

The Passionate Shepherd

Sanity is madness put to good ...

I. This is Brian Simpson's definition of 'common law'. Use the words from the box below to fill in the gaps.

<i>adjudication</i>	<i>indigenous</i>	<i>prostitute</i>	<i>substantive</i>	<i>precedents</i>
<i>ubiquitous</i>	<i>dispute</i>	<i>rival</i>	<i>litigation</i>	<i>evolved</i>

The common law is the name given to the legal tradition which (1) in England after the Norman Conquest, and which has become one of the major world legal traditions. Most states use legal traditions which, either in whole or in part, have been borrowed from elsewhere; they rely on what have been called legal transplants. The common law, however, did not originate in such a process of cultural diffusion; it was an (2) English legal tradition, though it has been considerably influenced by the other major Western European legal tradition, the Roman law (or 'civil law') tradition.



The Canterbury Pilgrims. From the British Library MS Royal 18 D. II

The common law evolved out of a practice of (3) resolution; this indeed is how Roman Law originally evolved back in the ancient world. The history of law and the resolution of disputes in England is a long one, and can be traced back to the reign of Aethelbert of Kent, a paramount chief in whose reign, in about 603, a code of written laws was promulgated, long before a unified realm of England had come into existence. However, historians tend to think of the common law as having assumed a characteristic institutional form at a much later date, during the reign of Henry II (1154–1189), when an unknown royal clerk was able to write a treatise (nominally associated with a Royal official called Ranulf de Glanvill) which gave a coherent account of the procedures followed by the King's officials in (4)

At this time there existed in England a multiplicity of customary laws—laws of manors and towns, laws of particular industries, like the stannary law of Cornwall, and laws which applied to particular persons, such as churchmen. The common law was one such body of law, but it was royal law, and this was the basis for its superior authority. It was royal not in the sense that it had been laid down by the monarch, but because it was administered by royal officials, amongst whom the judges possessed their authority as deputies for the King. The King's law was 'common' in the sense that it was not local or personal, but was, like a common (5), available, or at least applicable, to everyone throughout the realm; this was the primary sense in which this body of law was said to be 'common'.

In the early middle ages the scope of royal adjudication was very limited, being concerned only with important property disputes relating to the landholdings of freeholders, and to the graver crimes. It was also largely concerned with the procedures which brought disputes to a point of decision. The actual decision was originally submitted to mechanisms the legitimacy of which depended on some form of divine intervention, such as ordeals, or ritualized battles. But in the twelfth century some disputes were being adjudicated upon by juries of neighbours, and in the following century the lay jury came to be the typical

The Passionate Shepherd *Sanity is madness put to good ...*

common law mode of trial. With the rise of the jury came the expansion of the common law not only to regulate the procedures to be followed, but also to impose conformity to (6) law, ie law which prescribes how the dispute ought to be decided. With this evolved the notion that questions of law were the responsibility of the professional judges, whilst questions of fact were for decision by the lay jurors under professional supervision.

In the course of the thirteenth century there developed a common law legal profession, distinct from the Church, administering a secular body of royal law in three distinct courts—the Common Pleas for civil disputes, the King's Bench for matters specially concerning the monarch, and the Exchequer for tax disputes. Over the centuries, these various courts acquired overlapping jurisdiction in civil matters, though only the King's Bench handled crime. They survived as distinct institutions until reforms of the nineteenth century. In a second sense 'common law' meant the law used by these three courts. Though primarily based in London, the law which they used became (7) as the result of a system in which trials took place locally before royal judges who travelled around the country on established circuits, and before local juries. But issues of law arising out of trials were largely handled in London. Until modern times, very few professional judges were needed to run this system, since lay juries did most of the work.

Although, from an early time, the royal courts used writing, for example to formally record the proceedings, the common law was for long primarily an oral tradition, transmitted from the past to the present through practice and memory. But from the late thirteenth century lawyers came to compile unofficial notes of what had been said in court, and to use what had been done in the past as an argument for what should be done in the present. Reliance on (8) is indeed integral to any system of governing tradition, and common lawyers from an early time came to treat what had been done in earlier cases as a principal source of law, though legislative texts were also an important source of law. So when Chaucer in the Prologue to the *Canterbury Tales* gave a picture of a common lawyer, the Serjeant at Law, he said that he possessed law reports going back to the time of William the Conqueror. The term 'common law' came, in a fourth sense, to have the connotation of law based on cases, or law evolved through adjudication in particular cases, as opposed to law derived from the analysis and exposition of authoritative texts. Indeed sometimes 'common law' is more or less synonymous with the expression 'case law'. Since the common law was developed by the judges, interacting with barristers engaged in (9), the expression 'common law' came, in a related fifth sense, to mean law made by judges. A body of law developed in this way tends to be strong on detailed illustration and pragmatic sense, and weak on general principle; and this has often been remarked about the common law.

Attempts have been made by scholars to identify basic values thought to be embodied in the common law tradition, such as a respect for personal liberty, or a commitment to the pursuit of economic efficiency. There are numerous (10) theories, often of a romantic or speculative nature. Some, derivative of Marxist thinking, are derogatory, viewing the common law as an instrument of oppression. Exploration of such theories lies outside the scope of this entry.