Aspects of the Common Law System in the United States

Michael P. Seng

Common Law v. Civil Law

American law may sometimes seem incomprehensible to a European. While the common law system and the civil law system have much in common, there are also major differences between them. European law is founded on the Roman law system. It matured in the universities of Europe. It is logical and systematic, and its basic principles can be found in written codes. The common law system was developed by lawyers and judges, often on an *ad hoc* basis to meet contemporary demands. Traditionally students learned the common law by working with practicing lawyers. As Justice Oliver Wendell Holmes once said, "The life of the [common] law has not been logic. It has been Experience." The basic principles of the common law can be found in the opinions handed down by judges.

Distrust of Government

The history of the common law reflects a mistrust of government. Most of Medieval English history reflects a struggle between the local gentry and the crown. The Founding Fathers of the American Republic were well aware of the struggles for supremacy between the crown and parliament that occurred in post-Tudor England. Because of their experience as an English colony, the Americans were from the beginning mistrustful of government. At the time of the American Revolution, Americans mistrusted both the crown and parliament. The American Founding Fathers were also mistrustful of democracy run rampant. "We the People" were not to be given unchecked power either.

A good example of the difference between the American and European views of government is reflected in the decisions of the United States Supreme Court and the German Constitutional Court on the issue of abortion. At the time of the famous *Roe v. Wade* decision in 1973, most American states restricted abortions by making them a crime. The American Supreme Court struck down these laws as an infringement on the constitutional right of privacy, or more precisely the right to exercise autonomy in making certain personal decisions. *Roe* is in the tradition of many court decisions in the United States that protect individual liberties that have been infringed by governmental action. The decisions restrain an overreaching government when it intrudes on the rights of the individual. At the same time the United States Supreme Court has held that the **United States Constitution** does not affirmatively require states to provide support to mothers who cannot afford to raise their children. *Dandridge v. Williams* (1970). Nor must a state intervene to protect the lives or liberties of persons from interference by other private individuals. In *DeShaney v. Winnebago County Department of Social Services* (1989), the Supreme Court held that a state had no affirmative duty to protect the life of a child who was being abused by his father even when the state had reason to know that the abuse was occurring or was about to occur.

The Abortion Decision by the German Constitutional Court in 1975 shows a very different role for government as regards the individual. Germany had passed a law that allowed, with certain restrictions, personal choice over the decision whether to have an abortion at least during the first thirteen weeks of pregnancy. The German Constitutional Court found that the life of the fetus predominated over the freedom of the mother in many instances and that condemnation of abortion must be clearly expressed in the legal order. The Court held that the state had an affirmative duty to employ social, political and welfare means for securing the life of the fetus and possibly to employ the penal law to protect unborn life. The Court stated, "the state will also be expected to offer counseling and assistance with the goal of reminding pregnant women of the fundamental duty to respect the right to life of the unborn, or encourage her to continue the pregnancy and – especially in cases of social need – to support her through practical measures of assistance."

The significant difference between these two opinions on the right to an abortion is not in how the courts define life or the privacy of the mother. The significant difference is in how the court views the role of the state. The United States Supreme Court is willing to restrain the state from violating what it defines as a fundamental human liberty, but it is unwilling to affirmatively require the state to provide support for children whose parents cannot or will not support them. The German Constitutional Court sees government actively intervening into the lives of individuals affirmatively to provide support for what it defines as a fundamental human liberty. These differences can, of course, be overstated, but an American is more likely to erect a shield between the individual and the government to protect liberties, whereas a European is more likely to look to the government affirmatively to support liberties.

Jurisdictional Disputes in the Courts

A major question that is inherent in any common law judicial proceeding is whether the court has jurisdiction. Jurisdictional disputes between courts have been with the common law from the beginning and lawyers spend much time and energy debating whether a particular lawsuit was filed in the proper forum. When the Norman kings introduced the common law system to England in the 11th Century, the King's courts, which applied the common law, had jurisdiction of only limited disputes, generally those that affected

the peace of the realm or affected the King or royal power. The common law lawyers used all sorts of ingenuity so that cases would be tried by the common law in the King's courts and not in the local courts, where the procedure was thought to be less advanced by the standards of the times.

The common law eventually won out over the local courts because of the creative arguments of the common law lawyers and judges, but in the Tudor and Stuart era a new dispute developed between the common law courts and the courts of equity. The courts of equity applied a more flexible "Roman" modeled law to settle disputes that could not readily be resolved by the common law courts. Equity could only act, however, when there was no plain, efficient, or effective remedy available at common law. Disputes could go on for years over which court had jurisdiction over a particular aspect of a case. Law and equity were merged in England in the late 19th Century and in the United States in the early 20th Century. However, jurisdictional questions still arise in the United States because the constitutional right to a trial by jury applies in cases that formerly were tried by the common law courts but does not attach to cases that were formerly tried in the courts of equity.

Jurisdictional disputes take on a new role in the United States because of our system of federalism. We have both federal and state courts and the jurisdictions of these courts frequently overlap. State courts are courts of general jurisdiction and can hear both federal and state cases unless Congress has provided exclusive jurisdiction with the federal courts, which is generally not the case. Federal courts have a more limited jurisdiction that covers federal questions and also disputes between citizens of different states.

Thus parties frequently have a choice whether they will litigate a case in federal or in state court. Federal judges have often interpreted federal jurisdiction narrowly so disputes arise whether a matter is properly filed in federal court. Also, some types of cases can be removed by the defendant to federal court if the plaintiff has elected to file initially in state court. Sometimes cases involving the same dispute may be filed in both state and federal court and jurisdictional disputes can arise over whether the federal court should defer to the state court or whether the federal court should halt proceedings in the state court. Cases filed in state court can also be appealed to the United States Supreme Court if a federal question was raised in the state proceedings. Thus it is not at all unusual for arguments over jurisdiction to take precedence over arguments about the merits of the controversy.

Trial by Jury

Trial by jury in both civil and criminal cases is a cherished part of the common law system in the United States. The Normans introduced jury trials into England in the 13th Century. Arguments are frequently raised against juries, especially in complicated civil cases. England has abolished jury trials in most civil cases, but the **United States Constitution** prevents their abolishment in the United States. Juries have played an important role in the development of the common law. Many of the procedures and rules of evidence that the common law has developed are thought to be necessary to aid the jury in reaching a proper verdict.

Trial by a jury of one's peers places a barrier between the individual and the government. The verdict of a jury is virtually untouchable. Juries have been known not to convict if they feel that a particular law is unjust. Jurors bring the feelings of the community into the courtroom and act as a check on an overreaching government. The jury is thus the conscience of the community. This has caused problems when the community is governed by prejudice, as when black jurors were formerly tried for criminal offenses in the American South. But most of the time jurors take their responsibilities seriously and try to rise above their individual parochial interests to do justice.

The Importance of Procedure

It is often said that Europeans are preoccupied with finding the one "right" answer; a civil law trial is thus first and foremost a search for the "truth". Civil law trials are inquisitorial in that a neutral judge assembles and analyzes the evidence. Americans tend to be skeptical about whether the "truth" can be found through an impartial investigation, whether it is the police or the prosecutors or the courts that conduct the investigation. The common law system believes that "truth" is best uncovered not by a neutral investigator but through an adversarial process where each side offers evidence, cross examines witnesses, and makes arguments to a neutral hearing officer or judge. The American trial is thus adversarial. It is directed by the lawyers rather than by the judge. In part this is a reflection of the anti-government bias of the common law. Individuals should be allowed to make their own cases; government bureaucrats should not control the process.

The common law tends to be more concerned with process and procedure than the civil law. American appellate courts are more likely to review a case to see if proper procedures were followed than to see if the right result was reached. Part of this is because of the jury system. It is assumed that good procedures will produce good results, but even if they do not, there is an independent value in following the proper rules. Perhaps the most famous example is the exclusionary rule used in criminal cases, which excludes evidence if it was improperly obtained by the police or prosecutors. The rationale is that it is better for an accused to go free than for the government to violate the law in trying to obtain a conviction.

The emphasis on procedure can be explained in part by the history of the common law. The early common law was concerned not with rights but with remedies. The right to proceed in the King's courts depended upon the existence

of a writ. A writ was a remedy. Thus, the theory of the common law was that remedies preceded rights. The preoccupation was with procedure. If you could plead your case to fit within one of the traditional remedies, you were allowed to proceed with your case. Because the **Statute of Westminster** in 1285 limited the number of writs that were available, anyone alleging a new cause of action had to fit it within one of the old forms. Whether your rights were violated depended upon whether you could procedurally fit yourself into an existing cause of action. There was no abstract discussion of rights by university scholars; common law lawyers and judges battled over whether the existing writs might give a party relief in a particular fact situation.

In the United States, procedure is also emphasized in the **Bill of Rights**. The due process clauses of the **Fifth** and **Fourteenth Amendments** are a guarantee of fair procedures in both civil and criminal cases. The **Fourth, Fifth, Sixth,** and **Eighth Amendments** also guarantee specific procedural protections in criminal cases. These procedures have an independent value that the courts and government are required to uphold.

The Importance of Precedent

The common law has no code. The common law was largely unwritten. Judges looked to basic principles to determine the common law. Slowly the doctrine of judicial precedent, of *stare decisis*, was developed. The style was inductive and not deductive. In the middle ages lawyers kept notes of important decisions and these were reported in Yearbooks. Commentators such as Lord Coke and later Blackstone discussed important precedents in the common law. By the 18th Century, case opinions of the judges were regularly reported and our modern doctrine of *stare decisis* was formalized. Under the principle of *stare decisis*, lower courts are bound by the decisions of higher courts and higher courts are bound by their own precedents. Because prior decisions are never strictly on point, lawyers and judges engage in analogical reasoning when applying prior precedents.

The rule of *stare decisis* has been applied flexibly in the United States, and more strictly in England. However, because of the interest in continuity and uniformity, courts are loath to depart from their prior precedents except in the most exceptional circumstances. At first, common law lawyers and judges were skeptical if legislation could change the common law. It was thought that legislation could supplement the common law by filling in gaps and clarifying ambiguities, but legislation could not overrule the common law. Today the common law recognizes that legislation is indeed law and legislators frequently overturn common law precedents. But most Americans are so used to applying judicial precedent that they are often uncomfortable with new legislation until it has been interpreted and applied by the courts.

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United States v. Microsoft Corporation – a War on Many Fronts

Sherman Act Goes Online

Ondřej Vondráček

July 2000. Bill Gates' Microsoft Empire seems ruined. The judge of the District Court of the District of Columbia, Thomas Penfield Jackson, orders Microsoft to be split into two separate entities. One year later, Court of Appeals brings Microsoft to life again: proposed divestiture of the company is rejected. Judge Jackson is disqualified. The war resumes...

New Legal and Economic Challenges

Indisputably, none of the cases in the last decade has provoked so wide a response among so many professions; lawyers, economists and engineers have all been showing a profound interest in this case. This fact attests to the extreme complexity of the disputed issue. The judges are faced with the finest technological details and with the latest economic theories of the e-market to which old antitrust principles are rarely applicable. Furthermore, very few older cases apply to this new field. Thus, there is little precedent to guide future decisions. Consequently, the parties in dispute try to come up with brand-new theories. Microsoft, for instance, introduced its own theory on the e-market dynamics when in an attempt to defend its market controlling conduct, claimed that the classical structure of several firms competing in the market no longer applies to the software market. In this market, according to Microsoft, one firm gains for a limited time the dominant share in the market through technological innovation, and then another replaces it in the same manner. Microsoft tried thereby to demonstrate that, monopoly is