

History and Application of Common Law Family

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1. Introduction

The world is guided through several type of legal system. Legal system is system of rules which controls the society and provides the several rules and regulations to implement the particular law in the given society. It is also system of rules that governs the social behavior and it studies the structure of rules and expected the role of law in society. There are law making enforcing and adjudicating institutions which works to implement and execute the law. Such way of executing and implementing the rules and regulations said to be the legal systems. Here, 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 professionals helped administer, develop, and maintain law and procedure, and why it is still relevant today.

Every country has its own legal system to govern the nation. Countries have constitutionally defined different organ and their working procedure to balance the society under the constitutional and legislative provision. All the procedure to govern the country is known as legal system of the country in one understanding. Judicial system, executive system, parliament system, law making process, law enforcing, law implementing system, penal system, criminal law justice system and other relating issues are known the legal system. So, legal system is known as a system of rules, procedure, and process of the state to govern the nation. To identify the legal system of the

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country, there should be at least, content, structure, identity and existence to be a legal system. Legal system refers to a procedure or process for interpreting and enforcing the law. It elaborates the rights and responsibilities in a variety of ways. Three major legal systems of the world consist of civil law, common law and religious law.¹ Beside this, Socialist legal system has its own origin and scope towards the countries in the world.

Common Law Family, Civil Law Family, Religious Law Family, Socialist Law Family are known as the major legal system of the world. However, these legal systems have directly and indirectly impacted in the world. With the generation of these legal systems have scattered in the world and influenced each other. By this, country started to influence and reception the good features of the legal system and made own legal system. Mostly, the developed and developing countries started to follow the systems of the Romano-Germanic Legal Systems (Civil Law System), the Common Legal System, The Muslim Legal System, The Hindu Legal System and The Socialist Legal System and they made one legal system. Now, America, Canada, China, Russia and other developed countries want to influence their legal system to other countries. Legal System in Germany, French Legal System, and Judicial System in Spain, Judicial System in Portugal, Judicial System in Norway, Judicial System in Denmark, Judicial System in Sweden, and Judicial System in Finland has separate existence in the history and development of Civil Legal System in the world. Beside this, British Legal System, Indian Legal System, Legal System in Singapore, American Legal System, Legal System of Australia, Legal System of Malaysia have special existence in the development of Common Legal System.

The diversity of law poses a problem since the laws of the world are expressed in many different languages and forms and since they have evolved in the societies where the social organization, beliefs and social manners vary. As there are classification in different sciences, the laws can also be reduced to a limited number of families.² The world has been faced new technology and development. The reconciliation issues have become a novel idea to exchange legal system each other among the countries. Actually, countries have responsibility to follow the best features like the concept of Judicial Review, Liberty, Equality, precedent applying because almost all countries

¹ <https://definitions.uslegal.com/legal-system/> retrieved on 11th August 2019.

² DR. S.R MYNENI, LEGAL SYSTEMS OF THE WORLD, (Reprint), Asia Law House, Hyderabad, 1. (2011).

follow the rules of International Law. Beside this, the enter into the WTO, impact of globalization, members of European Union, African Union, Member of SAARC countries together exchange the sources of legal system each other. However, as per the need and sprit of the people in the country, demand of the Constitution every country is making their own legal system popular.

It is hard to search the facts of unanimous legal history. Philosophers gave their own version to define law and legal principles. It is based on their inner academic horizon but legal system represents its history. Legal system is dynamic nature it can't be static. This frustrating difficulty has been experienced particularly by those who have attempted to unravel the complex skein of English legal history.³ However, Roman law played vital role . Common law is rooted in centuries of English history. It emphasizes the centrality of the judge in the gradual development of law and the idea that law is found in the distillation and continual restatement of legal doctrine through the decision of the courts. Prior to the Norman Conquest of England in 1066, there was no unitary, national legal system. Before 1066 the English legal system involved a mass of oral customary rules, which varied according to region. The law of the Jutes in the south of England, for example, was different from that of the *Mercians* in the middle of the country (see map below). Each county had its own local court dispensing its own justice in accordance with local customs that varied from community to community and were enforced in often arbitrary fashion.⁴

Common Law developed in England since around 11th Century and started to dominate in the world. USA, Canada, Australia, New Zealand, Malaysia, India and other countries of the British Commonwealth followed Common Legal System to govern the Nation. Nepal is also directly and indirectly influenced to follow Common Legal System. The Judiciary of Nepal deeply rooted to implement the general principle of Criminal Law, Judge appoint system, decision making in separate Judgment in the influence of Common Law.

Judicial decisions, domination of Precedent, Customary Law has been administrated in England since around 11th Century in England known as Common Law Family. It is also called Anglo American Law, British Legal

³ EDWARD D RE, *The Roman Contribution to the Common Law*, FORDHAM LAW REVIEW, Vol. 29 | Issue 3, 1. (1961).

⁴ <https://www.open.edu/openlearn/society-politics-law/judges-and-the-law/content-section-2.1> retrieved August 8th 2019.

System, English Law etc. Those countries who was colonized from British is mostly influenced by Common Legal System. From it has evolved the type of legal system now found also in the United States and in most of the member states of the Commonwealth (formerly the British Commonwealth of Nations). In this sense common law stands in contrast to the legal system derived from civil law, now widespread in continental Europe and elsewhere.⁵

Common law is generally *uncodified*. This means that there is no comprehensive compilation of legal rules and statutes. While common law does rely on some scattered statutes, which are legislative decisions, it is largely based on *precedent*, meaning the judicial decisions that have already been made in similar cases. These precedents are maintained over time through the records of the courts as well as historically documented in collections of case law known as yearbooks and reports. The precedents to be applied in the decision of each new case are determined by the presiding judge. As a result, judges have an enormous role in shaping American and British law. Common law functions as an adversarial system, a contest between two opposing parties before a judge who moderates. A jury of ordinary people without legal training decides on the facts of the case. The judge then determines the appropriate sentence based on the jury's verdict.⁶

Common Law is the system of law that emerged in England beginning in the Middle Ages and is based on case law and precedent rather than codified law which describes legal principles and concepts which evolved over centuries but judges in English court. The term 'common law' is derived from after the Norman Conquest. It refers to all those legal systems which have adopted the historic English legal system. The common law was that the whole country had in common rather than particular tribal laws that might apply between smaller communities. Common Law refers to law developed by judges through decision of courts and similar tribunals rather than through legislative statutes or executive action and to corresponding legal system that rely on precedential case law. The body of precedent is called "common Law" and it binds future decisions.

The usual distinction to be made between the two systems is that the former, common law system. tends to be case centered, allowing scope for a

⁵ <https://www.britannica.com/topic/common-law/The-modernization-of-common-law-in-Great-Britain> retrieved in 8th August 2019

⁶ <http://www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html> retrieved in 02 February 2019.

discretionary, ad hoc, pragmatic approach to the particular problems that appear before the courts; whereas the latter, Civil Law system, tends to be codified body of general abstract principles which control the exercise of judicial discretion.⁷ The Common Law as we know is English Law. The English courts in the England developed it after Norman Conquest. Its fundamental basis was conventions, customs and general practice of the society, which did the English courts in various kind of dispute apply. The dispute, which was came before the court's past decision and its principle of *stare diesis* was highly recognized in the common law and should apply by the court oneself in coming same case of the court. It makes determine, formal, predictable justice system and restriction of the court and judges to change opinion of the past judgments. But it is not absolute because sometime court should change their previous opinion for the fulfillment of needs of society. The judges past judgments bound for to the government, organ of government and judges oneself. The United States, along with England and other countries once part of the British Empire, belong to the common law system.

The common law system began developing in England almost a millennium ago. By the time to England's Parliament was established, its Royal judges had already begun their decision on customary law common law to the realm. A body of decision was accumulating. Able lawyers assisted the process.⁸ It is often said that the common law system consists of unwritten "judge made" law, but now a days, most part of laws of common law follower countries are made by the legislature. So that it is incorrect to say that common law is unwritten law. The judicial decisions that have interpreted the law have, in fact, been written and have always been accessible. From the earliest time Magna Caritas a good example three has been 'legislation, what in civil systems would be called 'enacted law'. In the United States, this includes constitution as well as enactment by congress and states legislatures.⁹

2. History of Common Law

Anglo-Saxon People had developed Common Law especially in England. English common law emerged from the changing and centralizing powers of

⁷ REWATI RAJ TRIPATHEE, NEPALESE LEGAL SYSTEM. Lumbani Prakashan, Kathmandu. at 104, (2011).

⁸ U.S. (Maryland) District Court Judge of Petter J. Messitte, *A Article of Common Law v. Civil Law*.

⁹ *Ibid*

the king during the middle Ages. After the Norman Conquest in 1066, medieval kings began to consolidate power and establish new institutions of royal authority and justice. New forms of legal action established by the crown functioned through a system of *writs*, or royal orders, each of which provided a specific remedy for a specific wrong. The system of writs became so highly formalized that the laws the courts could apply based on this system often were too rigid to adequately achieve justice. In these cases, a further appeal to justice would have to be made directly to the king. This difficulty gave birth to a new kind of court, the court of *equity*, also known as the court of Chancery because it was the court of the king's chancellor. Courts of equity were authorized to apply principles of equity based on many sources (such as Roman law and natural law) rather than to apply only the common law, to achieve a just outcome.

Courts of law and courts of equity thus functioned separately until the writs system was abolished in the mid-nineteenth century. Even today, however, some U.S. states maintain separate courts of equity. Likewise, certain kinds of writs, such as warrants and subpoenas, still exist in the modern practice of common law. An example is the writ of *habeas corpus*, which protects the individual from unlawful detention. Originally an order from the king obtained by a prisoner or on his behalf, a writ of *habeas corpus* summoned the prisoner to court to determine whether he was being detained under lawful authority. *Habeas corpus* developed during the same period that produced the 1215 *Magna Carta*, or Great Charter, which declared certain individual liberties, one of the most famous being that a freeman could not be imprisoned or punished without the judgment of his peers under the law of the land—thus establishing the right to a jury trial.

In the middle Ages, common law in England coexisted, as civil law did in other countries, with other systems of law. Church courts applied canon law, urban and rural courts applied local customary law, Chancery and maritime courts applied Roman law. Only in the seventeenth century did common law triumph over the other laws, when Parliament established a permanent check on the power of the English king and claimed the right to define the common law and declare other laws subsidiary to it. This evolution of a national legal culture in England was contemporaneous with the development of national legal systems in civil law countries during the early modern period. But where legal humanists and Enlightenment scholars on

the continent looked to shared civil law tradition as well as national legislation and custom, English jurists of this era took great pride in the uniqueness of English legal customs and institutions.

That pride, perhaps mixed with envy inspired by the contemporary European movement toward codification, resulted in the first systematic, analytic treatise on English common law: William Blackstone's (1723-1780) *Commentaries on the Laws of England*. In American law, Blackstone's work now functions as the definitive source for common law precedents prior to the existence of the United States. Common law is rooted in centuries of English history. It emphasizes the centrality of the judge in the gradual development of law and the idea that law is found in the distillation and continual restatement of legal doctrine through the decision of the courts. Most law is generated, however, from the state and federal legislatures and common law is subjugated to federal and state legislative enactments. That is, common law can be overruled by legislative law (e.g. state legislatures can declare fornication between unmarried couples as legal even though the state's common law states that is illegal. Once the state passes the law, it vacates the history of the common law. However, a new common law tradition could be created around the enforcement of new legislative laws as they are enforced and brought to the attention of the court.

However, although state and federal legislatures have power over state and federal common law, the Supreme Court has the final say in interpreting the constitutionality of all state and federal legislative law and the constitutionality of state common law. Additionally, every state has a constitution and the state courts can interpret state legislative law in relation to whether it is constitutional within the constraints of that particular state's constitution. The hierarchy among the different forms of law therefore looks like-state common law-state legislatures-state constitution-federal constitution/Supreme Court. Common law consists of the rules and other doctrine developed gradually by the judges of the English royal courts as the foundation of their decision, and added to over time by judges of those various jurisdictions recognizing the authority of this accumulating doctrine. A legal rule is judge made as the source of law. It was during the period between the Norman Conquest of England and the settlement of the American colonies that many of the basic principles that eventually became part of the American system of justice were established. English common law emerged as an integral

part of the transformation of England from a loose collection of what were essentially tribal chiefdoms or proto-states to a centrally governed civilization.

Over a 400-year period, from the eighth to the eleventh centuries, this cultural system of settling disputes through local custom became increasingly formalized as the hierarchical organization of Feudalism began to slowly replace the collective and egalitarian organization of the early tribal peoples in England. Wars between various tribal groups brought growing political consolidation and increasing individual ownership of land by powerful lords. As the once collectively owned tribal lands came under the private ownership and control of feudal lords, the responsibility of an individual to his kinsmen was replaced by the responsibility of a person to his lord. Where the collective responsibility of kin-groups had once served as the basis of dispute settlement, it now became the responsibility and the prerogative of feudal lords to see that justice was done. As a means of consolidating power, feudal lords began requiring that dispute— be submitted to a local “court” for settlement.

By the time of the Norman conquest- in 1066, England was organized into approximately eight large kingdoms, which were at best loosely knit collections of relatively independent feudal landholdings. The basic units of social and political organization were the counties and “hundred.” The hundreds were subdivisions of counties, somewhat obscure in their origin but often privately owned and independently governed, it is estimated that at the time of the Conquest approximately half of all the hundreds were owned either by individual lords or by abbeys. The large number of hundreds owned by the church indicates the economic and political power of the Catholic Church, a situation that would bring it into direct conflict with a growing secular government in later years. The hundreds courts were essentially meetings of important hundred residents at which all manner of local problems were discussed, among them the resolution of local disputes. The right to hold court and to profit from it was the essential hallmark of a feudal ruler. Early feudal rulers required that compensatory damages he paid not to the offended party but to the lord of the hundred. The right of a lord to collect the profits resulting from the administration or Justice eventually became an essential force in the development of common law after the conquest.

In addition to the hundreds courts, feudal justice was also administered in the county courts held by the overlords of counties. These overlords could

command attendance at their courts by the lords of the hundreds and other representatives. These early county courts prefigured the later bicameral (two-house) legislatures of England House of Commons and house of the lords and the U.S. Senate and House of Representatives. It also established the relationship between the lower and higher courts in the U.S. Because the overlords of the counties were more powerful than lords of hundreds, it was possible for county courts to review and even overrule decisions rendered by lords in hundred courts, much the same way as higher courts now can overrule the decisions of the lower courts. In 1154, Henry II become the first plantagenet king. Among many achievements, Henry institutionalized common law by creating a unified system of law 'common' to the country through incorporating and elevating local custom to the national, ending local control and peculiarities, eliminating arbitrary remedies, and reinstating a *Jury* system of citizens sworn on oath to investigate reliable Criminal accusations and civil claims. The jury reached its verdict through evaluating common local knowledge, not necessarily through the presentation of evidence, a distinguishing factor from today's Civil and Criminal court systems.¹⁰

By 1066, England was halfway between tribalism and feudalism, between rule by custom and rule by state law. In such a way the history of common law can be studied as follows:

(i) Anglo Saxon Period (Before Norman Conquest 1066): This is the period of before Norman Conquest 1066. In the period of Anglo Saxon, Law was unwritten tribal custom. In the period of fifth century the Romans reign was finished, after then German tribal Angles, Danes and Jutes started to reign, according to them tribal law. At that time particular society had developed particular conventions, customs and ruled them oneself developed tribal law. According to David and Brierley, little is known about the law of the Anglo Saxon period just as in continental Europe, law were reduced to writing shortly after the convention to Christianity, these laws regulated only very limited aspect of those social relationship to which our present idea of law now extends. There was no law common to the whole of England at any time before the Norman Conquest¹¹

¹⁰ DR. S.R MYNENI, LEGAL SYSTEMS OF THE WORLD, (Reprint), Asia Law House, Hyderabad, 4. (2011).

¹¹ RENE DAVID, & JOHN E.C BRIERLY, MAJOR LEGAL SYSTEM OF THE WORLD TODAY, Stevens & Sons at 310, (1985)

Anglo Saxon Period also known as the period of Law of Customs. The Roman occupation of Britain lasted four centuries from the Emperor Claudius (AD 41-54) to the start of the 5th Century no more traces of it were left in England. For English legal historians the beginning of the history of English Law dates from the time when the Roman occupation terminated and different tribes of German origins Saxons, Jutes, Danes and Angles became masters of England. The Saxons drove the original people the celts Westward and occupied the larger part of England was converted the Christianity by the mission of St. Augustine of Canterbury in 597 A.D.¹²

(ii) Norman Period (1066-1485) By virtue of having conquered England, William the First was able to proclaim that all land and land-based rights, including those of keeping court, were now vested in the king. Through this redistribution of land and the consolidation of all rights and relationships associated with land tenure under the crown, local courts eventually came under the administration of Norman rule. The Norman ruled period is so much important period of the common law or English Law development. It is started to victory battle of Hasting. They were finished tribal custom which was expanded by Anglo Saxon period and installed feudalism. They were established good strong, united administered system in the England. They were also developed concept of writ. From Norman period to now common law follower says that where there is no writ there is no right and they are strongly followed *stare decisis* in the same or similar cases in the future.

The Norman Conquest is an event of the utmost importance in English legal history because brought to England in addition to the foreign occupation, a strong and centralized administration organization, and rich in experience that had shown it's worth in the Duchy of Normandy. With the Norman Conquest the period of tribal rule is finished and feudalism is installed.¹³ After the Norman Conquest, dispute was normally brought before the various courts just enumerated. The king only exercised 'high justice' he did not consider himself authorized to her circumstances made it impossible for justice to be rendered in the usual form. The *Cura Regis*, from which the king dispensed justice assisted by his closest officials and the persons of high rank of the kingdom, which a court for only the most important personalities and disputes; it was not an ordinary court open to all and sundry.¹⁴

¹² *MYNENI, Supra note 2 at 82.*

¹³ *Supra Note, 11. at 311*

¹⁴ *Ibid, at 313*

(iii) Rules of Equity Period: The royal court developed equity. It is derived from French word 'equite' which means justice or fairness. Where there is no common law to solve the dispute, which dispute is before the court, the court should fair-haired and apply fair, just or appropriate measure for the judgments. Where the common law could not fulfill the gapes of law, lawlessness, at that time equity is applied in the dispute and rules of equity is applied only civil dispute not for criminal offences. Equity has developed in the in the 15th century. In this period Chancellor became more and autonomous. Judge deciding alone in the name of the king and council upon a delegation of their authority¹⁵. Where not remedies in the common law there were was applied equity for the justice or fairness. The equity has developed some basic principles, such as equity did not go against the common Law. It means equity follows the common law. Who comes to equity must come with clean hand. It means the party who is relying upon and equity rule, must not he have acted in an improper manner.¹⁶

(iv) Modern Period: In the modern period has developed extremely the concept of written law, codified and determined law. The great English jurist Bentham advocated about written law at first then started to make written law but not accepted code system. After 19th century has developed liberal democratic system, rule of law, parliamentary supremacy. It has made radical reform of common law system. Judicial organization was also greatly changed by the judicature Act of 1873-1875 which removed the form distinction between common law courts and the courts of chancellor; all English court become empower to apply the rules of common law as well as those of equity, unlike the earlier position when a common law court could only award a common law remedy and one had to seek a remedy available in equity from the chancery court.¹⁷

The work of modernization that began in the 19th century continues today but with some new features. The liberalism dominant until 1914 has been replaced by a socialist trend attempting to create new social order. With this change the common law is undergoing a serious crisis; the judicial and case by case methods characteristic of its original development are no longer suited to the idea of bringing about rapid and extensive social change. Statutes

¹⁵ *Ibid*, at 325

¹⁶ *Ibid*, at 112

¹⁷ *Ibid*, at 330-331

and regulations now occupy a far more important place than they did in the past. The setting up of many new administrative regimes has brought about much litigation between citizen and government, which numerous bodies, alongside the ordinary court, have been established to handle. Because of the volume of this work and the need for special expertise in many fields, which the regular judiciary did not have, it was thought inappropriate to place such matters within the jurisdiction of the regular court.¹⁸

(v) Common Law Following Country: The common law constitutes the basis of the legal system of England and Wales, Northern Ireland, federal law in the US and the law of individual U.S. states (except Louisiana), federal law through Canada and the law of the individual provinces and territories (except Quebec), Australia (both federal and individual states) New Zealand, South Africa, India, Malaysia, Brunei, Pakistan, Singapore, Hong Kong, and many other generally.

(vi) Common Law as opposed to Statutory Law and Regulatory Law: The connotation distinguishes the authority that promulgated a law. For example, most areas of law in most Anglo-American jurisdictions include “statutory law” enacted by a legislature “regulatory law promulgated by executive branch agencies pursuant to delegation of rule-making authority from the legislature, and common law or ‘case law’, i.e. decisions issue by courts. This first connotations can be further differentiated into (a) pure common law arising from the traditional and inherent authority courts to say what the law is, even in absence of an underlying statute, i.e., most criminal law and procedural law before 20th century, and even today, most of contract law and the law of torts, and (b) court decisions that decide the fine boundaries and distinctions in law promulgated by other bodies, such as judicial interpretations of the constitution, of statutes, and regulations.

(vii) Common Law Legal Systems as opposed to Civil Law legal System: This connotation differentiates “Common Law” jurisdictions and legal systems from “Civil Law” or “Code” jurisdictions. Common Law systems place great weight on court decisions, which are considered “Law” with the same force of law as statutes. By contrast, in the civil law jurisdictions (the legal tradition that prevails in, or is combined with common law in, Europe and most non-Islamic, non common law countries), judicial precedent is

¹⁸ *Ibid*, at 331-332

given less weight and scholarly literature is given more. For example, the Napoleonic Code expressly forbade French judges from pronouncing general principle of law. As a rough rule of thumb, common law systems trace their history to England, while civil law systems trace their history to Roman law.

(viii) Law as opposed to Equity: The historical distinction between ‘law’ and ‘equity’ remains important today when the case involves issues where categorizing and prioritizing rights to property, for example, the same article of property often has a ‘legal title’ and an ‘equitable title’ and these two groups of ownership rights may be held by different people. Likewise, In the US, determining whether the Seventh Amendment’s right to a jury trial applies a determination of a fact necessary to resolution of a “common law” claim or whether the issue will be decided by a judge issue of what the law is, and all issues relating to equity and the remedies available and rules of procedure to be applied.

3. Conclusion

Common Law System is one of the major legal system of the world. It is generally meant the British or English legal system. The common law system came into being in England largely as the result of the activity of royal courts of justice from the time of the Norman Conquest-1066 A.D. The Common Law was originated and developed by the court practices or efforts done by the judges. Common Law is the name for what is called as English legal system in modern times.

The common law developed from English Circuit Court. The Circuit Court judge was traveled from community to community for hearing cases. Judges kept written records of their court decisions and in the beginning decided cases based on established community standards. Over time, this judge began to unify and regulate the legal code across deferent community. To accomplish this they, used past decisions as precedent for new legal dispute. Eventually this set up legal decision evolved into national unified set of codes or common law.

In the early centuries of English common Law, the justices and judges were responsible for adapting the Write system to meet every day needs, applying a mature of precedent and common sense to build up a body of internally consistent law. Obviously the Biblical influences through precedent can be seen throughout the centuries. As Parliament developed in strength legislation

gradually overtook judicial law making so that, today judges are only able to innovate in certain very narrowly defined areas.

The origin 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. Most of the countries have following Common Legal System. This article has shown to know the origin and development 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. All legal system has own scope and importance. In today's modern world, the best features of major legal systems need to follow by the country to govern the nation systematically.

