
Contemporary Lawmaking in Anglo Saxon Law: Problems and Prospects

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Abstract:

Purpose: Considering the modern law-making in Anglo-Saxon legal family, the authoresses raise several topical issues, through the prism of which the common law system appears to be a legal phenomenon. Answering the questions posed, the author pays special attention to the works of Anglo-Saxon legal scholars, judicial precedents, and archival documents. In addition, he analyzes Anglo-Saxon law from the standpoint of judicial law-making, which is of relevance to modern Russian law. The document addresses the key issues of judicial lawmaking in the Anglo-Saxon legal family.

Design/Methodology/Approach: Applying best practices, we focus on five main issues that address fundamental aspects of lawmaking in the Anglo-Saxon legal family. The questions posed are of a doctrinal nature and, at the same time, are formulated considering the modern realities in which Anglo-Saxon law now functions.

Findings: The results demonstrate that the Anglo-Saxon law-making objectively functions despite the legal culture of the judges of the corresponding legal family.

Practical Implications: Judicial lawmaking is the basis of the Anglo-Saxon legal family and legal culture, whose evolution was conditioned by the historical and political-legal development of Anglo-Saxon law.

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Originality/Value. *Understanding the features of judicial lawmaking in the Anglo-Saxon legal family allows us to understand the logic of one of the largest legal families in the world and contributes to integrative and globalization processes in modern jurisprudence. In addition, it determines the availability and effectiveness of international professional and political and legal communication, as well as international cooperation.*

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1. Introduction

The modern age is a kind of challenge to the traditional types of professional human activity, including legal activity. Streamlining the regulatory framework, rejecting outdated normative legal acts and adopting new ones, rethinking the sources and forms of law, testing legal concepts for their applicability to the changed socio-political and economic realities - these are just some of the legal processes taking place today. At the same time, the influence of modernity on the Russian legal system and the Romano-Germanic legal system as a whole is covered in one way or another in the works of Russian researchers, but the reform of Anglo-Saxon law is a terra incognita for Russian legal scholars.

The study of this process contributes not only to the understanding of the Anglo-Saxon legal logic, but also to the analysis of the objective processes taking place in the modern legal sphere on the global level. In addition, the Anglo-Saxon experience of reforming law is of professional interest for Russian theoretical lawyers, and is also of no small importance for practicing lawyers - due to the fact that both Anglo-Saxon and Romano-Germanic law have common legal forms, sources, processes and institutions (legal practice, judicial precedent, judicial lawmaking, etc.).

In this article we will focus on the Anglo-Saxon legal doctrine and jurisprudence, highlight several topical questions that Anglo-Saxon lawyers are trying to answer, and also analyze their positions on the problems indicated. It may seem that some of the issues discussed below have an "eternal" and enduring character for the theory of law - precisely because of their fundamental nature; it may also seem that the issues under consideration are not at all problematic - however, the Anglo-Saxon lawyers themselves adhere to a different point of view.

At the same time, as evidenced by the study of judicial practice, unambiguous answers are given to these questions nowadays and the main role in this process is played not only by a centuries-old legal experience, but also by the current conditions in which the Anglo-Saxon legal system exists and functions.

2. Topical Issues of Anglo-Saxon Lawmaking

2.1 Do Anglo-Saxon Judges Practice Lawmaking and Legal Reform?

Historically, most members of the Anglo-Saxon legal system judiciary have denied that judges are reforming the law. According to the statement of Lord Simond, who considered the case «Scruttons Ltd v. Midland Silicones Ltd» at the dawn of the 1960s., "heterodoxy, or as some might say heresy is not the more attractive because it is dignified by the name of reform," and reform of the law "is the task not of the courts of law, but of Parliament". In the 1980s Simond's position was shared by his English and Irish colleagues - in particular, O'Higgins, in the famous Norris case, argued that judges can share public concerns and desire to reform legislation; however, such actions are not within the court's competence.

Similar statements were made by Viscount Dill, Lord Scarman, Lord Reed and many other British judges; they are also reflected in Australian jurisprudence. Similar views stretch back to the works of such classics of English philosophy and jurisprudence as Francis Bacon and William Blackstone (1791):

- "Judges should remember that their job is *judicare* [to apply the law], but not *judicare* [to make the law]; interpret the law, but not make the law or bestow the law." (Cappelletti, 1981).
- "Judges ... are custodians of the laws, living oracles [The Judge] is empowered not to proclaim a new law, but to maintain and expound the old one. Precedents and rules must be respected, except for those that are categorically absurd or unjust ... Nevertheless, it will take time for some of them to be fully valid ... " (Blackstone, 1791).

At the same time, there is also an alternative opinion. For example, Lord Radcliffe was adamant in his belief that judges make law and reform laws: "There has never been a more fruitless debate than the debate about whether a judge is engaged in law-making. Of course, he does. Legislative power and the judicial process are two sources of lawmaking, and each of the participants in this process fulfills its functions." (Radcliffe, 1968). Indeed, it was ironic that Radcliffe, a former member of the House of Lords, wrote these lines a few months after he retired - as if he could express his true opinion only after he had ceased to be a judge.

There are many more positions of judges who agree with Radcliffe - their opinions are enshrined both in theoretical works on jurisprudence and in normative sources - judicial precedents. It is clear, however, that there is a conflict in the Anglo-Saxon legal system over whether judges create law and reform legislation. The very existence of this conflict is an argument against any categorical claim that judges are not creators of law and reformers of legislation.

In fact, in the Anglo-Saxon legal system, judges do make law and reform the law, despite their many claims to the contrary. Such statements are often used to disguise the real legally significant actions of judges. The ideas of Bacon and Blackstone are intended to hide judicial activity, and this has been done for centuries - for judicial activity in Great Britain, and then in the United States, has always had and still has a strong political overtone (Lawrence, 1973).

2.2 What Is the Role of Judicial Precedent In the Modern Anglo-Saxon Legal System?

At the moment, Anglo-Saxon lawyers recognize that some branches of law can function only on the basis of statutes, codes and other normative legal acts - moreover, this position was formulated and documented in the second half of the 19th century, in the case of *Rylands v. Felcher* (1868). At the same time, most branches of Anglo-Saxon law - which is contrary to popular belief divided into branches - is regulated by a kind of "mixture" of statutory and case law, with some institutions, branches and sub-branches entirely created by judges. Denial of this fact indicates a lack of knowledge of Anglo-Saxon jurisprudence.

Thus, the constitutional law of the United States is inconceivable without "*Brown v. Board of Education*" case (1954); the case "*Donoghue v. Stevenson*" (1932) laid the foundations for judicial protection of consumer rights in Great Britain, and the "principle of neighborhood" recorded in the text of this precedent became the source of dozens of laws in the area on both sides of the Atlantic, etc. In addition, judicial precedents have fully formed the law of justice (a set of legal principles operating within the tradition of English common law), proof and proving, legal proceedings and procedural law, *droit administratif* (administrative law) and *principes généraux du droit* (general principles of law). The last two points root in the 11th century - the era of William I the Conqueror, the first English king from the Norman dynasty, in the era when the nobility of the British Isles spoke French.

Considering *the principes généraux du droit* in modern Anglo-Saxon law, British lawyers Lionel Neville Brown and John Francis Garner classified them as follows:

- administrative prerogatives of state bodies (for example, the need to maintain public order and the separation of powers);
- individual rights and freedoms (for example, freedom of thought and belief, freedom of movement, the right to an extra-marital life);
- economic and social rights (e.g. the right to strike, the right to join or not join a trade union, the right to be paid minimum wage for public sector workers);
- environment protection;
- equality of all before the law and court;
- impartiality of the court;

- *Audi Alteram Partem* (“let the other side be heard” - the principle of fundamental natural justice, according to which no one should be sued without an objective hearing, during which each party is given the opportunity to provide counter evidence);
- the principle of non-retroactivity (retroactivity) of the law, according to which the law is not retroactive;
- the right to judicial review and judicial control (Brown and Garner, 1973).

In other words, on the basis of the above, it would be incorrect to argue that a judicial precedent is an outdated form of Anglo-Saxon law that should be replaced by statutes. The symbiosis of case law and statute law is a normal characteristic of the modern Anglo-Saxon legal system, since both a precedent and a statute are forms of law and, accordingly, contain legal norms. Nowadays, there is no need to talk about any deviation of the Anglo-Saxon legal system into the "statutory plane". To refute this position, it is enough to recall that in Great Britain there is still no written constitution, and changes are still not made to the curriculum of US law schools, that might allow us to talk about the rejection of judicial precedents or about the dominance of statutes in the American legal system.

2.3 Is the Act of Interpreting Law a Form of Lawmaking In the Anglo-Saxon Legal System?

Historically, the Anglo-Saxon doctrine of judicial precedent was "orthodox" and was based on a mechanical theory of judicial procedure (Von Mehren and Gordley, 1977). The interpretation of the law means that the judge determines its meaning. Currently, there is a tendency according to which interpretation is considered to be not a mechanical process, but a science (Marsh, 1974). Interpretational issues arise in the Anglo-Saxon courts almost daily - for example, as early as 1969 the British judicial commissions found that more than half of the cases in the courts of first instance and courts of appeal included clauses related to the interpretation of laws; a similar situation is developing with $\frac{3}{4}$ cases considered by the House of Lords. Obviously, if the interpretation of laws were a mechanical process, it would not have caused so many litigations.

In addition to comprehending the will of the legislator and the meaning of the words used in the text of a normative legal act, there is always a need in law enforcement to adapt an abstract legal norm to a specific life situation. Therefore, in this context, there is no such thing as “unambiguous wording”. These theses, known as the Marsh Argument, are the fundamental rationale for arguing that the act of interpreting law is a form of lawmaking. When a law is promulgated, many questions arise regarding the limits of its application - and the answer to them can be obtained only after the interpretation of this law provisions.

Specialists in the field of Anglo-Saxon constitutional law, on the contrary, have always recognized interpretation as a form of lawmaking as the formulations of the

constitution are sufficiently broad, and their meaning becomes clear only when the judges say what they mean. According to Charles Evans Hughes (1862 - 1948), a famous American lawyer, President of the US Supreme Court, "The Constitution is what the judges say about it" (Hughes, 2013). In other words, the interpretation of the constitution is a form of judicial lawmaking as well as the interpretation of the norms enshrined in other normative legal acts.

However, the judges are in no hurry to admit this fact. First, they find such activities, including psychologically, difficult. Secondly, the Western mentality favors the logical development of legislative provisions. This is due to the desire to rationalize legal procedures for the regulation and subsequent facilitation of social life, and to the instinctive desire of a person to gain security through structuring (and simplifications) of reality. However, in societies where the exercise of political power is legitimized through democratic mechanisms, the state is extremely reluctant to formulate a policy of regulating social behavior.

So, the reluctance of Anglo-Saxon judges to recognize interpretation as a form of lawmaking is understandable but hardly excusable. The fear that society's faith in justice will go down if judges clearly declare their law-making function is groundless, on the contrary, this faith is likely to increase. A similar point of view was voiced in the Supreme Court of Canada: "It is hard to believe that society will stop believing in the fairness of the courts if they introduce new laws from time to time. Be that as it may, faith in the courts will increase" (Hall, 1972).

2.4 Do Anglo-Saxon Judges Fill in Legal Gaps?

No legal system is immune to legal gaps, and the Anglo-Saxon one is no exception. The responsibility to fill these gaps falls on the shoulders of legislators - including judges. Henry Jacob Friendly (1983-1986), a prominent American lawyer, Judge of the US Court of Appeals, referred legislative errors, "ambiguous laws" and "obviously wrong laws" to those reasons for which the judge should fill in the gaps (Friendly, 1963).

In "McGonagale vs. McGonagale" case (1951), the UK Supreme Court corrected a parliamentary error in the Criminal Justice Act of 1924 (specifically in terms of preventing child abuse). In 1904, the Children Act was passed, but according to the position of the Supreme Court, Parliament overlooked the fact that most of the 1904 Act was repealed.

The analysis of Anglo-Saxon jurisprudence confirms that judges can determine the purpose of parliamentary legislation and, in accordance with it, adjust legal norms - both in terms of content and externally (the latter concerns the correctness of the wording used by Parliament). Consequently, Anglo-Saxon courts not only bridge, but they also fill the legal gaps.

2.5 Should Anglo-Saxon Judges Commit Fully to Judicial Precedent?

Unlike the Anglo-Saxon legal system, the doctrine of binding precedent never existed in the Romano-Germanic one. Previous judgments always look very convincing, if only because they have already been delivered. However, this fact does not make them legally binding.

At the same time, courts have a natural tendency to be guided by precedents. In common law countries courts must follow precedents under certain conditions, however, more recently, many Anglo-Saxon judges have recognized that precedent should not be respected if it would lead to injustice. The most famous example is The Practice Statement made by the House of Lords in 1966.

However, even without such acts, the Anglo-Saxon doctrine of a “strict” judicial precedent is a myth to a certain extent. Canadian lawyers argue that the precedent “was a protective shield, behind which the judges passed laws in silence and secrecy” (Hall, 1972). If a judge did not want to follow the precedent, he could always reject it “for technical reasons” and not be guided by it while hearing the case and planning.

However, today the Anglo-Saxon legal system is going through an era of digitalization and, therefore, of maximum openness, accessibility and transparency of the judiciary - accordingly, judges have the opportunity to refuse to follow one or another precedent quite openly. Anglo-Saxon law is not at all characterized by a persistent desire to perpetuate erroneous precedents.

The preconditions for the indicated tendency are at the core of the legal doctrine, the spirit and sense of common law; in addition, they are reflected in jurisprudence - for example, in the case of "Anderton v. Ryan" (1985). The Practice Statement [1966] just formally consolidated the judges' pre-existing mentality and, as Judge Lord Bridge observed, effectively renounced their claim to infallibility.

3. Conclusions

Summing up the results of our research, it should be noted that modernity has a significant impact on the reform of Anglo-Saxon law even though, historically, the core of Anglo-Saxon law is judicial law-making.

Legal processes taking place in common law today have an extensive historical and theoretical base, which has been formed over hundreds of years. Our age reveals the most problematic and debatable aspects of Anglo-Saxon jurisprudence, and acts as a catalyst with the help of which long-overdue legal problems are solved.

In general, the study of Anglo-Saxon law in domestic legal science is a promising area of research just because our knowledge of it seems to be very modest and largely

stereotyped, while common law acts as a dynamic developing system that has a powerful traditional basis and high adaptive characteristics.

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