GEOFFREY C. HAZARD, JR.

MICHELE TARUFFO

American Civil Procedure

AN INTRODUCTION

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PREFACE

The American legal system is a subject of general interest and importance. The United States is the leading industrial country in the world and one of the world's largest political democracies. The American political system has a distinctly legal character and the judiciary plays an especially important role in making public policy and defining private relationships. Civil litigation in the ordinary courts of justice is the principal mechanism through which this role is performed. Alexis de Tocqueville, the great nineteenth-century French observer of the American scene, noted that "there is hardly a political question in the United States which does not sooner or later turn into a judicial one."[1] Thus, such vital questions as equal treatment of racial minorities, legal limitations on the availability of abortion, and relationships between church and state are to an important extent governed by law pronounced by the courts rather than by the legislature. This book is designed to explain the procedure by which the courts resolve these questions to people interested in society and government.

The judicial system's importance in the American political system is well known. Most Americans recognize, for example, the name of the leading case concerning racial desegregation as *Brown v. Board of Education,* decided by the United States Supreme Court in 1954.[2] As many will recognize *Roe v. Wade* as the leading case concerning legal limitations on the availability of abortion.[3] The adjudication of important issues of public policy is not the only business of the American courts, however. In fact, cases involving important issues of public policy statistically are but a small part of the business of the courts. Most civil cases are private disputes

of little significance except to the specific plaintiffs and defendants—automobile accident suits; commercial contracts disputes; product safety suits; landlord-and-tenant disputes; divorce and other family legal problems. The American court system also handles millions of criminal cases each year, ranging from prosecutions for murder to parking violations.

An important characteristic of the American legal system is that the same courts and essentially the same procedural rules govern all types of noncriminal litigation. There is a distinct system of procedure in criminal cases, a complex subject that is beyond the scope of this book. Apart from criminal matters, however, the same rules of civil procedure govern great public controversies such as *Brown v. Board of Education* and routine litigation between private parties. Moreover, these controversies generally are adjudicated in the same court systems. There is thus a formal equality—one could say a democratic treatment—of public-issue litigation and ordinary litigation between private parties. Both kinds of litigation are at the same time matters of public interest and of individual justice.

Civil litigation in legally developed political systems has fundamental similarities the world over. Every civil case involves a complaining party who demands a remedy from the courts for an asserted legal wrong. Every case involves a defending party who denies having a legal obligation in the matter, or at least contends that its legal obligation is different or less than the complaining party contends. In any particular case, the facts may be contested, compelling the tribunal to resolve conflicting evidence in making a determination of the facts. In addition, the meaning or application of the law may be contested, in which event the tribunal must resolve conflicting interpretations of the law. Many cases involve disputes of both fact and law. Furthermore, in legal systems based on the Western tradition, the tribunal is in principle indifferent to the social consequences of the outcome of a specific case. The constitutional function of a court is to decide each case according to law and not to rehabilitate the parties or to improve their social consciousness. Concentration on the law and the facts of the specific

case reflects the concept that justice should be administered according to law, not according to social necessity. This limitation also means that the courts of civil justice do not remedy all forms of injustice or social wrong. The primary responsibility for remedial social measures lies with other agencies of government, such as the national legislature or executive.

Given these fundamental characteristics of a legal dispute, the procedure for adjudication must meet certain requirements. It must provide an authoritative arbiter to determine the facts and an informed authority to determine the law. According to universally recognized principles of fairness, the arbiter should be neutral as between the parties. So also, the procedure must permit the parties to tender evidence relevant to the factual issues and to suggest sources, such as applicable statutes, that are relevant to the legal issues. The tribunal is obligated to give serious attention to both sides of the dispute, and to all sides if there are more than two parties. The procedure must also have a definite conclusion. Unless there is a principle of finality, the stronger party or the more persistent one can prevail simply by protracting the litigation.

By universally recognized principles of fairness, in most cases there should also be opportunity for appellate review before a higher court. The only exceptions to this principle are in cases involving very small sums of money, where the cost of review would exceed the amount in dispute, and cases involving extraordinary emergency, where some kind of protective relief must be granted to preserve the status quo.

These fundamental similarities among procedural systems can be expressed in simple terminology. A tribunal that has authority to determine a civil controversy is described in American usage as having "jurisdiction of the subject matter" (the word *jurisdiction* derives from Latin roots meaning "the power to say what the law is"). In civil law usage the same concept is called "competence concerning the controversy." A civil case involves issues of fact and issues of law. The plenary hearing where evidence is received is called the "trial" in American usage; in the civil law, it is the "first-

instance proceeding." In American usage, a proceeding to review the trial judgement is called an "appeal"; in the civil law a proceeding to review the judgment of a first-instance proceeding is called a "proceeding of the second instance." The principle of finality, in both civil law and American usage, is known as the rule of *res judicata,* meaning "already decided." The concepts of issues of fact and issues of law, trial, appeal, jurisdiction and res judicata are fundamentally similar in the law of all legally developed countries. In this book we focus attention on the distinctive characteristics of American civil procedure. We also contrast American civil procedure with the civil law system of procedure that is employed in Europe, Latin America, and Japan. Contrast, we hope, avoids both idealizing the American system and denigrating it by comparison with an unreal system of perfect justice.

A different version of this book, designed for a European audience, is being published in Italian. The underlying analysis reflects several years of discussion and many written exchanges between us.

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CHAPTER ONE

History

Much of what is now the eastern United States originally was colonized by Great Britain. From the time of the first British settlements in the early seventeenth century, however, colonies were established by other European countries, including the Netherlands (occupying New Amsterdam, which became New York), Sweden (occupying part of what became New Jersey), and France (occupying what became Canada and areas that ranged from what is now western Pennsylvania to New Orleans). From 1660 on, Great Britain aggressively expelled the other European powers, securing what came to be thirteen American colonies as its exclusive domain. These European colonies gradually subjugated, exterminated, or pushed westward the Native Americans (Indians).

In this period, the emerging American legal system became patterned on that of Great Britain. Before 1700, the legal systems of the colonies were relatively primitive, reflecting the condition of early colonial societies, economies, and political structures. Legislation emanated occasionally from governing bodies that resembled town councils more than modern legislatures. The courts and judicial procedure were adaptations of the local tribunals that the settlers had known in English villages. Accordingly, the procedure of the early colonial courts was relatively informal, relying primarily on oral testimony and use of local lay people as arbiters (there were few trained lawyers in the colonies). Historical research indicates, however, that even in the seventeenth century the courts in the colonies occasionally adjudicated complicated controversies concerning such issues as rights in land and the governing powers of churches. In this early period, several characteristics emerged that

eventually would become permanent: courts were to be spread throughout the countryside, rather than concentrated in urban centers; courts were to call upon local laymen to determine the facts; and courts were to keep their procedures "simple" and readily intelligible by the ordinary citizen.

In general, the British government was indifferent to the judicial functions performed in the colonies. The legal controversies in the colonial courts usually were of only local and private significance, and hence could be ignored by the central government. However, Great Britain was concerned with legal issues that affected important interests of imperial government, such as the authority of the royal governors of the colonies. To protect these interests, the central government in London, acting through the king's Privy Council, retained authority to review judgments in the colonial courts. Here can be seen in original form a procedure that later came to have constitutional importance. The Privy Council exercised authority to determine whether a proceeding in a colonial court or legislative body conformed to the legal principles recognized in the British imperial regime. This procedure had the following characteristics: review by a judicial body having independent constitutional authority rather than merely an upper-level court of appeal in an integrated judicial system; determination of legal issues of general significance, not evaluation of the specific justice of the judgment in the court below; and resolution of important political issues through judicial proceedings. In embryonic form, the procedure for review of judgments of colonial courts by the English Privy Council resembles the modern American procedure for review of judgments of trial courts by the supreme courts of the various states and by the United States Supreme Court.

The constitutional relationship between the central legal authority and the courts in the colonies was not unique to the British Empire. Those familiar with Spanish history, for example, will recognize the similarity between the Privy Council mechanism of review and the more elaborate system established in Madrid for legal superintendence of Spain's American colonies. The crucial

point is that both English and Spanish colonies were components of empires whose central authority, like any other government, was committed to self-preservation. Among the necessary procedures for an imperial government is review of constitutionally important decisions of local courts.

It is paradoxical that this legal aspect of imperialism became a precedent for the authority by which appellate courts in the United States exercise important law-making functions in domestic affairs. The paradox is greater in light of the fact that modern European courts did not exercise any authority over their internal law (as distinct from review of colonial matters) until after World War II, when Europe began to absorb American concepts of constitutional law. The feature of American law that remains most difficult and most important to explain is why a country committed to democratic political and social principles continues to repose important law-making functions in the judicial branch of government.

From about 1700 on, civil litigation in the English colonies came to be more closely patterned on the procedure used in the principal courts of the mother country. This procedure, particularly the common law pleading system, is described later in this chapter. In general, common law procedure was more intricate and required greater technical legal knowledge than earlier colonial legal procedures. Its introduction into the colonies was possible because, as the colonies became more populous and economically more developed, professional judges and lawyers made their appearance: some legally trained officials were sent over by the government in London; other Englishmen with legal training came to seek their fortunes; an increasing number of people born in the colonies went to England for legal training. By 1776, when the War of Independence began, there existed a corps of lawyers familiar with the American versions of common-law procedure.

Although the colonies began cooperating with one another politically as early as 1753 (during the French and Indian War) and established a common voice of protest in the 1770s, their first joint legal act was the Declaration of Independence itself. Until 1776

each colony had sustained a stronger connection with London than with its sister states in matters of government, trade, finance, and law. Each colony developed its own legal institutions around this set of relationships with the mother country. Each colony accordingly had its own court system and judiciary, its own legislation and decisional law, its own legal procedure, and its own legal profession. All of these systems resembled their counterparts in England and hence are appropriately referred to as common law systems. However, the American systems were simplified versions of the originals. For example, although at the time there were separate common law courts in England (notably King's Bench and Common Pleas), in each colony these generally were merged into one tribunal and one procedure.

Each new state remained legally autonomous in the period between the separation from England in 1776 and the adoption of the U.S. Constitution in 1787. Each state regarded itself as a sovereign government within the loose association known as the Confederation. The separate identity of the states that originated in the Revolution continues to have major legal significance, for it is the foundation of the relationship among the fifty states and between each state and the federal government. Even today, the states remain semi-autonomous members of a federation. The federal nature of American government is most apparent in law enforcement, local administration, and judicial institutions. Each state has not only its own governor and legislature but also a separate system of courts and a distinctive procedural law, all stemming from colonial origins.

English Legal Inheritance

The English law of civil procedure, inherited by the new American states in 1776, had accumulated over seven centuries of English constitutional history. Some aspects of English procedure dated back to the Norman invasion of England in 1066; a few, particularly the use of local laymen to determine issues of fact, had

even earlier roots. Through this long period, England's legal system had undergone adaptations to meet changing social needs and political conditions. Some changes were accomplished through deliberate legislation, but many were accomplished by the courts through the creation of legal fiction that ascribed new functions to old legal mechanisms.

Taken as a whole, the legal system of eighteenth-century Great Britain could be understood only through practice and memory, not through rational analysis. The English law of procedure had never been subjected to comprehensive revision on the model of the Justinian Code of the sixth-century Roman Empire, or the legal revision that later appeared in Europe in the Napoleonic Codes. The closest approximation of a systematic treatment of English law was Blackstone's *Commentaries on the Common Law,* which was a scholarly treatise, not a legal code. Blackstone did impose a degree of coherence on a largely incoherent body of law, however. Interestingly, his *Commentaries,* first published in 1776, was to have greater influence in the new American states than in Great Britain.

The basic procedural institutions drawn from the English background include:

1. the separation between common law and equity;
2. within the common law, the writ system of procedure;
3. the use of juries for determining issues of fact;
4. the adversary system for presentation of the parties' contentions.

The separation between law and equity, the role of juries, and the adversary system remain salient features of American civil procedure, while the writ system has been superseded by modernized procedure. However, the historic English writ system is the matrix from which the modern American system of procedure has devolved.

The system of civil procedure in effect in the newly independent states of America was therefore, even in 1776, anachronistic and

in this sense profoundly conservative. The preservation of an archaic legal system in the new American republics was partly a matter of convenience. In the turmoil of establishing their independence from Great Britain, the states had more pressing political problems than reforming civil procedure. However, preserving the established legal system also had a constitutional motivation. One of the grounds stated in the Declaration of Independence for the separation from England was the colonists' claim that they were entitled to rights of the common law. The common law was perceived to include not only substantive rights but the procedural system in which those rights were embedded. That system was regarded as a fundamental protection of private rights and a source of immunity from government oppression. It would have been a political contradiction for the new states to jettison a legal system that they claimed as a birthright.

The origin and foundation of American civil procedure thus was a system at the same time alien and dearly held. Common law procedure was alien in that it had evolved to deal with problems of civil justice in feudal and postfeudal in England, but then had been implanted in North America, a developing region that had never known feudalism. Common law procedure was dearly held in that its preservation was one of the justifications for overthrowing the English colonial regime. To this day, the right to legal justice according to legal procedure remains a fundamental aspect of the American conception of political justice.

Common Law and the Common Law Courts

At the time of the separation of the colonies from the mother country, the English judicial establishment was an untidy combination of four different central courts and many local courts. The four central courts were King's Bench, Common Pleas, Exchequer, and Chancery. The local courts were innumerable and parochial, including manor courts, village courts, borough courts, and

special courts in certain strategic regions within England. The four central courts had the most significance in the ultimate development of American civil procedure, however.

The oldest of the four central courts was King's Bench, which dated back to the twelfth century. King's Bench was the superintending court for enforcing the king's peace and justice. As implied by its name, this court originally was held in the king's presence. Its authority or "jurisdiction" concerned primarily disputes over land, feudal incidents in land, and controversies involving violence and threats of violence. These legal problems—land and violence—were closely related: disputes over land were a principal cause of violence, and use of violence was a means by which local magnates often tried to settle disputes over land.

The king could not always personally attend the proceedings in King's Bench, however. His absence resulted in delay, inconvenience to litigants, and consequent failures of justice. Accordingly, members of the royal legal staff were delegated to hear cases in the king's absence. This arrangement originated as an improvisation but became established as an alternative tribunal, which came to be known as Common Pleas. The Court of Common Pleas had achieved a distinct identity by the thirteenth century.

Over time, the procedures of King's Bench and Common Pleas, though generally similar, became differentiated. At various periods in history, therefore, rights and remedies might be enforceable through one of these courts but not through the other—even though, in a general sense, they were both common law courts.

The third central court, Exchequer, evolved in a somewhat different way. Originally, the exchequer was the king's fiscal office. (Its name derived from the checkerboard tables on which counters, that is, metal disks, were moved about in making financial calculations.) The office resolved disputes between the king and his subjects over amounts due the king for taxes and other exactions. In the feudal system, these exactions often depended on legal relationships between the subject and some third person; accordingly,