I

The Sources of American Law

A consideration of the sources of law in a legal order must deal with a variety of different, although related, matters. Historical roots and derivations need explanation. The system's formal allocation of authority over the creation and adaptation of legal rules and principles deserves attention, as do the manner in which legal rules are presented and the processes of analysis through which they are applied. Finally, those structural features somewhat particular to the legal system that may affect significantly its general style and operational modes should be discussed.

A. HISTORICAL ROOTS

Historically speaking, American private law's source is the English common law. The reception on the North American continent of the common law is considered in Chapter 2, The American common law. A few words can be said here respecting certain structural features of the common law thus received that have particular importance for American law's general style and modes of operation.

The common law makes extensive use of juries in the administration of civil as well as criminal justice. The jury, which always deliberates separately from the judge, is basically responsible for

deciding disputed issues of fact. Widespread use of juries carries with it a number of consequences, some of which are mentioned later in this chapter or considered in greater detail in Chapters 6 and 8. These include concentration of the trial at first instance into a single episode, the development of a sophisticated and complex body of exclusionary rules of evidence, and giving community feelings and views greater weight in the administration of justice than is the case where professionals alone bear responsibility.

Another ramification of jury trial is the unacceptability of the civil law principle of *double degré de juridiction*. In a jury-trial system, there is no opportunity to redo the case at the first level of appellate review. On the one hand, considerations of cost and feasibility stand in the way of constituting a jury for each appeal in which factual issues might be raised; on the other, allowing appellate courts, sitting without juries, to decide contested factual issues would drastically reduce the significance of jury trial. Accordingly, American appellate review is limited to questions of law, including whether the evidence presented at first instance was sufficient to justify a reasonable trier of fact making particular findings.

Another characteristic of the common law derives from the emergence, alongside the traditional common law courts, of a separate judicial hierarchy, the courts of equity. These courts developed and administered a body of rules and principles – the law of equity – that supplemented the common law. By the fourteenth and fifteenth centuries, the King's courts had become in many matters rigid and narrow in their approach. Over the years, the kinds of issues needing adjudication had expanded beyond the traditional jurisdiction of these courts to include matters ill suited to their jury trial processes and the common law doctrines they applied. Reform could have been accomplished by reshaping the common law, but this approach would have required creative

judicial activity in a degree and at a rate that was perhaps then unacceptable. The needed changes could also have been undertaken by the legislature; however, the society of the time was not accustomed to such extensive legislative intervention. Allowing a new body of rules and principles to emerge from the work of a different judicial hierarchy provided a solution that avoided these difficulties and was compatible with the judicial process's central position in the legal order.

An uneasy truce between common law and equity was maintained by the principle that equity would act only where the remedy at law was inadequate. For example, the law courts did not grant specific performance of contracts. Equity would order specific performance but only if money damages – the remedy at law – could not put the obligee in a position substantially equivalent to that which he or she would have enjoyed had the contract been performed. Unlike the courts of law, equity was prepared to recognize a distinction between legal and equitable interests and entitlements; the law of trusts, developed by the courts of equity, rests on this distinction.

Although the equity courts, like the common law courts, operated without any abstract code of legal principles, either substantive or procedural, the equity courts frequently cited and purported to apply more or less abstract "maxims" of equity as guides to decision making. However, most of these maxims, such as "equity will not leave undone that which ought to have been done," were couched at such a level of generality that they could be and frequently were cited to support almost any conceivable equitable argument or disposition.

The courts of equity not only administered a special body of rule and principle, they also differed institutionally from the common law courts. For example, equity did not use juries. As a consequence, trials in equity could – and did – proceed as a series of

episodes, whereas the trial at law was a single, continuous event. The absence of the jury also affected the law of evidence; in particular, exclusionary rules had in equity courts much less importance than at law.

The existence of parallel and overlapping judicial hierarchies always creates complications for a legal system. By the nineteenth century in both England and the United States, these complications had become considerable; furthermore, law reform no longer depended on the existence of separate courts of equity. American courts of law and equity alike had demonstrated a creative capacity; moreover, legislation now provided an effective means of law reform. The New York Constitution of 1846 abolished the court of chancery; the New York Code of Civil Procedure (1848), drafted by David Dudley Field, merged law and equity. By 1900, the movement thus begun had been emulated by many sister states.

The disappearance of separate courts of equity did not, however, do away with the law of equity. That body of rule and principle still complements the body of rule and principle deriving from the work of the common law courts. Moreover, the historical distinction between proceedings at law and in equity continues to have procedural consequences. In particular, the right to trial by jury, guaranteed by the U.S. Constitution and by the constitutions of several states (e.g., Constitution of Massachusetts, Articles XII and XV), does not attach to matters that historically were within the equity jurisdiction.

The emergence in England of a separate hierarchy of courts of equity did not foreshadow a general proliferation of judicial hierarchies. In particular, neither in England nor in the United States did a separate system of administrative courts emerge; matters falling within what the French call the *droit administratif* and the Germans *Verwaltungsrecht* are handled by the regular courts.

B. ALLOCATION OF AUTHORITY TO CREATE AND ADAPT LEGAL RULES AND PRINCIPLES

With the Declaration of Independence in 1776, the former colonies fully controlled the allocation of authority over the creation and adaptation of their public and private laws. Colonial history and the form taken by the struggle to obtain independence led to the new states breaking with English tradition by adopting written state constitutions, such as the Constitution of Massachusetts adopted in 1780. These state constitutions constitute the ultimate source of state law; they formally allocate the authority to make and adapt law.

The importance of the Constitution of the United States (1789) as a source of American law and the special role played by the U.S. Supreme Court are discussed in Chapter 5. In this chapter, the allocation of lawmaking and adapting authority is discussed in general terms with special attention given to the work of the courts.

American state constitutional arrangements provide for legislatures; subject to such limitations as flow from the state or federal constitution, these have ultimate formal authority to make and to change law. With rapid and pervasive changes in economic, political, and social circumstances, such as those occurring late in the nineteenth century and throughout the twentieth century, legislatively formulated rules and principles have assumed ever-increasing importance. This is particularly true of public law. Although the American colonies inherited and applied a common law of crimes for a time after the Revolution, it is safe to say that by the end of the nineteenth century all American public law had its formal source in legislation.

The product of American legislatures is not, of course, to be compared to a European code, but rather to more usual legislative products. It is worth remarking that, on occasion, the

denominations carried by American legislative products can be misleading. For example, the Federal Internal Revenue Code – a highly complex, very detailed, and extremely specific corpus of rules – is the polar opposite to a continental code with its generalized, structured, and systematized statement of rules and principles.

This increase in the importance of the legislature's role ultimately brought about a decline in the relative importance of the role of courts in creating and adapting the law. However, the new constitutions did not seek to limit – let alone eliminate – the creative role of courts. Subject to legislative preemption, judicial decisions remained a source of law. Moreover, the advent of written constitutions was to give judicial decisions ultimate primacy over legislation with respect to issues regulated by constitutional provisions.

Another source of law – one whose importance has increased dramatically in the course of the twentieth century – is executive and administrative action. Administrative regulations and decisions shape many areas of contemporary law. Although in theory they could in large part be set aside or revised by legislation or by judicial decision, administrative regulations and decisions today constitute an extremely important source of law.

Starting during the twentieth century, American courts have asserted a kind of legislative competence to promulgate court rules governing procedure and other matters relating to the courts and even the practice of law in general. The exercise of this authority has occasionally brought the courts into conflict with the legislature, as was the case with the promulgation of the Federal Rules of Evidence in the early 1970s. Despite concerns about the scope and democratic legitimacy of court rulemaking, court rules are now an important source of procedural law at the federal level and in many states and also govern regulation of the bar in some states.

In discussing sources of law, it is traditional to consider the role of custom. Here, the American and western European situations are similar. For example, trade practices and usages play a significant role in commercial life and can be of great importance in interpreting contracts. However, if "source" is understood in a more formal sense, custom has relatively little contemporary importance.

1. The Judicial Decision

Because the forms and techniques of legislation and administrative decisions in the United States are, on the one hand, fairly readily understandable by a jurist with a civil law background and, on the other, the judicial decision is in common law systems a source of law of central importance, a discussion of these sources appropriately gives more attention to the judicial decision than to legislation or executive action.

Some general observations serve to set the stage. In the common law, a court's opinion gives a far more explicit and complete explanation of the court's reasoning than is true in French or German law. The opinion is written by one judge and bears his or her name. Other judges are free to concur or dissent in separate, reasoned, and signed opinions. Unlike continental European courts, American courts do not face the outside world as a single authority that always speaks with only one unanimous and anonymous voice.

In view of the role of the judicial decision as a source of law, the existence of an extensive system of reporters, both official and unofficial, does not surprise. Following the English tradition, from the earliest days of statehood, each state court of last resort has published its decisions in bound volumes available for purchase by lawyers and the public. The unofficial – but important – National Reporter System has covered state court decisions (principally appellate) from at least 1887 to the present.

This vast body of decisional material had to be organized so that the relevant decisions could be located with reasonable dispatch and certainty. Because comprehensive codes did not exist at earlier periods and are still today by no means the rule, the full corpus of decisional law cannot be made available by annotating codes as is typical in civil law systems. Instead, an elaborate system for analyzing and digesting cases was devised. The American Digest System, created near the end of the nineteenth century, covers reports of appellate cases from 1658 onward. By using key numbers, decisions that deal with a given issue are brought together. Access to the decisional law is also possible through words and phrases that typically occur in decisions dealing with the type of problem that has arisen. A further selection among the decisions thus located can be made in terms of date and jurisdiction.

Modern computer technology today makes the search for authority much more rapid and less subject to error and omission than in the past. The digest system described previously can be searched by computer. Furthermore, entire decisions are now entered into databases that one can consult by asking for material containing key words or by presenting a selected pattern of words.

In view of the principle of *stare decisis*, discussed herein, a jurist must know whether decisions have been overruled or otherwise limited. *Shepard's Citations* and other online services permit a lawyer to check quickly on a decision's status. Here again, the computer now simplifies the lawyer's task.

What effect does an American judicial decision have? The first effect is one recognized by all legal systems. Subject only to the possibilities for revision or reversal provided by the legal order, an end is put to the controversy before the court. This quietus may be temporary – for example, dismissal of the action as prematurely brought – or permanent – judgment for the plaintiff or the defendant on the merits. In all events, the court is, at a minimum, obliged to decide an issue that disposes of the controversy at least

temporarily. As in civil law systems, courts are not to refuse to decide because the relevant law is obscure or nonexistent.

The second effect of an American decision is somewhat particular to common law systems; the decision creates a precedent that will control the disposition of later cases in which the same issue or issues arise. The principle of precedent, or *stare decisis*, combines two propositions.

The first is a principle of hierarchy: The lower court is under a duty to accept the position held on any given issue by its hierarchical superior. Because the decided case is, in its own right, a source of law, the fact that the lower court thinks the decision wrong does not justify its ignoring the precedent. In civil law systems, where codes are a formal source of law but decisions are not, lower courts have at least in theory the freedom to depart from previous decisions of hierarchically superior courts. Of course, as a practical matter in the great majority of cases, lower courts in all systems accept the positions taken by their hierarchical superiors. The latter ultimately have the last word if review is sought; the lower court's taking of a different view usually simply makes the administration of justice more expensive.

The second proposition that flows from the principle of *stare decisis* is that a court is bound by its *own* previous decisions. Unlike the hierarchical principle, this proposition is not a logical entailment of the view that judicial decisions are a source of law. However, practical considerations argue strongly for this view, especially where there is no code to give the law structure and coherence. Considerations of equality of treatment, predictability, and economy of effort all support the proposition that a court should, in principle, follow its previous decisions. To the extent that these considerations are sociologically based, of course they operate in civil law systems as well; the highest courts in these systems exhibit a strong tendency to follow their previous decisions. However, the civil law view that the judicial decision is not, in principle, a source

of law means that prior decisions do not enjoy the same standing as in the common law.

Not all common law jurisdictions take the same position respecting the extent to which a court is bound to its own previous decision. Furthermore, not only are broad cyclical patterns to be observed, but also any given court may change its attitude toward *stare decisis* from era to era. Most, perhaps all, courts of last resort in the United States have felt and still feel a considerable sense of freedom; they remain more willing to overrule their previous decisions than British courts of last resort.

These different views respecting the requirements of *stare decisis* obviously cannot be explained as logical entailments of the proposition that judicial decisions are a formal source of law. Nothing in the concept of source requires that only one creative effort be permitted with respect to any given issue. The differences that have emerged are rather to be explained in intellectual, political, and sociological terms.

In the first place, the American federal system – by placing control over most private-law matters in the states of the union – makes it likely that for many issues, more than one solution will emerge. Because of the numerous channels of communication among jurists in the several states and because so much of legal education is national rather than local, a comparative dimension is present in American law that historically has no true counterpart in English law. This comparative dimension facilitates persuasive criticism of the results reached in previous decisions.

Also of importance is the American experience in adapting a received law to a new society and a new environment. In carrying out that task, jurists constantly had to face the relationship between social and economic circumstance and decisional law.

The effectiveness and capacity for decisive action that the British parliamentary system possesses are also of significance here. A court of last resort in Great Britain can have rather greater