Anglophone And Civilian: Two Legal Cultures For The Global Age

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Abstract

This paper compares two methods of law, Civilian and Anglophone. It discusses how any legal culture must have two aspects, the adjudicative and the educative. It explores the origin of both legal traditions in the medieval world, and how thy both were transformed by the great technological developments of the fifteenth century. It examines how both traditions adapted themselves to the new circumstance of modernity. Finally, it shows how the rise of a new style university and school in the nineteenth century completed a modern type of legal culture. The paper concludes by reviewing the implications of these past events, in assessing the effect of either law, as a basis of global order in the future.

Keywords: Civilian, Anglophone, law, legal culture

THE ORIGINS OF MODERN LAW

The advance of globalization taking place around the world today is commonly viewed in terms of its technological, political, and economic aspects. However, the foundation of the global project has a great deal to do with methods of law, and the legal cultures they represent. This atmosphere of legality is not only fundamental to the structure of the global system, but it also greatly determines how that system can be understood and the vocabulary best employed to describe it.

Every legal regime is comprised of two elements, the adjudicative and the educative. One element is employed to order human action, the other to shape human thought. For a legal method to operate with stability and continuity, the public within its jurisdiction must understand its actions in terms of the benefits it confers. They must be taught the habit of compliance and obedience to authority. Together, the tandem elements of judicial and educational, form a legal culture.

The two great traditions of Western law, the Continental or Civil, and the English Common or Anglophone law, both grew out of the same

medieval world. But their modern origins in the seventeenth century were very different, and their subsequent development shaped them in even more divergent ways. Although England was part of Latin Christendom, it was geographically detached; and because it had for centuries been ruled as a vassal kingdom, it had become insular in other ways as well. Over centuries, it developed an organic tradition of legality different in important respects from the pattern that prevailed on the Continent.

The catalyst for the rise of a modern incarnation of both traditions, was the great technological advance occurring around 1500. That event came to be symbolized by what were called the three great inventions: maritime compass, gunpowder weapons, and printing press. Combined together, these three innovations produced tumultuous effects: an enormous increase in sea trade and monetary wealth, mass armies and catastrophic warfare, and a phenomenal increase in the creation and dissemination of knowledge. Much of that increase of knowledge was in the realm of law.

The first impact of the printing press had been a dramatic efflorescence of culture and learning that occurred during the period of what historians call the Renaissance. But at the same time, the new technology also had an enormous impact on legal practice as well. Books of law no longer needed to be inscribed by hand, printed copies of the ancient Roman Codes were made widely available, and there was a corresponding increase in legal scholarship. Moreover, books were no longer published only in Latin; by simply changing the order of characters, valuable texts could be published in many languages. This gave rise to entirely new national jurisdictions, and eventually the rise of new polities and new forms of rule.

However, these sweeping changes were not without disturbance and controversy. The sixteenth century would be consumed by civil and religious warfare, resulting in a breakdown of the old medieval order. The world of lord and manor, of kingdom and empire, of village and town was no longer tenable. Along with that, the universal authority of a single ecclesiastical hierarchy could no longer resist the challenge of rising factions who sought to break it into parts. At the heart of these convulsions was an ascending and affluent merchant class who used the new inventions to advance and fortify their cause.

Within this cauldron of competing interests and violent conflict, important questions would ultimately revolve around the new concentrations of wealth and power that the technologies had made possible: What man, or group of men, should hold authority? How would succession to power be accomplished peacefully? By what means would the new accumulations of wealth be appropriated? How would the people of each nation be taught to submit and comply within a new structure of rule?

Philosophical and collegial law

Despite profound changes taking place in the sixteenth and seventeenth century, viewed another way, they were also the continuation of themes that had taken root centuries before. Historians mark the beginning of the Continental legal tradition with the founding of the University at Bologna, Italy, in 1088. Since that time the study of law had passed down through the universities. In doing so, that law had inevitably imbibed the influence of a classical heritage that was so much a part of the European tradition.

It might be said that in Continental law, the legitimacy of legal authority would come to rest on the extent to which it gave expression to the heritage of culture and learning that prevailed among the population generally. For this reason European law came to be admired for its adherence to principles of reason, its scholars and jurists admired for their high level of academic attainment, and strong principle.

The Continental law had been born out of a tradition where the influence of theology and jurisprudence were almost inseparable. Even though it would eventually become avowedly secular, that law still retained many ideals and assumptions patterned on its Christian predecessor. Nonetheless, the fundamental outlook of the tradition, and the basis of its legitimacy among the public, was its deep philosophical bearing.

By contrast, the Anglophone law began as a collegial tradition and was founded on a very different basis. Within a century after the Norman Conquest in 1066, England had developed a very unique system of adjudication; it emanated from the person of the king and from his three Royal Courts of Justice. Those courts, located in London, were administered by guildsmen of the Inns of Court. Like other fraternal tradesmen, their specialized service was based on their own proprietary knowledge and on the monopoly granted to them by the king. They would grow prosperous on the fees and gratuities accruing to them in the transactions of law and the procedures of litigation.

Originally, the three Royal Courts had been assigned the crucial task of processing cases of dispute among the noble landholders. Land was the primary form of wealth during the medieval period, and a main source of revenue for the king; questions of title and possession were of fundamental importance to the realm. Only later, with the new technical innovations around 1500, did new forms of coinage and bills circulating among a rising and prosperous merchant class, begin to draw the attention of these courts.

Under the influence of the great judge Edward Coke, after 1600, the procedures of the courts were enlarged to include not only questions of landed, but also of monetary riches. Over time, a confluence of legal authority and financial power came not only to predominate within the Royal

Courts, but also the High Court of Parliament, and even within the Monarchy itself. From that time forward, the progress of Anglophone law was tied to the production and accumulation of wealth.

The guild tradition of English law was very different from the academic tradition that came to prevail on the Continent. It was detached from the atmosphere of culture and learning of the university, as it was detached from the Roman legal heritage. Although it retained a strong element of religiosity, it was implacably skeptical toward philosophical speculation. Most of all, the legal culture it shaped had a close tie to instruments of property and wealth that were directly held by a very narrow and privileged class. Thus, its legitimacy rested not only on religious teachings, but also on an assumption that any increase in aggregate wealth within the Kingdom, would amount to a benefit for all its subjects, even those at the bottom.

A crisis of learning

Originally, both the Civil and Anglophone laws had emerged out of the medieval legal culture. That regimen had been administered by an ecclesia of bishops who combined the two elements of theology and jurisprudence. Together, they recognized the Bishop of Rome as inhabiting the old seat of empire, and as holding precedence over the entire hierarchy. In the authority of their offices the bishops were, in effect, priestly magistrates; they applied a Canon law that was part of the wider *Jus Commune*, or Common law of Christendom.

The bishops also exercised oversight in what might be called the high politics of the Latin world, their power and prestige symbolized by the great cathedrals that still survive in Europe. But, of course, these men had an important educational function as well. Teachings of the Church were formulated by its doctors, then taught by masters in the cathedral schools to the monastic bachelors who, in turn, would become priests to teach the population generally. The educative reach of the Church was impressive; its generally uniform doctrines descending down through every class of person and into every region.

However, beginning in the sixteenth and seventeenth centuries, the Roman ecclesia had been overthrown as the universal arbiter of Christian affairs. Its law was displaced by two modern Civil and Anglophone successors. Because of this, there occurred for a period of time a deficit, a breakdown, of the religious learning necessary for a complete legal culture to function. Neither of the two modern legal modes had successfully developed a replacement for the old Catholic instruction. The result of this lack was twofold: On one side harsh and repressive measures of torture and

execution—often in the form of judicial terror—were imposed to subdue unruly subjects, who would not accept the new religious teachings.

On the other side, beginning in the seventeenth century, a search was carried on by some of the leading lights of the era, for an alternative *methodus*, to replace religion as the educative half of legal rule. The most notable of these attempts were those of Descartes, and his rational philosophy, along with Bacon, and his proposed empirical science. Nonetheless, there continued into the eighteenth century a kind of anarchy of learning, as the old religious plenitude had broken down, with no cohesive successor. One fruitful result during this period of confusion, however, was an outpouring of ideas and proposals, during what historians call The Enlightenment.

Two modern universities

By the nineteenth century, however, an answer to this lack of educative function was coming into view. It began with the founding of the University of Berlin in 1810, an institution intended to create and dispense authoritative learning. Under its plan, the entire realm of knowledge was divided into strict categories, set forth in self-contained books, and taught by licensed professors. Within this modern institution of higher learning, the lessons of history, ideals of the nation, standards of culture, and methods of science were set forth.

From that high edifice, teachings of diligence and loyalty, literacy and numeracy, would descend down to all children through a system of schooling based on the Prussian model. The idea was to instill a permanent structure of knowledge in the mind of the student, an indelible framework through which the duties of the productive citizen could be understood. With the advent of such national universities and public schools, the second half of the tradition of law and learning had been established to complete a modern legal culture.

The progress of this type of university and school was immediate across Europe, Asia, and the Americas. Countries around the world that were attempting to modernize or westernize, quickly began to emulate its methods. The important benefits it provided, by educating a population for the industrial age, made its program irresistible, even in England.

In this worldwide advance, the modern universities of the European model would, however, differ in important ways from their Anglophone counterparts. The Continental university, after all, had emerged from the ancient tradition of culture and learning in which the study of law was an integral part. In its philosophical view all human knowledge was part of one vast continuum. All those who participated in the pursuit of academic work were part of a common enterprise. Thus, law, although an especially honored

discipline, was recognized as being inseparably connected with all other branches of knowledge.

By contrast, in the Anglophone world, the Common law was studied and taught in a different location, separate from the work of the university. There had long existed the ancient universities of England, Oxford and Cambridge, but their purposes were aristocratic distinction, not public enlightenment. The modern educational institutions in England were different, more scientific and practical, but, most of all, their course of study was still marked by a strictly proscribed atmosphere of learning.

The two modern types of education, the Civilian, based on a unity of knowledge, and the English, based on a division of knowledge, were very different from one another. Hence, the two legal cultures which they helped to shape, were also very different from one another. Inevitably, both the philosophical basis of the one and the collegial purposes of the other, were reflected in the ways of living and ways of thinking that prevailed among their two different populations.

It would not be possible to exclusively credit or blame either legal culture for the pattern of life among its people, but that basis would certainly have a fundamental impact. After all, its mandate insured that such influence would be pervasive, and even decisive. In any case, speaking in broad terms, and historically, certain obvious differences began to distinguish the effect of each legal culture, on the people living within its authority. Those traits became especially noticeable, when the two modes of living were contrasted with one another.

A global legal culture

In the technological transformation taking place during the twenty first century, there is a natural question, as to how either one of these two methods of law, would manifest itself as a plenitude of global authority. Although both traditions have demonstrated a remarkable ability to adapt to new technical advances, it is impossible to look into the future. Nonetheless, the record of the previous five hundred years does provide useful clues. To indulge in such speculation, there are advantages to posing it in the form of questions.

In the nations where Civil law, and its derivatives, came to prevail, such as Italy, France, Germany, Japan, and Argentina, for example, a great stress was placed on culture and learning among the population generally. In those nations culture was understood especially in terms of personal thought, speech, and manner. The assumption was that persons of cultivation would be able to govern themselves. The coercive power of law, though at times necessary, was viewed primarily as a supplemental instrument, held in

reserve. Thus, such peoples, consistently, and over time, had a reputation throughout the world for intellectuality and cultivated manner.

For purposes of contrast, the United States, is the one nation most wholly under the auspices of Anglophone law, while at the same time, being both the harbinger and hegemon for that global version of legality. Because of its singular and exceptional role, its legal culture is most useful in projecting a future comparison. England, on the other hand, although the source of Common law, continues to be governed by an idiosyncratic combination of class and law, unique to itself. Similarly, the Commonwealth nations fit an interim category, although they have certain underlying commonalities with the United States. Nonetheless, the latter stands as the epitome, the template of an advancing global way of life, under an Anglophone Rule of Law. Thus, the character of its people are of essential relevance.

America, probably more than any other single nation, is associated in the popular mind with material values, and a way of life based on labor and consumption. Culture among the general population is assumed to be primarily an embellishment, frequently a type of commodity. At the same time, within its prevailing values, intellectual attainment has less relevance as a personal attribute. America also represents an atmosphere of freedom in personal thought, speech, and manner, allowable, because the basis of public order is located, not among the public, but in an overarching authority. The fundamental premise of the American system, as a whole, is an unquestioned obedience to legal authority.

In making such a comparison, the purpose need not be judgement, regarding the superiority of inferiority of one tradition in relation to the other. Each way of ordering human life and shaping human thought has its particular advantages. In the present age of technological transformation the two modes of law are once again changing, adapting to circumstance. The educative element of both methods have become more reliant on electronic dissemination of sound and image. They both now manifest themselves in new forms of transnational and transcendent governance.

The parallel development of the two traditions continues on, but this time their historic convergence or divergence is being played out on a global scale. Within the cauldron of national rivalries and violent conflict, differing beliefs and competing interests, important questions revolve around the new concentrations of wealth, power, and knowledge that technology has made possible. The situation resembles the seventeenth century, when the instruments of law were highly developed, but questions about structures of rule and the mode of public learning, were not yet decided:

What person, or group of persons, should hold authority? How can succession to power be accomplished peacefully? By what means will the

new accumulations of wealth be appropriated? How would all the people of the world be taught to submit and comply within a single regimen of law? Will the answer to these questions be reflective and philosophical, or pragmatic and collegial? The answer chosen will determine the way human life is ordered and the way human thought is shaped, in the age of globalization.

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