

Legal Methods Orientation, 1991:  
Brief Introduction to the  
Anglo-American Legal System

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Brief Introduction to the Anglo-American Legal System.

Most of your courses in law school will be concerned with helping you learn "legal method" in various areas of "the law". In a general way, what you expect is that you will learn some or all of the material that you will use as a lawyer. If you do not already suspect it, you will soon discover that the way the material is used by lawyers is at least as important as the material itself.

Unfortunately, there is no convenient brief definition of either "legal method" or "the Law". As for the latter, you have encountered such terms as "natural law", "laws of nature", "moral law", "laws of logic", and you probably have discovered that there are different opinions about what those terms mean. Hence the lack of a neat definition of "the law" as lawyers use it may not surprise you. And if we cannot define "the law" neatly for you, it should not come as a surprise that we have the same problem with "legal method". For present purposes it may be enough to say that by "the law" we mean that collection of rules, standards, and principles (note, not just rules) compliance with which is enforced by the state, ultimately through decisions of courts. And "legal method" is the traditional, established way in which lawyers and judges find, interpret, and apply the law. While the law in the form of commands and authorizations enacted as statutes or ordinances by legislatures is the most obvious form of such law, you are probably aware not only that judges are the authoritative interpreters of that law, but also that in the

Anglo-American system a very substantial body of law had its origin, and is still found, in decisions of courts.

"Legal method", the way in which lawyers, including judges, interpret and apply the law, is not a purely deductive process from unquestioned premises, as in geometry or formal logic. It does employ logical reasoning and it attempts to become logically consistent at least within each doctrinal area. But the reasoning can only be persuasive. And, not surprisingly in a society as diverse as ours, the premises which are the appropriate starting points for reasoning in a given situation are often conflicting and sharply debated. Much of your legal education will be concerned with identifying, and learning to use in a professionally acceptable way, the kinds of reasoning that are persuasive in law, and with learning how premises can be selected and persuasively defended.

Since the identification and application of the controlling legal rules, standards, or principles in a particular litigated situation is not a purely logical process, the obvious question is: what other factors are significant in determining the outcome? On this question, there is today a great difference of opinion and wide ranging debate. To some extent moral precepts play a role. To some extent the results are determined by the way power is distributed and organized in our society. The extent to which each of these factors does and should play a role, and the manner in which they do and should operate, are the major issues in the current debate. As time goes on you will hear different

points of view from different members of the faculty, and you will ultimately make up your own mind.

One of the most important jobs of the legal system is the officially sanctioned settlement of disputes, whether between individuals or between individuals and some arm of government. This job is entrusted to judges. But they are not, in our system or in most societies, given complete freedom to decide every case as they wish. A fundamental question, then, is: on what basis are cases to be decided?

In the civil law system, under which the Legislature establishes a comprehensive code to govern all activity and to provide a basis for resolving all disputes, there is a tradition of scholars and commentators writing books which develop as fully as possible the implications of the various provisions of the code and present them in a logically related and coherent whole which is used as the basis of decision. The Anglo-American approach is drastically different, because there is no comprehensive code, only a miscellaneous assortment of statutes. What, then, are the authoritative grounds which judges are obliged to apply in deciding cases in the absence of a controlling statute? The answer is: "The Common Law."

After the Normans conquered England in 1066 they began to establish a centralized government, superimposed on the preexisting local governmental structures. While other countries were still decentralized feudal systems, England was gradually being pulled together under the leadership of a long line of strong

kings. One part of the job of the kings was to settle disputes between their subjects. This was gradually turned over to specialized officials who, in the course of decades, became institutionalized as courts.

When the king's representatives set out to resolve controversies among his subjects, the general approach which they took, in view of the recent conquest of the nation and the desire to avoid unnecessary friction with the new subjects, was to decide the controversies in accordance with the common customs of the realm; that is, those customs which had prevailed generally in the kingdom, as distinguished from those which prevailed in particular sections of the country only.

As far back as the 12th century, it became the practice to keep official records of the formal proceedings and decisions of the courts in what were called plea rolls. In the late 13th century there began another series of reports, called Yearbooks, of judicial hearings and decisions, designed more specifically for the use of lawyers and judges. These began to be printed in the late 15th century, and were continued through most of the 16th century. By then, it was becoming common for individuals to compile and publish similar reports under their own names.

The important point is that prior decisions became available to the profession at a fairly early stage in the development of English Law, and thus provided a body of authoritative material for deciding new cases. The theory that the judges decided cases in accordance with the common custom of the realm, or the common

law as it came to be called, persisted well into the 19th century in England. The working assumption was that there was a comprehensive body of legal principles and rules known as the common law which provided an authoritative basis for the resolution of any disputes, either by direct application or by analogy. Analogy is a tool frequently used by the law to bridge the gap from one situation for which there is a rule or principle to another situation similar in some respects but different in others to which no rule or principle directly applies.

As the centuries passed, written records of decisions made by the judges were increasingly relied upon as the primary source of information as to what the common law was. This was an obvious development, in the absence of any comprehensive written statement of the whole body of the common law. Increasingly, then, judges in deciding cases, and lawyers advising clients or arguing before the judges, looked to the recorded decisions as indications of what the common law was. During these years, the characteristic features of the English judicial system took shape: first, the job of the judges was to decide cases; second, the cases were to be decided, not just the way the judge thought they should be decided, but in the light of the rules and principles of the common law of England; third, the authoritative source for ascertaining the common law was the the body of prior decisions of other judges.

When it is considered that this theory of administering justice persisted from the medieval times through the commercial

revolution of the 16th and 17th centuries and well into the industrial revolution, it must be perfectly apparent that the general customs of England of the 12th or 13th century could not have provided adequate grounds for dealing with the vastly different problems that the subsequent centuries brought. Despite the fictitious nature of the underlying assumption, however, it was not until the 19th century that the basic premise shifted. It began to be accepted that what was authoritative was not some vague underlying body of common law, but the actual decisions of the courts in prior cases and the doctrines which were necessarily involved in those decisions. Thus, the basic theory of judicial process underwent a change. Judges have authority to decide cases and only to decide cases. But they do not have authority to decide cases any way they please. Rather they must decide them in accordance with authoritative principles and rules. In the absence of controlling statutes these are to be found in prior cases decided by the judges. Since the power of the judges was to decide cases, and not to promulgate or lay down doctrine at large, only those principles were authoritative which were thought to be necessary for deciding the particular prior cases. This point cannot be overemphasized. On the one hand, the judge may not lay down general rules as the Legislature does when it passes a law; he may only decide cases. On the other hand, he may not decide cases on any arbitrary basis or on any whim of his own, but he must do it in a way which is rationally consistent with the other cases which have been authoritatively decided by

past judges involving related matters.

This is the essence of the Anglo-American judicial theory, rooted in the doctrine of precedent, or stare decisis. As a general rule, a decision must be justified in terms of a reasoned relationship which is expressed between it and previously decided cases. In special circumstances courts in the United States, and only recently in England, have assumed the authority to overrule a prior case. You will see later the circumstances under which this occurs. Generally, however, the theory of judicial authority and judicial procedure is, as has been described, based upon relating the present issue in a rationally coherent way to prior decisions which have been authoritatively rendered by predecessor judges.

The law and the legal system, of course, have many more ramifications than this brief sketch indicates. But the points that have been made lie close to the heart of the approach which we call legal - and it will be the mastery of that approach with which you will be largely concerned in your classwork, particularly during the first year. In deciding the vast variety of controversies that may arise, there must always be a reasoned relatedness to prior cases or, when a statute applies, between the statute and the particular controversy. Since no two events in history can be identical, there being at the very least differences in time or place between them, the effort to relate the decision of individualized controversies to some policy or principle or rule, whether derived from cases or given by statute,



means that it is necessary to abstract certain elements from among the many particular ones present in each controversy. In order to be able to thus abstract some element, it is necessary first to be able to identify the various factual elements involved in the situation giving rise to the case. The legal method, then, demands first a close examination of every factual situation in order that the various elements in it may be sharply perceived, and then the selection, from among the elements, of those which are appropriate for the resolution of the controversy presented. The elements to be selected are ascertained in the light of the policies, principles, standards, and rules of the legal system. In a sense, then, it is necessary to have some overall understanding of the body of doctrine which makes up or impinges upon a particular area of the law in order to determine what factual aspects of a particular problem or controversy will be considered relevant to its resolution.

One final caution about statutes. The common law reliance upon cases has been so characteristic of the traditional Anglo-American judicial process that there has been considerable difficulty in adjusting to the change created by the significant role which statutes have taken in the law during the last hundred years. For centuries, judges, dominated by the case based common law approach, tended to be impatient with statutes and to limit their scope as narrowly as possible. It was an old adage that statutes in derogation of (i.e., which changed) the common law were to be narrowly construed; i.e., given as little scope as

reasonably possible And there has been a pronounced tendency among American courts, as well as English, to absorb statutes into the body of the common law and to treat cases interpreting a statute as if they, rather than the statute itself were the authoritative material. Recently, there has been increasing recognition of the obligation of the courts, when the legislature has issued directions or rules in a statute, to respect the legislative declaration and work primarily from the statute. However, you will soon discover, if you do not already suspect, that statutes or other general commands addressed to the future can never anticipate and provide explicitly for all of the contingencies to which they may have to be applied. Hence, the kind of analysis required for dealing with cases is also necessary in dealing with statutes.

One who wished to bring a case before the royal courts in England in the Middle Ages, rather than before one of the feudal or other local courts, was required to purchase from the king's secretary or chancellor an authorization called a writ. These were issued specifically for particular kinds of claims, and the royal judges over the centuries developed a complex set of procedural rules around each of the various writs. Since new kinds of writs were issued as time went on, different sets of procedures took shape in relation to different kinds of substantive claims, creating what came to be known as the formulary system. With procedure and substance thus closely intertwined, the common law procedural system in its major aspects was adopted in most of the

States.

From the middle of the 19th century in England and most States, the legislatures made repeated attempts to "reform" procedure by enacting comprehensive codes of procedure or practice acts. Since law is by its nature tied to the past, it should not be surprising to you that history still casts a long shadow over even the most advanced American procedural systems. You will find many instances in which existing rules make sense only in terms of the historical background, and many cases which you will study involve in varying degrees the forms and thinking of the older procedure.