THE BEGINNINGS OF COMMON LAW

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Alan Beesley

University of British Columbia

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It is impossible to state at just what point in English history common law had its primitive beginnings, for there are few records existing of those early times from which we can gather clues, and those available are by no means reliable. Actually, there is no point at which men paused to consider and deceided that they needed laws with which to govern themselves. Rather, the laws gradually evolved from custom; indeed, as Cicero says, "custom is law." The ultimate sources of common law as we know them then, lie in the customs and usages observed by the barbarous ancestors of the Saxon and Norman conquerors of Britain. They practised their primitive forms of law in their rude forest courts long before historic times.

Common law can be said to have two parents, one of Norman and the other of Teutonic origins. In all primitive societies, the whole motivating force behind their laws was the idea of vengeance; the desire for retaliation against the offending person or thing. All the early forms of legal procedure in the history of Roman law were based on vengeance. It has been suggested that Roman law evolved from the blood

feud, as did Teutonic law. The rules governing the blood feud were simple: If a man was slain then the slain man's relatives were bound to exact vengeance on the slayer or the slayer's kinfolk. However, gradually a system evolved by which the feud could be bought off. At first this "composition" of the blood feud was optional: later it became compulsory. In England, by the time of William the Conqueror the blood feud had been fairly well broken up, although not extinguished. The whole process was one of gradual growth and evolution. Killings and houseburnings ~~even~~ eventually became appeals of mayhem and arson; appeals de pace et plages and of mayhem developed into the action of trespass, still familar to lawyers. Compensation was considered an alternative to vengeance so the early English laws were limited to intentional wrongs. At first, action in case of trespass always embodied the idea of intentional wrong, but later the action was changed to include also those cases in which wrongs were foreseen but were not the intended consequence of the defendant's act. Later still the action was extended to contain even unforseen injuries. This is the way in which laws grew from custom and continued in their process of evolution, becoming eventually part of the common law.

Early conceptions of liability for wrongs inflicted changed as society developed from a state of barbarism to

to the present state of civilization. An example of this is the old Roman law which stated that if a slave or an animal committed a wrong then the animal or slave should be slain in punishment, the owner being under no liability. This conception gradually changed through the ages until it finally reached a point of complete reversal; to-day men pay daily for actions for which they have absolutely no blame; e.g. the baker must pay the damages if his delivery boy runs into a man.

On the Teutonic side of the legal family tree, we note instances of this same gradual change and growth. Salic law contains usages too early for either Roman or Old Testament influences, but it embodies many of the same ideas contained in early Roman laws. The German tribal customs changed along lines similar to that of the Roman laws. At first if a slave committed a wrong, the master surrendered the slave and was free of all liability, but in the final stages, the law stated that the master was responsible for all the actions of his slaves.

The German folk-laws crossed to England, and we find a Kentish law of 680 A. D. stating that if a man's slave should kill a freeman the owner of the slave must pay 100 shillings as well as surrendering the slave to be punished. In the nearly contemporaneous laws of ~~Ireland~~ One surrender and payment

are simple alternatives. The laws of Alfred the Great contain similar provisions regarding cattle.

Later laws of Anglo-Saxon England gradually increase the liability of the lord for his household, making him surety for his men's good conduct. It is not until quite late that unlimited liability as developed in Romanic and Germanic customs appears, and then it is a question if it comes as a result of gradual growth or is partly due to Roman influences.

Rules concerning surrender of animals gradually changed from the ruling in Alfred's time that the offending animal should be slain, to the present day ruling that a man is bound to keep his cattle from trespassing on another's property, and is liable for any damages incurred by them.

The early Anglo-Saxons were a patriarchal folk, living in isolated settlements, leading lives regulated by their ancient customs. Their society was to some extent homogenious, but differing considerably from one petty kingdom to another, almost, in fact, from one village to another. It is hard to discover any definite facts about them, as they did not record their customs. They had no need to, except in special cases where law-making was necessary to clear up a disputed point, for the village elders were familiar with the ancient usages, and the knowledge descended through them.

Some of the Anglo-Saxon laws are very archaic in character,

showing a society not far removed from barbarism, where women and slaves stand on the same footing as cattle and sheep.

It is not clear to just what extent foreign influences are involved in the shaping of early English laws--Justinian's Corpus Juris had appeared long before the earliest Anglo Saxon codes were drawn up. There are also some traces of ecclesiastical influences, Aethelbirht's code being drawn up on St. Augustine's Day." However, a rough, ignorant people like the English, noted for their sullen aloofness from the wider world, would not be very amenable to foreign influences. It is doubtful whether Justinian's legislation was generally known in Western Europe before the Norman.

There was no "equality before the law". The early English were governed by a status system which continued to influence English society long after the Norman invasion." A man's rights depended on his social rank and upon ~~under~~ the customs of the neighbourhood. The noble by birth (the eorl) was protected by a special weregild. (The weregild was the system of buying off the blood feud.) The eorl's weregild was higher than that of the ceorl, who was the farmer of Anglo-Saxon society. The ceorl probably had to pay some tribute to the eorl, and was liable to military service, but he could rightly be called the middle class of the Anglo-Saxon society. His weregild was not as high as

that of the eorl, but it was payable to his kinfolk and not to his lord as was the mannbot of the thrall, the lowest form of the society. The thralls were treated as property rather than as people, so they can rightly be called slaves, although they did possess certain rights.

The class most important for legal purposes is the class of "thegns" which, although apparently little known in the earliest days, rapidly acquired important position from the ninth century on. They were servants, but servants of a special type, particularly connected with the royal service, and having much to do with the laws of the age, especially as regards land-holding. Of the class of thegns, the King's thegns were the most important and they gradually excluded the others from their class. The rule of forfeiture for misbehavior seems to have originated with the thegn, for the thegn who deemed an unjust doom lost his thegnship.

In matters concerning justice there was almost a complete absence of state authority. It was invoked only in special cases, rarely, and with reluctance. Wrongs were redressed by the ancient method of personal vengeance, the blood feud. The blood feud was in a sense illegal, for it was not sanctioned by the state, but on the other hand there were no laws condemming it. It was regarded with toleration, if not with actual approval by the people of the day.

The first restriction on the blood feud comes with the concept that vengeance should not be indiscriminate, but should rather be directed against the actual wrong doer. If the wound proved fatal then the relatives of the slain man could avenge him, but they were obliged to confine their vengeance to the murderer and his kinfolk, who might have been supposed to be sheltering him. If an ox were stolen, then some attempt had to be made to track it and the trail was to be followed until it led to the stall of the thief. If the trail led to the thief's stall but the ox could not be found, the trailer could seize another ox in payment, to compel the return of the stolen ox. However, he could not make good his loss at the expense of his guiltless neighbor by seizing the first ox he encountered.

There is evidence that the wiser members of the community were continually endeavoring to restrict the feud, (it was only to be levied against the actual wrong doer, sanctuary was to be respected, and hostilities were to cease on peace days) and the laws always tried to persuade the aggrieved party to accept the blood fine or weregild in lieu of corporal revenge. Also, the accused person should have some chance of proving his innocence. The process of "anefang" was enjoined whereby the beast was lodged with a third party while awaiting the outcome of the dispute.

It is not known of just what the early trial consisted

but it is probable that it ran in the following manner: the formal proceedings commenced with the reading of a doom specifying the penalties for the crime in question. Then the accused party, assisted by oath-helpers, vigourously denied the charges. If the accused was of good character this usually sufficed, but if not then he was subjected to the ordeal. The ordeal was a very barbarous as well as a completely irrational method of trying a man. There were various forms of the ordeal: the hot iron ordeal, by which the suspect carried a red hot iron in his hand for nine feet, his hands then being bound and inspected after three days; if the wound was clean, he was considered innocent, if not, he was guilty. Another ordeal was that of the boiling water, by which the accused thrust his hand into a bowl of boiling water to withdraw a stone in it. His guilt or innocence was ascertained by inspecting his hand after three days. The cold water ordeal was more often applied, whereby the accused was bound hand and foot and cast into the water. If he sank only to a certain depth, he was judged innocent and withdrawn--otherwise he was guilty and allowed to drown. There were several other varieties of the ordeal, all equally barbarous. If, in either case, the accused failed to clear himself, he paid the weregild, or, if obstinate about the payment, the blood feud was revived. There was no central authority to inflict punishment--it was limited to the compelling of the

accused parties to attend before the moot. To secure his re-appearance it was necessary to take security from him, either by pledge (wed) or bail (borh)

In all this the action of the central government was small, but even in this early English period royal officials were beginning to play an increasingly important part in the administration of justice. The matter was probably first approached from the side of revenue, and then later from the side of police.

From the days Ine at least, the ceorl who neglected his military service paid fyrdwite to the King. In the reign of Edward the Confessor we find evidence of the "oferhyrnes"--special fines to the king for disobediance to the royal command, which ~~was~~ apparently often used to support the local moot in the adjustment of disputes.

But soon the King's claims went further. Certain crimes were considered personal crimes, as against the individual, but others were considered as crimes against the community as a whole, and these crimes the community takes upon itself to punish. The vengeance of the community is slow and unorganized though, and a great step was taken when the King took its place. The "bōt-leas" offences (offences against the community) were more promptly punished than before, and the list was indefinitely extended. The change in England was clearly marked by the time of Canute. By the time of the Conquest the jurisdiction of the Crown ~~rights~~ had been greatly extended,

if we can rely to any extent on "Leges Henrici". Thus did true criminal law be begin. A man accused on a bot-leas trial had no right to the elaborate priveleges standing between the private accuser and his prey. He was lucky if he could secure any semblance of a trial, such as trial by ordeal, until the Assize of Clarendon introduced something like the criminal procedure. By the time of the Conquest murder had become, in theory at least, a bot-leas crime, but with it the old weregild system continued to exist as a localized custom until the thirteenth century.

It is with difficulty and uncertainty that any traces of a law of property can be discovered amongst the numerous unsystematic "dooms" of the Anglo-Saxons. The first notion of property came with the recognition of theft as an offence and the reluctant allowance under stringent safe-guards of the sale of cattle. Many other articles were known to the pre-Conquest English but the fact that the word chattel has survived as meaning all moveable goods, points to the great importance of cattle in primitive times also to the idea of sale of barter. The laws did not regard other goods as transferable except perhaps for satisfaction of weregilds, in which case payment in kind was acceptable.

Land was divided into "hoc-land" and "folc-land". Folc-land was the holding of the ordinary peasant, and boc-land

This was not an absolute division. It is impossible to say that it was a complete division and system as we [illegible]

was that land held by a written charter or "boc". Boc-land was connected with ~~the~~ thegnship, and probably referred to the land over which he had jurisdiction rather than land which he actually owned; thus the same acre of land could be the folc-land of the ceorl (the land he ploughed and reaped by ancient customary rule) and the hoc-land of the thegn who was his lord. If so, then, a long step had been taken to-wards the establishment of the concept of tenure which to-day dominates our law, for the thegn's right must have come ultimately from the King.

There was nothing in Anglo-Saxon times which could properly be called a Law of Contract or a Law of Tort, but there were primitive practices which ~~later~~ grew into these later ideas. The practices of giving "wed" (pledge) and"borh" (bail) as surety for good conduct were the legal ancestors of ancient contracts of pledge and guarantee.

As to the system of courts, we find, roughly speaking, three main types of courts: the oldest is the communal system, represented principally by the county and the hundred; next we have the feudal or seignorial tribunals; finally, we have the royal courts gradually overshadowing all the rest. Within each of these classes there existed infinite variety.

Although the three classes of courts evolved in the order they are named, they existed also side by side through the later Anglo-Saxon period, and consequently each was influenced by the other. Therefore, it must be realized that this threefold

classification is very broad, and subject to many variations.

The communal courts were characterized by a territorial jurisdiction co-inciding with some administrative district within whose limits their authority extends. The Seignorial courts were less definitely territorial in their character; their jurisdiction seemed rather to depend more upon a personal bond existing between the lord and tenant, but later gradually included jurisdiction of the lord over the land of the tenants. In this way personal jurisdiction often grew into territorial jurisdiction. Then, too, often a great lord acquired domination over a county a hundred court, which became in the end his personal "franchise". It can be seen then, that there is no well defined dividing line between the two classes of courts.

Both classes however, differ from the third class--the royal jurisdiction. The royal courts gradually intruded upon the ground already held by the communal and seignorial courts. There is not much evidence of this in Anglo-Saxon times, but under the Normans the central courts were re-organized and systematized and they eventually took over all the jurisdiction which had been held by the other two classes of courts. Their authority was original, and not derived from the crown, although later the idea gradually grew up that the Crown was the sole fount of justice and all the other courts derived their authority from the Crown.

Taking the three classes of courts in the order in which they evolved, we consider first the Communal courts. The village or township was the smallest unit of government. Its workings were the most complicated and the most difficult to ascertain. A certain amount however, we know. The vill usually consisted of a little group of houses, a parish church, and often a lord's mansion resting nearby. It usually contained three fields around the vill, two under use and one lying fallow. The vill was held to-gether by a system of communal agriculture, and is thought to have been governed by a moot. The fields were divided into long, thin strips, each householder probably owning one or two strips in each field." The vill is most remarkable for the place it later held in the system of police and criminal procedure: it had many legal duties imposed by the Crown, such as raising the "hue and cry" in case of crimes committed, following the trail of stolen cattle, and arrest of the malefactors.

The next larger unit of communal government was the hundred or hundred court. It was probably originally an informal gild, a voluntary association of members undertaking police duties for the good of the community. It had powers to find out informally if suspects were guilty and it shared in the property of convicted criminals. King Edgar passed an ordinance in the tenth century regulating the workings of the hundred: the hundred was to

meet every four weeks; thieves were to be pursued and judgement executed on them. The hundred was ruled by a court, and it possessed executive as well as judicial powers, for it had to first catch the criminal and then try him.

By 975, it was a distinctly active institution, and probably the one with which lesser men most often came into contact. These activities were a source of revenue to the hundred, for fines were levied for disobediance of its com ands. Also, all the property of convicted thieves went to the hundred. The laws of Canute passed between 1027 and 1034 state further regulations: no distress was to be levied until the remedies available in the hundred were exhausted; every freeman over twelve years of age was to belong to a hundred; no one was to appeal to the king until he had first sought justice in the hundred. Later, after the Conquest, the hundred was much used as a convenient unit in legislation.

The county was the largest of the communal units. It is the most ancient of English institutions, many of the counties descending from the original Anglo-Saxon kingdoms when the realm was divided into numerous petty realms. The county was a "greater" and "more solemn" body than the hundred, but not "superior" in the sense that decisions of the hundred court were subject to review in the county court--it was a court of the first instance just as was the hundred. The shire-moot was an impressive assembly of all the greatest people of the shire who met to transact business both judicial and administrative. In its constitutio

it resembled that of the hundred." It was composed of suitors who bear the name "Doomsmen". They were not lawyers, or even officials, but simply lay persons who were bound by custom to attend. Theoretically, the county court consisted of all the great ~~and~~ of the land, and representatives of the lesser folk from every vill and hundred. Actually, attendance at the county was considered a burden, and those who could do so evaded it, sending a steward as their representative. Over the body of suitors presided the sheriff, who was not a judge, for he did not pronounce decisions, but merely announced the decisions of the suitors. Later, the sheriff's position changed to that of judge, and he grew to be a very powerful man. There was no limit to the jurisdiction of the county court: civil and criminal cases, pleas, common and royal, were alike in its power. In Norman times, as the sheriff became too powerful and grew in oppressions and ~~concoction~~ extortions many restrictions were imposed on the county courts to lessen his power.

The next type of jurisdiction to evolve was seignorial jurisdiction. Just what the early origins of the seignorial system are, it is difficult to ascertain, with any degree of certainty, but the system probably had its beginnings in the troubled times of the Danish invasions, and the fairly constant wars between petty kingdoms. The ~~small~~ small land-owners probably commended themselves and their land to some powerful lord for protection. The weakness of the central power no doubt

promoted the growth of small local jurisdictions which were ready to undertake the task of repressing crime and organizing military defense. This process was very probably aided by the process of heavy taxation. In this way a great deal of free land was converted into land dependantly held under pressure of taxation. This did not mean that the poor owner was dispossed; he retained the land but incured certain obligations to the lord, certain services in money, labour, or products. In this way the free men of early Anglo-Saxon times had gradually been converted into serfs by Norman times. Very often lords received grants of a jurisdiction called "sac" and "soc" from the Crown which meant the right to hold a petty court, to compel tenants to attend it, and to take profits from it.

To all this was added the system of frankpledge which later became typical of a good many manors. It developed from the institution of "borh" previously mentioned. It embodied the system by which every tenant eventually was bound as surety to some other tenants in pledge that certain moneys, labours, or products would be forthcoming. In this way the lords of the manor gradually acquired control over the vill. A lord often acquired control over the hundred by holding the hundred as a "court leet". This meant that the lord replaced the sheriff in the court.

Manorial courts were numerous and usually quite effecient. However, an individual could acquire no higher jurisdiction than that of a hundred, due to the fact that in the county courts the sheriff was accountable to the Crown, and it was this fact that later assured the triumph of the central court in the struggle for jurisdiction of the common law.

The Crown did not acquire much control of the courts in Anglo-Saxon times, but certain advances were made. The centre of government was the shire rather than the King himself, but the Crown gradually obtained some control of the shires. Originally, the shire was the petty Anglo- Saxon kingdom, and the alderman, the heart of the shire, represented the ancient royal family. The alderman therefore upheld local governments as opposed to central government, but the Crown overcame this by appointing beside him a new official representing the Crown, called the reeve. The King's reeve grew in importance at the expense of the alderman, and eventually he took the alderman's place and became the principal officer of the shire under the title of "shire reeve" of "sheriff". As has been mentioned, his power grew rapidly, and with it his oppresion and extortion, until eventually the Crown had to place stringent restrictions on him, but this did not come in Anglo-Saxon times.

The Anglo-Saxon period can be placed roughly between 600 and 1100 A. D., a long period, a difference in time as great as that between Chaucer and Kipling. The whole era was a formative period, and although there is nothing in Anglo-Saxon times which can properly be called a body of common law, the early English did develop a system of primitive law which has served as the foundation for all the intricate legal structure evolving in the succeeding centuries. The proof of the soundness of this foundation lies in the fact that English common law eventually reached the point equal or superior to the laws of most of the nations of the world to-day.

Alan Beasley

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