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Joseph H. Beale

Harvard Law School

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JURISTIC LAW AND JUDICIAL LAW*

JOSEPH H. BEALE**

It is a commonplace of the lawyer in the street that there is a considerable difference between the common law and the modern civil law with respect to the way in which law is formed and developed. The modern civil law, it is said, is based on a code and is chiefly developed by the writings of jurists and little, or not at all, by the decisions of courts, while our law is principally a common law based on former decisions of the courts and not much influenced by the writings of jurists. In order to test the soundness of this distinction it will be best first to look into the history of the modern civil law.

After the twelve tables, which was a code only in the sense in which that word is used in primitive law, the Roman law for centuries was developed in a way very similar to that of the common law; that is, the opinion of learned lawyers given upon special cases with a view to the decisions of those cases formed the basis of the progress of the older part of the law, while the more modern equitable doctrines were developed by the praetor whose power and influence were purely equitable.

An occasional commentator of influence based his work largely upon these opinions of the jurisconsults. Coming to maturity, the law was taken in hand by the emperor Justinian, who appointed a commission to reduce it into workable dimensions. This commission, formed of the leading lawyers of the empire, after a long

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**Professor of Law, Harvard Law School.
consultation made what they called a digest of such opinions of the jurisconsults as they approved, and these were given sanction by decree of the emperor. This digest, passing down for another thousand years, became the basis of the reception by the modern European nations of their law of today.

During the early middle ages, a shadowy revival of the Roman Empire began with Charlemagne and then gradually faded out again. After the revival of Roman law in Bologna, all Europe owed nominal allegiance to this law, though it was actually of most importance in southern Europe, and its authority was the Corpus Juris of Justinian, expanded by the glosses and comments of early scholars; but inside the empire and rapidly gaining more power and coherence in the empire itself there were growing up local governments, some of them the governments of mere city states, and others coalescing into great and powerful nations.

While each of these local units did lip service to the empire and accepted the imperial law as, so to speak, the general rule, each of them developed its own local law applicable to its own territory. In Italy, each local city-state had its statuta; every Spanish kingdom its fuero; in northern France, each province its coutume. Whatever this local legislation was called, it was regarded as what we should call a statutory change of the common imperial law. It tended to wax in importance, and the imperial law to wane, until the reception of the imperial law in new states. The young lawyers were trained in the Roman law, with such glosses and comments as the medieval scholars added to it. This was, so to speak, their common law. On the other hand, the local law roughly corresponded to the particular law of one of our states, and became available so far as it extended, while the imperial law was the body of common law behind it to fill up its gaps. It is to be noted, however, that while the two branches of law corresponded rather closely to our statutes and decisions on the one hand and our common law on the other, this particular law, nevertheless, was not taken to be legislation in our sense of the word, which could be the work of the emperor only, but was like that part of our local law which is made up of the local usages and the decisions of the local courts. In other words, it was not in its nature statutory so much as it was a body of local principles and customs.

During the 18th and 19th centuries this common law and these local customs were reduced by each of the new nations to a
code. Thus all the customs of France were gathered up into the Napoleonic codes of which the civil code is the most important. The example of France was followed by Austria, Spain, Italy, Germany, and Switzerland. Each of these codes was carefully considered for several years by a capable commission and was passed as the best possible reconciliation and restatement of the local law of the various parts of the country. They thus took the place of laws which did not have the rigidity characteristic of our statute law. They were rather the reduction to writing and the reconciliation of various unwritten customs and usages, together with parts of the common law, that is, with modern Roman law, which filled their gaps.

It is a not unnatural result of this history that European lawyers do not regard their codes as we regard our legislative enactments. Their code is a statement of principles; sound indeed, but in many instances vague, and in other cases over-general. The articles of the code must be supplemented by interpretation, which in turn is made according to the technique of the civil law. As a matter of fact, the courts not infrequently decide cases to the exact contrary of the clearly expressed statement of the code. Interesting examples occur in the interpretation of a provision of the civil code of France. Article III of that code provides that Frenchmen should be governed even while residing in foreign countries by the law of France as to capacity. This was declared by the courts and lawyers to express the principle that the capacity of a party to enter into a transaction is governed by the law of his nation. Nevertheless, when it came to be a question of applying this principle in favor of a foreigner in the case of a transaction undertaken in France, the courts held that the French law of capacity governed and that the foreigner could not hide behind the incapacity of his own country. The court in one case said, “Civil capacity may in fact be easily forfeited in case of transactions between French citizens, but it is otherwise as to transactions which take place in France between Frenchmen and foreigners. In such a case Frenchmen cannot be held to know the laws of various nations.” In another case the court said that “the application of the foreign statute is subject to restrictions and limitations required by the legitimate interest of citizens of France.”

In fact, the courts, while they must in France cite the applicable provision of the code, feel little more bound by its language than our courts do by the language of an earlier decision. On the
other hand, they treat the code as a statement of principles and precepts of their law, which they apply by analogy in situations not falling within the letter of the code.

In contrast with law of Europe, our own common law has had a very different history. As in France, Germany, Italy and Spain, England was divided into local divisions or *shires*, each with its own traditional system of law; and each manor and borough had its own custom, derogating from the law of its shire. But England did not wait until the 18th century for a reformer. Its second Henry, before he became King, had served an apprenticeship as chief justiciar of his predecessor Stephen, and had learned the impotence of royal justice, and the anarchy of the folk-motes. He proceeded, by such devices as were available, to supersede the local law of the shires by a single law of the realm. He sent his own judges to preside as his representatives in the shires; he secured the extension of the king’s peace, he bribed suitors to ask for his writs by offering a new and rational method of trial by a jury. He instructed his judges to apply to the decision of questions the universal precepts of the local laws, tempered with equity. He gave to the realm a common law of all; a law that in its origin and throughout its history has been developed by the courts, not so much because his judges made the law by their decisions as because they led the thought and fixed the reasoning of the profession. In an early case counsel remarked, "I think you will do as your predecessors have done in this case, else we shall not know what the law is." "It is the will of the justices," remarked the smart youngest judge, in words which have frequently been repeated since. "Not a bit of it," corrected the gray old chief, "It is reason."

For practice in each of these laws, students must be trained either in schools or in the courts themselves or both; that is, the training must include theory and technique. In Europe students in the civil law spend at least three years learning what they call the principles of law; their teachers are jurists, who until lately have developed the theory of law with little or no regard to the application of their principles to actual cases that arise in practice; and their lectures become the treatises on the subject. After receiving a degree in law, young men who intend to practice law in the courts spend several years of apprenticeship in court and office before they are qualified to be barristers or judges. Theoreti-

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1 Langbridge's Case, Y. B. 19 ed. 3, 375 (1345).
tical education is therefore divorced from practice and from the handling of fact; the function of theory is magnified as the intellectual part of every lawyer's education, while the decisions of courts, applying the law to facts, are regarded as inferior things. It is not surprising that civilians look to juristic writing as the principal source of a scientific knowledge of the law, and the sole influence in developing it.

In England, on the other hand, the Universities until recently held aloof from the common law. They thought, like the European Universities, that the action of the courts in specific cases is not worthy of intellectual attention. They taught Roman Law, the History of Law, and Jurisprudence, as philosophical and historical topics, quite divorced from the realm of reality, and therefore intellectual. To get the knowledge necessary for practice students must go into the courts and into the offices of lawyers, and learn their law as apprentices to a trade. In such a system the true sages of the law, those who fashioned it and influenced its growth, are the great judges, whose influence still lives and whose services to the law are still recognized after centuries. It is not surprising that no influential treatise on the common law, except the elementary and institutional work of Blackstone, has come from the Universities; and that the courts alone have developed and are now developing the actual law of the land.

In this country the Universities have played a different role. As American Universities have first seen and developed the intellectual and scientific aspects of medicine and engineering and business, so they have seen and developed these aspects of the common law; and since the time of Langdell, at least, our judge-made law has been taught not as a trade, but as a branch of the science of human relations. We have not thought of intellect as necessarily divorced from the facts of life. Critics of this system of teaching at first said that the art of dealing with facts and of taking account of the actions of courts could not be taught in universities, so as to make practical lawyers; and if the Universities undertook to teach judge-made law scientifically, it would only result in making "theorists." The eating proved the pudding. Graduates of the schools which taught most sincerely the science of our law, and let the arts of practice alone, were most successful in the practice of law. We have had then in this country the phenomenon of a law which had been developed almost exclusively by judges now being examined, criticized, and taught.
by jurists. We have seen in America a majority of the books that have really influenced the law written by teachers. A short catalogue of such writers is enlightening; let me name Reeves, Stearns, Story, Greenleaf, Kent, Parsons, Washburn, Minor, Dwight, Langdell, Thayer, Gray, Ames, Hammond, McClain, Cooley, Wigmore, Williston. More striking, if possible, than this list is the vogue of periodicals published at the schools and frequently cited by the courts. A few years ago successful lawyers in practice, while they valued the human product of the schools, still thought of teachers in general as theorists, amiable but impracticable, and of no use in the solution of a practical question; now they are consulted as experts on difficult questions arising in practice. When at last the whole profession, judges, practitioners, and teachers joined to undertake the work of reducing unsystematic judge-made law to a systematic statement, a task of far greater importance and difficulty than that of the commissions of Justinian and Napoleon, they turned to the teachers as the only lawyers who had the combination of scientific and professional knowledge necessary for the purpose.

Our law, then, formerly developed almost entirely by the judges, has become in America a joint enterprise; and juristic writings are shaping it to a greater and greater degree. The old notion that judges alone shape our law is greatly modified by modern conditions.

Let us turn again to the civil law of continental Europe. We have seen that law as a subject of scientific study has been developed almost entirely by jurists; does this condition of affairs continue? Is the law, regarded as an instrument by which society secures to each man his own share of good, still in the hands of jurists only, who develop it quite theoretically?

Legal literature is probably a fair measure of the printed sources of law in action. European legal literature, like our own, consists chiefly of three classes: treatises, statutes, and the decisions of courts. The number of each of these classes ought to throw some light upon their importance in the development of law. In a library which makes a serious attempt to collect all foreign legal literature, a count of these three classes (omitting books on international law) shows of European treatises about 37,000; statutes 24,000; the decisions of courts 28,000. The current volume of French decisions is about as great as of English decisions. The ratio of decisions to treatises does not appear to differ much in the two systems of law. If we look into a French
book of reports of decisions, to be sure, we shall usually find no former decisions cited; but that is because a French decision as reported does not contain what we call the opinion, but only the judgment, which in France contains a recital of reasons but not of authorities. Now and then the opinion of the Rapporteur, the judge who writes the opinion on which the court acts, is given; and this is as full of decisions cited as authorities as one of our own opinions. It is the same in other European countries. This quite accords with the practice of printing reports. For so many to be printed, lawyers must buy them; if they do so, it must be because they find the decisions useful both in answering clients’ inquiries and in preparing arguments for the courts. This all goes to show that really the decisions of courts influence the law greatly, and that the writings of jurists are not the only source of development of the law. It is even hinted that the jurists themselves are finding the decisions of courts useful in determining what the law is.

It thus appears that in the United States both judges and jurists share in the development of the law, and that the same thing is now true in Europe. There is doubtless a little difference in emphasis. This is true even between the different European countries. In Italy decisions seem to play a greater part in the development of law than in France; a little less, to be sure, than they do with us. But the differences are in degree only, and not in kind. All laws of the present day are both juristic law and judicial law.

But there is still an important question to be solved. In determining the juristic law, one would naturally assume that a court would look only at its own former decisions, not to those of the courts of another state. To this idea the English courts are pretty nearly committed. If you look in an English treatise or decision, you will find that almost without exception the authorities cited are English decisions or statutes, and that courts and text writers confine themselves entirely to these sources of knowledge of law. If this were the case in this country, we should expect to find in each state its local school of law, its local treatises, and its bar confined by the nature of its study and learning to the courts of its own state. How far this is from the truth we do not always realize. We are usually content to repeat the English doctrines of the binding effect of decisions and of the local nature of law without distinguishing our conditions from those of England. But we must realize the enormous differences. England is a single state, with one paramount court to the decisions and even dicta of
which every court in England pays heed. Instead of a single supreme court, we have in the continental United States fifty-nine, each in its sphere supreme, turning out countless decisions—a welter of decisions, Professor Edward Warren called them. We have too many decisions from too many courts, too much hurried to do really good work for us, to do any decision honor. We have no ultimate court to choose the good and throw out the bad. Even the decisions of our own state are too numerous for us to search the words of each judge for light and leading, and to treat his veriest dictum as gospel. One used to say that the decisions of one’s own state have compelling force, while the decisions of other states have only persuasive force. We say it no longer. We no longer believe that a decision of our own state is compelling. Decisions of our own state and of other states go into the melting-pot together, and we try out the pure gold, from whatever source it comes. The fate of our courts and decisions reminds one of the action of the good King whose deeds are described by the Grand Inquisitor in "The Gondoliers." He desired all men in his realm to have their wish,

"So to the top of every tree
Promoted everybody.
Lord Chancellors were thick as sprats,
And Bishops in their shovel hats
Were plentiful as tabby cats....
And dukes were five a penny."

At five a penny they command slight respect.

Some years ago an investigation was made into the habits of the Colorado courts, and it was found that the judges in their opinions were citing freely cases from England and from all the states in the Union; and that to support a single statement of principle they would add to the citation of a Colorado case the citations of cases from half a dozen other states, without any seeming difference in weight to be given them. A similar study has just been made of six late volumes of the West Virginia Reports with the same result. In these six volumes 2573 decisions were cited from the courts outside West Virginia as against 2530 West Virginia cases. Apparently, more foreign cases were cited than domestic; though if we should include among the West Virginia cases the decisions in Virginia before separation, we should find the balance changed. Nevertheless, the fact remains that in a West Virginia court a man may cite a decision from the court of another state
with as great expectation that it will be accepted as a guide by
the court as if the case cited were a West Virginia case.

Going further in the investigation of the use of citations, it
was possible to trace many of the out-of-state citations to cases
cited in a few reference books. Corpus Juris accounted for a con-
siderable number of them, Ruling Case Law, and the Lawyers
Reports Annotated for many of the rest. One would guess that
lawyers, especially in the country counties, had access to the West
Virginia and Virginia Reports, some of them, perhaps, to the Penn-
sylvania, Kentucky, and New York Reports, and probably to some
of the West Company Reporters, but for other authorities they were
indebted largely to Corpus Juris. Nevertheless, citations so found
and so made appeal to the court as sound evidence of its own
law, and the court uses them with as great freedom as they use
the citations to the West Virginia Reports themselves. Looking
further, in the last two accessible volumes, a still more interesting
condition was found. In nearly half the cases the opinion was not
long and the authorities cited were practically all West Virginia
statutes and decisions. Examining them, one notes that in general
they are either practice cases, prosecutions for crime, suits for
negligent injury, or suits involving the interpretation of a local
statute. In the other half of the cases there are many more foreign
cases than West Virginia cases cited. For instance, in a case in-
volving the validity of a gift causa mortis, along with five West
Virginia cases, there are thirty-five cited from other jurisdictions;
a number from England, New York, Maine, Massachusetts, Penn-
sylvania, and Indiana, and single cases from several other states
including Oregon, California, and Wyoming, showing evidently
that counsel had found, either in Corpus Juris or in some other
source, a good collection of authorities on the somewhat obscure
question of gifts causa mortis. In one case of negligent injury in-
volving a rather difficult question of causation, there were 26
West Virginia cases cited, and 36 citations from other jurisdictions.
The latter included the Federal Reports, Virginia, Pennsylvania,
Massachusetts, and Michigan, with sporadic cases from such un-
expected states as Oklahoma, North Carolina, and Louisiana; again,
access had been had by counsel to some full collection of authorities
on the point. Criminal cases were usually decided with reference
to West Virginia decisions only, but in one case of the sort in-

\(^a\) Waugh v. Richardson, 107 W. Va. 43, 147 S. E. 17 (1929).
\(^b\) Morris v. Railroad Co., 107 W. Va. 97, 147 S. E. 547 (1929).
volving intoxicating liquor, in addition to 8 West Virginia decisions, cases were cited from New York, Massachusetts, Georgia, Virginia, North Dakota, and Colorado. In an insurance case along with one West Virginia case 12 others were cited, several from the Federal Courts, but single cases from New York, South Carolina, Wisconsin, Colorado, North Dakota, Maryland, Nebraska, and Indiana. In a case involving equity jurisdiction, in addition to 4 West Virginia cases, decisions were cited from Tennessee, Alabama, Illinois, New York, New Jersey, California, Florida, Pennsylvania, and Oklahoma. In a corporation case, in addition to 8 West Virginia cases, there were cited 2 Federal cases, 2 from Missouri, 2 from Washington, and 1 each from Kentucky, Maryland, and Connecticut. Not a state was excepted from the hospitality of the court; and there was no indication in its treatment of the authorities that the court distinguished between a decision of the Surrogates’ Court of New York county or a district court of Ohio and the Court of Appeals of New York or the Supreme Court of the United States. With so many thousands of decisions a year reported, each decision looks very small. Our English brothers still quote with bated breath the dicta of a Coleridge or a Kekewich, and treasure the witticisms of a Darling or an Arabin. For us, too, all decisions are created equal; but equally unconvincing. An opinion of Surrogate Fowler or of Judge Farmer-Labor Robinson is as good as one of Chief Judge Cardozo or Justice Holmes, except that the reasoning of one may commend itself, and not that of another.

It thus appears that a court will read and will rely upon authorities from other states as freely, apparently, as upon authorities from their own state; and that the creed of the courts of a state, if that is what law is, proves to be a much broader creed than what one might call the legal fundamentalism of the English courts. As a matter of fact, it would probably be more accurate to say that law is the creed of the bar and that the creed of the bar depends upon its education and its access to helpful books of the law.

There is, then, a law broader than the local law of a particular state which is evidenced by its own legislation and decisions. This is an unwritten law, of which the decisions of every common law

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state are evidence; and writings which collect the decisions of every common law state are subjects of study and helps to investigation. This is, of course, what we call the common law. And this is a real law. We find all the law schools which have the equipment to do so, welcoming students from all over the country and teaching them a law not apparently peculiar to any one state. We find a bar which practices readily in any part of the country, so that the leaders of the bar of one state not infrequently remove to another state where the practice is better. We find the standard treatises on our law from Story and Greenleaf to Wigmore and Williston written for lawyers in any part of the country, and we find the highly successful reference books, like Corpus Juris, Cye, and the Lawyers Reports Annotated, assembling cases from every common law state. If we examine carefully our conditions, we shall find that the law which we really study and practice is not merely the local law of a state, but some more general law whose precepts will guide us in the solution of a question arising in any court of the country.

It appears, then, that in America both juristic and judicial law has a broader basis than the decisions of a single state; that we are working out, in fact, an American law by the joint action of the courts and the schools. Even this has its counterpart in Europe, where jurists study the "common law", derived from Rome, as well as the codified law of a particular state; and where some courts, at least, are considering the decisions of the courts of foreign states as well as their own decisions.

Having thus established that the development of both modern systems of law is shared by courts and jurists, it is desirable to examine what part each is fitted to play in this development.

If we are faced with a set of facts and desire on those facts to make a brief of an argument to establish the law applicable, we go through certain stages of thought. First, from our general knowledge of legal principles and precepts, we determine what, without further investigation, we think the law to be. As a man gets more familiar with the law he professes, this process becomes less and less a rational process and more and more intuitive. A man well versed in the law and its ways tends more and more to feel an instinctive legal reaction to a state of facts brought to his attention. The first step, therefore, in the process is apt to be taken very promptly.

But this legal reaction, reasoned or instinctive, is the mere starting point in the lawyer’s investigation. He has to check his
first impression in two ways: first, by his own thought; second, by an examination of legal authorities. One is a juristic, the other a judicial, test of the correctness of the first hypothesis. The result of the first examination by reason and by authority is the correction of the first hypothesis and the formulation of what is then believed to be the rule of law. The next step is to support this rule by such legal reasoning as is likely to convince a court. This reasoning, again, is partly on principle and partly by the assembling of authorities in support of the proposition. In the course of this investigation it is quite possible that the investigator may find either a line of reasoning or a body of authority which will lead him again to revise his opinion. In that case the process goes on with a corrected restatement of the principle, until, finally, a line of reasoning is adopted and a result is reached which seems satisfactory. By this careful process of trial and error the brief is drawn; by a similar process the whole of the law has been developed by courts and lawyers and is now being brought into consonance with the ideals of the time.

We find, then, two kinds of argument, one from principle, and one from authority, that are employed in the process of legal investigation. The employment of reason in the investigation means a juristic process. It is not necessarily a logical process; usually it does not proceed in accordance with formal logic. It "will depend on a judgment or intuition more subtle than any articulate major premise". It does, however, necessarily, proceed on some ideal conception of legal truth, whether that conception be one of the older stages of law or the conception of liberty, equality, and fraternity of law in its most modern dress. How far does the proposed rule conform to other known rules of law; how far is it consistent with well established legal doctrine; how far is it in accordance with social or economical needs or with current morality? All these are juristic tests to be applied to the doctrine. On the other hand, there is to be considered how far the doctrine conforms to the prior decisions of the courts and to the opinions of great judges. This is the judicial part of the doctrine. After the reasoning is completed and the doctrine accepted, we shall assume its correctness and go on to further inductions or deductions. From the process stated it is clear that the lawyer may proceed either inductively or deductively from his premises.

From his juristic premise he deduces his result. From his judicial premise he induces his result. The two processes act as checks upon one another.

From this it appears that the function of juristic reasoning is double. First, it provides intellectual premises and conclusions by deduction from these premises; and second, it provides a means of criticism of the former process. Judicial reasoning presents data from which by induction one may derive conclusions, but it has no standpoint from which to criticize the result. The judicial process is historical and inductive, not critical; judicial reasoning is both critical and constructive.