

Handout 1: Sources of Law Then and Now

Sources of Law

Common law and statute law are the source of all our law. By looking at the way cases were decided in ancient times, we can see the beginnings of the judicial system as it is today.

Common Law

Common law is judge-made law. The common law system began in the eleventh century in England. Let's take a brief look at how it developed.

In the early fifth century, different Anglo-Saxon tribes lived in England. They came from northern Europe and each tribe had its own customs and laws.

Early elected officials were called "reeves." They were chosen by the serfs (the people working the land for the owners) from among themselves, so a reeve was also a serf. His duties included making sure everyone worked and didn't cheat the landowners out of money. Sometimes an entire district or "shire" was administered by one reeve, so that person would be referred to as the "shire reeve." This is where the word sheriff comes from.

In the year 1066, the Normans invaded and conquered England. They had come from Scandinavia, and were living in France when they invaded England. The leader of the Normans, named William the Conqueror, became King of England. To look after all the different territories in England, William set up a centralized government. A centralized government is run from a 'central' location. For example, the federal government in Canada is run from Ottawa. This is a centralized government.

The centralized government of William the Conqueror had a court system. The king would choose justiciars (judges) who travelled from village to village to hear cases and settle conflicts. At first, they would use the law of the local community.

Justiciars in England travelled the countryside, meeting with the townspeople to solve disputes. They helped the king. In each community a local group of twelve senior men would tell the justiciars which persons were accused of breaching the local customary law. Those men or jurors would most often have no direct knowledge of the crime.



Once the accused was brought forward before the court, the jury would assist by telling exactly what the customary law was. The local accusers would tell their story. If the accused was found guilty, s/he might be put to a test such as a trial by ordeal. Over time the same type of disputes arose and the justiciars started to apply the law in the same way in similar cases much like our judges today. This practice created the common law and the idea of precedents, that is, following the decisions in previous cases that had similar fact patterns.

Statute Law

Statute law started as far back as King Hammurabi who created and codified the laws to be followed by everyone. He carved all 282 laws on an eight-foot tall black stone which was placed in the city of Babylon for all to see. In fact he really created the first legal code. The Roman Code and the much later Justinian code solidified much of the law of that time in statute form. The civil codes of many countries today are based on the Justinian and Roman Codes. If a king did not like the common law then he could make his own statute law. Today our parliament is responsible for making or enacting laws for us to obey. That practice is broader based than if one king or queen made the law. Statute law is made by the people and not by judges.



Law Then and Now

Jury System

The system of being judged by your peers or the jury system has developed over centuries. The road was a long one, from the 200-500 jury of Greek times to the 12-member jury of today. Britain started the greater use of trial by oath takers who gave evidence. Today these jurors are the unbiased triers of fact.

Legal Contracts and Legal Entities

Written contracts governing business and marriage date back to Hammurabi's times. These contracts clearly set out the agreement between two people so there would be no misunderstandings. Contracts govern the parties who agree to them. The company entity was first developed in Roman times. The idea of a company extended the law to apply to a non-living thing. Before this the law applied only to people and their rights and responsibilities. Now companies or nations could make binding legal contracts. These ideas are part of our law today.

Fairness in Decision Making

The concept of fairness has been applied since ancient times. If they could not decide who was correct or telling the truth, the decision as to what to do was left to chance. People did not want to convict someone when they could not decide if that person was at fault or not. For example, in the case where one man killed another with a weapon and claimed that they were only practising their skills, the accused was thrown in the river. If he drowned he was considered to have lied. If he survived it was accepted that

he truly did not intend to commit murder and he was set free. Trial by ordeal was acceptable until it was banned by the church. Today fairness is built into the system through the protections afforded to a person accused of a crime, one being the right to a fair trial.

Punishment

Common problems have existed since ancient times such as what to do about the crime of murder. Ancient people used the blood feud or the killing of one person in each tribe until the whole tribe was dead to punish this crime. Later this was replaced by the wergild which assessed or valued each person's life at a certain number of shekels. If you were killed then the person who killed you had to pay your tribe that sum of money to compensate. This ended the loss of life under the blood feud. In Babylonian times the penalties were severe and harsh and probably were the source of the expression, "An eye for an eye, a tooth for a tooth." Many laws carried the punishment of death if they were broken. In Greek times, the death penalty was common under the lawgiver, Draco.

Laws and the Court System

People in early Greece thought that Themis, the Greek Goddess of Justice, actually helped the kings make judgments, as there were no formal laws. Themis is blind folded because "Justice is blind," which means everyone is treated equally before the law. That is a founding principle of our system. Later the Greek lawgiver, Solon, created four main types of law, which we still have today. They are tort laws (where someone does harm to you or your property), public laws (dictating how public services would be provided and run), procedural laws (step-by-step rules that told judges how law should be enforced) and family laws (the regulation of the behaviour of families).

The Greek court system was created to try, convict and sentence offenders. Amateurs ran the courts and trials were completed on the same day. Each side presented their case to the large court of between 200 and 500 people who decided the case and then gave the punishment. Later, in Britain, the laws of evidence and those about questioning witnesses were developed and improved.

Ownership of Property

King Hammurabi was said to own all the land, but even he bought land if he wanted to give some as a gift to his family members. The Norman's *Doomsday Book*, which listed all the land and who owned it in England, illustrates the importance of property rights. From ancient times, land was a source of power to landowners, and with that power came responsibilities. If the king required it, landowners had to provide armed soldiers in time of war. Today, property is important and many laws govern its ownership.