THE COMMON LAW AND CIVIL LAW SYSTEMS IN A RAPIDLY CHANGING WORLD ORDER

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I Introduction

The renowned British jurist, Lord MacMillan, in a 1938 article[1] set forth his belief that two great legal systems shared the civilized world between them: the civil law system that featured codified or legislated law and the common law system of case law or judge-made law. The existence of these two distinct systems can be explained by the two different basis of thinking about law. The civil law system is based on the belief in the power of comprehensive legal design of predetermined and detailed principles. The common law embraces a more free and pragmatic spirit that prefers law to be made as controversies arise, with the only pre-determination arising *from* precedents set through other cases that were decided in the past.

Over half a century has passed since Lord MacMillan declared his observations. Europe, America, and all the rest of the world have seen and undergone rapid changes, especially in the last high technology decade. In the new global marketplace of ideas, how have the common law and civil law systems fared in comparison with each other and also in comparison with other approaches to law? And how are they expected to fare in the future?

1(a) The Common Law

As a threshold matter, it is appropriate to first present some salient aspects of the common law. To the lawyer who has not been trained *ab initio* in the common law, this system will appear bewildering, complicated, and inefficient. Where does one even begin to find the legal principles behind the law that is common to the people, or the law of the common people? In fact, is there a common principle of law? These concerns are legitimate. It is true that the common law system ranks as the most cumbersome and inefficient in the world.

To master the common law, one is well advised to first understand the history of England[2] and then the English-speaking peoples of the world.[3] The common law is that

[1]Lord MacMillan, *Deux man ieres de penser, in 2 Introduction a L 'etude du droit compare: Recueil d'etude en L'honneur d'Edouard* 5(1938).

[2] See, e.g., R. H. Hickling, *LMC001 Course Materials Chapter IV, The Common Law,* Northern Territory University.

body of law that has arisen as a result of disputes being resolved in the various courts of law of the land. The legacy of case law can be traced back to the Saxon kingdoms which maintained a mostly oral tradition of law. Over time, these decisions, initially unwritten and known only to the jurists and litigants became written and were available primarily to the legal profession. These collections eventually came to be known generically as *Law Reports.*

The common law places great emphasis on the "opinion" of judges as elicited through one dispute or another and these opinions are elevated to the stature of *stare decisis.* Much is made of the spirit of justice rather than organizing the corpus of the law into a written code. Law happens as cases come along and a critical layman can with justification characterize the method as a great "muddling through" or one that "flies by the seat of the pants." But the careful student will discern common threads of liberty and concern for the protection of the individual. In accord with the traditions of the common law, the English to this day has no written constitution, that written code which constitutes the supreme legislated law of the land.

Nevertheless with the rise of Parliament and a corresponding demise from power of the King and the King's judges,[4] the English system experienced a shift towards the use of legislated law. The judges however, retained the power to interpret the statutes as cases came up, but do not have the power to completely invalidate an Act of Parliament, the latter being supreme as there is no written constitution against which the legality of an Act can be compared.

The other great bastion of the common law is the United States of America. Although the American colonies revolted against Britain, the new nation elected to inherit the tradition of the common law, subject however to that first and greatest American Code, the United States Constitution. Since Chief Justice John Marshall established judicial supremacy over both the legislative and executive branches,[5] the common law tradition has been preserved and is alive and well today.[6] American judicial review extends supreme over

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[3]See, e.g., Winston Churchill, *A History of the English Speaking People.* It must be pointed out that Churchill in selecting the title was a little too ambitious even in light of his awe inspiring four volume work as it encompassed only England, Great Britain, and America up to the end of the 19th century.

[4]The astute English monarchs used the royal judges to dispense the "King's Justice" to the corners of the land against the petty tyrannies of the local barons and satraps. Conversely the barons, always resented the great tyranny of the King and used every legal device to strengthen themselves against the King — hence the *Magna Carla* extracted from King John on June 23, 1215 at Runnymede. This Great Charter often is exaggerated into a guarantee of the liberties of the common man—S it is less than that as it tended more to define the powers of the feudal lords in relation to the king, with an afterthought, if any, to the serfs and villeins of the age. Nonetheless that most renowned sentence from the *Magna Carta, "No freeman shall be arrested or imprisoned, or disseized, or outlawed, or banished, or in any way molested,' nor will we set forth against him, nor send* against *him, unless by the lawful judgment of his peers and by the law of the land*, "is an enduring statement of the fundamental right of the subject

[5]Marbury v. Madison, 1 Cranch 137 (1803)

[6]If anything, with the constitutional crises during the Nixon presidency, the public prestige of the courts has been enhanced. S, .g. U. S. v. Nixon 418 U.S. 683 (1974) (the president must obey an *subpoena tuces tecum* issued by a federal district court but the court at the same time has a very heavy responsibility to see

all legislation and executive acts. The American common law system, like its English ancestor can be criticized as being convoluted and "user-unfriendly", as litigation "can be slow and appalling expensive."[7] It is also arcane and constitutes "a harvest field for lawyers, and a barren, dark labyrinth for laymen."[8]

Because of the rapid development of a young nation through immigration and the sheer availability of natural resources, and the vast expanse of available land, there separately evolved one federal and fifty state systems of law. Depending on the jurisdiction, deference to *stare decisis*, will also vary. A perception arose that the sheer volume of judicial decisions, some of which were inconsistent, threatened to make a real morass of what was an already unwieldy common law tradition. To counter this problem, the American Law Institute, an official body of professors and legal experts reviewed all the major topics of law and compiled a uniform set of authoritative but consensual texts known as the *Restatement of Law*. These came to be viewed with respect as "model legal codes" and the states began to adopt them as law statutes. The United States Congress also exercised its legislative powers under Article II of the Constitution and by federal legislation has preempted the states in select areas such as civil rights, labor, environmental, communications, immigration, national security and defense. All legislation must be enforced through the courts and the judges have the power of judicial review as to the constitutionality of all statutes.

1(b) European Civil Law

The law on the Continent of Europe bears a closer relationship to Roman law. It must be pointed out at this junction that England is not without roots to Rome.[9] However, in that fateful year, 410 A.D. the Roman Emperor Honorius wrote his famous letter to the English civitates warning them to look "to their own defense." After the Roman eagle had flown from the islands, invasions by war-like tribes from the Continent, loosely referred to as the Angles and Saxons, obliterated the bulk of "Romanized" law and civilization in Britain. Before about 880, the trend of new Anglo-Saxon kingdoms was

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to it that Presidential conversations, which are either not relevant or not admissible, are accorded that high degree of respect due the President of the United States v. Nixon v. Fitzgerald. 457 U.S. 731 (1982). cc. Harlow v. Fitzgerald, 457 U.S. 800 (1982).

[7] J.B. Priestley, *The English,* (Heinenmann 1973) at 13. Quoted in, R. H. Hickling, *LMCOOJ Course Materials Chapter IV, The Common Law,* at 32, Northern Territory University.

[8] Id.

[9] A manifestation of the Dark Ages covered England a generation after the Roman departure, primarily due to the loss of the art of writing. By the time St. Augustine arrived as a Christian missionary in *597* A.D., he reported that Saxon tribes were literally living in the Roman ruins at Canterbury and elsewhere. True, there were romantic legends of stout resistance by Romanized Britons including the bardic legends of King Arthur and the gallant knights of the Round Table at Camelot. In stark reality however, the land was divided among invading tribes, who constantly fought each other and with new invaders.

towards an oral tradition of law,[10] different from the Roman fondness for detailed legislation and the use of written codes.

Respecting the modern law on the Continent, the source of law is through legal codes as promulgated by legislatures. In contrast, judicial decisions are not accorded the persuasion of precedents as do the common law courts. The thoughts of judges can be viewed more as *dicta* when held up against the efficacy of the code of general legal principles: it is a passing remark specific only to the case before the court. Because of deference to codified law, the power of civil law flows from pre-fabricated general rules over actual cases, whereas the common law grows out of cases and controversies, as they arise and are brought into the courts.

A particular division in common law jurisprudence is the dichotomy of law and equity. The common law brand of equity jurisprudence arose to complement the deficiencies of the King's Courts of Law. Typically, the royal law courts could only enter judgments for payment of money by the defendant to the plaintiff. Over time, aggrieved persons seeking other relief, such as injunctions, accountings, and rescission of documents, and reformations of contracts, began to complain to the King's Chancellor especially when the relief available in the law courts was thought to be inadequate. The Chancellor, who was entrusted with the "king's conscience", took in the complaints for equitable relief and undertook to dispense justice requiring more than the judgment of monetary damages. A *corpus* of law developed which was time and again phrased as maxims. For example, these principles of equity are well known:

> Equity looks upon that as done which ought to have been done.
> Equity suffers no right to be without a remedy.
> Equity regards substance rather than form.
> Where the equities are equal, the first in time will prevail.
> Where equities are equal, the law will prevail.
> He who seeks equity must do equity.
> He who seeks equity must have clean hands.
> Equity aids the vigilant, not those who sleep on their rights.
> Equity will not concern itself with abstract wrongs.
> Equity abhors a forfeiture.
> Equity does not require an idle gesture.
> Equity will not permit a party to profit by his own wrong.
> Equity delights to do justice, and not by halves.
> Equity will take jurisdiction to avoid a multiplicity of suits.

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[10]Except for the work of small numbers of hardy Christian monks, there was almost no written record from the early Anglo-Saxon settlements. As the English and Danes (the Danelaw) were able to consolidate their tribes into larger 'kingdoms,' from about 880 A.D. to the end of the period with the Norman invasion in 1066 AD., Anglo-Saxon records fall into roughly three categories: (1) dooms or laws' of particular kings; (2) customary oaths; and (3) bocs, or grants of land.

Thus, the common law boasts of a certain fame and superiority by reason of the equity jurisprudence of its judges and the judicial power to grant injunctive relief. This elevation of equity is rare in Continental systems because equity is subsumed as a principle of interpretation to a legal question and cannot stand out as a separate body of law.

The civil law approach is conducive to the development of wide ranging, comprehensive, and detailed principles of law while the common law rationale is more haphazard and must draw heavily from the analytical school of jurisprudence. The civil law casts a wide net of general principles whereas the common law is empirical and caters to the particular facts of the case, with always an eye towards equity.

I(c) The Instance of Scottish Law

Since the Act of Union of 1707, Scotland bound herself to a common political and legal life with England, including the sharing of the same supreme court of appeals, the House of Lords. Prior to 1707, Scotland historically had kept herself free and separate from England and cultivated strong ties to France and the Continent. It is no surprise then that Scottish law shows strong ties with Roman law as does the rest of the Continent. Scottish jurisprudence is more inclined to the systematic but abstract approach of the civil law system than the empirical approach of the common law. Accordingly, Scottish law does not recognize the separate administration of equity.

I (c) The Merging of Common And Civil Law And the Rise of Administrative Law

The modern Western jurisdictions show **a** readiness to receive and utilize the best of both aspects of the two systems. In the United States, with which this writer is most familiar, there is indeed a proliferation of codes and statutes. The federal government, through the Congress has spun a massive web of codified law formally known as the *United States Code.* A major publisher of legal material has attached as footnotes the various case law decisions and judicial interpretations of these statutes into the *United States Code Annotated.*

In fact, many legal commentators have pointed out that the entire body of federal law is statutory (i.e. Code based) and there is not such animal that can be called "federal common law." There is some confusion on this issue. United States district courts are empowered to exercise jurisdiction over lawsuits between citizens of different states provided that the amount in controversy exceeds $75,000.00.[11] Until 1938, Swift

[11] 28 U.S.C. Section 1332. S ?Iafl. Judiciary Act of 1789.

v.Tvson,[12] has held because of diversity jurisdiction, the federal courts may decide state law independently of state courts, and to diverge from state precedents, including decisions that were based on the common law of that state. This of course tended to cause friction between the states and the federal courts within those states. In 1938, the Supreme Court decided to limit the role of the federal judiciary in matters involving state law and through the landmark case of Erie Railroad Co.. v Tompkins.[13] held that the federal district (trial) courts must follow the common law as decided by the state courts. Since that time, the federal district courts could no longer create common law for the states. However, the federal trial courts still followed the Federal Rules of Civil Procedure even though they were adjudicating state law matters before them on diversity jurisdiction.[14]

In addition, each of the fifty states has its own codified law as promulgated under the authority of its own state legislatures and these are also published with case law annotations attached. State courts are bound both by common law precedents and the strictures of applicable codes, unless the court finds that code unconstitutional.

Beyond statutes created by legislature, in the last century as a result of the complexity of modern commerce and technology, there has come into existence a body of specialized jurisprudence known as administrative law. The pace of development of administrative law has increased as a result of the American experience with the Great Depression of the 1930's where a panicked public increasingly turned to government for economic salvation. The basic philosophy behind American administrative law is essentially the spirit of the civil law system. Congress has enabled administrative agencies within the executive branch to enact quasi-legislation known as federal regulations and these are annually codified into a multi-volume collection known as the *Code of Federal Regulations.* An example of this approach is the creation of the U. S. Occupational Safety and Health Administration in 1970:

> In effect, Congress has identified a social problem (i.e. excessive workplace injuries and illnesses), selected a goal (reduction of injuries and illnesses) and told an agency (OSHA) to go solve it. This approach at problem solving is called the Doctrine of Delegation. Just as senior management delegates its authority to lower managers, Congress delegated some of its powers to administrative agencies within the Executive Branch. For a while, the courts were skeptical of the Doctrine of Delegation, but since *1935* (during the New Deal), the United States Supreme Court has upheld every act of delegation by the Congress. As a result, OSHA is a legally valid creation of Congress and is fully authorized to pass its

[12] 18 U.S. 1, 16 Peters 1(1842).
[13] 304 U.S. 64 (1938).

[14]See, e.g., Manna v. Plumer. 380 U.S. 460 (1965); accord. Walker v. Armco Steel Corn.. 446 U.S. 740 (1980).

> own standards and regulations which must be followed as if they were laws made by Congress itself.[15]

Disputes arising from the enforcement activities of OSHA, were adjudicated by administrative law judges (ALJs), a new class of officialdom attached to the Executive Branch. Only the most seriously contested issues are reviewed by the federal Courts of Appeals which exist by reason of Article III of the United States Constitution, but only after appeal from the Administrative Law Judge have been exhausted by another Executive tribunal known as the Occupational Safety and Health Review Commission.

Yet another analogy to civil law is the federal scheme of immigration law, another subject with which this writer has practical familiarity. American immigration law is entirely legislative in that a comprehensive plan is embodied in the *Immigration and Naturalization Act (as amended).* This statute is administered by the U. S. Immigration and Naturalization Service, an Executive agency within the U.S. Department of Justice which in turn is authorized to promulgate more regulations that supplement the Act to minute detail. Disputed issues involving immigration law are adjudicated within the Agency's own Administrative Appeals Unit. Cases involving deportation are adjudicated by first by Immigration Judges, a type of administrative law judge whose decisions can be appealed to the Board of Immigration Appeals, yet another agency within the Executive Branch. Perhaps, for reasons of efficiency, immigration judges give first preference to the narrow wording of immigration "codes"[16] than to principles of common law. The regular Article III courts review on the record only very limited cases and these featuring the most serious questions of law.

There are many other administrative law agencies within all levels of American government: federal, state, and local. The local health sanitarian who inspects restaurants for compliance with city health ordinances is yet another example of the vast administrative law scheme. Thus, it scarcely can be disputed that the American law system, in addition to retaining the cornerstones from the common law, also features much of the spirit of civil law through its use of legislated acts, statutes, regulations and ordinances. The modern American legal system is in actually a hybrid system of both the common and civil law systems, with the *caveat* that the common law remains supreme.

II. Other Approaches to Law

While residual differences remain between Anglo-American law and Continental (or Scottish) law the two systems have moved closer to each other since the days of Lord MacMillan. Today, it can be asserted that civil law and common law appear as simply

[15] Charleston C. K. Wang, *OSHA Compliance and Management Handbook* (Noyes Publishers 1993) at p.11

[16] By codes, it is meant the *Immigration & Naturalization Act* (as amended) and the Title8 of *the Code of Federal Regulations.*

two variants of a single way of thinking, that is the Western concept of "Rule of Law," with its corresponding emphasis on individual liberties and rights at the expense of the power of the state.

Other conceptions of social law and order should be noted. For example, in opposition to these two systems, the "socialist legal systems' have waxed and waned as a major source of law in the world. Other law systems are based on religion and these include Jewish Law, Islamic Law, Hindu Law, (the first three being religion-based) Chinese and Japanese law insofar as it involves disputes between private parties may be traced to the ethical injunctions of the philosopher Confucius. Beyond the veil of Confucianism stand the administrative methods of the Chinese Legalist School. It can be observed that Western frameworks of law, while apparently dominant, is the law prevails only in economically/technologically advanced nations, and form only a part of the contemporary world.

On cursory inspection there appears to be a willing reception of code-law and common-law systems (the Westernized "Rule of Law") around the globe, including in the various charters of the United Nations. Even so, some societies openly reject the Western concept of law. Other societies accept Western law only superficially. In some countries nothing more than a veneer has been added; behind this thin surface, the application of Western law is resisted.

The distaste toward "liberal" or "natural rights" law felt by especially by the leaders of non-Western nations may be due to basic presumptions on social order. Many politely point that that their people are not ready for the Western "Rule of Law" and prefer a system that guarantees greater stability and national cohesion with their own part of the world. It is asserted that the legal blue-prints that found utility and were embraced in Europe and America beginning with the nineteenth century, do not necessarily have the same value outside of the West, or even within the West in the twentieth-first century. Can we learn from these assertions especially in the new world order when nations have to engage in commerce and closer diplomatic intercourse? With a trend away from the resolution of disputes with the force of arms, what is the role of law in resolving disputes between nations?

Is it then safe to assert that there is general consensus that for most disputes, a resort to law and the utilization of juridical techniques is the best and the most appropriate manner for regulating disagreements? Since the close of World War II, the nations of the West, professing themselves "countries of law," have exalted the role of law in its different forms. Codified law or case law, it matters but little. Practitioners of law swear by the necessity of judicial process, and students flock to the law schools. *Ubi societas, ibi jus.* It is a ubiquitous tenet in Westernized societies that crimes must be punished, disputes between private persons are to be resolved in civil court, and that the conduct of the administration of government be judged by the application of a Rule of Law. The citizens cannot conceive that disputes could be otherwise resolved. Citizens are hard pressed to realize how a society could prosper, or even live, without judges and without law.

III. Conclusion: The Future of the Westernized "Rule of Law"

It appears that the future of the Western concept of the "Rule of Law" will lie in the international marketplace. With the discrediting of the Marxist paradigm of economics and social order, at least within the Soviet half, the world has entered into a new order where there is presently little or no serious military threat to the English speaking world, as well as, all of the Westernized democracies.

Even within the last remaining power that is stubbornly clinging on to the façade of Marxist-Leninism, China, there is a subtle but firm shift towards catering to the needs and opportunities of the international marketplace. In the world order of open markets and commercial competition, enhanced by rapid "internet" communication, the common ground for the rapid development of the "Rule of Law" is in the arena of contracts and commercial law. As nations engage in trade, disputes will arise on matters of contracts and commerce; there will be a certain parallel need for the orderly, predictable and fair resolutions of disputes. This is one area where the "Rule of Law" not only will establish itself but also flourish against competitors.

Beyond the area of commercial law involving agreements or "privity" between contracting parties, there is the looming specter of product liability, a subset of common law torts. As products are bought and sold and then consumed in all parts of the world, the law of statistics will result in a predictable number of injuries that result from the use of products. The common law system has come to champion the rights of the injured consumer and provided the consumer the right to collect damages. In all the Continental codes will be found a general recognition of the principle of liability and these are usually enhanced further by creative judicial interpretations.[17] Under both the common law and civil law, there will be a legal right of the injured to recover damages to both to person and property from all those associated in the chain of commerce. Accordingly, there will be the scenario which will refute Rudyard Kipling's infamous observation that "East is East and West is West — never the twain shall meet.[18] In the field of tort law/product liability, the East and West have already met in the courts.

The global marketplace is multi-faceted. Products are increasing being manufactured in the developing industrial economies and transported for sale to Europe and North America. The quality and consistency of such products are always open to questions and the law must develop the capacity to regulate such quality and in the event of failure, must have the power to award damages against the a complex and sometimes murky supply chain. On the other side of the coin is the protection of intellectual property of companies which seek to sell products into the developing economies. Beyond the

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[17] See, *Friedmann,Legal Theory,* Chapter 33 (1967 Steven & Sons, London) pp 527-53 1.

[18] *Oh, East is East, and West is West,*
and never the twain shall meet,
Till Earth and sky stand presently by
at God's great judgment seat."
Rudyard Kipling, Ballad of East and West.

questions of patents, trade secrets, and copyrights, there will be a dire need to develop a system for the protection of trademarks, and tradenames. These are some major issues which will challenge jurists and lawyers everywhere in the foreseeable years to come.

A final example, insofar as this paper will discuss, is in the very fundamental of constitutional form, procedure, and substance. As a result initially of the common bazaars of international commerce, there will arise opportunity for the examination of Western constitutional forms, systems of government, and judicial systems beyond that of contracts, torts, and administrative regulation (be it of common law or civil law roots). As Judge Richard A. Posner has pointed out,[19] law itself is commodity fully subject to the economic laws of supply and demand of the marketplace. It appears that the particular brand known as the "Rule of Law" is expected to do well at market around the globe.

Charleston C. K. Wang , November, 2000.

[19] Third, the idea of market force procedure was pioneered by the leading American economic analyst, former University of Chicago professor and now Judge Richard A. Posner wrote: "legal procedure is competitive like the market." S. Richard A. Posner, *Economic Analysis of Law* 321 (Little Brown Press) (1992).