The Origins and Development of Courts

Striking similarities among dispute resolution institutions across so many cultures, separated by time and space, suggest that there is an element of universality to courts.

by Richard E. Messick

The oldest surviving courtroom drama in world literature closes with the presiding judge appealing to the parties to accept the court's decision and end their pursuit of revenge:

Fair trial, fair judgment . . . Evidence which issued clear as day . . . [Q]uench your anger; let not indignation rain Pestilence on our soil, corroding every seed Till the whole land is sterile desert . . . [C]alm this black and swelling wrath.

Aeschylus, The Eumenides, 458 BCE

The plea succeeds, and the play concludes with the restoration of social peace and the promise of prosperity.

The drama's enduring appeal rests in large measure on the solution it offers to a problem all societies face. Without some kind of machinery to settle disputes, the only recourse open to those who seek justice is revenge. But the taking of revenge can spark an endless cycle of violence as first one side and then the other retaliates. The adjudication of a dispute by a court of law offers an alternative, one where facts are carefully assayed and self-defense and such other considerations as may excuse or explain the conduct are reviewed. In short, courts are a way to resolve disputes justly, and as the Eumenides
society's need to contain the impulse for revenge. The authors of the *Gongyang Commentary to the Spring and Autumn Annals*, a 4th century BCE (Before the Common Era) text on law in China, make a similar point in analyzing a son's responsibility when the state has unjustly executed his father. While they concede that when the execution was unjust a loyal son must revenge his father's death, if the execution was justified, they argue that the taking of revenge can lead to chaos, what they term "the way of the thrusting sword." Accordingly, they conclude that the legal system must provide a method for determining the truth or justice of state action.

Although the *Eumenides* suggests that courts emerge suddenly and fully formed to answer society's need to contain the impulse for revenge, in fact they develop gradually, reflecting a society's own development. When society is a small, close-knit collection of kin, informal, low-cost methods of intervention suffice to resolve conflicts. But as the population grows and trade expands, group ties weaken. As these ties lessen, the means of intervention grow progressively more formal.

The rise of a court system parallels, and also signals, the rise of formal government. A decision of a court represents a collective response to a dispute. But these decisions are only enforceable when society has become sufficiently cohesive that it can act collectively in a firm and decisive manner. This is, of course, one way to mark the appearance of government itself, and the close connection between courts and government has not escaped notice. The *dharmaśāstra* attributed to Narada, a principal source of Hindu law, asserts that government is created to put an end to disputes among the citizenry, and almost two millennia later James Madison wrote that no political system deserved to be called a government unless it had a court system. Modern scholars suggest that while a certain degree of state power is a prerequisite to the establishment of courts, once created courts help consolidate and extend this power.

**Negotiation and mediation**

The simplest means for resolving disputes is mediation. An elder, community leader, or other figure the disputants respect, will try to help them find common ground but will have no power to impose a solution. A pure negotiator presents each side's position to the other while a mediator can suggest solutions of her own. In either case, the only requirement is that the solution be acceptable to both parties.

Simplicity and low cost explain why negotiation and mediation are found in every society. Unlike judges, mediators and negotiators do not have to sort out conflicting legal or factual claims. Nor do they have to prepare a written opinion showing how the settlement conforms to the law. Hence, unlike judges, they require no specialized training or expertise. Negotiation and mediation do not require enforcement machinery either. Compliance is assured because the settlement rests on both parties' consent.

Perhaps the first step in the evolution of more complex dispute resolution mechanisms occurs when social norms arise to complement mediation or negotiation. Since a mediated or negotiated settlement is most often one that splits the difference between the parties, they each have an incentive to overstate their claim. An individual suffering $50 in damages is more likely to be fully compensated if he claims his loss was $100. In the extreme case, a person may falsely claim a loss or injury in the expectation a compromise settlement will yield at least something. Chinese society very early developed a norm against such over-claiming. Confucian moralists taught that when a conflict arose, the person less assertive in pressing a claim or who sacrifices his interests to restore harmony acquired the greater moral status.

While a mediator is free to suggest any settlement the parties can agree upon, in virtually all societies norms appear that reflect a consensus on what is a reasonable settlement under the circumstances. Tacitus, the first century Roman historian, reports that among German tribes a murderer could be compromised by the payment of a certain number of cattle or sheep to the victim's family, and the Celtic cultures of Wales and Ireland also had guidelines for compromising homicides. Ethnographic studies of more contemporary tribal societies describe similar practices. The Nuer of Sudan have rules that specify the compensation generally required to settle cases of murder, bodily injury, adultery, and other wrongs. While such norms reflect moral judgments, they serve a practical end as well. By providing the mediator a point of reference in discussions with the two sides they reduce the cost of reaching a settlement.

But even when underpinned by supportive social norms, mediation and negotiation have their limitations. There is nothing to compel a party to a dispute to settle it. A bargaining impasse is always a possibility and with it the threat of private warfare. As an early code of the Anglo-Saxons put it, one accused of wrongdoing can either "buy off the spear or bear it." Nor do even the most powerful social norms assure conflicts will always be settled. Deviants are present in all societies.

**Imposing settlements**

A significant step in the development of a court system comes when a society moves beyond simply urging the parties to settle their dispute and begins to pressure one side or the other to agree to a resolution. The shift may be very subtle. In tribal societies...
mediators may suggest that a failure to accept a compromise carries the risk of offending supernatural forces. Public opinion may also be mobilized. In Zambia, if the village elders appointed to mediate a dispute conclude one party is unreasonably refusing to settle, the community will ostracize the individual.\(^5\)

A more formal method for exerting public control over disputants is described in the *Eumenides*, and similar methods were employed in the ancient Near East, the Carolingian empire, and medieval France. The process was initiated by one who was the target of a self-help remedy. In the *Eumenides* this was the person sought by the forces of revenge. In ancient Babylon, it could be a debtor fearful a creditor was about to seize his property to satisfy the obligation. The initiating party would request a declaration that under the circumstances self-help was unjustified. If the tribunal hearing the case agreed, the target of the expected attack was entitled to society’s protection. If it disagreed, the community would not interfere with the use of private force to secure redress.

**Elements of a court**

The seeds of a modern court are visible in tribunals like these. Rather than urging or pressuring a party to accept a resolution, society is now imposing one. Nor is the solution it is imposing arbitrarily chosen. In the *Eumenides*, the tribunal exonerated the individual sought by the forces of revenge after concluding that his actions were what Greek society would have expected of any one who confronted similar circumstances. Besides grounding their judgments in accepted norms or customs, these tribunals often had means, however primitive, for sorting out conflicting factual assertions.

These three elements—(i) state-backed decisions that are (ii) reached after a fact-finding process and that are (iii) grounded in prevailing norms—are what distinguish courts from mediation and other non-state dispute resolution mechanisms.\(^6\) Where a court differs from a tribunal like that described in the *Eumenides* is that enforcement is taken out of the hands of private individuals entirely. Had the tribunal there found the killing complained of was unjustified, it would have left it up to the forces of revenge to retaliate as they saw fit. By contrast, with a court responsibility for punishment always rests with the state.

When a formal court system appears is to some degree definitional. Some stress that decisions must be the product of reasoned argument.\(^7\) Under this view, until the taking of

---

6. Compare Becker, supra n. 2, at 13 (identifying seven characteristics of a court including independence and a belief by the judges that they should behave impartially).
testimony and the examination of documents replace ordeals, trials by combat, and other irrational means for determining facts, the institution is at best a prototypical court. Other definitions emphasize that for a court to exist, it must be presided over by a judge who is independent of the other branches of government. If this is the criterion, courts do not appear in a number of industrialized countries until the mid-20th century, and many developing nations are still awaiting their appearance.

Reflecting early government's need to preserve social peace, the first disputes a nation's courts, or court-like institutions, hear almost always involve those that have the potential to spark private warfare. These generally arise from criminal acts—homicide, assault, theft, and so forth. In return for providing crime victims with an alternative to private revenge, governments typically demand that victims eschew the use of private force altogether. Revenge was outlawed in China in the 2nd century, and the first national legal code to appear in Europe after the fall of the Roman Empire, the Liber Augustalis of Norman Sicily, permitted self-help only to ward off an immediate attack.

In some societies, courts never expand much beyond hearing criminal cases. In China, at least initially, few disputes over contracts, property rights, and other non-criminal matters were brought to court. The Chinese aversion to litigation is legendary (see "Litigation: a view from ancient China") and is most often explained by Confucian principles stressing social harmony. Mediation, facilitated by norms such as that against over-claiming, provided a substitute for lawsuits, although recent archival research suggests that by the late Qing era this substitute was not as effective as once thought.

Private and state courts

While norms against resort to formal, state-run courts may not be as powerful elsewhere as they are in China, other substitutes for state-supervised litigation exist. In medieval Europe the Roman Catholic Church operated an elaborate network of courts, and many towns, merchant associations, and large landowners also ran tribunals that competed with state-run courts. The "judges" were privately named, and court fees and fines paid to the tribunal's operator. A similar situation seems to have obtained in ancient India where townspeople and merchants and artisans also ran court-like institutions (pūgas and viśeñī). Community pressure, the threat of ostracism or excommunication, and other informal enforcement mechanisms ensured that the litigants would appear and comply with the tribunals' decisions.

Government-run courts in many countries began to absorb the dispute resolution business handled by private bodies. Part of this expansion is attributable to state building. The resolution of important disputes was a way governments could win the loyalty of their subjects and weaken ties to local lords.

State-run courts also offered litigants, or at least claimants, certain advantages. Unlike their private counterparts, courts can mobilize public force to compel a defendant to submit to their processes and be bound by their decisions. In some instances they also can provide better service. The royal courts established after the Norman invasion of England are a well known example. Matters once heard by feudal or local courts were increasingly brought to the royal courts because of their streamlined procedures and more effective remedies. In cases arising from a violent seizure of land, a common problem in 15th century England, the royal courts provided a quick and easy method for restoring the land to the one entitled to it. (See "A more efficient remedy for protecting possession," page 179).

But state-run courts could lose business to more efficient rivals, something that happened to the Qadis' courts during the Abbasid dynasty. On the assumption that no Muslim would lie under oath, fact-finding in these courts rested solely on the sworn testimony of the parties. But as the Muslim community expanded its contacts with the Byzantine and Persian empires, more and more contracts were reduced to writing, and when disputes about them arose, the value of referring to

---

A more efficient remedy for protecting possession

For most of the 12th century England suffered from a crime wave brought on by a bitter civil war. Roving bands of marauders would descend upon an estate and forcibly eject its occupants. The bandits might stay for years, exploiting the serfs and livestock attached to the land.

While the dispossessed could appeal to the court of their feudal overlord, this remedy often provided little relief. If the occupiers were from outside the area, the court was without jurisdiction. Even if the court could hear the case, a defendant had many ways of delaying it. He could, for example, claim illness and take to bed, which automatically postponed the trial for a year. Nor did trial guarantee the land would be restored to its rightful possessor, for the matter was decided by combat.

Somewhere around 1166 the royal courts devised a new procedure to handle these cases. The Assize of Novel Disseisin provided for a trial by 12 jurors with the jury limited to deciding a single issue: Was the plaintiff unjustly forced off the land? If the answer was yes, the court ordered that possession be restored immediately. No adjournments were permitted, and if defendant did not show, the agent in charge of the property was deemed to be appearing in his place. Not was the dispessor allowed to raise a claim of rightful ownership as a defense. Claims based on title had to be litigated in a separate proceeding.

The new procedure proved extremely popular. Within 50 years people of modest means were bringing actions to recover possession of very small parcels. The procedure cemented the hold of the central government over the citizenry and fostered social peace by reducing the use of private force.

The Assize of Novel Disseisin marks the beginning of the civil action in England. For the first time plaintiffs could secure relief in a national court. It is the beginning of the system of using juries to decide questions of fact. Finally, it represents a key step in the development of property law. With its advent, English law begins to split the idea of property into different bundles of rights. One bundle is denominated "ownership" and another "possession." The notion of divided interests in property stems from this innovation, and thus the example ultimately demonstrates how a procedural innovation—here a speedy remedy to restore possession—and substantive law—the law of property—are intertwined.

—Richard Messick


Unlike the Qadis' courts, the expansion of trade in Europe in the 15th and 16th centuries brought state-run courts there much new business. During the Middle Ages, European merchants created their own courts to resolve disputes among themselves. Before contracting with a stranger, a merchant would investigate his background. If the potential trading partner had failed to comply with a decision of one of these courts, the merchant would refuse to contract with him. But as trade expanded, the number of background checks merchants had to conduct rose dramatically, and the growing expense this entailed has been advanced to explain why traders began turning to state-operated courts to enforce their contracts.

In England, the common law courts absorbed the influx of commercial disputes, whereas on the continent special courts separate from those hearing ordinary civil matters were created to meet merchant needs. The difference again reflects competitive considerations. English common law courts were more powerful than their continental counterparts, and thus their judgments were more likely to be observed. English judges were also willing to incorporate into the law the substantive rules, particularly those concerning negotiable instruments, that traders had devised to facilitate commerce. Continental judges, on the other hand, were bound by legal doctrines that were often at odds with commercial law principles.

Competition for "dispute resolution business" occurs not just between different kinds of courts. Other societal institutions enforce social norms and uphold order, and how well they perform these functions help determine what is left for the courts to do. In Africa, religion, morality, and kinship systems all affect the scope of courts. In the United States and South Asia "public interest" litigation can result in courts' ordering changes in the administration of government programs and even lead to their assuming responsibility for the operation of

an entire department or ministry.\textsuperscript{16} By contrast, such litigation is less common in many European states where institutions such as the ombudsman play a much more active role in overseeing government.\textsuperscript{17} Some nations may consciously discourage the use of courts, as Japan did until recently by limiting the number of lawyers and judges and otherwise making litigation a time consuming and costly exercise.\textsuperscript{18}

**Assuming new functions**

Although dispute resolution is what gives rise to courts, in some societies courts begin performing additional functions as well. Often these new functions represent nothing more than an ingenious bending of the litigation process to serve a new end. In medieval England parties wanting to enter into a land transaction would manufacture a lawsuit between themselves. The purchaser would bring a suit asserting that he owned the property and the seller would admit the claim. Entry of judgment provided written evidence of the transfer title and made it difficult for third parties to contest the transaction later.\textsuperscript{19}

A far more significant function that courts began to assume is the making of law. A court opinion issued in one case can provide guidance to a judge handling a similar dispute later. Following earlier decisions economizes on judicial resources. Judges need not spend time devising new solutions to problems others have already solved. And because it makes the law more predictable, following precedent also discourages litigation altogether. If the parties to a lawsuit can predict how a court is likely to decide the case, the chances of settlement increase dramatically.\textsuperscript{20}

While the law making power of courts is most closely identified with the English common law tradition, it is by no means unique to it. A Thai legal code dating from the middle of the 14th century directed judges to follow precedent, and under Islamic law opinions rendered by legal specialists in the course of litigation provide authority in later disputes. Even in those nations following the civil law tradition, court opinions serve as a source, albeit informally, of law.

**Judicial review**

The most recent step in the evolution of courts has been their assumption of the responsibility for seeing that the other branches of government obey the law. Ensuring that rulers follow the law is a problem as old as government itself. Even when a ruler accepts the principle, there is, as the Islamic jurist Al-Jahiz observed in the 8th century, the challenge of devising an institution that can determine when government has violated the law and fix an ap-

\begin{center}
**The unintended consequences of creating a court**
\end{center}

Shortly after the British took control of the Deccan Plateau in the early part of the 19th century, they introduced formal, state-run courts modeled after those in England. One of the reasons was to increase the flow of capital to small farmers. Without courts, only those who could avail themselves of "informal" means for enforcing debt contracts lent to farmers. In practice only a well-connected villager could bring sufficient pressure to bear on a defaulting borrower. The result was that agricultural lending was dominated by a series of local monopolists. The creation of a court system had the desired impact. New lenders entered the market, and competition drove interest rates down.

But, when drought hit several villages in the region in 1875 and lenders turned to the courts to foreclose on defaulting debtors, rioting broke out. Scores were killed or injured, and in several areas the courthouses were sacked and the documents evidencing the debts destroyed.

The commission formed to examine the cause of the riots concluded that courts had upset what was, under the circumstances, a desirable institutional arrangement. Local money-lenders had enjoyed what was in effect an exclusive right to lend to farmers. While the lender realized supra-competitive interest rates, these earnings provided him with a financial cushion that allowed him to carry debtors in bad times. The commission concluded that the lower rates brought about by the introduction of formal courts had robbed the lenders of this cushion and forced them to foreclose at the first sign of a downturn.

A formal economic analysis confirms the commission's view.\textsuperscript{1} Its authors note that had the courts been able to recognize and enforce the kind of exclusive dealing contract that was implicit in the relationship between the money lender and the farmer, foreclosures and the ensuing riots might have been avoided. But when an institutional reform takes place in the world of "second best," here a situation in which not all contracts could be enforced, the reform can have unintended, and deleterious, consequences.

\textit{— Richard Messick}

\textsuperscript{1} Kranton & Swamy, The Hazards of Piecemeal Reform: British Civil Courts and the Credit Market in Colonial India, 58 J. Dev. Econ. 1 (1999).

\textsuperscript{16} Ahmed, Public Interest Litigation Constitutional Issues and Remedies (1999).

\textsuperscript{17} See Gellhorn, Ombudsmen and Other Citizens' Protectors in Nine Countries (1965); Gallogly, Administrative Procedures and the Supervision of Administration in Hungary, Poland, Bulgaria, Estonia, and Albania 77-88 (Org. Econ. Coop. & Dev. SIGMA Paper No. 17, 1967).


\textsuperscript{19} Simpson, A History of the English Law 122-23 (2d ed. 1986).

propriate sanction.21

The United States originated the practice of using courts to make this determination. In Marbury v. Madison, the Supreme Court held that it had the power to review whether legislative and executive actions conformed to the constitution. Political leaders criticized the Supreme Court for overstepping its bounds, and until the later part of the 19th century American courts used this power sparingly.22 Despite some limited experiments, other nations were also reluctant to grant their courts wide-ranging powers to review the actions of other branches of government. Only after World War II, when many laid at least a part of the blame for the war on lawless government, did European states give their courts the power of judicial review. The practice spread to developing countries, and in the 1990s almost all of the former communist states adopted some form of judicial review.23

Borrowing and colonization

As the experience with judicial review shows, courts do not develop solely in response to internal pressures. When Japan’s rulers decided to modernize the economy in the latter half of the 19th century, they borrowed several features from European civil law systems.24 Many Asian, African, and Latin American nations did not have the luxury of a choice, of course. The court systems of colonizing states were imposed on their own indigenous dispute resolution mechanisms, often with disastrous results. (See "The unintended consequences of creating a court").

****

The development of modern courts is a difficult story to tell. No small set of variables explains the rise of courts or the reasons why they differ from one country to the next. Whereas an early generation of scholars posited a universal evolution of law and legal institutions,25 it is now clear that social, economic, and political forces, both within and without, shape a nation’s courts and its legal system. On the other hand, the striking similarities among specialized, state-run dispute resolution institutions across so many cultures separated by both time and space suggest that there is an element of universality to courts. As Aeschylus shows in the Eumenides, they are a means of achieving an objective that is universal: the just resolution of conflict.26

For further reading


John Merryman et al., The Civil Law Tradition: Europe, Latin America, and East Asia (1994).

David Pearl & Werner Menski, Muslim Family Law (3d ed. 1998).


Hans Julius Wolf, The Origin of Litigation Among the Greeks, 4 TRADITIO 31 (1946).