the encouragement of industrialization by the legal community should take a different shape than that followed in the Anglo-Saxon world. But the goals were similar. Thus, we could talk of a "continental model" where industry would also be favored by laws, but where administrative regulations would play the more dominant role. Civil law countries' legislators made use of administrative procedures to encourage industrialization, while a similiar objective was pursued in the United States by applying the negligence rule. Both administrative and civil laws took into account the advantages that the new industries and technology offered to social welfare and sought formulas by which the affected third parties would pay a part of the external cost. Throughout the 19th century, Spanish law also upheld, with very few exceptions, the principle of negligence, so that interesting similarities can be found between Spanish cases and the decisions reached by the British and North American courts which are often quoted to support the theory of the industrialist tendency of common law in the that century.

For instance, the Spanish courts maintained the thesis that the railways inevitably gave rise to accidents and risks, and that it was the obligation of the railway workers to take the necessary measures to avoid these dangers. But if accidents occurred even when such measures had been taken, the companies could not be held responsible for what had happened. In this sense, we could mention the Spanish Supreme Court's decision of May 30, 1865 . It denied the appeal for annulment presented by a landowner in Burgos against the decision of the Court of Appeals of that city. The Court had acquitted the Isabel II Railway Company of the damages caused by a fire in a gorse thicket on the property of the appellant. Since the railroads crossed the appellant's land, the engines started a fire on more than one occasion, causing considerable damage. The landowner claimed compensation before the Court of

Appeals of Burgos, but the railway company fought the case. They argued that they recognized that the engines caused the fires, but they claimed that the engines were only working in keeping with their nature and that the fires had been completely unavoidable and beyond the control of the engine drivers. The Supreme Court accepted this reasoning and pointed out that, since no carelessness or blame on the part of the engine drivers had been proved, there were no grounds for imposing the payment of compensation to the aggrieved party.[16] The Spanish Supreme Court ruled similarly on many occasions. To cite another example, let us look at the case resolved by the Supreme Court in its decision of June 3, 1901. On this occasion, an engine which caused a fire in a nearby haystack while maneuvering in a station. The court applied the law mentioned above and ruled that there was no blame or negligence on the part of the engine driver. It pointed out, moreover, that the haysacks had been placed near the railway line without any agreement that would limit the right of the company to use the line, and in full knowledge of the constant use that was made of the railway line and of the consequent risk to the merchandise.[17]

The opinions of the British and American Courts in that period were not very different. Economists familiar with Coase's theory will now find themselves on well-known ground. As an example, let us look at two interesting North American cases in which the judges' arguments coincided with the enthusiasm for industrialization which we have seen reflected both in the text of the Spanish Law referred to above and in the Spanish Supreme Court decision mentioned earlier. The first of these court decisions was in reference to the explosion in a factory which caused damage to a neighboring farm. In 1873 a judge in New York State ruled in the case of Losee v. Buchanan that "society has to have factories, machines, dams, canals and railways. These installations are called for to satisfy the multiple needs of the people and form the basis of our civilization". He went on to add that if any damage was caused to a third party's property

[16] Jurisprudencia civil (1901), 921-23
[17] For a general view of the role of administrative and tort law in 19th century Spain see Cabrillo (1994)

because of an accident, the factory owner could not be held responsible for it.[18] Some years later we find a similar opinion in the case of the Georgia Railroad and Banking Co. v. Maddox (1902), where the judge ruled that if a railway station had been authorized and was appropriately run, the people who lived in the vicinity could not sue the company for damages since these were the inevitable results of the very existence of the railway system itself.[19]

V.- CONCLUSIONS

The main thesis of this article is that most of the changes that took place in the legal systems both in the civil law countries and in the common law countries in the 20th century should be understood more as the expression of the Zeitgeist and the new system of values that gained strength during the course of the 19th and 20th centuries in the Western world. The two main fields of private law, contracts and torts, have been studied in order to check if the specific characteristics of the common law and the civil were responsible for substantial differences in these two legal systems. More similarities than differences have, however, been found. In contract law both systems were based on the principle of freedom of contract in the 19th century. Moreover, reforms in both systems were introduced in the 20th century as a means of achieving redistribution of income, whereby the principle of private interest was substituted by moral and common interest ideas.

19th century tort and administrative law shows that the belief in technical progress and industrialization as the driving force for prosperity and happiness for all mankind- had spread throughout the Western World; and the varying legal systems simply supplied answers to a common worry. It is not a coincidence that new consumer preferences in the second half of the 20th century caused major modifications in regulations of dangerous activities and in the liability

[18] Hovenkamp (1983), 687
[19] Coase (1988), 129

rules. When the main objective is industrialization, the negligence rule and tolerant administrative regulation are the legal implements to be applied. But when, as nowadays, the value of such assets as clean air and a healthy environment increase even at the cost of more expensive production techniques and a slowing-down of the rhythm of industrial growth, we should not be surprised at the increase in restrictive administrative regulation and a recovery of the strict liability rule. No big differences can be found in this respect in civil law and common law countries

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