Common law

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Common law (also known as **case law** or **precedent**), is law developed by judges through decisions of courts and similar tribunals rather than through legislative statutes or executive branch action. A "common law system" is a legal system that gives great precedential weight to common law,[1] on the principle that it is unfair to treat similar facts differently on different occasions.[2] The body of precedent is called "common law" and it binds future decisions. In cases where the parties disagree on what the law is, an idealized common law court looks to past precedential decisions of relevant courts. If a similar dispute has been resolved in the past, the court is bound to follow the reasoning used in the prior decision (this principle is known as *stare decisis*). If, however, the court finds that the current dispute is fundamentally distinct from all previous cases (called a "matter of first impression"), judges have the authority and duty to make law by creating precedent.[3] Thereafter, the new decision becomes precedent, and will bind future courts.

In practice, common law systems are considerably more complicated than the idealized system described above. The decisions of a court are binding only in a particular jurisdiction, and even within a given jurisdiction, some courts have more power than others. For example, in most jurisdictions, decisions by appellate courts are binding on lower courts in the same jurisdiction and on future decisions of the same appellate court, but decisions of lower courts are only non-binding persuasive authority. Interactions between common law, constitutional law, statutory law and regulatory law also give rise to considerable complexity. However *stare decisis*, the principle that similar cases should be decided according to consistent principled rules so that they will reach similar results, lies at the heart of all

common law systems.

Common law legal systems are in widespread use, particularly in England where it originated in the Middle Ages,[4] and in nations or regions that trace their legal heritage to England as former colonies of the British Empire, including the United States, Malaysia, Singapore, Bangladesh, Pakistan, Sri Lanka, India,[5] Ghana, Cameroon, Canada, Ireland, New Zealand, South Africa, Zimbabwe, Hong Kong, and Australia.[6]

Contents

Primary connotations

The term *common law* has three main connotations and several historical meanings worth mentioning:

1. Common law as opposed to statutory law and regulatory law

Connotation 1 distinguishes the authority that promulgated a law. For example, most areas of law in most Anglo-American jurisdictions include "statutory law" enacted by a legislature, "regulatory law" promulgated by executive branch agencies pursuant to delegation of rule-making authority from the legislature, and common law or "case law", *i.e.*, decisions issued by courts (or quasi-judicial tribunals within agencies).[7][8] This first connotation can be further differentiated into (a) pure common law arising from the traditional and inherent authority of courts to define what the law is, even in absence of an underlying statute, *e.g.*, most criminal law and procedural law before the 20th century, and even today, most of contract law and the law of torts, and (b) court decisions that decide the fine boundaries and distinctions in law promulgated by other bodies, such as judicial interpretations of the Constitution, of statutes, and of regulations.[9]

2. Common law legal systems as opposed to civil law legal systems

Connotation 2 differentiates "common law" jurisdictions and legal systems

from "civil law" or "code" jurisdictions.[9] Common law systems place great weight on court decisions, which are considered "law" with the same force of law as statutes—for nearly a millennium, common law courts have had the authority to make law where no legislative statute exists, and statutes mean what courts interpret them to mean. By contrast, in civil law jurisdictions (the legal tradition that prevails in, or is combined with common law in, Europe and most non-Islamic, non-common law countries), courts lack authority to act where there is no statute, and judicial precedent is given less interpretive weight (which means that a judge deciding a given case has more freedom to interpret the text of a statute independently, and less predictably), and scholarly literature is given more. For example, the Napoleonic code expressly forbade French judges from pronouncing general principles of law.[10]

As a rough rule of thumb, common law systems trace their history to England, while civil law systems trace their history to Roman law and the Napoleonic Code.

The contrast between common law and civil law systems is elaborated in "Contrasts between common law and civil law systems" and "Alternatives to common law systems", below.

3. Law as opposed to equity

This connotation differentiates "common law" (or just "law") from "equity".[7][8] Before 1873, England had two parallel court systems: courts of "law" that could only award money damages and recognized only the legal owner of property, and courts of "equity" (courts of chancery) that could issue injunctive relief (that is, a court order to a party to do something, give something to someone, or stop doing something) and recognized trusts of property. This split propagated to many of the colonies, including the

United States (see "Reception Statutes", below). For most purposes, most jurisdictions, including the U.S. federal system and most states, have merged the two courts.[11][12] Additionally, even before the separate courts were merged together, most courts were permitted to apply both law and equity, though under potentially different procedural law. Nonetheless, the historical distinction between "law" and "equity" remains important today when the case involves issues such as the following:

- categorizing and prioritizing rights to property—for example, the same article of property often has a "legal title" and an "equitable title," and these two groups of ownership rights may be held by different people.
- in the United States, determining whether the Seventh Amendment's right to a jury trial applies (a determination of a fact necessary to resolution of a "common law" claim)[13] or whether the issue will be decided by a judge (issues of what the law is, and all issues relating to equity).
- the standard of review and degree of deference given by an appellate tribunal to the decision of the lower tribunal under review (issues of law are reviewed *de novo*, that is, "as if new" from scratch by the appellate tribunal, while most issues of equity are reviewed for "abuse of discretion," that is, with great deference to the tribunal below).
- the remedies available and rules of procedure to be applied.

4. Historical uses

In addition, there are several historical uses of the term that provide some background as to its meaning. The English Court of Common Pleas dealt with lawsuits in which the King had no interest, i.e. between commoners. Additionally, from at least the 11th century and continuing for several centuries after that, there were several different circuits in the royal court

system, served by itinerant judges who would travel from town to town dispensing the King's justice. The term "common law" was used to describe the law held in common between the circuits and the different stops in each circuit. The more widely a particular law was recognized, the more weight it held, whereas purely local customs were generally subordinate to law recognized in a plurality of jurisdictions. These definitions are archaic, their relevance having dissipated with the development of the English legal system over the centuries, but they do explain the origin of the term.

Basic principles of common law

Common law adjudication

In a common law jurisdiction several stages of research and analysis are required to determine "what the law is" in a given situation. First, one must ascertain the facts. Then, one must locate any relevant statutes and cases. Then one must extract the principles, analogies and statements by various courts of what they consider important to determine how the next court is likely to rule on the facts of the present case. Later decisions, and decisions of higher courts or legislatures carry more weight than earlier cases and those of lower courts.[14] Finally, one integrates all the lines drawn and reasons given, and determines what "the law is". Then, one applies that law to the facts.

The common law evolves to meet changing social needs and improved understanding

The common law is more malleable than statutory law. First, common law courts are not absolutely bound by precedent, but can (when extraordinarily good reason is shown) reinterpret and revise the law, without legislative

intervention, to adapt to new trends in political, legal and social philosophy. Second, the common law evolves through a series of gradual steps, that gradually works out all the details, so that over a decade or more, the law can change substantially but without a sharp break, thereby reducing disruptive effects.[15] In contrast to common law incrementalism, the legislative process is very difficult to get started, as legislatures tend to delay action until a situation is totally intolerable. For these reasons, legislative changes tend to be large, jarring and disruptive (sometimes positively, sometimes negatively, and sometimes with unintended consequences).

One example of the gradual change that typifies the common law is the gradual change in liability for negligence. For example, the traditional common law rule through most of the 19th century was that a plaintiff could not recover for a defendant's negligent production or distribution of a harmful instrumentality unless the two were in privity of contract. Thus, only the immediate purchaser could recover for a product defect, and if a part was built up out of parts from parts manufacturers, the ultimate buyer could not recover for injury caused by a defect in the part. *Winterbottom v. Wright*, 10 M&W 109, 152 Eng.Rep. 402, 1842 WL 5519 (Exchequer of pleas 1842). In *Winterbottom*, the postal service had contracted with Wright to maintain its coaches. Winterbottom was a driver for the post. When the coach failed and injured Winterbottom, he sued Wright. The *Winterbottom* court recognized that there would be "absurd and outrageous consequences" if an injured person could sue any person peripherally involved, and knew it had to draw a line somewhere, a limit on the causal connection between the negligent conduct and the injury. The court looked to the contractual relationships, and held that liability would only flow as far as the person in immediate contract ("privity") with the negligent party.

A first exception to this rule arose in *Thomas v. Winchester* (http://www.courts.state.ny.us/reporter/archives/thomas_winchester.htm) , 6

N.Y. 397 (N.Y. 1852), which held that mislabeling a poison as an innocuous herb, and then selling the mislabeled poison through a dealer who would be expected to resell it, put "human life in imminent danger." *Thomas* used this as a reason to create an exception to the "privity" rule. In *Statler v. Ray Mfg. Co.*, 195 N.Y. 478, 480 (N.Y. 1909) held that a coffee urn manufacturer was liable to a person injured when the urn exploded, because the urn "was of such a character inherently that, when applied to the purposes for which it was designed, it was liable to become a source of great danger to many people if not carefully and properly constructed."

Yet the privity rule survived. In *Cadillac Motor Car Co. v. Johnson*, 221 F. 801 (2nd Cir. 1915) (decided by the federal appeals court for New York and several neighboring states), the court held that a car owner could not recover for injuries from a defective wheel, when the automobile owner had a contract only with the automobile dealer and not with the manufacturer, even though there was "no question that the wheel was made of dead and ‘dozy‘ wood, quite insufficient for its purposes." The *Cadillac* court was willing to acknowledge that the case law supported exceptions for "an article dangerous in its nature or likely to become so in the course of the ordinary usage to be contemplated by the vendor." However, held the *Cadillac* court, "one who manufactures articles dangerous only if defectively made, or installed, e.g., tables, chairs, pictures or mirrors hung on the walls, carriages, automobiles, and so on, is not liable to third parties for injuries caused by them, except in case of willful injury or fraud,"

Finally, in the famous case of *MacPherson v. Buick Motor Co.* (http://www.courts.state.ny.us/reporter/archives/macpherson_buick.htm) , 217 N.Y. 382, 111 N.E. 1050 (N.Y. 1916), Judge Benjamin Cardozo pulled a broader principle out of these predecessor cases. The facts were almost identical to *Cadillac* a year earlier: a wheel from a wheel manufacturer was sold to Buick, to a dealer, to MacPherson, and the wheel failed, injuring MacPherson. Judge Cardozo held:

It may be that Statler v. Ray Mfg. Co. have extended the rule of Thomas v. Winchester. If so, this court is committed to the extension. The defendant argues that things imminently dangerous to life are poisons, explosives, deadly weapons—things whose normal function it is to injure or destroy. But whatever the rule in Thomas v. Winchester may once have been, it has no longer that restricted meaning. A scaffold (Devlin v. Smith, supra) is not inherently a destructive instrument. It becomes destructive only if imperfectly constructed. A large coffee urn (Statler v. Ray Mfg. Co., supra) may have within itself, if negligently made, the potency of danger, yet no one thinks of it as an implement whose normal function is destruction. What is true of the coffee urn is equally true of bottles of aerated water (Torgeson v. Schultz, 192 N. Y. 156). We have mentioned only cases in this court. But the rule has received a like extension in our courts of intermediate appeal. In Burke v. Ireland (26 App. Div. 487), in an opinion by CULLEN, J., it was applied to a builder who constructed a defective building; in Kahner v. Otis Elevator Co. (96 App. Div. 169) to the manufacturer of an elevator; in Davies v. Pelham Hod Elevating Co. (65 Hun, 573; affirmed in this court without opinion, 146 N. Y. 363) to a contractor who furnished a defective rope with knowledge of the purpose for which the rope was to be used. We are not required at this time either to approve or to disapprove the application of the rule that was made in these cases. It is enough that they help to characterize the trend of judicial thought.

We hold, then, that the principle of *Thomas v. Winchester* is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests then, irrespective of contract, the

> manufacturer of this thing of danger is under a duty to make it carefully. ... There must be knowledge of a danger, not merely possible, but probable.

Note that Cardozo's new "rule" exists in no prior case, but is inferrable as a synthesis of the "thing of danger" principle stated in them, merely extending it to "foreseeable danger" even if "the purposes for which it was designed" were not themselves "a source of great danger." *MacPherson* takes some care to present itself as foreseeable progression, not a wild departure. Note that Judge Cardozo continues to adhere to the original principle of *Winterbottom*, that "absurd and outrageous consequences" must be avoided, and he does so by drawing a new line in the last sentence quoted above: "There must be knowledge of a danger, not merely possible, but probable." But while adhering to the underlying principle that *some* boundary is necessary, *MacPherson* overruled the prior common law by rendering the formerly dominant factor in the boundary, that is, the privity formality arising out of a contractual relationship between persons, totally irrelevant. Rather, the most important factor in the boundary would be the nature of the thing sold and the foreseeable uses that downstream purchasers would make of the thing.

This illustrates two crucial principles that are often not well understood by non-lawyers. (a) The law evolves, this evolution is in the hands of judges, and judges have "made law" for hundreds of years. (b) The reasons given for a decision are often more important in the long run than the outcome in a particular case. This is the reason that judicial opinions are usually quite long, and give rationales and policies that can be balanced with judgment in future cases, rather than the bright-line rules usually embodied in statutes.

Interaction of constitutional, statutory and common law

In common law legal systems (connotation 2), the common law (connotation

1) is crucial to understanding almost all important areas of law. For example, in England and Wales and in most states of the United States, the basic law of contracts, torts and property do not exist in statute, but only in common law (though there may be isolated modifications enacted by statute). As another example, the Supreme Court of the United States in 1877,[16] held that a Michigan statute that established rules for solemnization of marriages did not abolish pre-existing common-law marriage, because the statute did not affirmatively require statutory solemnization and was silent as to preexisting common law. In almost all areas of the law (even those where there is a statutory framework, such as contracts for the sale of goods,[17] or the criminal law),[18] legislature-enacted statutes generally give only terse statements of general principle, and the fine boundaries and definitions exist only in the common law (connotation 1). To find out what the precise law is that applies to a particular set of facts, one has to locate precedential decisions on the topic, and reason from those decisions by analogy. To consider but one example, the First Amendment to the United States Constitution states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"—but interpretation (that is, determining the fine boundaries, and resolving the tension between the "establishment" and "free exercise" clauses) of each of the important terms was delegated by Article III of the Constitution to the judicial branch,[19] so that the current legal boundaries of the Constitutional text can only be determined by consulting the common law.[20]

In common law jurisdictions, legislatures operate under the assumption that statutes will be interpreted against the backdrop of the pre-existing common law and custom. For example, in most U.S. states, the criminal statutes are primarily codification of pre-existing common law. (Codification is the process of enacting a statute that collects and restates pre-existing law in a single document—when that pre-existing law is common law, the common law remains relevant to the interpretation of these statutes.) In reliance on

this assumption, modern statutes often leave a number of terms and fine distinctions unstated—for example, a statute might be very brief, leaving the precise definition of terms unstated, under the assumption that these fine distinctions will be inherited from pre-existing common law. (For this reason, many modern American law schools teach the common law of crime as it stood in England in 1789, because that centuries-old English common law is a necessary foundation to interpreting modern criminal statutes.)

With the transition from English law, which had common law crimes, to the new legal system under the U.S. Constitution, which prohibited *ex post facto* laws at both the federal and state level, the question was raised whether there could be common law crimes in the United States. It was settled in the case of *United States v. Hudson and Goodwin*, 11 U.S. 32 (http://supreme.justia.com/us/11/32/case.html) (1812), which decided that federal courts had no jurisdiction to define new common law crimes, and that there must always be a (constitutional) statute defining the offense and the penalty for it.

Still, many states retain selected common law crimes. For example, in Virginia, the definition of the conduct that constitutes the crime of robbery exists only in the common law, and the robbery statute only sets the punishment.[21] Virginia Code section 1-200 establishes the continued existence and vitality of common law principles and provides that "The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly."

By contrast to statutory codification of common law, some statutes displace common law, for example to create a new cause of action that did not exist in the common law, or to legislatively overrule the common law. An example is the tort of wrongful death, which allows certain persons, usually

a spouse, child or estate, to sue for damages on behalf of the deceased. There is no such tort in English common law; thus, any jurisdiction that lacks a wrongful death statute will not allow a lawsuit for the wrongful death of a loved one. Where a wrongful death statute exists, the compensation or other remedy available is limited to the remedy specified in the statute (typically, an upper limit on the amount of damages). Courts generally interpret statutes that create new causes of action narrowly – that is, limited to their precise terms—because the courts generally recognize the legislature as being supreme in deciding the reach of judge-made law unless such statute should violate some "second order" constitutional law provision (*cf*. judicial activism).

Where a tort is rooted in common law, all traditionally recognized damages for that tort may be sued for, whether or not there is mention of those damages in the current statutory law. For instance, a person who sustains bodily injury through the negligence of another may sue for medical costs, pain, suffering, loss of earnings or earning capacity, mental and/or emotional distress, loss of quality of life, disfigurement and more. These damages need not be set forth in statute as they already exist in the tradition of common law. However, without a wrongful death statute, most of them are extinguished upon death.

In the United States, the power of the federal judiciary to review and invalidate unconstitutional acts of the federal executive branch is stated in the constitution, Article III sections 1 and 2: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. ... The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority..." The first famous statement of "the judicial power" was *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (http://supreme.justia.com/us/5/137/case.html) (1803). Later cases interpreted

the "judicial power" of Article III to establish the power of federal courts to consider or overturn any action of congress or of any state that conflicts with the constitution.

Overruling precedent—the limits of *stare decisis*

Most of the U.S. federal courts of appeal have adopted a rule under which, in the event of any conflict in decisions of panels (most of the courts of appeal almost always sit in panels of three), the earlier panel decision is controlling, and a panel decision may only be overruled by the court of appeals sitting *en banc* (that is, all active judges of the court) or by a higher court.[22] In these courts, the older decision remains controlling when an issue comes up the third time.

Other courts, for example, the Court of Customs and Patent Appeals and the Supreme Court, always sit *en banc*, and thus the *later* decision controls. These courts essentially overrule all previous cases in each new case, and older cases survive only to the extent they do not conflict with newer cases. The interpretations of these courts - for example, Supreme Court interpretations of the constitution or federal statutes - are stable only so long as the older interpretation maintains the support of a majority of the court. The majority may persist through some combination of belief that the old decision is right, and that it is not sufficiently wrong to be overruled.

In the UK, since 2009, the Supreme Court of the United Kingdom has the authority to overrule and unify decisions of lower courts. From 1966 to 2009, this power lay with the House of Lords, granted by the Practice Statement of 1966.[23]

Common law as a foundation for commercial economies

The reliance on judicial opinion is a strength of common law systems, and is a significant contributor to the robust commercial systems in the United Kingdom and United States. Because there is common law to give reasonably precise guidance on almost every issue, parties (especially commercial parties) can predict whether a proposed course of action is likely to be lawful or unlawful. This ability to predict gives more freedom to come close to the boundaries of the law.[24] For example, many commercial contracts are more economically efficient, and create greater wealth, because the parties know ahead of time that the proposed arrangement, though perhaps close to the line, is almost certainly legal. Newspapers, taxpayer-funded entities with some religious affiliation, and political parties can obtain fairly clear guidance on the boundaries within which their freedom of expression rights apply.

In contrast, in non-common-law countries, and jurisdictions with very weak respect for precedent (example, the U.S. Patent Office), fine questions of law are redetermined anew each time they arise, making consistency and prediction more difficult, and procedures far more protracted than necessary because parties cannot rely on written statements of law as reliable guides. In jurisdictions that do not have a strong allegiance to a large body of precedent, parties have less *a priori* guidance and must often leave a bigger "safety margin" of unexploited opportunities, and final determinations are reached only after far larger expenditures on legal fees by the parties.

This is the reason for the frequent choice of the law of the State of New York in commercial contracts.[25] Commercial contracts almost always include a "choice of law clause" to reduce uncertainty. Somewhat surprisingly, contracts throughout the world (for example, contracts involving parties in Japan, France and Germany, and from most of the other states of the United States) often choose the law of New York, even where the relationship of the parties and transaction to New York is quite

attenuated. Because of its history as the nation's commercial center, New York common law has a depth and predictability not (yet) available in any other jurisdiction. Similarly, corporations are often formed under Delaware corporate law, and contracts relating to corporate law issues (merger and acquisitions of companies, rights of shareholders, and so on.) include a Delaware choice of law clause, because of the deep body of law in Delaware on these issues.[26] On the other hand, some other jurisdictions have sufficiently developed bodies of law so that parties have no real motivation to choose the law of a foreign jurisdiction (for example,, England and Wales, and the state of California), but not yet so fully developed that parties with no relationship to the jurisdiction choose that law[*citation needed*]. The common theme in each case is that commercial parties seek predictability and simplicity in their contractual relations, and frequently choose the law of a common law jurisdiction with a well-developed body of common law to achieve that result.

Likewise, for litigation of commercial disputes arising out of unpredictable torts (as opposed to the prospective choice of law clauses in contracts discussed in the previous paragraph), certain jurisdictions attract an unusually high fraction of cases, because of the predictability afforded by the depth of decided cases. For example, London is considered the pre-eminent centre for litigation of admiralty cases.[27]

This is not to say that common law is better in every situation. For example, civil law can be clearer than case law when the legislature has had the foresight and diligence to address the precise set of facts applicable to a particular situation. For that reason, civil law statutes tend to be somewhat more detailed than statutes written by common law legislatures – but, conversely, that tends to make the statute more difficult to read (the United States tax code is an example).[28] Nonetheless, as a practical matter, no civil law legislature can ever address the full spectrum of factual possibilities

in the breadth, depth and detail of the case law of the common law courts of even a smaller jurisdiction, and that deeper, more complete body of law provides additional predictability that promotes commerce.

History

The term "common law" originally derives from the reign of Henry II, in the 1150s and 1160s. The "common law" was the law that emerged as "common" throughout the realm (as distinct from the various legal codes that preceded it, such as Mercian law, the Danelaw and the law of Wessex)[29] as the king's judges followed each other's decisions to create a unified common law throughout England. The doctrine of precedent developed during the 12th and 13th centuries,[30] as the collective judicial decisions that were based in tradition, custom and precedent.[31]

The form of reasoning used in common law is known as casuistry or case-based reasoning. The common law, as applied in civil cases (as distinct from criminal cases), was devised as a means of compensating someone for wrongful acts known as torts, including both intentional torts and torts caused by negligence, and as developing the body of law recognizing and regulating contracts. The type of procedure practiced in common law courts is known as the adversarial system; this is also a development of the common law.

Medieval English common law

See also: English law

In the late 800s, Alfred the Great assembled the Doom book (not to be confused with the more-famous Domesday Book from 200 years later), which collected the existing laws of Kent, Wessex, and Mercia, and

attempted to blend in the Mosaic code, Christian principles, and old Germanic customs.[32]

Before the Norman conquest in 1066, justice was administered primarily by what is today known as the county courts (the modern "counties" were referred to as "Shires" in pre-Norman times), presided by the diocesan bishop and the sheriff, exercising both ecclesiastical and civil jurisdiction.[33] Trial by jury began in these courts.[33][*citation needed*]

In 1154, Henry II became the first Plantagenet king. Among many achievements, Henry institutionalized common law by creating a unified system of law "common" to the country through incorporating and elevating local custom to the national, ending local control and peculiarities, eliminating arbitrary remedies and reinstating a jury system – citizens sworn on oath to investigate reliable criminal accusations and civil claims. The jury reached its verdict through evaluating common local knowledge, not necessarily through the presentation of evidence, a distinguishing factor from today's civil and criminal court systems.

Henry II developed the practice of sending judges from his own central court to hear the various disputes throughout the country. His judges would resolve disputes on an ad hoc basis according to what they interpreted the customs to be. The king's judges would then return to London and often discuss their cases and the decisions they made with the other judges. These decisions would be recorded and filed. In time, a rule, known as *stare decisis* (also commonly known as precedent) developed, whereby a judge would be bound to follow the decision of an earlier judge; he was required to adopt the earlier judge's interpretation of the law and apply the same principles promulgated by that earlier judge if the two cases had similar facts to one another. Once judges began to regard each other's decisions to be binding precedent, the pre-Norman system of local customs and law varying in each

locality was replaced by a system that was (at least in theory, though not always in practice) common throughout the whole country, hence the name "common law."

Henry II's creation of a powerful and unified court system, which curbed somewhat the power of canonical (church) courts, brought him (and England) into conflict with the church, most famously with Thomas Becket, the Archbishop of Canterbury. Eventually, Becket was murdered inside Canterbury Cathedral by four knights who believed themselves to be acting on Henry's behalf. Whether Henry actually intended to bring about the assassination of Becket is debatable, but there is no question that at the time of the murder, the two men were embroiled in a bitter dispute regarding the power of Royal Courts to exercise jurisdiction over former clergymen. The murder of the Archbishop gave rise to a wave of popular outrage against the King. Henry was forced to repeal the disputed laws and to abandon his efforts to hold church members accountable for secular crimes (see also Constitutions of Clarendon).

Judge-made common law operated as the primary source of law for several hundred years, before Parliament acquired legislative powers to create statutory law. It is important to understand that common law is the older and more traditional source of law, and legislative power is simply a layer applied on top of the older common law foundation. Since the 12th century, courts have had parallel and co-equal authority to make law[34] -- "legislating from the bench" is a traditional and essential function of courts, which was carried over into the U.S. system as an essential component of the "judicial power" specified by Article III of the U.S. constitution,.[35] Justice Oliver Wendell Holmes, Jr. observed in 1917 that "judges do and must legislate."[36] There are legitimate debates on how the powers of courts and legislatures should be balanced. However, a view that courts lack law-making power is historically inaccurate and constitutionally unsupportable.

Influences of foreign legal systems

Roman law

The term "common law" (connotation 2) is often used as a contrast to Roman-derived "civil law", and the fundamental processes and forms of reasoning in the two are quite different. Nonetheless, there has been considerable cross-fertilization of ideas, while the two traditions and sets of foundational principles remain distinct.

By the time of the rediscovery of the Roman law in Europe in the 12th and 13th centuries, the common law had already developed far enough to prevent a Roman law reception as it occurred on the continent.[37] However, the first common law scholars, most notably Glanvill and Bracton, as well as the early royal common law judges, had been well accustomed with Roman law. Often, they were clerics trained in the Roman canon law.[38] One of the first and throughout its history one of the most significant treatises of the common law, Bracton's *De Legibus et Consuetudinibus Angliae* (On the Laws and Customs of England), was heavily influenced by the division of the law in Justinian's *Institutes*.[39] The impact Roman law had decreased sharply after the age of Bracton, but the Roman divisions of actions into *in rem* (typically, actions against a *thing* or property for the purpose of gaining title to that property; must be filed in a court where the property is located) and *in personam* (typically, actions directed against a person; these can affect a person's rights and, since a person often owns things, his property too) used by Bracton had a lasting effect and laid the groundwork for a return of Roman law structural concepts in the 18th and 19th centuries. Signs of this can be found in Blackstone's *Commentaries on the Laws of England*,[40] and Roman law ideas regained importance with the revival of academic law schools in the 19th century.[41] As a result, today, the main

systematic divisions of the law into property, contract, and tort (and to some extent unjust enrichment) can be found in the civil law as well as in the common law.[42]

Propagation of the common law to the colonies and Commonwealth by reception statutes

Initial reception of English common law into new colonies

In *Commentaries on the Laws of England* (Bk I, ch.4, pp 106–108), Sir William Blackstone described the process by which English common law followed English colonization:

> Plantations or colonies, in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother-country; or where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of colonies, with respect to the laws by which they are bound. For it hath been held, that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force... But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country.

In other words, if an 'uninhabited' or 'infidel' territory is colonized by Britain, then the English law automatically applies in this territory from the moment

of colonization; however if the colonized territory has a pre-existing legal system, the native law would apply (effectively a form of indirect rule) until formally superseded by the English law, through Royal Prerogative subjected to the Westminster Parliament.

Reception statutes as a step in decolonization

As colonies gained independence from England, most adopted British common law as the basis for their legal systems. In most cases, newly independent colonies received common law precedent as of the date independence as the default law, to the extent not explicitly rejected by the newly freed colony's founding documents or government.

For example, following the American Revolution in 1776, one of the first legislative acts undertaken by each of the newly independent states was to adopt a "reception statute" that gave legal effect to the existing body of English common law to the extent that American legislation or the Constitution had not explicitly rejected English law.[43] Some states enacted reception statutes as legislative statutes, while other states received the English common law through provisions of the state's constitution, and some by court decision. British traditions such as the monarchy were rejected by the U.S. Constitution, but many English common law traditions such as habeas corpus, jury trials, and various other civil liberties were adopted in the United States. Significant elements of English common law prior to 1776 still remain in effect in many jurisdictions in the United States, because they have never been rejected by American courts or legislatures.[44]

For example, the New York Constitution of 1777[45] provides that:

> [S]uch parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of

> the colony of New York, as together did form the law of the said colony on the 19th day of April, in the year of our Lord one thousand seven hundred and seventy-five, shall be and continue the law of this State, subject to such alterations and provisions as the legislature of this State shall, from time to time, make concerning the same.

Alexander Hamilton emphasized in The Federalist that this New York constitutional provision expressly made the common law subject "to such alterations and provisions as the legislature shall from time to time make concerning the same."[46] Thus, even when reception was effected by a constitution, the common law was still subject to alteration by a legislature's statute.

One could note a certain irony: one of the first acts of many of the newly independent states was to adopt the law of the foreign sovereign from whom independence had just been gained. But this is one more demonstration of the point mentioned above (Commercial economies), that the newly independent states recognized the importance of a predictable and established body of law to govern the conduct of citizens and businesses, and therefore adopted the richest available source of law.

The Northwest Ordinance, which was approved by the Congress of the Confederation in 1787, guaranteed "judicial proceedings according to the course of the common law." Nathan Dane, the primary author of the Northwest Ordinance, viewed this provision as a default mechanism in the event that federal or territorial statutes were silent about a particular matter; he wrote that if "a statute makes an offence, and is silent as to the mode of trial, it shall be by jury, according to the course of the common law."[47] In effect, the provision operated as a reception statute, giving legal authority to the established common law in the vast territories where no states had yet been established.

Over time, as new states were formed from federal territories, these territorial reception statutes became obsolete and were re-enacted as state law. For example, a reception statute enacted by legislation in the state of Washington requires that "[t]he common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state."[48] In this way, the common law was eventually incorporated into the legal systems of every state except Louisiana (which inherited a civil law system from its French colonizers before the Louisiana Purchase of 1803, adopting a code similar to but not directly based on the Napoleonic Code of 1804).

The pattern was repeated in many other former British colonies as they gained independence from the United Kingdom. Republic of Ireland, Canada, Australia, New Zealand, India, Belize, and various Caribbean and African nations have adopted English common law through reception statutes.

Reception in Hong Kong

For example, when Hong Kong was handed over to China in 1997, Hong Kong retained the common law through a reception statute in Chapter I, Article 8 of the Basic Law of Hong Kong:[49]

> The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.

Decline of Latin maxims, and adding flexibility to *stare decisis*

Well into the 19th century, ancient maxims played a large role in common law adjudication. Many of these maxims had originated in Roman Law, migrated to England before the introduction of Christianity to the British Isles[needs a citation], and were typically stated in Latin even in English decisions. Many examples are familiar in everyday speech even today, "One cannot be a judge in one's own cause" (see Dr. Bonham's Case), rights are reciprocal to obligations, and the like. Judicial decisions and treatises of the 17th and 18th centuries, such at those of Lord Chief Justice Edward Coke, presented the common law as a collection of such maxims. See also Thomas Jefferson's letter to Thomas Cooper.

Reliance on old maxims and rigid adherence to precedent, no matter how old or ill-considered, was under full attack by the late 19th century. Oliver Wendell Holmes, Jr. in his famous article, "The Path of the Law",[50] commented, "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Justice Holmes noted that study of maxims might be sufficient for "the man of the present," but "the man of the future is the man of statistics and the master of economics." In an 1880 lecture at Harvard, he noted "The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."

In the early 20th century, Louis Brandeis, later appointed to the United States Supreme Court, became noted for his use of policy-driving facts and economics in his briefs, and extensive appendices presenting facts that lead a judge to the advocate's conclusion. By this time, briefs relied more on facts than on Latin maxims.

Reliance on old maxims is now deprecated.[51] Common law decisions today reflect both precedent and policy judgment drawn from economics, the social sciences, business, decisions of foreign courts, and the like. The degree to which these external factors *should* influence adjudication is the subject of active debate, but that judges *do* draw of learning from other fields and jurisdictions is a fact of modern legal life.

1870 through 20th century, and the procedural merger of law and equity

As early as the 15th century, it became the practice that litigants who felt they had been cheated by the common-law system would petition the King in person. For example, they might argue that an award of damages (at common law) was not sufficient redress for a trespasser occupying their land, and instead request that the trespasser be evicted. From this developed the system of equity, administered by the Lord Chancellor, in the courts of chancery. By their nature, equity and law were frequently in conflict and litigation would frequently continue for years as one court countermanded the other,[52] even though it was established by the 17th century that equity should prevail. A famous example is the fictional case of Jarndyce and Jarndyce in *Bleak House*, by Charles Dickens.[53]

In England, courts of law and equity were combined by the Judicature Acts of 1873 and 1875, with equity being supreme in case of conflict.[53]

In the United States, parallel systems of law (providing money damages, with cases heard by a jury upon either party's request) and equity (fashioning a remedy to fit the situation, including injunctive relief, heard by a judge) survived well into the 20th century. The United States federal courts procedurally separated law and equity: the same judges could hear either kind of case, but a given case could only pursue causes in law or in equity, and the two kinds of cases proceeded under different procedural rules. This became problematic when a given case required both money damages and injunctive relief. In 1937, the new Federal Rules of Civil Procedure combined law and equity into one form of action, the "civil action." Fed.R.Civ.P. 2. The distinction survives to the extent that issues that were "common law" as of 1791 (the date of adoption of the Seventh Amendment) are still subject to the right of either party to request a jury, and "equity" issues are decided by a judge.[54]

Alabama, Delaware, Mississippi, New Jersey, Tennessee still have separate courts of law and equity, for example, the Court of Chancery. In many states there are separate divisions for law and equity within one court.

Common law pleading and its abolition in the early 20th century

For centuries, through the 19th century, the common law recognized only specific causes of action, and required very careful drafting of the opening pleading to slot into one of them: Debt, Detinue, Covenant, Special Assumpsit, General Assumpsit, Trespass, Trover, Replevin, Case (or Trespass on the Case), and Ejectment.[55] To initiate a law suit, a pleading had to be drafted to meet myriad technical requirements: correctly categorizing the case into the correct legal pigeonhole (pleading in the alternative was not permitted), and using specific "magic words" encrusted over the centuries. Under the old common law pleading standards, a suit by

a *pro se* ("for oneself," without a lawyer) party was all but impossible, and there was often considerable procedural jousting at the outset of a case over minor wording issues.

One of the major reforms of the late 19th century and early 20th century was the abolition of common law pleading requirements.[56] A plaintiff can initiate a case by giving the defendant "a short and plain statement" of facts that constitute an alleged wrong. This reform moved the attention of courts from technical scrutiny of words to a more rational consideration of the actual facts, and opened access to justice far more broadly.

Contrasts between common law and civil law systems

Adversarial system vs. inquisitorial system

Common law courts tend to use an adversarial system, in which two sides present their cases to a neutral judge. In contrast, in civil law systems, inquisitorial system proceedings, where an examining magistrate serves two roles by developing the evidence and arguments for one and the other side during the investigation phase.

The examining magistrate then presents the dossier detailing his or her findings to the president of the bench that will adjudicate on the case where it has been decided that a trial shall be conducted. Therefore the president of the bench's view of the case is not neutral and may be biased while conducting the trial after the reading of the dossier. Unlike the common law proceedings, the president of the bench in the inquisitorial system is not merely an umpire and is entitled to directly interview the witnesses or express comments during the trial, as long as he or she does not express his

or her view on the guilt of the accused.

The proceeding in the inquisitorial system is essentially by writing. Most of the witnesses would have given evidence in the investigation phase and such evidence will be contained in the dossier under the form of police reports. In the same way, the accused would have already put his or her case at the investigation phase but he or she will be free to change his evidence at trial. Whether the accused pleads guilty or not, a trial will be conducted. Unlike the adversarial system, the conviction and sentence to served (if any) will be released by the trial jury together with the president of the trial bench, following their common deliberation.

There are many exceptions in both directions. For example, most proceedings before U.S. federal and state agencies are inquisitorial in nature, at least the initial stages (*e.g.*, a patent examiner, a social security hearing officer, and so on.) even though the law to be applied is developed through common law processes.

Contrasting role of treatises and academic writings in common law and civil law systems

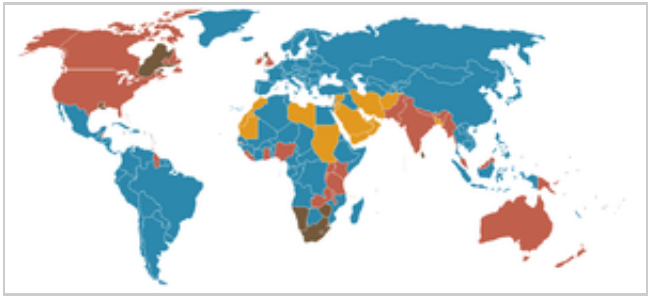
The role of the legal academy presents a significant "cultural" difference between common law (connotation 2) and civil law jurisdictions.

In common law jurisdictions, legal treatises compile common law decisions, and state overarching principles that (in the author's opinion) explain the results of the cases. However, in common law jurisdictions, treatises are not the law, and lawyers and judges tend to use these treatises as only "finding aids" to locate the relevant cases. In common law jurisdictions, scholarly work is seldom cited as authority for what the law is.[57] When common law courts rely on scholarly work, it is almost always only for factual findings,

policy justification, or the history and evolution of the law, but the court's legal conclusion is reached through analysis of relevant statutes and common law, seldom scholarly commentary.

In contrast, in civil law jurisdictions, the writings of law professors are given significant weight by courts. In part, this is because civil law decisions traditionally were very brief, sometimes no more than a paragraph stating who wins and who loses. The rationale has to come from somewhere else, and the academy often filled that role. As civil law court decisions move in the direction of common law reasoning, it is possible that this balance may shift.

Common law legal systems in the present day



Legal systems of the world

- Civil law
- Common law
- Bi-juridical (civil and common law)
- Customary law
- Fiqh

The common law constitutes the basis of the legal systems of: England and Wales, Northern Ireland, Ireland, federal law in the United States and the law of individual U.S. states (except Louisiana), federal law throughout Canada and the law of the individual provinces and territories (except Quebec), Australia (both federal and individual states), Kenya, New Zealand, South Africa, India, Malaysia, Bangladesh, Brunei, Pakistan, Singapore, Hong Kong, and many other generally English-speaking countries or Commonwealth countries (except Scotland, which is bijuridicial, and Malta). Essentially, every country that was colonised at some time by

England, Great Britain, or the United Kingdom uses common law except those that were formerly colonised by other nations, such as Quebec (which follows the law of France in part), South Africa and Sri Lanka (which follow Roman Dutch law), where the prior civil law system was retained to respect the civil rights of the local colonists. India uses common law except in the state of Goa which retains the Portuguese civil code.

Scotland (1707)

Scotland is often said to use the civil law system but it has a unique system that combines elements of an uncodified civil law dating back to the Corpus Juris Civilis with an element of common law long predating the Treaty of Union with England in 1707 (see Legal institutions of Scotland in the High Middle Ages). Scots common law differs in that the use of *precedents* is subject to the courts' seeking to discover the principle that justifies a law rather than searching for an example as a *precedent*, and principles of natural justice and fairness have always played a role in Scots Law. Comparable pluralistic (or 'mixed') legal systems operate in Quebec, Louisiana and South Africa.

States of the United States (1775 on)

The state of New York, which also has a civil law history from its Dutch colonial days, also began a codification of its law in the 19th century. The only part of this codification process that was considered complete is known as the Field Code applying to civil procedure. The original colony of New Netherlands was settled by the Dutch and the law was also Dutch. When the English captured pre-existing colonies they continued to allow the local settlers to keep their civil law. However, the Dutch settlers revolted against the English and the colony was recaptured by the Dutch. When the English finally regained control of New Netherland they forced, as a punishment

unique in the history of the British Empire, the English common law upon all the colonists, including the Dutch. This was problematic, as the patroon system of land holding, based on the feudal system and civil law, continued to operate in the colony until it was abolished in the mid-19th century. The influence of Roman Dutch law continued in the colony well into the late 19th century. The codification of a law of general obligations shows how remnants of the civil law tradition in New York continued on from the Dutch days.

The U.S. state of California has a system based on common law, but it has codified the law in the manner of the civil law jurisdictions. The reason for the enactment of the codes in California in the 19th century was to replace a pre-existing system based on Spanish civil law with a system based on common law, similar to that in most other states. California and a number of other Western states, however, have retained the concept of community property derived from civil law. The California courts have treated portions of the codes as an extension of the common-law tradition, subject to judicial development in the same manner as judge-made common law. (Most notably, in the case *Li v. Yellow Cab Co.*, 13 Cal.3d 804 (1975), the California Supreme Court adopted the principle of comparative negligence in the face of a California Civil Code provision codifying the traditional common-law doctrine of contributory negligence.)

Instead of common law, the U.S. state of Louisiana uniquely uses a system based on the Napoleonic code, remaining true to the state's French and Spanish roots, which predate the U.S. annexation of the Louisiana territory in 1803. Historically notable among the code's differences from the more typically implemented system of common law is the role of property rights among women, particularly in inheritance gained by widows.

United States federal system (1789 and 1938)

The United States federal government (as opposed to the states) has a variant on a common law system. United States federal courts only act as interpreters of statutes and the constitution by elaborating and precisely defining the broad language (connotation 1(b) above), but, unlike state courts, do not act as an independent source of common law (connotation 1(a) above).

Before 1938, the federal courts, like almost all other common law courts, decided the law on any issue where the relevant legislature (either the U.S. Congress or state legislature, depending on the issue), had not acted, by looking to courts in the same system, that is, other federal courts, even on issues of state law, and even where there was no express grant of authority from Congress or the Constitution.

In 1938, the U.S. Supreme Court in *Erie Railroad Co. v. Tompkins* 304 U.S. 64, 78 (http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=CASE&court=US&vol=304&page=64) (1938), overruled earlier precedent,[58] and held "There is no federal general common law," thus confining the federal courts to act only as interpreters of law originating elsewhere. *E.g.*, *Texas Industries v. Radcliff*, 451 U.S. 630 (http://supreme.justia.com/us/451/630/case.html) (1981) (without an express grant of statutory authority, federal courts cannot create rules of intuitive justice, for example, a right to contribution from co-conspirators). Post-1938, federal courts deciding issues that arise under state law are required to defer to state court interpretations of state statutes, or reason what a state's highest court would rule if presented with the issue, or to certify the question to the state's highest court for resolution.

Later courts have limited *Erie* slightly, to create a few situations where United States federal courts are permitted to create federal common law rules without express statutory authority, for example, where a federal rule of decision is necessary to protect uniquely federal interests. *See, e.g.*,

Clearfield Trust Co. v. United States, 318 U.S. 363 (http://supreme.justia.com/us/318/363/case.html) (1943) (giving federal courts the authority to fashion common law rules with respect to issues of federal power, in this case negotiable instruments backed by the federal government); *see also International News Service v. Associated Press*, 248 U.S. 215 (http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=CASE&court=US&vol=248&page=215) (1918) (creating a cause of action for misappropriation of "hot news" that lacks any statutory grounding, but that is one of the handful of federal common law actions that survives today); *National Basketball Association v. Motorola, Inc.*, 105 F.3d 841, 843-44, 853 (2d Cir. 1997) (noting continued vitality of INS "hot news" tort under New York state law, but leaving open the question of whether it survives under federal law). Except on Constitutional issues, Congress is free to legislatively overrule federal courts' common law.[59]

India (1857)

Indian Law is largely based on English common law because of the long period of British colonial influence during the period of the British Raj.

After the failed rebellion against the British in 1857, the British Parliament took over the reign of India from the British East India Company, and British India came under the direct rule of the Crown. The British Parliament passed the Government of India Act of 1858 to this effect, which set up the structure of British government in India. It established in England the office of the Secretary of State for India through whom

The Constitution of India is the longest written

the Parliament would exercise its rule, along with a Council of India to aid him. It also established the office of the Governor-General of India along with an Executive Council in India, which consisted of high officials of the British Government.

constitution for a country, containing 395 articles, 12 schedules, numerous amendments and 117,369 words.

Much of contemporary Indian law shows substantial European and American influence. Various legislations first introduced by the British are still in effect in their modified forms today. During the drafting of the Indian Constitution, laws from Ireland, the United States, Britain, and France were all synthesized to get a refined set of Indian laws, as it currently stands. Indian laws also adhere to the United Nations guidelines on human rights law and the environmental law. Certain international trade laws, such as those on intellectual property, are also enforced in India.

Indian family law is complex, with each religion adhering to its own specific laws. In most states, registering marriages and divorces is not compulsory. There are separate laws governing Hindus, Muslims, Christians, Sikhs and followers of other religions. The exception to this rule is in the state of Goa, where a Portuguese uniform civil code is in place, in which all religions have a common law regarding marriages, divorces and adoption.

Ancient India represented a distinct tradition of law, and had an historically independent school of legal theory and practice. The *Arthashastra*, dating from 400 BCE and the *Manusmriti*, from 100 CE, were influential treatises in India, texts that were considered authoritative legal guidance.[60] Manu's central philosophy was tolerance and pluralism, and was cited across Southeast Asia.[61] Early in this period, which finally culminated in the creation of the Gupta Empire, relations with ancient Greece and Rome were not infrequent. The appearance of similar fundamental institutions of

international law in various parts of the world show that they are inherent in international society, irrespective of culture and tradition.[62] Inter-State relations in the pre-Islamic period resulted in clear-cut rules of warfare of a high humanitarian standard, in rules of neutrality, of treaty law, of customary law embodied in religious charters, in exchange of embassies of a temporary or semi-permanent character.[63] When India became part of the British Empire, there was a break in tradition, and Hindu and Islamic law were supplanted by the common law.[64] As a result, the present judicial system of the country derives largely from the British system and has little correlation to the institutions of the pre-British era.[65]

There are 1160 laws as on September 2007[66]

Canada (1867)

All but one of the provinces of Canada use a common law system (the exception being Quebec, which uses a civil law system for issues arising within provincial jurisdiction, such as property ownership and contracts). Criminal law, which is uniform throughout Canada, is based on the common law as interpreted by the Supreme Court of Canada. The mid-tier Federal Court of Appeal is a single court that sits and hears cases in multiple cities, and thus mid-tier decisions have precedential value throughout Canada (that is, unlike the United States, Canada is not divided into appellate circuits).[67] Canadian federal statutes[68] must use the terminology of both the common law and civil law for those matters; this is referred to as legislative bijuralism.[69]

Nicaragua

Nicaragua's legal system also is a mixture of the English Common Law and

the Civil Law through the influence of British administration of the Eastern half of the country from the mid-17th century until about 1905, the William Walker period from about 1855 through 1857, USA interventions/occupations during the period from 1909 to 1933, the influence of USA institutions during the Somoza family administrations (1933 through 1979) and the considerable importation between 1979 and the present of USA culture and institutions.

Israel (1948)

Israel has a mixed system of common law and civil law. While Israeli law is undergoing codification, its basic principles are inherited from the law of the British Mandate of Palestine and thus resemble those of British and American law, namely: the role of courts in creating the body of law and the authority of the supreme court in reviewing and if necessary overturning legislative and executive decisions, as well as employing the adversarial system. One of the primary reasons that the Israeli constitution remains unwritten is the fear by whatever party holds power that creating a written constitution, combined with the common-law elements, would severely limit the powers of the Knesset (which, following the doctrine of parliamentary sovereignty, holds near-unlimited power).[70]

Alternatives to common law systems

The main alternative to the common law system is the civil law system, which is used in Continental Europe, and most of the rest of the world. The contrast between civil law and common law legal systems has become increasingly blurred, with the growing importance of jurisprudence (similar to case law but not binding) in civil law countries, and the growing importance of statute law and codes in common law countries.

Examples of common law being replaced by statute or codified rule in the United States include criminal law (since 1812, U.S. courts have held that criminal law must be embodied in statute if the public is to have fair notice), commercial law (the Uniform Commercial Code in the early 1960s) and procedure (the Federal Rules of Civil Procedure in the 1930s and the Federal Rules of Evidence in the 1970s). But note that in each case, the statute sets the general principles, but the common law process determines the scope and application of the statute.

An example of convergence from the other direction is shown in Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health (Corte suprema di Cassazione, Italy, 1982) (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61981J0283:EN:NOT) , in which Italy's Supreme Court held that questions it has already answered need not be resubmitted. This brought in a distinctly common law principle into an essentially civil law jurisdiction. As the Italian courts continue to follow this precedent and assume that the Supreme Court's rulings have precedential value.

The former Soviet Bloc and other Socialist countries used a Socialist law system.

Scholarly works

Lord Chief Justice Edward Coke, a 17th-century

Lord Chief Justice Edward Coke, a 17th-century English jurist and Member of Parliament, wrote several legal texts that formed the basis for the modern common law, with lawyers in both England and America learning their law from his *Institutes* and *Reports* until the end of the 18th century. His works are still cited by common law courts around the world.

Sir William Blackstone as illustrated in his *Commentaries on the Laws of England*.

The next definitive historical treatise on the common law is *Commentaries on the Laws of England*, written by Sir William Blackstone and first published in 1765 - 1769. Since 1979, a facsimile edition of that first edition has been available in four paper-bound volumes. Today it has been superseded in the English part of the United Kingdom by Halsbury's Laws of England that covers both common and statutory English law.

While he was still on the Massachusetts Supreme Judicial Court, and before being named to the U.S. Supreme Court, Justice Oliver Wendell Holmes, Jr. published a short volume called *The Common Law*, which remains a classic in the field. Unlike Blackstone and the Restatements, Holmes' book only briefly discusses what the law *is*; rather, Holmes describes the common law *process*. Law professor John Chipman Gray's *The Nature and Sources of the Law*, an examination and survey of the common law, is also still commonly read in U.S. law schools.

In the United States, Restatements of various subject matter areas (Contracts, Torts, Judgments, and so on.), edited by the American Law Institute, collect the common law for the area. The ALI Restatements are often cited by American courts and lawyers for propositions of uncodified common law, and are considered highly persuasive authority, just below binding

precedential decisions. The Corpus Juris Secundum is an encyclopedia whose main content is a compendium of the common law and its variations throughout the various state jurisdictions.

Scots *common law* covers matters including murder and theft, and has sources in custom, in legal writings and previous court decisions. The legal writings used are called *Institutional Texts* and come mostly from the 17th, 18th and 19th centuries. Examples include Craig, *Jus Feudale* (1655) and Stair, *The Institutions of the Law of Scotland* (1681).

See also

- Anglo-Saxon law
- Common law offences
- Alimony
- Doom book, or Code of Alfred the Great
- Arraignment
- Civil law (legal system)
- Common-law marriage
- Russian law
- English law
- Grand jury
- Jury trial
- List of legal topics
- Scots law
- List of legal doctrines
- Rule of law

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7. ^ ***a b*** Garner 177
8. ^ ***a b*** Salmond 32
9. ^ ***a b*** Garner 178
10. ^ "5. The judges are forbidden to pronounce, by way of general and legislative determination, on the causes submitted to them." Code of Napoleon, Law 5 (http://www.napoleon-series.org/research/government/code/book1/c_preliminary.html)
11. ^ Federal Rule of Civil Procedure, Rule 2 (http://www.law.cornell.edu/rules/frcp/Rule2.htm) ("There is one form of action —the civil action.") (1938)

12. ^ Friedman xix
13. ^ "In Suits at common law ... the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."
14. ^ *e.g.*, *Ex parte Holt*, 19 USPQ2d 1211, 1214 (Bd. Patent App. & Interf. 1991) (explaining the hierarchy of precedent binding on tribunals of the United States Patent Office)
15. ^ The beneficial qualities of the common law's incrementalist evolution was most eloquently expressed by the future Lord Mansfield, then Solicitor General Murray, in the case of *Omychund v. Barker*, who contended that "a statute very seldom can take in all cases; therefore the common law, that works itself pure by rules drawn from the fountain of justice, is for that reason superior to an act of parliament." I Atk. 21, 33, 26 Eng. Rep. 15, 22-23 (Ch. 1744)
16. ^ *Meister v. Moore*, 96 U.S. 76 (1877) ("No doubt a statute may take away a common law right, but there is always a presumption that the legislature has no such intention unless it be plainly expressed.")
17. ^ *E.g.*, Uniform Commercial Code, Article 2, on Contracts for the Sales of Goods (http://www.law.cornell.edu/ucc/2/)
18. ^ Model Penal Code as adopted in several states, for example, New York's Penal Law (http://caselaw.lp.findlaw.com/nycodes/c82.html)
19. ^ Graham Hughes, Common Law Systems, § VII, collected in Alan B. Morrison, Fundamentals of American Law, p. 23-24, Oxford University Press (1996).
20. ^ To consider one example, *Lemon v. Kurtzman*, 403 U.S. 602 (1971), resolves one part of the tension between the "establishment" and "free exercise" clauses of the First Amendment with a three part test: a government-sponsored message violates the Establishment Clause if: (1) it does not have a secular purpose; (2) its principal or primary effect advances or inhibits religion; or (3) it creates an excessive entanglement of the government with religion..
21. ^ *Johnson v. Commonwealth*, 209 Va. 291, 293, 163 S.E.2d 570, ___ (1968)
22. ^ *E.g.*, *South Corp. v. United States*, 690 F.2d 1368 (Fed. Cir. 1982) (*en banc* in relevant part) (explaining order of precedent binding on the United States Court of Appeals for the Federal Circuit); *Bonner v. City of Prichard, Alabama*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*) (after the Eleventh Circuit was split off from the Fifth Circuit, adopting precedent of Fifth Circuit as binding until

overruled by the Eleventh Circuit *en banc*: "The [pre-split] Fifth followed the absolute rule that a prior decision of the circuit (panel or *en banc*) could not be overruled by a panel but only by the court sitting *en banc*. The Eleventh Circuit decides in this case that it chooses, and will follow, this rule."); *Ex parte Holt*, 19 USPQ2d 1211, 1214 (Bd. Patent App. & Interf. 1991) (explaining the hierarchy of precedent binding on tribunals of the United States Patent Office).

23. ^ 83 Cr App R 191, 73 Cr App R 266
24. ^ See, e.g., Yeo Tiong Min, "A Note on Some Differences in English Law, New York Law, and Singapore Law (http://www.singaporelaw.sg/content/SomeDifferences.html) " (2006).
25. ^ Theodore Eisenberg & Geoffrey P. Miller, The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts (2008). New York University Law and Economics Working Papers. Paper 124, http://lsr.nellco.org/nyu_lewp/124 (based on a survey of 2882 contracts, "New York law plays a role for major corporate contracts similar to the role Delaware law plays in the limited setting of corporate governance disputes.")
26. ^ Eisenberg & Miller
27. ^ Osley, Richard (2008-11-23). "London becomes litigation capital of the world" (http://www.independent.co.uk/news/uk/home-news/london-becomes-litigation-capital-of-the-world-1031231.html) . *The Independent* (London). http://www.independent.co.uk/news/uk/home-news/london-becomes-litigation-capital-of-the-world-1031231.html.
28. ^ U.S. Internal Revenue Service, Taxpayer Advocate Service, 2008 Report to Congress, http://www.irs.gov/pub/irs-utl/08_tas_arc_msp_1.pdf
29. ^ Outside the law (http://www.nationalarchives.gov.uk/pathways/citizenship/citizen_subject/law.ht The National Archives
30. ^ Jeffery, Clarence Ray (1957). "The Development of Crime in Early English Society". *Journal of Criminal Law, Criminology, and Police Science* (The Journal of Criminal Law, Criminology, and Police Science, Vol. 47, No. 6) **47** (6): 647–666. doi:10.2307/1140057 (http://dx.doi.org/10.2307%2F1140057) . JSTOR 1140057 (http://www.jstor.org/stable/1140057) .
31. ^ Winston Chruchill, *A History of the English Speaking Peoples*, Chapter 13, *The English Common Law*

32. ^ *see* Oliver Wendell Holmes, Jr., *The Common Law*, Lecture I, sec. 2, "In Massachusetts today...there are some (rules) which can only be understood by reference to the infancy of procedure among the German tribes."
33. ^ *a b* "Common Law". *Catholic Encyclopedia*. New York: Robert Appleton Company. 1913.
34. ^ William Burnham, *Introduction to the Law and Legal System of the United States*, 4th ed. (St. Paul, Thomson West, 2006), 42.
35. ^ E.g., *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (N.Y. 1916) (discussed above, adjudicating the tort of negligence that existed in no statute, and expanding the law to cover parties that had never been addressed by statute); Hadley v Baxendale (1854) 9 Exch 341 (defining a new rule of contract law with no basis in statute); *Marbury v. Madison*, 137 5 U.S. 137 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); Alexander Hamilton, THE FEDERALIST, Nos. 78 and 81 (J. Cooke ed. 1961), 521-530, 541-55 ("The interpretation of the laws is the proper and peculiar province of the courts. A constitution, is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body."); see rule against perpetuities for a judicially created law originating in 1682 that governs the validity of trusts and future interests in real property, Rule in Shelley's Case for a rule created by judges in 1366 or before, and life estate and fee simple for rules of real property ownership that were judicially created in the late 1100's as the crown began to give law-making power to courts.
36. ^ *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).
37. ^ E.g., R. C. van Caenegem, *The Birth of the English Common Law* 89-92 (1988).
38. ^ E.g., Peter Birks, Grant McLeod, *Justinian's Institutes* 7 (1987).
39. ^ E.g., George E. Woodbine (ed.), Samuel E. Thorne (transl.), *Bracton on the Laws and Customs of England*, Vol. I (Introduction) 46 (1968); Carl Güterbock, *Bracton and his Relation to the Roman Law* 35-38 (1866).
40. ^ Stephen P. Buhofer, *Structuring the Law: The Common Law and the Roman Institutional System*, Swiss Review of International and European Law (SZIER/RSDIE) 5/2007, 24 (download at http://www.szier.ch - archive).

41. ^ Peter Stein, *Continental Influences on English Legal thought, 1600 - 1900*, *in* Peter Stein, *The Character and Influence of the Roman Civil Law* 223 *et seq*. (1988).
42. ^ See generally Stephen P. Buhofer, *Structuring the Law: The Common Law and the Roman Institutional System*, Swiss Review of International and European Law (SZIER/RSDIE) 5/2007 (download at http://www.szier.ch - archive).
43. ^ Glenn Lammi and James Chang, "Michigan High Court Ruling Offers Positive Guidance on Challenges to Tort Reform Laws (http://www.wlf.org/upload/121704LBChang.pdf) " (December 17, 2004).
44. ^ *Milestones! 200 Years of American Law: Milestones in Our Legal History* By Jethro Koller Lieberman Published by West, 1976 Original from the University of California Digitized Jun 11, 2008 ISBN 0-19-519881-6, 9780195198812, pg. 16 [1] (http://books.google.com/books?id=i_2wAAAAIAAJ&pgis=1)
45. ^ New York Constitution of 1777 (http://www.yale.edu/lawweb/avalon/states/ny01.htm) via Avalon Project at Yale Law School.
46. ^ Alexander Hamilton, Federalist 84 (http://www.constitution.org/fed/federa84.htm) (1788).
47. ^ Nathan Dane, 6 *General Abridgment and Digest of American Law* §182, art. 5, 230 (Cummings, Hilliard & Co. 1823).
48. ^ *Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3d 835 (http://laws.lp.findlaw.com/getcase/9th/case/9835154&exact=1) (9th Cir. 2001).
49. ^ "Chapter I, Section 8 of Hong Kong Basic Law" (http://www.basiclaw.gov.hk/en/basiclawtext/chapter_1.html) . Basiclaw.gov.hk. 2008-03-17. http://www.basiclaw.gov.hk/en/basiclawtext/chapter_1.html. Retrieved 2010-05-30.
50. ^ Holmes, Jr., Oliver Wendell (1897). "The Path of the Law" (http://www.gutenberg.org/ebooks/2373) . *Harvard Law Review* **10** (8): 457, 469. doi:10.2307/1322028 (http://dx.doi.org/10.2307%2F1322028) . http://www.gutenberg.org/ebooks/2373.
51. ^ *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004) (Roberts, J., concurring).

52. ^ Salmond 34
53. ^ ***a*** ***b*** Lobban, M. (2004). "Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Part II" (http://www.historycooperative.org/journals/lhr/22.3/forum_lobban.html#FOOT142) . *Law and History Review*. University of Illinois. http://www.historycooperative.org/journals/lhr/22.3/forum_lobban.html#FOOT142.
54. ^ *E.g.*, *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996) ("[W]e [the U.S. Supreme Court] have understood that the right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted. In keeping with our longstanding adherence to this 'historical test,' we ask, first, whether we are dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was. If the action in question belongs in the law category, we then ask whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791." citations and quotations omitted, holding that interpretation of the scope of a patent had no analogy in 1790, and is thus a question to be decided by a judge, not a jury)
55. ^ John Jay McKelvey, Principles of Common Law Pleading (1894).
56. ^ Note that the remainder of the "common law" discussed in the rest of the article remained intact; all that was abolished were the highly technical requirements for language of the paper provided by the plaintiff to the defendant to initiate a case.
57. ^ At least in the U.S., practicing lawyers tend to use "law professor" or "law review article" as a pejorative to describe a person or work that is insufficiently grounded in reality or practicality - every young lawyer is admonished repeatedly by senior lawyers not to write "law review articles," but instead to focus on the facts of the case and the practical effects of a given outcome.
58. ^ *Swift v. Tyson*, 41 U.S. 1 (http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=CASE&court=US&vol=41&page=1) (1842). In *Swift*, the United States Supreme Court had held that federal courts hearing cases brought under their diversity jurisdiction (allowing them to hear cases between parties from different states) had to apply the statutory law of the states, but not the common law developed by state courts. Instead, the Supreme Court permitted the federal courts to make their own common law based on general principles of law. *Erie*

v. *Tompkins*, 304 U.S. 64 (http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=CASE&court=US&vol=304&page=64) (1938). *Erie* over-ruled *Swift v*. *Tyson*, and instead held that federal courts exercising diversity jurisdiction had to use all of the same substantive law as the courts of the states in which they were located. As the *Erie* Court put it, there is no "general federal common law", the key word here being ***general***. This history is elaborated in federal common law.

59. ^ *City of Boerne v*. *Flores*, 521 U.S. 507 (http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=521&invol=507) (1997) (invalidating the Religious Freedom Restoration Act, in which Congress had attempted to redefine the court's jurisdiction to decide constitutional issues); *Milwaukee v*. *Illinois*, 451 U.S. 304 (http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=451&invol=304) (1981)
60. ^ Glenn 2000, p. 255
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62. ^ Alexander, C.H. (July 1952). "International Law in India". *The International and Comparative Law Quarterly* **1** (3): 289–300. ISSN 00205893 (http://www.worldcat.org/issn/00205893) .
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64. ^ Glenn 2000, p. 273
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66. ^ "Indian Legislation" (http://www.commonlii.org/in/legis/num_act/) . Commonlii.org. http://www.commonlii.org/in/legis/num_act/. Retrieved 2010-05-30.
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Maturation of a Modern State. New York: Rowman & Littlefield. p. 126. ISBN 0-7425-611-3.

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External links

- *The Common Law* (http://biotech.law.lsu.edu/Books/Holmes/claw_c.htm) by Oliver Wendell Holmes, Jr.
- *The Common Law by Oliver Wendell Holmes Jr.* (http://www.gutenberg.org/etext/2449) at Project Gutenberg
- The History of the Common Law of England by Matthew Hale (http://www.bdlawservice.com/books/the_history.pdf)
- The Australian Institute of Comparative Legal Systems (http://ausicl.com)
- The International Institute for Law and Strategic Studies (IILSS) (http://www.iilss.org)
- *New South Wales Legislation* (http://legislation.nsw.gov.au)
- Historical Laws of Hong Kong Online (http://xml.lib.hku.hk/gsdl/db/oelawhk/search.shtml) – University of Hong Kong Libraries, Digital Initiatives

- Maxims of Common Law (http://www.lawfulpath.com/ref/bouvier/maxims.shtml) from Bouvier's 1856 Law Dictionary

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