
CONTRACTS LAW IN ASIA

LEGAL APPROACHES TO CONTRACTS

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CONCEPTS

INTO LAWYER DOCTRINAL APPROACHES

von Mehren writes as a Common Law lawyer trying to stretch doctrine far enough to accommodate Civil Law views hidden sometimes in terminology

Whole discussion of tort vs contract seems attempt to fit law of obligations into Common Law categories, but idea too that Civil Law tort has minimal statutory anchor (insurance and personal responsibility discussion convincing?)

Plan versus contract procedural issue of who decides allocations (Socialist framework, old Chinese), but is that risk allocation in economic terms

CONCEPTS

WHY ENFORCE PROMISES AT ALL, AND WHICH ONES?

Rather than allocative efficiency I & e case, views aimed either at

- 1. Philosophical liberalism (enforcing autonomy values), or**
- 2. Stress on community (which here at least originally is 19th century reflection of secular natural law theory)**

CONCEPTS

WHY ENFORCE PROMISES AT ALL, AND WHICH ONES? CONT'D

What is ambiguous in stress on “will” as basis of contract is that will can be individual (of the person) or collective (will of the community) as with secular natural law tradition

Later psychological emphasis seems to move towards individual, but real significance is lack of offer, acceptance & consideration

CONCEPTS

WHY ENFORCE PROMISES AT ALL, AND WHICH ONES? CONT'D

Re enforceability, unilateral versus bilateral formulations a procedural way of justifying enforceability

Doctrinal idea that bilateral will not be disproportionate, but concerns still on unilateral side distinguishing unilateral acts from contracts as agreement

How to treat traditional unilaterals like reward offer and gift (non-consideration vs. formality)

Problem of even formally bilateral adhesion contracts

CONCEPTS

WHY ENFORCE PROMISES AT ALL, AND WHICH ONES? CONT'D

Ultimate problem of limitations on party agreement as social question

Same problem as irreducible economic risk/bounded rationality

CIVIL LAW THEORY

JURISDICTIONAL THEORIES
(Separation of Powers)

PUBLIC LAW EFFECTS
(Contracts too)

PROCEDURAL EFFECTS
(fact finder, file & judiciary/profs)

CIVIL LAW

HIDDEN PROCEDURAL ASPECTS

Much of the hidden decisional flexibility is hidden in the fact that the profession Civil Law judge is also going to be finder of fact

While you typically have reviewability of both law & facts through at least two instances, prob is that the Civil Law rarely has word for word protocols or transcripts because evidence law is minimal in the absence of a lay jury. So the reviewing court usually just has a short summary of testimony, and in the absence of something like new evidence it would be rare to repeat live testimony, etc.

CIVIL LAW

HIDDEN PROCEDURAL ASPECTS CONT'D

TRIALS ARE SHORT, OFTEN EPISODIC AND TRADITIONALLY THE FILE (DOSSIER FR., AKTE GER.) IN THE JUDGES' HANDS IS THE LOCUS OF THE PROCEEDINGS

TO THE EXTENT THE TRIAL IS EPISODIC, IT IS MORE ON THE WRITTEN RECORD (FILE) BECAUSE THE JUDGES MAY SEE THE CASE MORE LIKE IN MOTION PRACTICE IN US THAN A CONTINUOUS LIVE TRIAL FOR A JURY

CIVIL LAW

HIDDEN PROCEDURAL ASPECTS CONT'D

**A JURY TRIAL MUST BE DONE IN ONE SITTING
SINCE THE LAY PEOPLE THEN LEAVE, BUT WITH
PROFESSIONAL JUDGES CAN DO
EPISODICALLY SINCE THEY ARE
PERMANENTLY IN COURT**

**THE JUDGES STEER TRIAL IN A FORENSIC SENSE,
GIVEN INQUISITORIAL PRINCIPLES, SO THAT
LAWYERS' ROLE IN COURT IS MUCH
DIMINISHED**

CIVIL LAW

HIDDEN PROCEDURAL ASPECTS CONT'D

AS A MATTER OF DOCTRINE, CASES HAVE NO PRECEDENTIAL AUTHORITY SINCE THE FICTION IS THAT THE JUDGES ARE NOT MAKING LAW BUT RATHER “FINDING” IT

AS A PRACTICAL MATTER JUDGES ARE VERY INTERESTED IN OPINIONS IN SIMILAR QUESTIONS, BUT DECISIONALLY MUCH GREATER RELIANCE ON TREATISES & ACADEMIC OPINION BECAUSE FULL OPINIONS ARE RARELY PUBLISHED AT LEAST IN CIVIL LAW CASES

CIVIL LAW

HIDDEN PROCEDURAL ASPECTS CONT'D

Civil Law forms of opinions are very stylized, with unintended consequences

Typically, can have a short oral opinion announced from the bench British style with reasoning to follow

CIVIL LAW

HIDDEN PROCEDURAL ASPECTS CONT'D

Since the decision eventually has to be logically reasoned the flow tends to portray the result as inevitable, with the result that hard to see how a court reasons out a close case (the decision may come across as a logically reasoned justification of the final decision, rather than clarifying what court weighed)

CIVIL LAW

PUBLIC LAW AREA DIFFERENCES

Basically, public law is caselaw

Public law system is more centered on administrative law in special courts, recognizing the special problem of litigating against the State

Administrative courts have the feel of constitutional litigation to US lawyer, since higher level of Conseil d'Etat in France is technically not a court, while German constitutional court is in many ways a political tribunal rather than court in normal sense since it breaks the Continental separation of powers mold

CIVIL LAW

PUBLIC LAW AREA DIFFERENCES CONT'D

Special nature of public law contracts is that they involve the shifting or provision of government functions or services

Inherent term that government cannot bankrupt itself/agree to anything to end services

CIVIL LAW

PUBLIC LAW AREA DIFFERENCES CONT'D

Hidden decisional bias to, e.g., continuing services, with result that courts readier to rewrite public contracts and are biased away from rescission type remedies even more

If looking at government function rather than economic deal between private parties, equivalent of public policy kicks in

NEXT CLASS

COVER CIVIL LAW OF OBLIGATIONS

Do French doctrine via Nicholas

Look at legal plurality seen in Gautama

Look at how much French inspired Civil Law doctrine we see in Gautama's Indonesian civil code explanation