

**LAW, COURTS AND SOCIETY**  
**Political Science 3120**  
**Course Notes-G. Michael Stathis**

**Introduction**

*...we will not have a man to rule over us, for a man rules with an eye to his own interest and becomes a tyrant. We will have the law for our ruler, for we consider that the function of a ruler is to be the guardian of justice and, if justice, of equality. (Aristotle, Book V, The Nicomachean Ethics)*

*In the beginning was the word and the word was with God, and the word was God. St. John*

What is law?

Black's Law Dictionary: *That which is laid down, ordained or established. A rule or method according to which phenomena or actions co-exist or follow each other. That which must be obeyed and followed by citizens, subject to sanctions or legal consequences, is a "law."*

St. Thomas Aquinas: Summa Theologica:

*The Nature of Law: Law is a measure of action in virtue of which one is led to perform certain actions and restrained from the performance of others. The term "law" derives from "binding," because by it one is bound to a certain course of action.*

*The Object of Law is the Common Good.*

*The Various Types of Law:*

*The Eternal Law*

*The Natural Law*

*Divine Law*

*Human Law*

*The Barometer of Society? As such is it simply a means by which we understand the nature of society, or is it the factor that itself determines the nature of society?*

*Where Do Laws Come From?*

Numa Denis Fustel de Coulanges, The Ancient City:

*Law among the ancients was at first a part of religion. (248) No man invented them. (250) Initially laws were scattered about in the midst of rules for sacrifices, for burial and for worship of the dead. (248)*

*Law was not born of the idea of justice, but of religion and was not conceived as going beyond it. (257)*

Regarding *law* as the creation of lawgivers or legislators he emphasized *If we understand by legislator a man who creates a code by the power of his genius and who imposes it upon other men, this legislator never existed among the ancients. (250) Law was not the result of a conscious act but the religious belief that men entertained. (252)*

*Natural Law:* Laws were not created but have always existed, they emanate from nature and are discoverable by right reason. (*In the beginning was the word and the word was with God*).

*The Gods or God?*

Mr. Justice Oliver Wendell Holmes: *The life of the law has not been logic, it has been experience. (The Common Law, 1881).*

### **The Oral Tradition**

Vague beginnings as family, clan, and tribal *custom*. Originally, not law but family stories and history. Memorized and related by word of mouth by elders or *law rememberers*.

### **Law Among the Ancients**

According to people such as Numa Denis Fustel de Coulanges and Donald Magnetti, society's rules were something less than *law* in the modern definition and more akin to a *sacral text* or a collection of *religious rites*. The common focal point was God or the gods.

### **Egypt**

The *god-king* or *pharaoh* represented other Egyptian gods on earth. *Law*, such as it was, was a product of that line. *Maat*, the daughter of the god Re, was described as *order* in the universe...mans' duty was to insure that mortal activity corresponded with *divine order* and that was achieved by adhering to religious rites as employed by the god-king...something less than a sense of law. It is interesting that in both Hebrew and Muslim tradition that the *pharaohs* were regarded as *lawless* tyrants.

### **The Babylonian/Assyrian Tradition (Mesopotamia)**

Legal development for Babylon, and later Assyria, is most often associated with one individual and one major achievement: Hammurabi and the *Code of Hammurabi* ...written law.

#### **Hammurabi**

*The Golden Age of Hammurabi 1728-1686 B.C.*

Union of a number of cities into one kingdom via a common ruler, law and god.  
Was written law already established?

### **The Code of Hammurabi**

Written law taken from the codes of a number of cities (some Sumerian). Hammurabi claimed to receive these laws from *Shamash*, the god of justice. Earlier laws included in the code were also the creation of *Shamash*.

### **The Preamble to Hammurabi's Code**

Ultimate authority is placed in *Anu* and *Enlil* who named Hammurabi *the exalted prince, the worshipper of gods, whose duty was to cause righteousness to prevail in the land, to destroy the wicked and evil, and to prevent the strong from plundering the weak, to go forth like the sun over the black-headed race, to Enlighten the land and to further the welfare of the people.*

The *Preamble* concludes with Hammurabi evoking the authority of heaven, *when Marduk sent me to rule the people and to bring help to the land, I established law and justice in the language of the land and promoted the welfare of the people.*

### **Penalties in Hammurabi's Code**

Penalties in the Code were commonly severe with the death penalty, generally by *impalement*, often in evidence. The first law reads *If a man accuse a man and charge him with murder but cannot convict him, the accuser shall be put to death.* In Law 153 *If a man's wife brings about her husband's death because of another man, they shall impale the woman.* Lesser penalties were also present but no less brutal: Law 195 *If a man strikes his father, they shall cut off his hand.* But the Code also expressed a familiar sense of justice: Law 196 *If a man destroy the eye of another, they shall destroy his eye;* Law 197 *If he breaks a man's bone they, shall break his bone;* Law 200 *If a man knock out a tooth of a man of his own rank, they shall knock out his tooth.*

### **The Code's Conclusion**

Again, Hammurabi's authority and the heavenly source of the laws are emphasized:

*The king who is preeminent among kings am I.  
My words are precious, my wisdom is unrivaled.  
by the command of Shamash, the great judge of  
Heaven and earth, may I make righteousness to  
shine forth on the land; by the word of Marduk,  
my lord, may there be none to set aside my statutes.*

For those who attempted to replace Hammurabi's law, he called down the judgment of the heavens:

*...may the great Anu, father of the gods, who  
foreordained my reign, take from him the  
glory of sovereignty, may he break his scepter  
and curse his fate*

Equal penalties are reemphasized in his concluding statement which also claims the support of all the gods:

*May the great gods of heaven and earth, the Anunnaki in their totality, the protecting deity of the temple and the walls of Ebarra curse him, his seed, his land, his army, his people and his troops with an evil curse. May Enlil, with his word which cannot be altered, curse him with powerful curses and may the curse come upon him speedily.*

### **The Assyrian Code**

Also associated with one king, Ashurbanipal who reigned 669-628 B.C. Related to Hammurabi's Code, written and equally harsh (if not worse).

Despite the obvious invocation of the gods in the introductions and conclusions of both Babylonian and Assyrian law...the codes themselves exhibit a remarkable absence of specific religious laws.

### **Hebrew Law**

More popularly known, but not without certain questions. Still, among the significant sources of the Western evolution of law as we conceive of it.

#### **Moses**

Prince of Egypt, Prophet of Yahweh...God...and sublime *lawgiver* (1300-1200 B.C. ?).

#### **The Code of Moses**

Generally known as the *Ten Commandments*, but greatly embellished by other laws noted in *Exodus*, *Leviticus*, *Numbers*, and *Deuteronomy*. Part, at least, in writing, and served to unify the various tribes under one law and one god. More humane than Babylonian law, but hauntingly similar in many instances (*an eye for an eye, a tooth for a tooth*). Also more religious...note the first of the commandments: *I, Yahweh, am your God; You shall have no other gods.*

#### ***The Covenant***

Beyond the simple commandment of a superior, Hebrew Law involved a contract with *Yahweh* himself, based on personal consent.

Much of Hebrew Law (especially commentary on the law-Torah) remained in the oral tradition until as late as the seventh century (Talmud).

### **The Persian Tradition**

#### ***The Achaemenid Empire (550-330 B.C.)***

Existed with a positive reputation based on tolerance. Cyrus the Great also known as *Cyrus the Just* to the Greeks in general and was a model for a *philosopher-king* for Plato.

**Persian Law, the *databara* (*data*: law).**

Consistent with the Eastern tradition of law from the gods, but also considered as just...*the law of the Medes and Persians which changeth not*. Received by the *Shahanshah*, the *king of kings*, from Ahuramazda, the chief deity in Zoroastrianism:

*A great god is Ahuramazda who hath created this earth, who hath created heaven, who hath created man, who created the gladness of man, who made Darius King sole lawgiver of many.* (Inscription at Persepolis).

The equivalent of two court systems...social tribunals for family or personal problems; and royal tribunals for problems involving the state. The *Shahanshah* both received law and was its chief judge.

Punishments for crimes against the state were severe and included impalement, mutilation, and dismemberment.

## **The Greeks: The Origins of the Modern Concepts of Law, Courts, and Society**

### **The Revolutionary Separation of East and West**

Herodotus had the correct general idea, but failed to mark the most important points: law made by the community rather than the gods, self rule and the beginnings of *secularism*.

### **The Polis (Poleis, pl.)**

Greece did not exist as a single country or state, but a patchwork of sovereign city-states: the *polis* and *poleis*. Each independent and with its own form of government. But all with some form of the similar formula: assembly of all of the citizens (adult, free, males), high council (often some form of council of elders), and some form of executive leadership subject to the assembly and customs of the city.

### **The Archaic and Homeric Ages (1300-800 B.C.)**

The ages of traditional or tribal monarchies. Not *law* as we know it but a customary sense of *justice (dike)*. Three methods for settling disputes: combat, compromise, or submission of question to third party for arbitration. In the last instance a judge or law-knower (*istor*) was sometimes employed and was often the king himself. In all cases the king was a possible source for appeal. In Homer's *Illiad* there is reference to the shield of Achilles which depicts a case submitted to a council of elders as arbitrars.

### **The Age of Aristocracies (800-600 B.C.)**

The end of traditional monarchy also led to the creation of political offices, the magistrates including the equivalent of law-rememberers: the *thesmothetai*, and the appearance of legal codes. The codification of law probably began in the colonies rather than the mother cities. Early codes created law known as *thesmos* or *thesmoi*, law created by a higher authority, god-given or a *lawgiver*...note the example of the constitution of Lycurgus in Sparta, and Draco and Solon in Athens. By the end of this period many laws were known as *nomos*

or *nomoi* signifying that they had authority not according to a higher authority but by the acceptance of the people.

### **The Classical Period of the *Polis* (550-338 B.C.)**

*Nomos* and later *psephisma* emerged as the basic references to law. *Nomos* in general still referred to older laws granted by lawgivers while *psephisma* came to be regarded as a decree or a voting indicating action in an assembly; the former as *the law*, the latter simply as *laws*.

## **Courts and Juries in Ancient Greece (Athens)**

### **The Court of the King**

The *wisdom* of Solomon.

The shield of Achilles: the council of elders as judge, court and jury.

### **The Birth of Democratic Judgments**

Homer and the shield of Achilles: judgment by a council.

When did *judicial procedure* become obligatory?

Two kinds of decisions emerged:

according to written laws.

according to the verdicts of juries.

The role of early high councils (elders, etc.), the *areopagos*.

Solon and law courts: the *eliaia* which effectively was the assembly (*ekklesia*) called strictly for legal purpose. Initially done primarily on an appeal of a magistrate (archon). With this judgments by magistrates alone faded out. But as appeals to the law courts increased the process of calling the entire assembly to session became cumbersome. The solution was a small but representative collection of assembly members: a *jury*.

In the mid 500s, Pericles added the notion of a paid jury.

### **Selection of Juries in Athens**

600 volunteers chosen by lot to be a pool of potential jury members for the year.

Courts did not meet every day, but only as needed. Jurors were paid two to three *obols* a day.

Magistrates still introduced cases

Numerous mid-level courts emerged with special cases reserved for the full *eliaia* itself.

Toward the end of the fifth century B.C. corruption became a problem in the form of bribery. Anytos (who later brought charges against Socrates) developed a form of bribery known as *dekazein* necessitating a more complicated means of jury selection.

In trials references to the state or city was to you, the people and Athens a decision by a jury was final with no appeal.

### **Prosecutors and Cases**

Initially prosecutors were volunteers, magistrates or members of the offended family.

Prosecutors had to know which kind of court his case applied to. The term *dike* came to refer to *cases* in general but were of two types:

*dike idia*: a private case.

*dike demosia*: a public case.

Cases involving homicide or *dike phonom* could not be private.

#### **Public Prosecutors**

Acting in an official capacity and assigned.

Magistrates acting on their own.

Advocates-a group appointed by the *ekklesia* or *boule*.

*Synegoroi*-a group of ten advocates.

Volunteers preferred because they were considered impartial.

### **Subjects of the Law**

Citizens

Aliens

Resident Aliens

Privileged Aliens

Slaves (owners were responsible for their actions)

### **Sacred Law**

Religious laws still recognized, especially major sources such as the Delphic Oracle, etc. but usually not a matter for the law courts.

### **Trial and Punishment**

Trials generally initiated by a magistrate or an individual.

Preliminary proceedings

Evidence

Trial

Jury oaths all together at the beginning of year.

Penalties fixed by written law, otherwise potentially unlimited as determined by the court.

Execution as a penalty usually took place quickly after trial and only rarely postponed (not during public festivals), and carried out by a professional executioner, a *public man* or *demios*.

Penalties:

The chasm or pit.

The board (usually for homicide...death by exposure or strangulation).

Poison-hemlock.

Exile.

Confiscation of property.

Demolition of one's home.

Disfranchisement...loss of rights.

Imprisonment was rare.

Fines.

In rare cases a vote by the whole assembly might amend the punishment imposed by a jury.

### **The Trial of Socrates**

On the one hand an indictment of Athenian justice, but also as portrayed by Plato (The Last Days of Socrates: especially The Apology) an account of judicial procedure according to law in ancient Greece. Socrates was charged on two counts: *corrupting the youth of Athens* and *impiety*. He was convicted on the earlier charge. The latter charge was effectively waived, as was later custom. And although Socrates was sentenced to death by hemlock, it was clear no one in Athens wanted to inflict it. Exile was offered but he refused citing his unyielding loyalty to the laws of his city.

### **Roman Law**

The roots of the modern Western Liberal Tradition and the fundamental assumptions of public law, constitutionalism, judicial procedure, and due process of law are deeply embedded in Ancient Rome.

The American founding fathers were well versed in Roman history and culture which served as the foundations of the modern American federal republic, or as Princeton University, history professor Frank Bourne always began and ended his course on Roman history: *De nobis fabula narrator, Their story is our story.*

According J.W. Cecil Turner the *fame* and *success* of Rome was the result of their *talent for military affairs* and their *genius for making law*, or taken together what can be called

a *gift for organization*. And this gift for organization was especially evident in law from the earliest codes to the *Code of Justinian*.

### **The History of Rome: 753 B.C.-476 A.D., or 1453**

The Regal Period...*Rex* (753-509 B.C.)

The Republic (509-27 B.C.)

The Principate or Constitutional Monarchy (27 B.C.-284 A.D.)

The Dominate or Absolute Monarchy (284-565)

The Eastern or Later Roman Empire, or the Byzantine Empire (565-1453)

### **Roman Law**

*Manus*, etc., powers of the *paterfamilias*.

*Jus civili*

*Jus gentium*

*Jus naturale*

### **Fundamental Foundations: the Family, the *Paterfamilias* and *Manus***

The *family-father*, the *paterfamilias*, sole owner of family property, family judge, and priest...the basis of a patriarchal society.

*Manus* was the power of the *paterfamilias* over a wife.

*Patria potestas* was power over children (including daughter in law).

*Dominica potestas* was power over slaves and others in the household.

Importance of virtue and morality: *dignitas*, *gravitas*, *auctoritas*.

### **Law in the Regal Period**

Law a function of custom and the authority of the *rex*, and the *senate*. The *rex* served for life but not hereditary, and limited by customary law and the *senate*.

The *senate* was comprised of the male head of every great family (*gentes*). They were quite literally the *fathers of Rome*. Kings were chosen from their number...every member was a potential king.

#### *The Servian Reforms*

Associated with the second to last rex Servius Tullius (578-538 B.C.), but may not have had much to do with him. Extended citizenship out of military necessity and Effectively divided society into two classes: *patricians* and *plebians*.

Vital relationship of patronage: *clientes*.

Sources of law (interpreted by priests):

Custom: *jus non scriptum*, *mos maiorum*.

*Leges regiae*.

### **The Expulsion of the Kings (509 B.C.)**

Involves some great moral offense by Tarquinius Superbus who is generally known as a vile tyrant. Did he molest a matron, or a Vestal Virgin?

Monarchy ends forever; for political purposes even the word *rex* is removed from accepted speech. A new office emerges the *rex sacrorum*, the sacred king or high priest marking the beginning of a Roman separation of church and state.

### **Law in the Early Republic (509-450 B.C.)**

The expulsion of the kings may have been characteristic or part of a general movement in region involving constitutional revolution and the replacement of appointed chiefs and kings with annually appointed officials. In Rome the Senate began its emergence with magistrates that it created.

Law evolved from unwritten custom to unwritten laws made by the assembly or the Senate and came to be known as *lex*. Other traditional laws (custom) were distinguished between *fas* or laws dealing with religion or moral matters and *jus* or laws dealing with civil matters.

### **The First Plebian Crisis**

Exclusion of *plebs* owning state land, marriage to *patricians*, knowledge of and administration of the laws, and weighed down with severe debt.

Temporary solution in the *lex sacrata*-some remission of debt and creation of two magistrates to protect them: the *tribuni plebis*, but it was not enough.

Further pressure from the plebs forced the Senate to appoint ten of their number as *decemviri* in 481 B.C. to study the *poleis* of Greece and suggest a legal solution.

### **The Law of the Twelve Tables**

The *decemviri* created the *Law of the Twelve Tables* which has been called *the fountain of all public and private law*. In fact, it was a rough and primitive system by modern standards.

Chief innovation: replaced customary law with open publication of a written system of law. Marked the final distinction between *fas* and *jus*, as well as the end of personal redress and remedy replaced by legal process. Compensation for wrongs now fixed by written law.

In the *Law of the Twelve Tables* and long afterward Roman law was essentially civil law primarily concerned with the rights of the individual. A separate body of criminal law came later during the empire.

The *Law of the Twelve Tables* remained the basic legal code. Rulings of magistrates and opinions of jurists developed a supplementary body of case law or legal precedent.

*What sort of thing is the civil law? It is the sort that cannot be bent by Influence or broken by power or spoiled by money. Cicero*

*It is not the Roman custom to condemn any man before the accused meets his accusers face to face and has an opportunity to defend himself against the charge. St. Luke (Acts of the Apostles in the New Testament)*

### **Roman Law in the Republic (The Historical Period 449-27 B.C.)**

The Roman concept of a republic was quite simple...it was not a monarchy, there was no *rex*. *Libertas* or freedom referred to simply as freedom from the rule of a king...a free man was a citizen, not a king's subject. Cato the Elder noted *A king is an animal that lives on human flesh.*

### **The Roman Constitution**

A mixed constitution minus the monarch. *SPQR*...the Senate and people of Rome...the consuls, the Senate, the popular assemblies.

### **Sources of Law**

The tradition of the Law of the Twelve Tables

*Mos*, now as customary law.

*Leges*, legislation by the assembly.

*Senatus consulta*, legislation by the Senate.

*Edicta*, regulations made by the magistrates.

*Responsa prudentium*, interpretations of those skilled in the law.

### **The Basis of Obligation in Roman Law**

*Pacta sunt servanda*, agreements, or pacts must be served or honored! Actually taken from *Pacta convent aquae neque dolo malo inita sunt omni modo observadan sunt, agreements which are not contrary to the law nor entered into with a fraudulent design are in all respects to be observed.*

### **The Praetors**

From 366-242 B.C. the *praetors* in effect had sole jurisdiction in legal proceedings.

Six *praetors* were elected every year by the Senate (later ten), and among other duties they served as judges in the law courts (and later as governors of provinces).

Eventually two types of *praetor* evolved:

*Praetor urbanus* in the urban court.

*Praetor peregrinus* in the *peregrine* court.

Praetors were fairly unrestricted. Indeed, they had the duty of providing rules of law and procedure.

### **Later Legal Developments in the Republic**

#### **The *Lex Hortensia* (287 B.C.)**

Another legal attempt to placate the *plebians* by Senator Quintus Hortensius. Increased authority of the Tribunes and the power of the plebs in their assembly. *Hailed as the triumph of democracy.*

Creation of a new magistrate: the *praetor peregrinus* to oversee legal cases involving non-Romans which began the process towards the *jus gentium*.

#### **Interpretation of the Law**

Legal interpretation of the law (the Law of the Twelve Tables for instance) or *responsa prudentium* was left to specialists: *juris prudens* or *juris consultus*. This authority was first held by the *College of Pontiffs* (priests), then by trained laymen, and later according to scientific study and literary expression. Interpretations never had the status of new law.

After 149 B.C. *praetors'* civil courts could include a jury (*judices*) made up of Senators for important cases.

### **The End of the Republic**

The end of the Republic can be cited by a number of events including the rule of Julius Caesar, or his assassination on March 15, 44 B.C., or the Battle of Actium in 31 B.C. One point is clear. By the time Octavian Caesar took office as *princeps* or *first citizen* and took the title Caesar Augustus the Republic was long dead.

### **Law in the Principate (the Constitutional Monarchy) 27 B.C.-284 A.D.**

Beginning with Caesar Augustus attempts were made to balance the *imperium* of the emperor, *princeps* or *imperator*, with the law and the role of the Senate. There was at least the illusion that laws were made by the Senate and the people rather than the simple will of the emperor.

#### **Sources of Law in the Principate:**

- Custom
- Statutes
- Senatus consulta*
- Imperial Constitutions
- Responsa Prudentium*
- Edicts of the Magistrates

*Praetors* still retained their primary judicial functions, but were limited by the monarchy-the emperors. Gradually they lost power in favor of numerous imperial agents: the *praefects*.

By the end of the period litigation came to be held before administrative rather than judicial officials.

Note the *trial* of Jesus of Nazareth.

Growing importance of edicts of magistrates and imperial constitutions, effectively *lex regia*.

Under Tiberius, the Senate itself became a high criminal court.

### **Law in the Dominate or Absolute Monarchy 284-565**

Also known as the *empire*, so-called, from Diocletian to Justinian with a concentration of all ultimate power legislative, executive, and judicial in the hands of the emperor.

Some remnants of legal authority left with the *praetors*, but most of this authority had shifted to imperial appointments.

Ultimately, it marked the triumph of the *imperial constitution*.

### **Sources of Law in the Dominate**

Custom

Imperial Constitutions

### **The *Corpus Juris of Justinian (Justinian's Code)***

Ten individuals appointed to combine earlier laws in A.D. 529.

### **The *Digest***

Collating and reviewing the whole mass of Roman law. Justinian ordered that there was to be no interpretation of the *Digest* after it was set in writing.

Unlike the empire, Roman law has survived through numerous avenues and remains a functioning part of modern domestic and international law.

**Mid-Term Examination Friday, January 29. This exam will cover material from the beginning of the course up to and including Roman law.**

## **The Two Swords: Law Courts, and Society in the Middle Ages**

### **Law in the *Dark Ages* (455-800)**

The loss of literacy and knowledge in Western Europe forced a general recourse to customary law with some sporadic additions of Roman law in oral form. Law in the Byzantine Empire was an exception as was Canon Law, and Islamic Law.

Tribal customs: using elders under oath as a form of jury, and trial by ordeal and combat. Reversion to the oral tradition, with limitations on the tribal king of chief who was simply the *first among equals, primus inter pares*.

### **Islamic Law**

The *shari'a* or straight path is the body of Islamic law, God's law. The *shari'a* is based on three sources:

The Qur'an

*Hadith*-traditions, sayings and actions attributed directly to Muhammad.

*Sunna*-general traditions related to Muhammad.

Legal questions are answered through a process of *analytical deduction* known as *qiyas* which employs a systematic examination of the three sources. Consensus or *ijma* of the community is sought and preferred over interpretation or *ijtihad*, and generally since the eighth century *taqlid* or a legal decision based on the authority of an established predecessor has been the rule.

There is no sanctioned court system or judges. There are however individuals who are respected for their knowledge of the Qur'an and the *shari'a* who are given the title of *qadi*, and a few who based on their knowledge are considered *mujtahids* and capable of individual interpretations of the law.

There is a category of the *shari'a* that is often described as the Islamic *law of nations*, but in truth the *siyar* is simply Islamic law for non-Muslims. Much of the substance of *siyar* involves and was derived from limitations on the practice of *jihad* or *holy war*. Generally, *siyar* includes rules guarding the sanctity of embassies and ambassadors, the status of non-combatants, treatment of prisoners, and the use of certain weapons and tactics. The use of poison, on arrows or the poisoning of wells, and the targeting of women, children, the wounded and the old were forbidden for example. These limitations bring into stark contrast the indiscriminate slaughter of the knights of the First Crusade in the taking of Jerusalem in 1099, and the comparatively peaceful and humane capture of the city by Salah al-Din in 1187. But they also bring into question the recent application of *jihad* by radical terrorists in the name of Islam.

### **Law in the Middle Ages (800-1453, or 1485, or 1492)**

The Middle Ages in Europe began with the crowning of Charlemagne as Holy Roman Emperor by the pope in Rome on Christmas Day 800. The date for its ending depends on one's source. Was it 1453 and the fall of Constantinople (Byzantium or modern Istanbul) to the Ottoman Turks, or the end of the Hundred Years War between the kings of England and France? Was it 1485 and the end of the Wars of the Roses in England? Or was it 1492 and the end of Muslim rule in Spain, or even the first voyage of Christopher Columbus to the New World?

### **Sources of Law in the Middle Ages**

Customary law  
King's law  
*Canon law*

Of the three only *canon law* was at all consistent and written, while customary laws and the laws of various princes and kings was local, and of course custom was an oral tradition.

### **The Two Swords**

One of the characteristic political struggles during the Middle Ages was between prince and bishop...the state and the church. Effective two legal systems emerged side by side, one for the state, the other for the church, the *Two Swords*. The battle continued until the Reformation and the Thirty Years War on the continent and the reign of Henry VIII in England. The problem was best portrayed in the conflict between Henry II of England and the Bishop of England (and Henry's former best friend) Thomas á Becket.

### **The Evolution of Law, and Courts in England**

The evolution of law and courts in England marks the beginning of the modern Anglo-American judicial tradition, and begins a stark separation with continental law much of which derived from Roman law whereby trials resembled inquisitions.

English law comprised a combination of influences, Roman, tribal, Norman, the constitutions of kings, and above all *custom*.

**King William I**, the Duke of Normandy, the *Conqueror* included in his post-Hastings (1066) triumph a king's council, the *curia regis* made up of his nobles and high churchmen. Part of the council's duties was to try disputes.

William's son, **Henry I**, divided the functions of the *curia regis* in two: one judicial and the other financial. He also sent members of the council cross country to try disputes rather than make petitioners come to the court. This was the beginning of the notion of the *circuit court*.

Under William's great grandson, **Henry II**, English law approached a true sense of constitutional law. Henry was well aware of the early Anglo-Saxon practice of using the

tribal council of elders under oath as a form of jury, as well as trial by combat and ordeal in which God was expected to decide the issue. Henry added to this the practices of *inquest* and *investigation* by selecting twelve of the accused neighbors appointing them to agree upon a *vere dictum*, a verdict. The right to such a trial was to be open to any freeman. Appeal to the king, or trial by combat was allowed. Note Sir Walter Scott's Ivanhoe and the role of the *champion*.

Originally, most local disputes were determined by local barons but with Henry II *royal writs* could be made to appear in the king's court. In time the process of writs became common and more complicated. This process reduced the legal authority of the barons.

Henry II also attempted to bridge the gap between the king's law or as it was coming into being secular law and the law of the church, *canon law*. Since the late Roman Empire church clerics (bishops, priests, monks, crusaders, students, and servants of clerics) were subject only to *canon law* and thus were immune from the king's court; they even had the right of appeal to papal authority in Rome. In 1164 drafted the *Constitutions of Clarendon* that would bind English clerics to the customs of the realm and prohibited appeals to Rome. One bishop challenged this ruling, the king's former best friend and his bishop, Thomas á Becket, with tragic consequences.

It became a common maxim of English law that *legal memory began with the accession of Richard I*, not that Richard had much to do with it, but rather this was the time that his father's laws became the foundations of the English Common Law which was the same all over the land

### ***Magna Carta, the Great Charter or the Big Paper***

With Henry's constitutions clerics and nobles were becoming upset; the former because they had been set under the common law of the realm, the latter because the power of the central government and law was reducing their authority (as it was meant to do). These grievances came to a head under King **John I**, *Lackland* or *Softsword*, Henry II's youngest son, and yes the villainous Prince John who had betrayed his brother Richard I, *Coeur de Lion*-the *Lionheart*. Making matters worse John was also known as one of the most *erratic and unscrupulous* kings of England.

While John was in France attempting secure English lands on the continent, which he failed to do losing the Battle of Bouvines (1214) to King Philip II of France his clerics and many of his barons conspired to action.

John had effectively suffered papal interdict, and the threat of excommunication; he had ordered the murder of his nephew; and effectively had alienated the French, his barons, and the clerics of England.

The Archbishop of Canterbury, Stephen Langton, urged the barons to demand a return to the rights they had enjoyed under Henry I, and indeed many of them renounced their loyalty to John. In June of 1215 a group of barons and their knights confronted the King at Runnymede on the banks of the Thames River some 20 miles outside of London.

After days of wrangling John finally accepted an agreement that has come to be known as the *Magna Carta*.

Written in Latin on one large parchment, the document listed 63 provisions, most of which emphasized that the barons had rights that even the king could not set aside without due *process of law*. Generally, the *Magna Carta* is noted for its guarantees of individual rights and due process of law, but it was designed to protect only the barons. Poor Latin is blamed in part for a passage that could be interpreted to mean that it applied to all freemen.

*We have also granted to all freemen of our kingdom, for us and our heirs, forever all the liberties underwritten to be had and held by them and their heirs of us and our heirs forever.*

Specifically the charter emphasized that no man could be placed on trial without credible witnesses against him; that no man could be imprisoned or stripped of his rights without recourse to a judgment of his peers; that seizure of property must involve compensation; and that fines or other punishment must be equal to the offense of a crime.

*Throughout the document it is implied that here is a law which is above the King and which even he must not break. This reaffirmation of a supreme law and its expression in a general charter is the great work of Magna Carta; and this alone justifies the respect in which men have held it.* Winston S. Churchill, *A History of the English Speaking Peoples: The Birth of Britain*, 1956.

The charter was revisited again in 1225 (and after).

In 1250 a judge by the name of Henry Bracton compiled a book of some 900 pages, *A Tract on the Laws and Customs of England* which listed numerous cases, commentary and rulings. It began a process by which *case law* entered the fray and created a sense of *legal precedent*. Not that England needed digests or codes, for in theory at least the law was always there; it just needed to be discovered.

### **St. Thomas Aquinas (1225-1274)**

St. Thomas was a medieval churchman and Aristotelian who attempted a synthesis between the thought of the Greeks (especially Aristotle), medieval thought, and Christian dogma. His theological impulses were tempered by the influence of Aristotle. His main work was the *Summa Theologica*.

His sources were limited and he clearly made use of kindred writers in the Islamic world: ibn Sina (Avicenna), and ibn Rushd (Averroes). It is ironic that a major source for the reintroduction of classical learning in Europe should come through Arabic rather than Latin or Greek.

For St. Thomas the moral purpose of government was paramount. Happiness and the good life in this existence leads to happiness and a good life in the next. One is the foundation of the other.

He defended monarchy, but stressed that *true government* is distinguished from tyranny by being *lawful*.

St. Thomas listed four forms of law:

*Eternal Law*-identical with the reason of God and beyond human comprehension.

*Natural Law*-man's participation in God's law.

*Divine Law*- revelation: Moses and the commandments.

*Human Law*-man's laws both *jus civili* and *jus gentium*.

Law seen as *an ordinance of reason for the common good. Made by him who has care of the community and promulgated. Promulgation* was considered essential-that is that something is the product of whole people for the common good.

### **Laws of War**

*Bellum justum*

*Jus in belli*

### **The Early Origins of Parliament**

England's Parliament (from the French *parler*, to speak) as a keystone to government began with the heirs of John I, his son Henry III and grandson Edward I. The idea of forming a council made up of knights and local burgesses from every shire was institutionalized under Edward as a body to help make national policy, impose taxes, and mold public opinion, and eventually to make laws and actually govern.

The evolution of Parliamentary power in England was a long one which coincided with the split between Catholicism and Protestantism. Parliament was clearly secondary under the early Tudors, especially Henry VIII. Elizabeth created the illusion that Parliament ruled England when in fact she did. A crisis began to brew with James I, and boiled over with Charles I leading to civil war.

Views of Sir Thomas More in Robert Bolt's play A Man For All Seasons:

More-*I believe, when statesmen forsake their own private conscience for the sake of their public duties they lead their country by a short route to chaos.*

More-*And go he should if he was the Devil himself until he broke the law.*

Roper-*So, now you'd give the Devil benefit of law?*

More-*Yes. What would you do? Cut a great road through the law to get at the Devil?*

Roper-*I'd cut down every law in England to do that!*

*More-Oh? And when the last law was down and Devil turned round on you-where would you hide Roper, the laws all being flat? This country's planted thick with laws from coast to coast-man's laws, not God's and if you cut them down-and you're just the man to do it-d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.*

True to his conscience, More was tried for treason over the king's oath and the *Act of Supremacy*. He was found guilty, and beheaded in 1535, *I die the king's good servant, but God's first*.

### **The English Civil War**

The question of who ultimately ruled England and who made law, the monarchy or Parliament, came to a head with James I and Charles I with dramatic impact on the so-called Anglo-American tradition; in effect it was the beginning of modern law and constitutions in that tradition.

As Americans we tend to overemphasize the importance of the American Revolution and even the French Revolution, and we certainly underestimate the importance of the English Civil War:

*The French Revolution has not received more attention than it deserves; but in comparison disproportionately little attention has been given to the English Civil Wars of the seventeenth century.* Francis D. Wormuth, *The Origins of Modern Constitutionalism*, 1949.

James I (son of Mary Queen of Scots, and cousin of Elizabeth I) assumed the throne in 1603. He advocated traditional notions of absolutism and the *divine right of kings* (Jean Bodin).

What became a dispute over constitutional supremacy between the King and Parliament began as something closer to an attempt to establish or reestablish a constitutional balance. Initially, the key figures were King James I, Sir Thomas Smith, Sir Francis Bacon, and Sir Edward Coke.

The state of sixteenth century English constitutional theory was best represented by Sir Thomas Smith's *De republica Anglorum* written in 1565 and published in 1583. Often cited as taking the extreme side of parliamentary supremacy, Smith, in fact, described the king as the "authority" for everything done in English government but also cited Parliament as "the most high and absolute power of the realm," and the most important point in his book that the constitution essentially consisted of English courts and that the highest court in the realm was Parliament.<sup>1</sup>

James' first "controversy" was not over the ultimate question of constitutional supremacy with Parliament but rather concerning the courts of common law and the issue of *royal prerogative* which he assumed was clearly his. The subsequent argument set Sir Francis

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<sup>1</sup> George H. Sabine, *A History of Political Theory*, 3<sup>rd</sup> Ed., (New York: Holt, Rinehart and Winston, 1961), 449.

Bacon on one side and Sir Edward Coke on the other and the original substance of the dispute as not absolute power but the proper balance between the King and the courts, and a rightful place "...for the King and every other organ of government without the supremacy of any." "The King regarded himself as the fountainhead of justice and the judges as his ministers, and hence he claimed the right to instruct them in cases touching his prerogative..." It is also clear that would intend to govern without Parliament.<sup>2</sup>

Sir Francis Bacon never advocated *absolute* royal power but increasingly had to defend positions that approximated it (note his work, *New Atlantis*, 1627). He believed in a strong *royal prerogative* and royal power but always with the model of the Tudor monarchs in mind where the King was the "trusted leader of the nation and of parliament," something he attempted to encourage James to embrace when he took the throne. Bacon's embrace of *royal prerogative* was "sincere" as emphasized in his essay *Of Judicature* wherein Bacon noted, as did the King, "the propriety of the courts' keeping clear of questions of state and royal prerogative; judges should be lions but 'lions under the throne.'"<sup>3</sup>

Sir Edward Coke, the chief justice, assumed opposition to James' efforts to expand *royal prerogative*. Coke began from the fundamental belief in and reverence for the *common law* which he perceived as the "fundamental law of the realm and the embodiment of reason."<sup>4</sup> He also described the common law as a "mystery" and himself as "its chief technician." For Coke the *common law* "...assigned to the king his powers, to each of the courts of the realm its proper jurisdiction, and indeed to every Englishman the rights and privileges of his station."<sup>5</sup> And what the common law established was fixed, and certainly beyond the whim of a monarch or Parliament who wished to change them.

It is said that James I steered the English ship of state towards the rocks, but that his son Charles I ran it aground. Charles I took the throne in 1625 with a more tolerant outlook than his father, but one that still insisted on the supremacy of the King over Parliament.

Open conflict erupted over who controlled the purse strings in England.

1642-1645-The First Civil War. The rise of Oliver Cromwell and the Puritans. The first war ended in a truce.

1648-The Second Civil War. Charles allied himself with the Scots, but lost nevertheless.

1649-Charles tried by Parliament for treason (bringing a foreign army onto English soil). He was found guilty and sentenced to death, and later beheaded.

*The Commonwealth*-actually a dictatorship by the Puritans and Cromwell (and later his son).

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<sup>2</sup> Ibid., 449-450.

<sup>3</sup> Ibid., 450-451.

<sup>4</sup> Ibid., 451.

<sup>5</sup> Ibid., 452.

*The Restoration* -1660-Charles II. His brother James II attempted to restore Catholicism and was tried for attempting to subvert the English Constitution. Found guilty he was banished.

*The Glorious Revolution*-1688-1689-William of Orange and wife Mary (daughter of James II) invited to England to serve as *constitutional* monarchs beginning the rule of Parliament, government based upon laws promulgated by Parliament as representatives of the people.

*Thomas Hobbes* (1588-1679). Something of a witness to the horrors of civil war, Hobbes determined that law and government were a necessity and must have authority to govern. He favored a strong central government that held almost absolute power, but a government that had to be established according to a *popular contract*, a *constitution*. Law was simply the product of that constitution and the established sovereign, however defined.

*John Locke* (1632-1704). Like Hobbes, Locke demanded that government must be the product of a popular contract, but held that since people were born with reason and *unalienable rights* that the necessity of government was limited, and that it was held in check by the popular right to change it if it failed to uphold its contractual duties, i.e. protect the rights of the citizens.

*The Anglo-American Legal Tradition*. Despite a war of independence and the Atlantic Ocean, the United States remained tied to the mother country by essential concepts of law. *The Declaration of Independence*, *Federal Constitution*, and the *Bill of Rights* all have their foundations in English tradition, as do the essential theories surrounding the courts including the fundamental concept of *habeas corpus*. But dramatic changes involved the creation of a republic, and an independent judiciary (and *judicial review*), the latter being according to Francis D. Wormuth the single original American contribution to the extended theory of law and politics.

#### ***The Code Civil or Napoleon's Code (March 21, 1804)***

Napoleon Bonaparte as First Consul of France hoped to combine the main tenets of the revolution, the rights of man: equality, brotherhood and liberty, with the best of old French law (customary law in the north and Roman law in the south) with emphasis on civil law (especially regarding religion). He attempted to ease criminal law. Both Napoleon and the Revolution favored importing the English idea of a jury, but this reform failed. In 1807 the code became known as the Code Napoleon and is considered his most significant lasting achievement.

**Second Mid-Term Examination Friday, February 26. This exam will cover material since the first Mid-Term including the Dark Ages, the Middle Ages, the evolution of the common law in England, St. Thomas, the triumph of Parliament in England, the emergence of the Anglo-American Legal Tradition, and the *Code Napoleon*.**

