

## A HISTORICAL INTRODUCTION TO ENGLISH LAW

There are some stories that need to be told anew to every generation. This book tells one such story. It explores the historical origins of the common law and explains why that story needs to be understood by all who study or come into contact with English law. The book functions as the prequel to what students learn during their law degrees or for the SQE. It can be read in preparation for, or as part of, modules introducing the study of English law or as a starting point for specialist modules on legal history or aspects of legal history. This book will not only help students understand and contextualise their study of the current law but it will also show them that the options they have to change the law are greater than they might assume from just studying the current law.

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# A HISTORICAL INTRODUCTION TO ENGLISH LAW

Genesis of the Common Law

RUSSELL SANDBERG

*Cardiff University*



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To Emma, with love.

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## Prologue

### The Man of Law's Tale

It was five thousand years since all of life on Earth had been destroyed. Just before the solar flares hit the planet, representatives from the human race had boarded a giant space ship. Aboard that ship, named 'Freedonia', those representatives entered cryogenic chambers and underwent suspended animation. For five thousand years, they were asleep out amongst the stars. They were only to be revived once it was safe to return to the Earth.

Five thousand years previously, the Council of the World Executive had decided that in order to preserve and eventually replicate humanity's achievements, the ship would be peopled with representatives from each country. Furthermore, reflecting the highly compartmentalised society that existed at the time and the need to build a new earth society, there would be one representative from each occupation within the delegation from each country.

Now, as the survivors of the human race were revived from their suspended animation, the commanders of the mission met not only with the lead representatives from each of the countries but also with the representatives from each occupation so that lessons could be learnt from their previous experiences on their return to the purified Earth.

Today, the commanders were meeting with the lawyers and the time had come for them to meet with the volunteer who had boarded the ship to represent the English legal profession. The Man of Law shook hands with the commanders. It was his first meeting for five thousand years; it was their sixth meeting that morning.

One of the commanders began the meeting with a frown. 'We do not seem to have a copy of your country's constitution in the electronic depository', he shrugged, already tired of administrative errors.

'Ah', the Man of Law exclaimed, 'that is because we don't have one. Well, there's no one written constitution or constitutional document. Instead, our constitutional rules are scattered in a variety of legal forms.'

The commander frowned further. 'And what about your code of civil law and your code of criminal law?', he enquired, scrolling on the electronic screen in front of him trying unsuccessfully to find them.

'We don't have any codes of law as such', replied the Man of Law, pushing up his glasses. 'The law of England is to be found in many different sources but the two most important types are Acts of Parliament – often called statutes – which are made and passed by Parliament to which the monarch then gives Royal Assent; and the decisions made by judges.'

‘Do you not even distinguish between civil and criminal law?’ responded the commander, treating himself to a short laugh.

‘Yes, of course, we distinguish the two’, replied the Man of Law, grabbing his lapels. ‘Criminal law largely applies to rules that are enforced by the State. So, criminal cases usually the form of “*R v. Bloggs*”, R being short for the Crown, personifying that they are being brought by the State. Technically R stands for “Rex” if the monarch is male or “Regina” if the monarch is female.’

The commander nodded, which the Man of Law took as encouragement to continue his lecture.

‘In contrast, civil cases are usually between two individuals. So, the case is referenced as “*Bloggs v. Jones*”. Oh, and by the way, the word “v” is written as “v” but pronounced as “and”. The two parties are known as the claimant (the person bringing the claim, who used to be known as the plaintiff) and the defendant (the person defending the claim). There’s a variety of different forms of civil law and they can be distinguished in different ways. There’s property law and there’s the law of agreements, known as contract law. There’s also the law of private wrongs, known as tort law – that’s from the French word meaning “wrong”. That covers the situation where, say, I commit a wrong against you: if it’s a criminal wrong, then the State could prosecute me; but if you suffer damage, then you could sue me in tort.’

The Man of Law paused for breath and the commander took advantage of this to interrupt. ‘So, English law was made by the judges then?’ he enquired.

‘Well’, replied the Man of Law, ‘that’s an interesting question. Parliament is supreme and creates the law through Acts of Parliament. And technically, the judges are there to declare or apply the law rather than to create it. However, as they apply the law to new circumstances, they are inevitably creating law. We call that – well, we called that – the common law.’

The commander’s frown increased further.

‘It’s not a free for all’, exclaimed the Man of Law, ‘because of the system of precedent. Basically, the decisions of higher courts are binding on lower courts. The principle that the case establishes becomes binding precedent. We call that part of the judgment the *ratio decidendi*, to give you the Latin. Other things that the judge says that are not the point that determines the judgment are known as *obiter dicta*. Working out what is *ratio* and what is *obiter* in a legal judgment is a key lawyerly skill. It’s often not clear cut.’

The commander interjected, ‘So you are telling me that English law has no singular constitutional document, no criminal or civil codes and that your role is to find and interpret laws in thousands of Acts of Parliament and how they have been interpreted by the common law judges?’

The Man of Law nodded.

‘But how can we get a sense of your achievements and accomplishments then?’ the commander continued. ‘How can we see how your law has developed? How can we understand English law if there is no one constitution or code, no singular book of law?’

‘Ah’, interrupted the Man of Law. ‘There is no book. But there was a man.’

The Man of Law proceeded to tell the commander that many books had been written that sought to describe the common law at any one moment and that as time went on many

books had been written devoted to exploring in detail particular areas of English law such as criminal law or contract law. However, he noted, one author stood out: ‘the legal historian Frederic William Maitland (1850–1906).’

‘The common law developed in a pragmatic and piecemeal way’, the Man of Law continued. ‘It had no singular author but developed over time with each generation adapting it to fit their circumstances and needs. It was characterised by change but also by continuity. And that means that the English common law can only be truly understood historically.’

The commander nodded and the Man of Law warned to his theme.

‘You cannot really understand the common law as a whole’, the Man of Law continued. ‘You can only ever see parts of it. One approach, favoured by the law schools, was to explore the common law bit by bit, examining each area and what the law was at that time, looking at statutes and the decisions of senior courts. But that only gives you part of the picture. English law needs to be understood historically.’

‘And this Maitland fellow was the pioneer of the historical study of the common law?’ asked the commander.

The Man of Law grinned and proceeded to explain that, although there had been important legal historians before and after Maitland, it was Maitland who is seen as the founder of the study of English legal history. It was his work that established the framework for understanding the history of the common law, and it was Maitland who stressed the need to understand the past in its own terms rather than reading back later expectations and values.

‘I see’, replied the commander. ‘But if we look at English law through a man’s work rather than looking at a constitution or a code, are we not just seeing his interpretation?’

‘That is true’, considered the Man of Law. ‘You could say that the common law is really a collection of memories that became stories and those stories then mutate into being histories. But you are right: they are always interpretations. It is important that we retell the stories of the common law but also that we question and are critical about those stories. We need to cast critical light upon the stories that the common law tells and the stories that we forget. We need to listen to Maitland but also need to dialogue with him.’

The commander paused and considered this before asking, ‘What are the main stories of the common law? What do we need to know in order to understand the development of English law and to shape its future?’

‘There are so many stories’, the Man of Law replied. ‘One group of stories surrounds the origins of the common law – its genesis. These are the stories about how the legal system developed in England before and after the Norman Conquest of 1066 during the medieval period up to and including the Civil War. It is not a continuous tale of progress, far from it. It’s a tale – no it’s a number of tales – of how legal ideas and institutions adapted, developed and then fell out of use; how they grew and regressed; and how law is always moulded by human hands and shaped by human experience. The common law is created by people and also affects people, advantaging some and disadvantaging others.’

The commander nodded. The Man of Law then proceeded to tell the stories that you will find in this book.

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