**Law 1 Lesson 1: What is the Law?**

**What is the Law?**

We know that there are laws which govern what we can and can’t do, and from a young age we start to become aware of some of them. Children are taught not to take items from the shop without paying, and we become aware of the police and their role in keeping law and order. As we get older, we learn more explicitly about laws which impact us and the choices that we can make in our lives, and we are told about the consequences of breaking the law. As adults, more specific laws start to have a greater impact on our lives, when we want to buy property, trade a car, get married or perhaps adopt a child. Through our experience and in context we know what is meant by the law, but what actually is the law and how did we get here?

The laws of the land are the system of rules that have been agreed upon and which govern our behaviour. They dictate what is and isn’t crime and set rules for social relationships and for business. The authority to make law has changed significantly over time, not only in the UK but in most countries around the world, from a single monarch or leader to a more democratic process, though the way that law is made differs significantly from country to country as we will go on to see in this course.

**Ancient Law:**

The idea of a set of rules governing over people is undoubtedly almost as old as people themselves. There is evidence of a code of laws in Ancient Egypt over 5,000 years ago, archaeological evidence (a stone with laws inscribed on it) of a set of laws in Babylon (now part of Iraq) 3,800 years ago, and much written evidence of laws, including those made in a parliament, from the Ancient Greeks as early as 2,700 years ago. The earliest surviving recorded Greek laws were created by Draco, and were extremely harsh, leading to the word **draconian**, which is used to describe extremely harsh punishments to this day.

Ancient Law is generally assumed to have been draconian and punishments such as “an eye for an eye” have led to that conclusion. There is some truth that the ancient world was a less enlightened place and that punishment was generally about settling scores, however, it is a much more complex picture than that. Often, ancient civilisations had legal systems that were not written down, but passed down orally, and those who were able to make judgements could have some flexibility in their decisions. This would allow them to be creative with their decisions based on the facts of the situation, which is a lot more sophisticated than some would have you believe. Fairness was not always at the heart of the system though, with slaves often left without any rights, and treated as property, as women were also. This is not unique to the ancient world though, slavery was only abolished in the Western World at different points in different countries throughout the 19th century, and women barely featured in any form of law-making prior to the 20th century, and even then progress was slow.

**History of Scottish and UK Law:**

The United Kingdom did not exist prior to the 1707 Act of Union which united Scotland and England into the partnership which endures today. It has changed throughout that time, mainly due to the status of Ireland changing significantly, and in recent times the creation of the Scottish Parliament. Prior to the 1707 Act, Scotland was an independent country, meaning that it made its own laws, which naturally differed from many of those made in England. For that reason, Scotland has a different legal system from that of England and Wales, and there are some obvious differences. One of the most obvious differences is the size of juries, which are 15 in Scotland compared to 12 in England and Wales, as well as the availability of a third verdict, the controversial “Not Proven” decision which has the same effect as “Not Guilty” in practice.

Less visible differences exist between Scots Law and English law. The English system is a **Common Law** system in which judges often follow the judgements of higher courts in previous cases, though Acts of Parliament can change the law. In Scotland a **Civil Law** system, also referred to as Roman Law, was the main influence on the law, though the system also has common law elements. This makes the Scottish system something in between the dominant system in England and the dominant system in Europe. The creation of the Scottish parliament means that laws for Scotland can be made in Scotland, but also at the UK parliament (we will learn more about how law is made in the next lesson) as well as occurring as a consequence of decisions at the highest court levels including Scottish courts, the UK Supreme Court and the European Court of Human Rights.

More detail on the workings of the court system will come later in the course, but the important point here is that Scottish and English law is very similar in many respects (because so many laws have been made in parliament for the whole of the UK since 1707) but that there are also significant differences. Scotland maintained a separate legal system after the Act of Union and the two have evolved over time.

**Natural Law Versus Positivism:**

There are competing theories on the law, two of which are the theory of **Natural Law** and theory of **Positivism** (or Positive Law), each of which is the opposite of the other. Natural Law is the view that there are certain things which just should be; that morally there are certain laws which exist naturally without having to be written down or agreed. For example, people have the right to life, and there doesn’t have to be a law written down to make that the case, it is immoral to kill someone. Positivists argue that this is not the case, and that laws require to be written down in order to ensure that the law is clear. They say that something is only a law where it has been ruled to have been so by whoever has the authority to make law in that **jurisdiction**, which means the place in which those laws will apply.

There are some clear issues with each approach; if laws are based on assumptions then could this change over time, and does this make the law less clear? Meanwhile, suggesting that something is law when it is passed by the authorities gives huge power to dictators, or other individuals like monarchs, as well as taking out of the system the common sense and morality that tells us that killing other people is unlawful. The Holocaust was not illegal, slavery was not illegal and the use of child soldiers in some countries is not illegal, because there is no law making it illegal, or there is a law making the opposite behaviour illegal, such as making it illegal to set free a slave belonging to another person.

A famous exchange took place on this topic in the pages of the Harvard Law Review in 1958 among two prominent legal scholars, Lon Fuller a professor at Harvard, and Herbert Hart a professor at Oxford. This is known (for very obvious reasons) as the Fuller Hart (or Hart Fuller) Debate, and continues to be studied by law students around the world to this day. Essentially Hart argued the positivist case that law is separate from morality, whilst Fuller argued that morality was central to the law and gave it its power. The two men debated many of the finer points of each theory, Hart argued that law comes from a command, with the authority of the person who can make laws, with a punishment for breaking the law and which people generally will follow, and therefore morality does not come into it. Fuller argued that judges have to make decisions because laws are not always clear, and judges have to interpret words, but will generally take that word to mean what they think it should mean, based on natural laws, or morality. The debate was wide ranging and raised some important arguments which still divide opinion among legal scholars which is why the issue is still debated today.

**Law 1 Task 1: What is the Law?**

Please complete this week’s task as a word document and return it as an attachment on teams. The document title should be PUPIL NAME Law week 1.

**Part A:**

England operates a system based on common law, whilst most of Europe uses a civil law system, Scotland being a mixture of both. Read this short article from the Economist Magazine - <https://www.economist.com/the-economist-explains/2013/07/16/what-is-the-difference-between-common-and-civil-law> and answer the following:

Which is better, a common law or civil law system? Explain your choice.

**Part B:**

Fuller and Hart debated Natural Law and Positivity in the 1950s, with the memory of World War 2 fresh in so many people’s minds. After World War 2, many of the people involved at a high level in the Nazi regime were tried for War Crimes at the Nuremberg Trials. These trials took place even though what these people did had not been considered illegal in Nazi Germany. Watch this (17 minute-long) video – <https://www.youtube.com/watch?v=vywGZzb9O4M> and then answer the following:

The Nuremberg Trials used Natural Laws to prosecute the Nazis demonstrating that morality is more important than written down laws – in **less than** 300 words, discuss the extent to which you agree or disagree with this statement.

**Part C:**

Throughout this lesson there have been some words **in bold**. This task is optional, but you may wish to take those words down and look up their definition in order to create a glossary which may be useful to you in the future.

**Next Time:**

Having looked at where law comes from, next time we will look at how it is made.

**Further Reading:**

The following essay on what the law is makes for an interesting read if you wish to find out more about that: <https://www.thebritishacademy.ac.uk/blog/what-is-law/>

This article on ancient law is very interesting, in particular the very short section on ethical justice which has some brilliant examples: <https://leidenlawblog.nl/articles/the-ethical-dimension-of-ancient-laws>