Anglophone and Civilian Legal Cultures:
Two understandings of human trust for the global age

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Abstract

The principle of human trust works in both the Anglophone and Civilian legal cultures, but does so in two opposite ways. Although not explicitly stated in either legal tradition, the element of trust is of central importance in both. The two traditions began in the medieval period, but in very different circumstances. They had entirely different understandings of what law was and the purposes for which it worked. Their modern incarnations, together with implicit attitudes toward human trust, took shape during the seventeenth and eighteenth centuries--in ways that reinforced their original differences. Their contradictory ideas of trust derived from opposing concepts of human nature: a Humanist confidence in the capacity of men as compared with a Calvinist belief in the depravity of men. Eighteenth century Continental jurists rejected religion as the educative basis of rule. Instead, they embraced an *Optimistic* philosophic view of human nature, expressed in the *Sensus Communis*. During the same period England retained a deeply established Puritan ethos. It separated Church and State but, unlike the more secular Continent, it retained an amorphous religiosity as the legitimizing basis of its rule. In Continental legal culture, the ideological and educative half of governance was emphasized. Public cultivation and learning, and the faculty of human reason, were relied on as the ultimate basis of order. By contrast, Anglophone legality, resting on an assumption of human turpitude, promised freedom—but within enforced limits. Its hierarchical Rule of Law was founded on public faith in judicial authority. The project to construct a global law brings these traditions into confrontation. A resolution reached by them will determine the meaning and importance of human trust in the global age.

Keywords: anglophone; civilian; law; reason; faith; trust.

Introduction

Although the importance of trust between persons may not be explicitly defined in either of the two great Western traditions of law, Anglophone and Civilian, in fact, it comprises an important implicit theme in both of them. In particular, their respective views on trust can be inferred from the two very different assessments of human nature that have historically distinguished the two.

These different concepts originated in the distant past. For Anglophone law, its evaluation of human nature is rooted in a seventeenth century Puritan understanding of predestined human tendencies as a threat to public order. For Civil law, its modern understanding of human composition is, in substance, still tied to the eighteenth century, the period historians refer to as The Enlightenment, especially its confidence in human potential and the capacity of reason.

As these two traditions of law confront one another in the twenty-first century, their two very different conceptions of human nature, their different understandings of law and the purposes it serves come together. The question of which conception of human nature will prevail in the legal project to construct a method of governance to include all regions and peoples of the earth will decide the role of human trust in the global age. (Kennedy 2016)

English legal culture vs. Civil law

In fact, even in the present day, many aspects of the rivalry between the two traditions of Anglophone and Civilian law are rooted in their almost simultaneous beginnings during the medieval period. Although they both originated during the eleventh century, they did so in very different circumstances, and although they existed in close proximity, they also developed in virtual isolation from one another.

The origins of the Civil law tradition are usually marked from the founding of the University at Bologna in1088. This, the first in a tradition of Western universities, was established as a place for the study and teaching of law. There the voluminous and sophisticated Roman Code of Justinian was reduced and adapted to the rather backward and rustic conditions of medieval Christendom. From its inception, the European tradition of law was centered in the legal scholar. His learning was part of the universe of theological, philosophical, and classical knowledge passed down through the university. (Lesaffer 2009)

By contrast, the origin of a distinctive English legal culture began with the Norman Conquest of England in 1066. That brutal invasion produced a servile kingdom governed mostly by absentee monarchs. To maintain order on their behalf, the kings established three Royal Courts of Justice which were located in London. Those courts were operated by a fellowship of legal functionaries who were organized into guilds of trade. Their methods were completely separate from the learned law of the universities while they conducted the procedures of litigation as a form of trade. Serving on behalf of the king, the judge presided over the brotherhood as an oracle of law and as the central figure in the English legal method. (Baker 2002)

Civilian and Anglophone traditions of law and the impact of the technological revolution

Both traditions of law, Civilian and Anglophone, swept by the impact of a technological revolution, underwent a profound transformation beginning around the year 1500. Although many scientific and mechanical devices originated at that time, for purposes of governance none were more important than what were called the Three Great Inventions: maritime compass, gunpowder weapons, and the printing press. These innovations brought, in turn, increased trade and enormous wealth, warfare involving mass armies, as well as widespread publication and literacy. (Misa 2011)

Across the Continent and in England these advances were mobilized by a rising merchant class and a restive legal class. Joined together, they were determined to throw off the old constraints of a medieval order based on a warrior nobility and a universal Latin ecclesia. The immediate effect was more than a century of civil and religious warfare, one of the most destructive and deadly periods in human history. The end result was an overthrow of the old way of life, a unified Christendom that had been based on emperor and pope, bishop and king, lord and commoner. (Bellomo 1995)

In place of the former patterns of life were constructed new territorial enclaves of governance based on centralized authority, uniform codes of law, and a widely published Bible—each in the national language. The culmination of this lengthy and violent process was represented, symbolically, in several pivotal events. Most important in Europe was the Treaty of Westphalia in 1648 that marked the origin of the nation-state as the archetype of modern government. Then came the English Commonwealth beginning in 1649, followed a generation later by the Glorious Revolution of 1689 that provided England with a new and more permanent kind of monarchy. It was monarchal rule based on an organic, unwritten constitution, and an all-competent High Court of Parliament. That body, in turn, had the power to create fictive legal personalities, by act of incorporation, as a means of extending its geographic order of persons and things around the globe. (Maitland 2003)

Human Trust and traditions of learning

Modern ideas of human trust arising out of these developments were greatly influenced by two different traditions of learning that had wide influence at the time, and that were promulgated through the new technology of print. First was the tradition of the *Studia Humanitatis*, a Ciceronian mode of education in speech and manner that was premised on a great confidence in human capacity. In contrast with that, and introduced somewhat later, were the tenets of Calvinism, a doctrine of government that combined both the two elements of law and religion in an *Elect* magistracy and ministry. It was an approach to governing based on an understanding of human nature as being inherently depraved. (Kallendorf 2002)

In contrast, the *Studia* entailed much more than a cultivated voice and impressive manner. Its teachings, originating among the ancient Greeks and transmitted by the Romans Cicero and Quintilian, included a method of instruction beginning in boyhood and intended to shape men of wide knowledge and sophistication, men imbued with a deep sense of public obligation—the ideal of the amateur generalist. Religiously agnostic in his outlook, the *Humanisti* did not appeal to supernatural intervention as a solution to the problems of kingdom and state. Instead, he looked to the developed capacities of men to bring order and harmony to affairs of the world.

The approach of John Calvin was very different. Amid the disintegration of the medieval system, he sought to impose order neither by the inherited methods of nobility and ecclesia, nor by the ancient teachings of Athens and Rome. Instead, he chose a third alternative polity, albeit one that was familiar throughout Christendom. That was the Talmudic method of Rabbinic Judaism, the *Respublica Hebraeorum*. Calvinist government required that a *Chosen Elect* rule over a population of subjects who were assumed to be, by nature, venal and corrupt. In its view the most severe forms of punishment were necessary to impose on recalcitrant humanity the moralistic standards ordained by God. (Nelson 2010) (Rosenblatt 2006)

A new framework for governance

But the eighteenth century brought a widespread reaction against the extremes of Calvinism, the rancor and divisiveness it fomented, especially its infamous prosecutions for witchcraft and heresy. Its teachings had produced chaos rather than order on the Continent and led to a widespread rejection of religion as the educative half of legal culture. In the meantime, the influence of Humanism, the development of Cartesian philosophy, and the rise of a scientific outlook made possible a different approach to government. Instead of religion, it would be founded on abstract secular ideals. The very idea of law moved from the realm of moral philosophy to the realm of science.

This construction of a plausible framework for governance based on abstract conceptions required time to develop. Over a generation, this work came on the Continent to be predominated by two philosophical influences. First was the *Optimistic* view of human nature implicit in the writings of Spinoza and then strongly affirmed by Leibnitz and Wolff--the exact opposite of Calvinist teachings. This new view of human possibility reached its apex in writings of Rousseau, whose assessment of that potential was expressed in the notion of what came to be called *Perfectibility*.

These ideas were followed by another complimentary school of thought that followed on the teachings of Socrates and the ancient Stoics. The idea of the *Sensus Communis* asserted a confidence in the common sense of human beings to live a prosperous and harmonious life if they were only provided the advantage of cultivation and

learning. These tenets, set forth in the writings of Shaftsbury, Thomas Paine, Jefferson, Condorcet, and Emmanuel Kant, for example, had an enormous influence on the shape of Continental legal culture during the eighteenth century--what historians call The Enlightenment. (Pocock 2003)

England between tradition and pragmatism

However, the method of rule evolved differently in England, where Calvinism, in the form of Puritanism, had taken a deep root. There the ideas of Leibnitz, Wolff, Shaftsbury, and Paine were widely condemned by the prevailing legal faction. Instead, the English eventually developed a unique approach that combined the harsh tenets of the Puritan with the elegant demeanor of the Ciceronian. They also adhered to a pragmatic understanding of reality in opposition to the philosophical ideals that prevailed on the Continent. The hierarchy of British rule, with its organic constitution, was in fact, established in three strata of the noble, the gentle, and the simple. (Potter 2015)

In England a fixed framework of abstract conceptions was unsuitable as the basis of legitimacy for collegial rule over the multitude of commoners. Instead, the hierarchy looked back to a long reliable heritage of Christian, or Judeo-Christian, teachings as the source of public inculcation. Because a policy of enforced illiteracy was imposed on the common population, the educative work of the legal culture was necessarily performed by a trained ministry. The English method of rule was by nature organic in makeup and inexplicit in function. Its legitimacy among the populace rested, not on precise reasoning, and clarity of understanding, but rather on an amorphous religiosity.

While the ritual and pageantry of public worship in England lent an aura of sanctity to the reigning personages of the monarchy, its Puritan tendencies also provided a rationale for imposing a stern order by punitive measures. There remained the underlying conviction that human beings were by nature depraved and contentious and required constant oversight. They could only be taught the habit of obedience by the example of strict punishment. (Hostetler 2006)

The age of the trust in humanity and Civil Law

Into the twentieth century, the assumptions underlying Continental law included a trust in the natural human capacities, a trust which was basic to the foundation of its ideology of governance. This did not mean that every European government was respectful of this capacity or demonstrated such a respect by actual performance in every situation. But it did mean that, in their conception of themselves and in their explanations of themselves toward the public, those who governed had to make a plausible representation that their policies were rooted in Enlightenment principles: the brotherhood of humankind, the capacity of humans to grow and develop, and the faculty of human reason.

Because of its appeal as a humane and equitable system of law, based on the exercise of reason, the Civil law was widely received by nations and governments around the world. Due to its confidence in human potential, the Civil law regimen placed a great emphasis on education that combined the development of personal character and manner with an emphasis on the faculty of thought. For this reason, Europeans enjoyed a worldwide reputation for their high culture and their intellectual acuity.

Moreover, as a practical matter, because theirs was a law based on abstract principles, it was translatable into any language. Thus, of the approximately three hundred separate countries in the modern world, the vast majority were governed in their own language and by a legal method of Civilian origin. Its most important innovation, the nation-state, is the structure through which the authority of law is almost everywhere made manifest. That sovereign territorial polity became the normative template for governance on every habitable continent. (Lambropoulos 1993)

Anglophone Law and the trust in human nature

By contrast, Anglophone law rested on a basis of trust in human nature--but in an inverse way. Its religious premise asserted, first of all, that because human nature was corrupt, human behavior would invariably descend into lawlessness and anarchy, if not closely disciplined. To counter these invidious tendencies, a unified fellowship of legal practitioners was necessary. Whereas, the Civil tradition emphasized culture and learning as the basis of social cohesion, the Anglophone tradition emphasized freedom of personal behavior. It permitted almost complete latitude of action and thought—but within legal limits strictly enforced by judicial authority, the institutional basis of social order.

In fact, in the Anglophone approach, the fact of congenital human depravity was not to be lamented, nor was it to be understood as an obstacle to effective governance. Instead, the impulse of greed, the lust for domination, and the tendency to violence that infected all men was to be institutionalized within the ruling stratum itself. By harnessing those base tendencies, a permanent hierarchy of rule could be constructed upon the unfailingly reliable attributes of human perversity. (Stern 2011)

Nonetheless, Anglophone legal method had one obvious deficiency that had at various times limited its effectiveness, even during the nineteenth century apex of the British imperial system. The problem was that, although English law employed abstract complexity as the instrument of its procedures, the tradition was itself, collegial in nature. The law was comprised of a fellowship, and because of that, it was necessary that all its members speak the same language, the English language. The fraternity of law was based--not on metaphysical principle--but upon internal consensus. For this reason, the methods of Anglophone law could only be implanted where a guild, or

brotherhood of its law existed, and where the English language was commonly spoken among the public. (Potter 2015)

Actually, only a relatively few nations of the world--principally those that were once colonies or protectorates of the British Empire--employed the English legal tradition. These included, of course, the United Kingdom and the United States, but also Australia, New Zealand, and Canada, as well a special category of polities that included Hong Kong, Singapore, and Israel. Although limited in number, this group of nations wielded an enormous influence, and when combined together, and balanced against the mixed realm of Civil law nations, it comprised a world system of enormous strength and unity. (Slaughter 2004)

The Continental tradition, the predictability of Civil law with the inventive adaptability of English law

In the twenty-first century, the two Western legal traditions are coming into close and frequent engagement. It remains to be seen whether one or the other, or some combination of the two, will prevail as the basis for a global Rule of Law. The miracles of technical advance have greatly transformed assumptions of national autonomy, perhaps fatally weakening the nation-state--the conventional vehicle of modern legal authority. By contrast, technological innovations in finance and trade, embodied in the extraterritorial corporation, have produced an unprecedented corporate expansion. They have also helped make English the global language, spoken on at least a rudimentary level by the rising generation in virtually all parts of the world. (Habermas 2008)

Moreover, because the Continental tradition is a universal type of law, made coherent by logic and principle, its adaptation to all lands and peoples requires a laborious educative effort in many languages. By contrast, Anglophone law, as a transcendent law, is able to preside over lands and people from an elevated position, beyond the involvement, or even the awareness of the peoples who are subject to its authority. Because of that, the flexible and adaptable English language law has enjoyed an inestimable advantage in the project to build a legal atmosphere of oversight and governance in the global age.

There are many jurists who hope for a convergence of the two systems, a joining together that will combine the rational predictability of Civil law with the inventive adaptability of English law. The traditional role of the Civilian legal scholar, long assimilated to the larger realm of academic and scientific knowledge, is being reconsidered. The role of the oracular Anglophone judge who, embedded in a realm of insular knowledge, beyond the reach of scientific and academic examination, is also being reconsidered. No result of these reassessments will be more important than the

conception of human nature that will underlay the resulting legal method produced by them. The resolution of this encounter between two legal cultures will determine the role of human trust in a future global age. (Giddens 1991)

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