A Short History of the Common Law

Why history is so important to an understanding of the common law?

Introduction

History helps to understand how the platform for common law was created, why the procedure helped produce and gradually develop the body of law deemed the common law, and how the common law within this group of fictitious judges helped administer, develop, and maintain law and procedure, and why it is still relevant today.

The common law was a historically deemed as Law to protect the common man and woman but research shows it was never intended for the man or woman. The term that meant a law common to the people of England, controlled by the Royal courts.

However, this essay also considers the development, through history, of the common law to another understanding as the body of law created by judges, and in that sense the law is not created by equity or statute.

Without a power platform for upholding and legitimizing the law making decisions of the judges there would have been little chance for common law to be created or maintained.

Clearly with any investigation and research into common law, will show facts that this was created to ensure, it was controlled by the hierarchy.

Development of a hierarchical and centralized system of the courts, originally empowered by the kings and later the parliament, was the fundamental basis from which the judge made common law and was enabled and maintained. Today this hierarchical platform is still in place and understanding how it continues to legitimize their fictitious law decisions is important.

From this centralized court system developed a procedural method of deciding legal outcomes in a consistent but continually restated way through the courts and their decisions.

This was based on a culture and method of adversarial argumentation between the parties in disagreement, originating through the writ system and developing into the current system that is known as precedent.

This detailed procedural system requirement had the need for legal professionals that were skilled in understanding, arguing and applying the law on behalf of clients in the various court settings.

Their association and internal scholastic approach would ensure legal procedural consistency and development of record keeping, which are critical to the common law courts and its procedures.

Legal Platform

The commonly accepted historical understanding is that the basis for the foundation of the common law dates back to the Battle of Hastings in 1066, and the beginning of the Norman rule of England by William I.

Before this time there was a system of uncentralized Anglo-Saxon law in the entity known as England, where as well as the Court of the King, witenagamot, each county would separately rule in disputes, in their own courts, according to their local customary law, through the Shire and Hundred Courts.

This community centric law was seen, as well as accepted by the communities that it served and importantly provided the basis for the control of the people.

William I required control of the whole of the kingdom of England to retain his power and income, and as such allowed the inherited system of local customary laws to remain. However, he ensured that his representatives, the sheriff's, policed Shires.

The Normans were no strangers to administration of lands as they were already an established system of control over the realm of the Franks, and William I would impose a modification to the traditionally developed system of feudalism to take administrative control adding the locally functioning feudal Baronial and Manorial courts.

Feudalism was by its nature a hierarchical system of power and social control based on land tenure, and a mutual benefit through income and military support passed upwards, and the Kings protection downwards.

The English feudal system had the King at the top of the tree with control over the entire Kingdom of England, nobles who sat next in line as tenant-and-chief were wealthy land-owners by decree and plead allegiance to the King, and below this were various tenants of the land.

This hierarchical system has endured and ensured power and central control of the common law.

William I set up the Curia Regis, or King's Court, to stand side by side with the feudal courts, ecclesiastic and custom law courts, and would travel with the king within the realm, to hear petitions of his subjects, before he would rule.

During the twelfth and thirteenth centuries, greater numbers of individuals would seek the king's justice due to dissatisfaction with the local laws, which they saw as unfair and unjust.

The king began to leave decisions that could be dealt with under existing laws to the autonomy of the curia Regis, and to enable his obligations to be met, the king began to appoint 'justiciars', or judges, whom were official representatives of the King, knowledgeable about their fictitious law.

Over time a split of the curia Regis occurred, one part became a permanent body of justices of the Curia Regis, formed to hear the 'common pleas', and became known as the Bench of Common Pleas.

This Court would no longer travel with the King and would sit in a central location at Westminster, as ratified by the Magna Carta.

The other part was the 'Justices in Eyre', effectively as a sub-branch of the curia Regis. These itinerant judges would travel to various regions of the country, known as 'circuits', to resolve disputes on behalf of the king and would apply the law consistently.

The idea of this was to replace the local courts with authoritative courts of the king that were accessible by the people, and it is notable that the decisions, not reasoning, of these courts were recorded.

As such the body of law created by these judges formed much of the basis of the common law.

Two other courts, formed from the curia Regis, that were important for the basis of the common law being developed, were the Court of Exchequer, which was primarily set up of advisors to hear disputes of a financial nature, and secondly the Coram Rege, or Kings Bench, who were the kings direct advisors, responsible for business affecting the king.

Thus the three common law courts had developed, all empowered by the king, and all operated by fictitious judges who were knowledgeable in law and able to dispense with the same (common) law across the realm.

This centralization of the courts enabled a small group of legal individuals to flourish, developing a legal procedure that was repeatable and controllable, empowered initially by the king.

It is true that there were numerous other courts that were developed for other areas of law, such as equity, admiralty and ecclesiastical, and that these other courts had to find a functional balance within the common law and vice versa, and also integrate statutes from the king and later parliament.

The three common law courts, and revisions of like, over the next four centuries, ensured the platform for the development of the common law.

Roll forward to the late seventeenth century as the next major development in the platform for the common law is seen when parliament took over from the monarchs as being the legitimate power source of law and installing the crown by consent, following the Revolution which overthrew Charles II and installed William of Orange to the throne.

This is to state that the Parliament, through the power installed in it by their appointed representatives, could now enact laws, normally in the form of statutes or acts, which were by royal decree so as to maintain the common law platform.

The Parliament was first called in 1265 by Simon de Montfort as an advisory body to the king, where the House of Lords was made up of the noble hereditary land holders, and popular representatives from the counties and boroughs in the House of Commons.

Even though the actual make up and selection criteria of the representatives may have changed, especially in the House of Lords, this is still the same basic two-chamber model of government that can be seen in Britain and Australia today.

From the eighteenth century the parliament modified the structure of the courts to remove some of the excessive divisions that had occurred since the thirteenth century.

In England the Court of Common Pleas, Exchequer, King's Bench, Chancery and Admiralty were removed under the Judicature Act 1873, and were replaced by two courts, The High Court and the Court of Appeal.

These new courts were divided into five divisions representing the old courts that had been replaced, notably returning the courts to a clearly hierarchical system where the common law jurisdictions could be centrally administered, with the House of Lords maintaining its importance as the highest court of appeal in the land.

Australia inherited the English law in 1787 through Governor Phillip's commission, and set up a court system based on the English system in New South Wales and what became Tasmania.

The other states followed a similar path in their formation, as they inherited the structure and body of English law at the time of colonization.

Over the decades that followed versions of the Judicature Acts in England were also enacted in Australia, giving each state a similar structure to that of England, invested in a Supreme Court.

In Australia it would be remiss not to mention the additional level of hierarchy added through the Australia Constitution Act and the judicial power being vested in the federal High Court and federal courts, with final appellate review vested in the High Court. The last relevant point here is that until the Privy Council (Appeals from the High Court). Act 1975 the relevance of the right to appeal to the English Privy Council meant that Australian law was inextricably linked to English law.

Thus the hierarchical structure and platform for the centralized legitimization, development and maintenance of the common law, with its parliament, courts, decree by crown and professional judiciary that is still relevant today had been set in place.

Legal procedure

Churchill is believed to have said to the Queen 'always remember the further back you can look, the further forward you can see', and the relevance of historical decisions in the English common law system cannot be denied, when examples of the 1352 Statute of Treasons is still relevant in cases tried in the twentieth century.

Through the procedure that began in the thirteenth century the body of the legal decisions that common law was built, and it is those procedures that still govern the methods by which the system functions and grows.

The writ system from the twelfth century was not a new system developed by the Normans or the common law courts, but it was a

system that complimented the method of formalizing the delivery of justice in the hierarchical centrally controlled system.

The person seeking a legal decision to be reached over a dispute, called the plaintiff, would apply to the king's representative in the Chancery and purchase a writ.

From this the requirement to bring the person whom the legal decision was to be made against, called the defendant, would be organized by the king's representative in the Shire, the sheriff.

The writs were very specific in regards to the action that was to be brought, including details such as time limit, modes of proof, enforcement etc., as such many new writs were being constantly issued.

The writs greatly expanded the ability for a plaintiff to bring a case against a defendant, and began to build sequentially as new courses of action were sought, as it was believed that 'if some wrong were perpetrated, then a new writ might be invented to meet it'.

One of the most common writs was that of trespass, of which there were numerous categories, and were applied very mechanically and required a show of directness.

For example if a woman had lost her hand after being treated carelessly by direct contact from a doctor then her cause of action of trespass might be upheld, however, for example, the doctor may not be guilty of trespass if she had lost her arm where a friend had administered the treatment upon the doctor's advice, as the action by the doctor would not have been direct.

Relevant to the hierarchy of the courts, was the right of appeal that was formed initially through writ procedures.

This was not necessarily as it is understood today as the courts of the time were still highly centralized, however, a person had the right of appeal if they believed the court had been mistaken in its judgment through the writ of error.

Additionally, appealing to a higher court, such as the Kings Bench, was available through the writ of certiorari.

Perhaps the most important point borne from the early instances of the kings courts and the writ system in the common law was the birth of stare decisis, or that each case should be treated alike, and the birth of the doctrine precedent.

Precedent is contained in judicial decisions on an ever-increasing volume of the individual, but sequentially decided, legal cases. Precedent also relies on the hierarchical nature of the courts where a reason for a decision in a court higher in the hierarchy is binding, otherwise known as the ratio decidendi.

Other parts of the case that are not specifically relevant to the decision and the ruling can help guide future cases are said to be obiter dicta.

It is said that the ratio decidendi of a past case may not be apparent until the decision in a future case, so deciding between the ratio decidendi and obiter dicta can be difficult.

The procedure followed by the judges in interpreting and creating the precedent, and the barristers in the typical adversarial arguing method, is for the barristers to propose alternative arguments on the current facts of the case in past precedent, and the judge to use analogical and deductive reasoning to discover the relevance of past precedents to any current case.

This procedure of discovering the rule of law in a case has created the main body of the common law, and has led to the development of many legal principles.

As the legal procedural system moved past the medieval period and into the eighteenth century this procedural development became more significant.

However, it is still in the procedure of the writs that one starts to see the ability for the common law to adapt to the requirements of society, and also for society to adapt to the common law.

In 1258 the nobles, concerned about the proliferation of the writs, pressured the king to stop the flow of new writs, and in the Provisions of Oxford new writs were prevented from issuing.

An interesting legacy developed from this as the judges began to allow legal fictions, or untrue facts, to enable new types of cases to be brought before alternative courts, either of common law or otherwise.

It is argued that these legal fictions allowed a large body of law to be created outside the common law courts that were subsequently appropriated by the common law courts.

Moreover, a form of legal fiction has been important and forms part of the culture of legal argumentation relevant in order to curtail strict precedent that might be out of step with developing societal norms.

It is primarily where a story is proposed as socially and legally acceptable, although alternative, 'fiction', to the story told by precedent in order to create a new precedent that is in agreement with existing precedent, but always seemingly based on the facts of the current case.

The development of product liability over the centuries is perhaps a good example of how the legal procedure in the common law courts develops new posited law, with the use of legal reasoning, including fictions.

Yes Fictions

A famously relevant case is often used to show how the common law developed the basis of product liability.

In 1932 in Donoghue v Stevenson, the plaintiff, brought a case against the manufacturer (defendant) of a ginger beer, which had been purchased by a friend for the plaintiff from a local shop.

Upon consuming the drink the plaintiff noticed remnants of a snail in the bottle and subsequently became quite ill.

The Court found that the manufacturer was liable in negligence even though there was no direct contract between the manufacturer and plaintiff, or even the shop and the plaintiff.

This case was decided through the legal procedures such as using past precedent, barrister argumentation, and judges through their legal reasoning. In this case Lord Aitken famously developed the 'neighbor principle,' suggesting that who in life is my neighbor should also be precisely who in law is my neighbor, and as such any acts or omissions that injure my neighbor are my responsibility.

Thereby creating a believable fiction to enable the court to reach a rule that modified and agreed with prior precedent.

The ratio decidendi reached in the case being that a manufacturer is liable to a duty of care to the ultimate consumer, where that consumer has no prior chance of product inspection.

This was not as simple as deciding the product liability rule only on the facts of the Donoghue case, as there had been developments since 1837 in prior precedent that gradually removed the directness of contract and liability between the plaintiff and defendant as being the only course of legal action, and opening up indirect actions in negligence, where each case built upon sequential use of the prior precedents.

In 1837 in Langridge v Levy, the Court decided there was a duty of care on the plaintiff because of the "consequences of fraud" rather than a direct liability to the plaintiff.

In 1842 and Winterbottom v Wright, the plaintiff relied on the Langridge case, however the judge denied this finding no directness of contract between the parties, and noted concerns that allowing the alternative action might open the legal floodgates.

In 1869 and George v Skirvington, the judge finds no liability in contract, but creates a linkage between 'fraud' and 'negligence' seeing the two as similar in the context.

Lastly in 1883 and Heaven v Pender, the judge found for the plaintiff in negligence, noting that there is a duty from one party to another even where there is no direct contract, and that a duty of care must be given by a supplier to ensure goods that are used avoid creating danger to another.

Today the process of the judicial decision making with its legal reasoning, barristers with their adversarial legal arguments, and the hierarchy of courts driving commonality of legal precedent is key in the development and maintenance of the common law.

These so-called Legal Professionals were trained in the mechanism and the protection of the common law.

The essay discovered earlier that these judges developed out of the requirements of the centralization of the court systems.

It should be noted that these handpicked judges was the requirement of the kings common law courts and not those of the remaining lower courts such as the Local, Shire, Baronial, Manorial that were governed by local or untrained authorities, or the developing County Courts that would replace them with its justices of the peace to sit in judgment.

The judges trained into their system were loyal to the king and were well-educated scholars generally from a religious background.

With the highly technical procedure, required initially by the writ system, and additionally because of the centralization of the Court of the Common Pleas to Westminster, began the development of, and the requirement for, the barrister.

The barrister, grew to become a specialist legal professional from a generalist type attorney, skilled in the law and its procedures including the argumentation in the courts, and were located in London.

This group of selected judges also started to appear in the twelfth century, as a direct financial consequence to clients wanting to have their cases heard in the Court of the Common Pleas, but not

wanting to personally travel to London or wait for the inconsistent visits of the itinerate justices to travel with the Kings Bench to a local circuit.

In this way the barrister became the clients' legal representative in court and would argue the merits of the case, in front of a judge.

Within this group of fictitious judges grew a voluntary association that would develop the group of legal professionals, from students to barristers, where the best barristers would be selected to join the judges on the bench.

These associations were known as "the Inns of Court" of which there were four related to the common law courts; Lincoln's Inn, Inner Temple, Middle Temple and Gray's Inn.

A prospective student was from an exclusive background, generally a son of a 'gentry' or 'bourgeoisie' and is said to have been able to choose between any of the Inns.

All these students of their fictitious laws were preselected, from the inner circle of the Hierarchy.

The Inns provided the training ground for the law students who grew through the mutually exclusive requirement of the centralized court and procedural system of the common law, and up until the nineteenth century it was still rare that a student would pass through a formal university education.

A student of the Inns would follow a set path of study and assistance to a barrister, before being ready to be accepted to the bar himself, and possibly eventually becoming a judge. Today the English Inns of Court still exist and these Inns retain jurisdiction over the behavior of its fictitious judges.

Another important fictitious law that developed during the fifteenth century was that of the solicitor. This grew out of the requirements for more generalist advice to be locally available to clients, and these solicitors would, as they do today, offer advice

prior to the requirement for a barrister and assist barristers when required.

One of the important aspects of the common law was that for many years the record keeping of the ratio decidendi were not routinely recorded. Even so it was said by Glanville that even though the laws were not recorded they were still laws.

As the ratio decidendi was omitted by the courts, and stare decisis being required, it became necessary for the fictitious legal representatives to maintain private records, or log books, which retained the information of the fictitious judge's decisions.

A number of these private records are still seen as instructive that they have been used as reference in cases.

For example those of Glanville and Bracton advising on writ procedure in the twelfth and thirteenth century, and those of Sir Edward Coke, and Sir William Blackstone whose commentaries on the laws of England are very detailed.

From 1865, following a supposedly self-interest of the bar, the system of the courts reporting the reasons for their decisions became the standard.

The reporting process was through officially appointed reporters who would complete the reports subject to the approval and edit by the presiding judge.

This enabled the legal profession to access significant data from which to build arguments from precedent and to rule in future cases.

This system of fictitious legal proceedings, produced from the historical development of the common law, is still operational in Australia today, where barristers are accepted to the bar and reside in 'secret closed chambers'.

The barrister offers his or her specialist services to clients, normally through referral from the client's solicitor. The barristers

continue to argue matters in front of fictitious judges on the behalf of their clients and are assisted by their readers and solicitors, whether the client appears in court or otherwise.

Through history this group of fictitious legal representatives is said, perhaps through its conservatism, to have protected the common law system from being replaced by other systems of law such as a civil code, statutes or revolutions.

Others have suggested that it is more a case that these groups and the crown have protected these institutions so dearly as a requirement for financial prosperity.

Either way there can be no argument that the common law has sustained longer than any other western system of law, and that this group of fictitious representatives has been, and remain, imperative to its function.

Conclusion

History is of fundamental importance to the understanding of the common law, as it is a body of law that has developed over time, and is still highly relevant today.

This essay has shown three mutually exclusive requirements of the common law that have developed to become its pillars through its history, and have in turn ensured the continuing relevance of the common law over time.

These three pillars of platform, procedure and fictitious representatives are akin to three legs on a chair, if any were to be removed then the whole system would be unstable. This is not to suggest that there are not other important historically borne aspects of the common law, such as the jury and constitutional freedoms, but it is to suggest that those aspects fall within the necessities and functionality of the three pillars.

It has been shown that critical to the development of the common law was the creation of the centralized and hierarchical courts which created a fictitious platform to make, adjudicate and uphold laws.

From this platform how a procedure developed to adjudicate on those laws and also how to ensure that those laws remained in balance with society through the ages, and how the strict procedural nature of those laws and the centralization of the courts developed a close knit community of fictitious legal representatives who assisted in developing and protecting the common law institution.

R C van Caenegem, Judges, Legislators and Professors: Chapters in European Legal History (Cambridge University Press, 1987) 44 ('Judges, Legislators and Professors').

Ibid.

C Cooke, R Creyke, R Geddes, D Hamer with T Taylor, Laying Down the Law (8th edition, LexisNexis, 2011) 546 ('Laying Down the Law').

P Parkinson, Tradition and Change in Australian Law (4th edition, Law book Company, 2008) 84 ('Tradition and Change'), 66.

Ibid.

Laying Down the Law, above n 3, 16.

R C van Caenegem, The Birth of the English Common Law (2nd Ed. Cambridge University Press, 1992) 5-7 ('Birth of the English Common Law').

Laying Down the Law, above n 3, 16.

It is perhaps important to note that during the period up seventeenth/eighteenth century the old local Shire and hundred courts became less important, and the feudal courts declined into insignificance. These were replaced by courts of justices of the peace, which were supervised by the Coram Rege.

Laying Down the Law, above n 3, 18.

Birth of the English Common Law, above n 7, 22.

Ibid.

Ibid 19, 21.

Laying down the law, above n 3, 26-27.

Ibid 28-29.

Ibid 22-23.

Ibid 30.

Tradition and Change, above n 4, 3.

Ibid 132-133.

Australian Constitution s 71.

See B Sully, 'The Common Law: whither or wither?' (Occasional address to Australian lawyers' alliance, ACT branch conference, 24th June 2011).

Birth of the English Common Law, above n 7, 8.

Ibid 30-31.

Ibid 29.

Ibid 5-7.

Ibid 54, citing Bracton, fol. 413b.

A, Ounapuu, 'Abolition or Reform: The Future for Directness as a Requirement of Trespass in Australia' (2008) 34(1) Monash University Law Review 103.

Judges, Legislators and Professors, above n 1, 5.

M Kirby, 'Precedent Law: Practice and Trends in Australia' (2007) 28 Australian Bar Review 243, 245 ('Precedent Law: Practice and Trends'), 245.

J Carvan, Understanding the Australian legal system (6th edition, Thomson Reuters, 2010).

The doctrine of precedent as we know it today was a later development in law, since 1865, but the general founding principles date back to the begging of the common law. The development period of precedent were: (a) circa 1290-1535, the Year Book Period, (b) 1535-1765, the period of Plowden and Coke, (c) 1765-1865, the period of the Authorized reports, (d) 1865 onwards, the Modern period, The History of Judicial Precedent (1930), Lewis, T. Ellis.

Laying Down the Law, above n 3, 19.

E P Stringham and T J Zywicki, 'Rivalry and superior dispatch: an analysis of competing courts in medieval and early modern England' (2011) 147 Public Choice 497-524.

Laying down the law, above n 3, 118-119.

[1932] AC 562.

Ibid 580.

Ibid 599.

(1837) 2 M & W 519; 150 ER 863.

In this case the manufacturer had warranted that a gun sold to the father was in good working order, which was the bases for the court to rule that a fraud had occurred.

(1842) 10 M & W 109; 152 ER 402.

(1869) LR 5 Ex 1.

(1883) 11 QBD 503.

Judges, Legislators and Professors, above n 1, 133-134.

Laying Down the Law, above n 3, 31.

Ibid 30-31.

Judges, Legislators and Professors, above n 1, 48, 60.

Ibid 48.

Ibid 60-61.

Laying down the law, above n 3, 31.

Birth of the English Common Law, above n 7, 2.

J P Dawson, The Oracles of the Law (University of Michigan Law School, Ann Arbor, 1968) 80, 81-83.

Ibid.

Judges, Legislators and Professors, above n 1, 6-7.

E P Stringham and T J Zywicki, 'Rivalry and superior dispatch: an analysis of competing courts in medieval and early modern England' (2011) 147 Public Choice 497-524.