



Distinctiveness of Common Law

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Abstract. This essay examines the distinctive characteristics of the common law tradition. It first analyses the conceptual meanings of ‘common law’ from semantic, historical and comparative perspectives, demonstrating how common law emerged. The essay then explores the macro- and micro-level features that distinguish common law, including the central role of judicial precedent, the doctrine of stare decisis, the comparatively limited role of statutes, and the pragmatic orientation of legal reasoning. The essay further investigates how these characteristics manifest in three substantive legal domains: contract law, tort law, and private international law. Through comparative analysis, it argues that the common law tradition is characterised by incremental case-based development, procedural pragmatism, and a strong emphasis on practical dispute resolution, whereas the civil law tradition tends to prioritise codification and conceptual coherence. The common law continues to maintain a distinctive legal mentality rooted in its historical development and judicial method.

Keywords: Common law; Civil law; Stare decisis; Legal tradition

1 Introduction

According to Prof. Dr. Uwe Kischel, ‘The way law develops in the common law clearly shows that its distinctiveness lies primarily in a specific way of thinking about the law ...’^[1], it can be inferred that there are some distinctive features of the common law compared to other legal systems.

This essay will explain the meanings and distinctive characteristics of the common law as against the civil law tradition, and choose three substantive domains, namely contract law, tort law, and private international law, to trace how these structural differences manifest in doctrine and practice.

2 The Conceptualization of ‘Common Law’

Any serious discussion with the distinctiveness of common law must begin with a prior question: what, precisely, does ‘common law’ mean?

At the semantic level, the term ‘common law’ itself is itself instructive, covering different meanings in different languages. In French, ‘common law’, translated as *droit*

commun, usually denotes general law as opposed to ‘special law’. This is a purely formal distinction with no necessary connection to judge-made rules or English legal history. In German, *gemeines Recht* functions as a reference point for a common system of legal thought, carrying connotations of universality rather than particularity. And in the Arab world, the term ‘common law’ is frequently rendered as ‘general law’, which technically overlaps with the term ‘public law’. Within the English-speaking world itself, the term ‘common law’ carries slightly distinct meanings in different historical periods and different countries.

From the historical perspective, the term originally not to a body of doctrine that was consciously designed, but to the gradual centralisation process of royal justice in medieval England. As the king’s own courts progressively asserted jurisdictional authority over disputes previously governed by local custom, a body of law truly common to the whole realm emerged in their wake.^[2] The common law, on this account, was the by-product of institutional expansion rather than deliberate jurisprudential ambition, which truly becomes a body of law that serves the entire kingdom. In this sense, the term ‘common law’ designates the rules developed by these royal courts of law and stands in opposition to Equity, the distinct body of principles administered by the Court of Chancery to temper the occasional rigidity of common law rules in cases where strict legal application would yield unconscionable outcomes.^[3]

From the comparative standpoint, common law took root in England and spread overwhelmingly through colonial imposition, whose counterpart is the civil law tradition, which drew its intellectual foundations from Roman law, which was subsequently carried outward through French, Spanish, and Portuguese expansion.^[4] It should be noted that civil law codification proceeded from an ambition to capture the whole of private law within a logically ordered system of general principles from which particular outcomes could be deduced. By contrast, the common law evolved incrementally from individual disputes into broader doctrinal rules and was never comprehensively codified. Accordingly, when comparative lawyers refer to the common law as a legal family, they are identifying a tradition that persists across jurisdictions and centuries.

3 Distinctive Characteristics of the Common Law

Having examined the multiple meanings of ‘common law’, the analysis turns to the more substantive question of what distinguishes it, as a legal tradition, from the civil law world.

3.1 Macro-level Features

From a broad perspective,

At the macro level, two unique features distinguish common law from its civil law counterpart: first, its remarkable internal cohesion as a legal family, and second, its affinity with conditions conducive to economic development. To be specific:

Firstly, common law jurisdictions have maintained across vast geographical and cultural distances.

Common law governs jurisdictions representing roughly one-third of the global population, and its cohesion is reinforced by English as a shared medium of legal discourse, whereas the civil law world has no comparable linguistic unity. In fact, except for the US, most of the former colonies still have an exceptional judicial link with the UK, which they have the right of ultimate appeal to 'the Judicial Committee of the Privy Council'. Another example is about the famous *Mareva Injunction* introduced into English law by the High Court in England in 1975. After that, courts in New Zealand, Australia, Canada, Hong Kong, Singapore etc...also agreed with this development and started to issue the injunction.

A second source of the common law's attractiveness may lie in its perceived capacity to foster economic growth. The *World Bank's Doing Business Reports* (2004 and 2006) suggest a correlation between a country's economic performance and its legal system, indicating that common law systems may operate more effectively in this regard than their civil law counterparts.

3.2 Micro-level Features

At the microscopic level, Kischel identifies four features that together constitute the common law's characteristic legal features. Taken individually, each feature reflects a methodological tendency; taken together, they point to a more fundamental epistemology of law that distinguishes the common law not merely in terms of technique, but also in its underlying conception of what law is and how it develops^[5].

Firstly, unlike the statutory law character of the civil law tradition, the common law shows a case-by-case development, which means that it primarily relies on judicial decisions in individual cases. For example, the doctrine of '*Forum non Conveniens*' invented in the case of *Sim v. Robinow*^[6] and has worked so far. But unlike the 'landmark decisions' in civil law jurisdiction which include general principles that can be put into practice in future cases, the judicial decisions in common law seems more specific and just links to the current facts in individual cases.

The second distinctive feature of common law lies in the doctrine of *stare decisis*, which means that courts are bound to follow the decisions of higher courts when confronted with materially similar facts. The doctrine is the mechanism through which common law achieves whatever systemic coherence it possesses. Where civil law derives consistency from the logical structure of a code, common law derives it from the vertical authority of precedent: lower courts are bound by the decisions of appellate courts, and the reasoning embedded in those decisions that carries normative force beyond the immediate dispute that generated it. The contrast with civil law is instructive but requires careful qualification. The difference lies in the formal status of precedent as a source of law.^[7] In civil law systems, judicial decisions are not binding authority. Beyond what is contained in the law, judges have a very less power and authority to interpret it; codified regulations and statutory law are the main sources of authority for legal decisions.

The third distinctive feature of common law is the comparatively weaker role of legislation and the correspondingly greater authority of the judiciary in shaping legal

development. In civil law systems, the code occupies the centre of the legal order, constituting the primary source of law. In addition, the judge's role is essentially interpretive, who plays a role in identifying the applicable provision and apply it to the facts at hand. In this sense, legislation, is not merely one source of law among others but the authoritative expression of the legal order as a whole. Of course case law matters a lot in common law, it doesn't mean that case law is superior than statutes in common law. There is no doubt that statutes always take precedence over the common law. But compared with the civil law, it can be easily understood that judges play a central role in the development of the common law. Unlike the civil law, statutes are not considered the main and the most crucial source of law when dealing with social relationships. In other words, statutes are more like exceptions in the view of common law. By contrast, the civil law tradition is defined by the primacy of comprehensive codification, including civil relations, criminal liability, commercial activity.

The fourth character is about the less prominent role of academic literature, which results from a fact that common law courts tend to avoid to cite the work of legal scholars. For instance, in the proceedings in the common law, the jury system plays an important role. Since most of the members in the jury are illiterate, it is necessary to explain understandably to them.

Up to now, compared to civil law, it is sure that common law pays most attention to practice and to obtain good results in individual cases fuzzy rules may be accepted and sacrificing legal principles can be tolerated sometimes. Next we will continue to talk about the special thinking ways of the common law in specific law compared to civil law.

4 Specific Legal Domains: The Common Law's Distinctiveness in Practice

Building on the analysis above, the distinctive features of common law reflect a deeper jurisprudential orientation: common law reasons from the ground up, from the particular to the general, from the remedy to the right. This section examines how common law's 'distinctiveness' shapes substantive doctrine across three legal domains in ways that consistently and tellingly diverge from civilian approaches.

4.1 Contract Law

Though it is common that contracts refer to legally binding agreements, there are still some major differences in conception between civil law and common law. Contracts are based on the doctrine of 'will' which is a legal concept in civil law while they are based on the doctrine of 'promise' which is a factual concept in common law. Unlike the focus is placed on the determination of the general principles that govern contracts in civil law, it is more concerned with the kind of promises that are enforceable in common law. In other words, people concentrate on promises that will trigger binding legal consequences. For instance, to give a gift is an contract in civil law but not in common law.

The difference of conception naturally leads to different approaches of contracts. In civil law system, the contract law system is highly systematized and structured so the substantive law of contract is focused on. But in common law, people care more about remedies afterwards such as an action of debt or an action of detinue. It is known to all that a contract includes an offer and an acceptance no matter in civil law or common law, but when it comes to the enforceable promises, we pay attention to the consideration in common law. Generally speaking, without the consideration which shows the intention to be bound by the promise, the promise will be considered as lacking binding force. Of course there will be exceptions such as contract executed, consideration is an important symbol in contracts in common law.

4.2 Tort Law

Tort law offers a particularly illuminating site for examining common law's distinctive legal mentality, precisely because the structural contrast with civil law is here most visible at the level of basic architecture rather than merely doctrinal detail.

Generally speaking, civil law tort systems are organised around a general clause. It is possible to recover all of the loss of the victim in civil law, while in common law, it will be evaluated if the loss of damage deserves to be recovered based on whether the claim fits in one of the cause of actions. It results in that not every loss will be recovered. As for jurisdictions in common law, unlike civil law jurisdiction, in case of intentional tort, even if the act did not cause the damage for the victim, a person may be still found liable. Even in leading common law jurisdictions such as England and the US, tort law shows a different development. For example, the defamation which refers to the act of making false statements about others that harm their reputation. In England, the victim have to show that he or she has suffered an actual or probable serious harm. But in the US, it will be more strict to the plaintiff. If the victim is a public figure, he or she also has to prove that the statement is made with malice.

4.3 Private International Law

Private international law also brings the deep contrast between common law and civil law into our focus, because the differences here reflect fundamentally different assumptions about the nature of law itself and the role of the judge in its application.

For private international law, it directs a national court to identify and apply the law of another state where the connecting factors of the case so require. When it comes to the foreign law's applying, a supremely pragmatic way is shown by the judges of common law courts. It is assumed that the judge knows only its national law, and foreign law is not different from the national law. So in case that application of foreign law is put forward by the party and the party has interpreted the foreign law to the satisfaction of the court, the foreign law will be able to be applied. Opposed to this, the general approach of civil law seems a little dogmatic. The judge is asked to apply law no matter it is national or foreign. The standard of which to apply is connection to the dispute--the most closely connected one will be chosen. So the judge should take the responsibility to raise the issue of the application of the foreign law.

With regard to the international jurisdiction, civil law systems ground jurisdiction in principled connecting factors, such as domicile, habitual residence, nationality, or the place of performance of a contractual obligation, reflecting an attempt to allocate adjudicatory authority among states on the basis of genuine and meaningful connections between the forum and the dispute. In contrast, common law jurisdiction rests on procedural convenience and a certain connection between the parties or the dispute with the state in civil law but is based on the 'power theory' in common law. That is to say, courts in common law jurisdictions hold that they have an inherent power to take jurisdiction in personam or jurisdiction in rem found within the State. For instance, in the case of *Maharanee of Baroda v. Wildenstein* [8], Wildenstein is considered under the jurisdiction of English Court while he is in a temporary visit to England because the writ had been properly served on the defendant in England.

5 Conclusion

From the discussion and comparison above, it is known that the distinctive characteristics of common law links so closely to its history and culture originally started in England. Though it has already developed differently in some ways in different jurisdictions such as the US, the England, Singapore and so on. We can still feel the influence of England on it. It can also be seen that common law seems more practical and flexible when dealing with specific disputes than civil law. And due to the different basis, it is also interesting to find the special thinking way of common law, such as the international jurisdiction and the judgement for tort. It seems that there is a tendency which the civil law system and common law system tries to learn from each other, and how the two law systems will develop in the future is remained to be seen.

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