Chapter 3: American and Civil Law Courts

3.1 Introduction

Trials in America are heavily influenced by the British tradition of jury trials. Jury trials are guaranteed to any citizen who requests one, and they are one of the main reasons the American judicial system differs from the civil law system. The jury trial is so important in America that the Constitution requires it for both criminal and civil trials. An important requirement of jury trials is that they must be continuous. That is, once they begin they must be completed without interruption (Amendments VI and VII).

3.2 Courts of General Jurisdiction

The trial courts of the fifty states and the federal courts are "courts of general jurisdiction." Each court has a criminal and civil trial docket. In a single month a court of general jurisdiction might have trials of both. In other words, American courts have few jurisdictional limits (i.e., Zustaendigkeitsbeschraenkungen). Criminal trials have priority over civil trials because the U.S. Constitution requires a "speedy trial" in criminal cases. The constitution says, "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury …" (Amendment VI). This sometimes requires the court to suspend the "civil docket" in order to handle a case on the "criminal docket" speedily. If the accused person requests a speedy trial, usually the trial must be held ninety days after indictment of the accused. Some states have trial courts of limited jurisdiction for family, juvenile, and inheritance matters, but the majority of cases are tried in a court of general jurisdiction. Usually their decisions are by a judge sitting without a jury. Although every accused has a right to a jury trial, most of them waive (i.e., give up) the right. That means that the

judge listens to the evidence, determines the facts, and makes the decision of "guilty" or "not guilty" in place of the jury. This is called a "bench trial."

In contrast, the European civil law system requires separate courts for criminal and civil cases. The reason for this is the strict separation of public and private law in civil law systems. The criminal law is categorized as a branch of public law that involves disputes between private persons and the state, and also includes constitutional and administrative law. Private law includes the rights of individuals vis à vis each other, particularly those involving contracts, and in civil law countries this requires a judge with private law expertise. American judges are not required to have special expertise because they are not actively involved in finding facts.

Civil law countries such as Germany have independent court systems for labor, tax, and social security law. Each has its own supreme court. But in America, all court systems have only one Supreme Court which decides appeals of public and private law cases.

3.3 Judges

Judges enter service in civil law countries directly from the college of law. Graduates of college apply for the job as a form of government service. They may be required to meet high standards and to pass a state qualifying examination before they start a training period. In their lifelong careers they progress from lower courts to higher courts based on seniority and merit.

American students never become judges immediately after law school. Instead, they observe judges by trying cases for many years. In some states trial lawyers decide to become judges by asking a political party to recommend them for "election to the bench." The election process is the same as for legislators and governors, except that judge candidates do not formally state which party, if any, (Republican or Democrat) they belong to. In other states lawyers are appointed to become judges by the governor. After an appointed judge has worked in court for a number of years, the people vote on whether to keep them. They seldom lose this vote, but if they do the governor appoints a new judge. This system of appointment and approval is called the "Missouri system" because it began in Missouri.

3.3.1 American Judges' Duties

In America the judge "presides" over a trial, but the duties are light compared with a civil law judge's duties. The American judge is responsible for starting and concluding a trial, but practically all of the most important functions of the trial between the start and conclusion are performed by lawyers for the plaintiff and defendant.

At the beginning of the trial the lawyers for the prosecution and defense each address the jury (or the judge in a "bench trial") to introduce the facts that they wish to produce at trial. Next, each lawyer calls witnesses to testify in a process called "direct examination." After each lawyer completes direct examination the other lawyer may ask follow-up questions in a procedure called "cross-examination." The prosecutor goes first with his witnesses, and when he is finished he "rests" (i.e., states to the judge that he is finished calling witnesses). It is then the defense lawyer's turn to call defense witnesses.

The primary role of the American judge is to decide on admissibility of evidence. The judge must rule whether evidence must be struck from the record (omitted from the record of the trial). The judge's role is to make sure the lawyers are offering their evidence fairly. But, unlike civil law judges, that is about all American judges do. They simply watch the lawyers question witnesses, and occasionally rule to strike evidence. Some Hollywood movies illustrate the process well. One of the best films about an American trial is, "Anatomy of a Murder," based on a novel written by a Michigan judge.

The judge concludes the trial by inviting each lawyer to make closing arguments to the jury. After closing arguments the jury goes into a room to "deliberate" (i.e., discuss) and then "render a verdict" (i.e., decide the case). When the jury deliberates it has a verbatim record of the trial. This is a record of what every witness and lawyer said, made by a specially-trained court reporter.

3.3.2 Civil Law Judges

Civil law judges are much more active in a trial. In the first place, they cooperate with the prosecutor to develop the facts of the case before the trial begins. They continue to be active in developing facts during the trial. In contrast American judges play a passive role at a trial because it is the duty of the lawyers, not the judge, to develop the facts through their witnesses. The American judges sit as a sort of neutral umpire at the trial; civil law judges are active participants.

The civil law criminal proceeding starts with an investigative phase conducted by the public prosecutor. At some point after the public prosecutor opens an investigation a judge begins to review the written records in order to decide whether the case should proceed to trial. This is the examining phase. During this phase the judge can question the defendant but the defendant has a right to remain silent (the same right is found in the U.S. Constitution, Amendment V). Before and during the trial the judge plays an active role in collecting evidence and questioning witnesses.

3.3.3 American and Civil Law Judges Compared

The American judge is not actively involved in developing the case prior to trial; in fact, he is generally prohibited from learning the facts prior to trial. Even at trial the American judge plays only a passive role. The lawyers have the responsibility to develop the facts, both before and during trial. The prosecutor begins the criminal investigation and decides whether a trial is necessary, but a judge does not participate in this process.

While the prosecutor investigates, the defense lawyer also investigates, but in the pre-trial phase both sides develop facts independently. The prosecutor is required to share facts with the defense lawyer that would help exonerate the accused, but the defense lawyer does not have an obligation to share facts with the prosecutor.

3.4 The Adversarial and Inquisitorial System

Americans say that common law judges follow an "adversarial procedure" and civil law judges follow an "inquisitorial procedure." In the inquisitorial procedure government officials, including the judge, have basic responsibility to gather and present information to the judge for decision. Civil law officials proceed steadily toward a decision. At every stage of the investigation the judge and officials have a duty to protect the legal rights of a suspected person. In America this responsibility lies primarily with lawyers.

In the adversarial procedure each side, prosecutor and defense lawyer, develops a separate presentation of the case. They are not required to share their strategy for the trial. In other words, the prosecutor and defense lawyers act in their own self-interest. The prosecutor is only required to share information with the defense lawyer if it is "exculpatory" (i.e., is favorable to the defense).

The difference between the inquisitorial and the adversarial procedures can be summarized as follows. In the first, finding a correct legal decision is a team effort of lawyers and judges. In the second, two parties oppose each other, and the arguments are supposed to convince the jury. The adversarial system operates best when each party has an excellent trial lawyer. Sometimes the accused also needs money to hire detectives to gather exculpatory evidence, since the police and prosecutorial team are paid by the state to work for a conviction.

3.5 Single Event Trials

The American criminal trial is a concentrated contest between the prosecutor and defense lawyer rather than a continuing investigation. The American contest must continue once it is started; there can be no interruptions as in civil law trials. Interruptions of jury trials would not be practical because a separate panel of jurors is chosen for each trial. It would be difficult for jurors to stop and restart a trial. To perform their duties, jurors must take time away from work and family.

The American trial stops when the jury or judge decides innocence or guilt. The civil law trial continues until it is clear what crime has been committed and who has committed it. It may be adjourned and continued at a later date. The prosecutor in the American trial asks for a trial based upon "probable cause" that a crime has been committed. Guilt or innocence will be proved, not by the prosecutor's certainty that a crime has been committed, but by the evidence that is brought out during a rigorous contest. In other words, American prosecutors rely on the contest to bring out the truth; the civil law prosecutors are assured that they have plenty of time to conduct a trial. The extreme adversarialism in American trials means that poor people cannot hire the best lawyers. This makes the system unfair to them. The U.S. Supreme Court ruled that persons who cannot afford lawyers are entitled to a publicly-provided lawyer. *Gideon v. Wainwright* (1963).

3.6 Plea Bargains

Because the American trial is expensive for both parties and the result is somewhat unpredictable, the defendant and prosecutor both often wish to avoid a trial. There is a common method to avoid trial called a "plea bargain." The prosecutor presents the plea bargain to the judge before the trial. The judge is not required to agree to it, but he often does.

In a plea bargain the prosecutor and criminal defendant agree that the defendant will plead guilty to a lesser crime. In return the prosecutor agrees to ask the judge to give a smaller penalty than the judge would give after a trial. The classic plea bargain is for the defendant in a capital murder case to plead guilty to second degree murder or manslaughter; in return the defendant goes to prison but avoids the death penalty or a long prison sentence. The great number of plea bargains is one reason that few criminal cases go to a trial.

3.7 Bench Trials

Another reason that jury trials seldom take place is that a criminal defendant may "waive" (i.e., give up) the Constitutional right to a jury trial. For various reasons many defendants prefer to have a judge decide guilt or innocence instead of a jury. When this happens the trial is called a "bench trial." The word, "bench," refers to the seat on which the judge sits in court.

Civil law students might think the bench trial becomes like a civil law trial. This is not true, because the judge must do the same things a jury does: listen to the witnesses. Judges do not question witnesses in either jury trials or bench trials. The duty of presenting evidence through witnesses remains the duty of the lawyers.

3.8 Judges' Use of Codes and Case Law

Law is not a science in America as it is in civil law countries. In the civil law countries scholars constantly research and propose improvements to codes such as the modern Bürgerliches Geseztbuch (BGB). The BGB derives in part from Roman law as it appeared in the Digest of Justinian's Corpus Juris Civilis (534 A.D.). Scholarly studies over the centuries were used in the preparation of the French Civil Code of 1804 (The Code Napoleon) and the German Civil Code of 1896. The Austrian Code of Joseph II, the Allgemeines bürgerliches Gesetzbuch of 1812 (ABGB), was a forerunner of the BGB. These codes were intended to be comprehensive rules of private law, except for commercial law which was not addressed in Roman law. Guilds and merchants' associations such as the Hanseatic League established their own rules and courts for commercial law controversies. Academic scholars and judges in civil law countries constantly interpret and suggest improvements of the code. Judges generally use scholarly interpretations when they decide a case. Thus, the development of the civil law owes much to scientific studies.