



Max Planck Institute
LUXEMBOURG
for Procedural Law

Legal Systems, Legal Ordering and Legal Terminology

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Outline - Session One: 9th November

Key topics for discussion:

- Questions about studying the common law;
- The importance of legal language, culture and tradition;
- The structure of English law;
- What do we mean by common law?
- Historical development of the common law;
- Key characteristics of the common law;
- The spread of the common law.

What Approach to Studying the Common Law?

What is the law?

Where does one find “the law”?

What are the purpose(s) of law?

How can or should we criticise the law?

How can or should the law be used?



The Importance of Legal Language

What is legal language or legal terminology?

A vocabulary of a special subject-field:

- Terms of art (precise legal definition);
- Argot;
- Law terminology with another everyday meaning;

Why do we use it?

- The importance of communication to lawyers;
- “law only exists in human language” (Brækhus 1956)



The Importance of Legal Language

Law as a social phenomenon = legal rules, terminology and concepts differ in different legal orders.

Historical interactions between legal systems – e.g. English law and the US – yet differences.

Same legal concept; different legal terms – eg articles of association (English law) – articles of incorporation (US).



Legal Systems and Legal Traditions

Legal System

- Nature & content of rules;
- Vocabulary;
- Categories;
- Structures & methods for legislation, interpretation, application;
- Techniques & institutions for adjudication and dispute settlement.

Legal Tradition

- Set of deeply rooted, historically conditioned attitudes:
- about the nature of law,
- about the role of law in society and polity,
- about the proper organization and operation of a legal system.



Taxonomies of Legal Systems and Legal Traditions

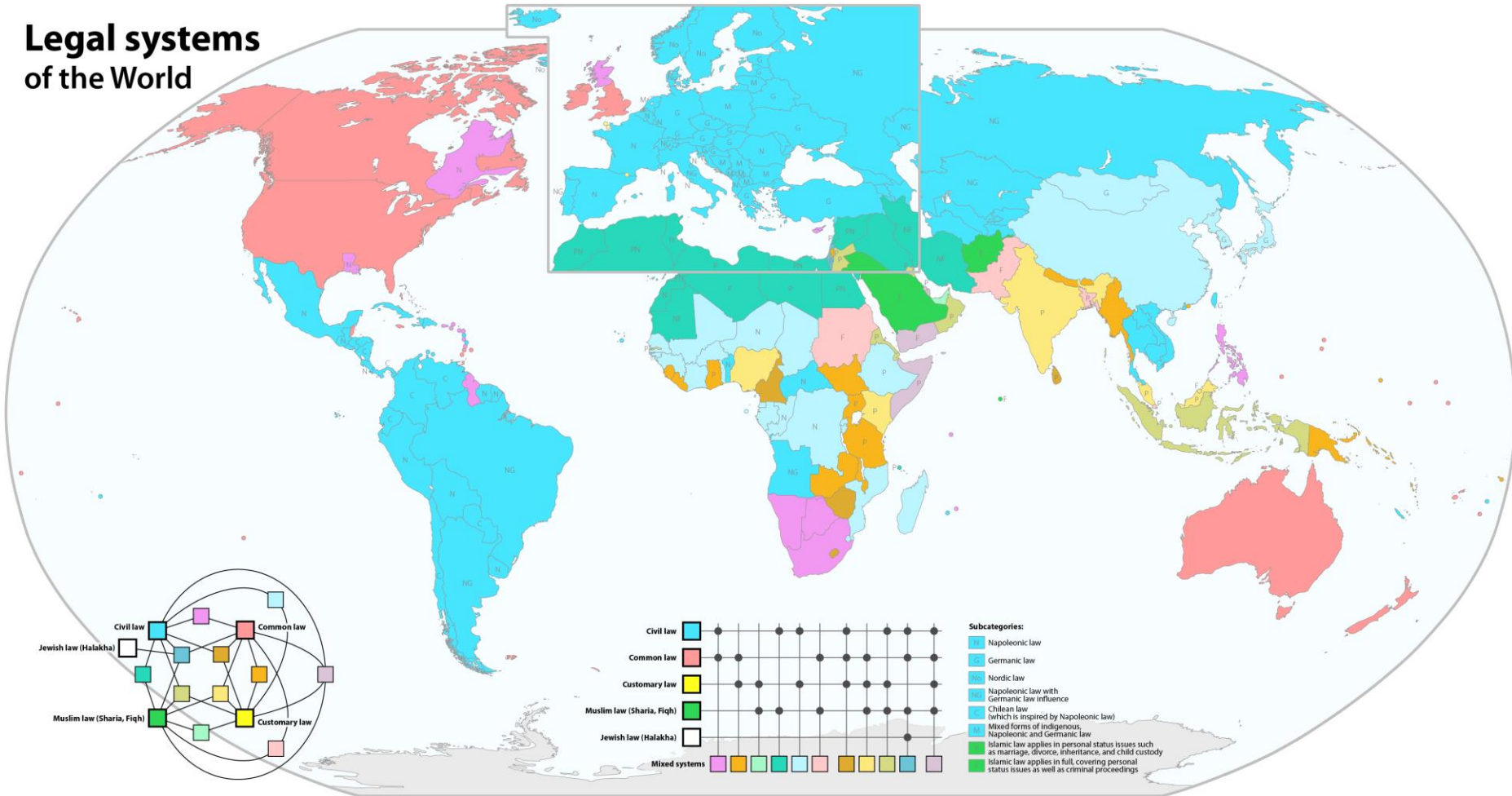
Different ways of classifying legal systems and traditions

- By legal culture or legal tradition: common, civil, religious...
- Adding multiplicity of Asian, African, socialist legal systems;
- Or by varieties of economic system or capitalism dominant in each system, organisational approaches, relational?



Mapping Legal Systems and Traditions

Legal systems of the World



What Approach to Studying the Common Law?

Law not only as a set of norms but a complex, dynamic social sub-system with deep historical-cultural dimensions.



Not a focus on the social demands on the legal system (rules on contract, tort, property, constitutional law etc).



What Approach to Studying the Common Law?

But the underlying institutions, actors and processes as well as legal culture:

- Where do ideas come from?
- How have they developed?
- How have they been employed?

Each – help us to think about the way law is or should be made, applied, studied, perfected, and taught.



What do we mean by Common Law?

- Common across the land (cf previous diversity of local custom)
- To distinguish the “common law” from specialised bodies of law (eg law of the Church; equity)
- Common law as case law or judge-made law
- Common law as a legal tradition (distinguished from civil law etc)



The Structure of the English Law



EU Law



International Law
(e.g. ECHR)



Statute



Common Law



Equity



Origins of the Common Law

Turning point in emergence of the English Common Law:



Norman conquest
- 11th century



Origins of the Common Law

Medieval ages in (now) England:

- Not unified in law or governing – multiplicity of Kingdoms;
- Diversity of local customs and “assemblies” for dispute resolution;
- Multiple influences including Celtic, Danish, Anglo-Saxon.

Changes emerge – 9th-10th centuries:

- Unification of Kingdom, with still diverse sets of actors that governed;
- Small, local assemblies applying custom to all disputes.



Emergence of the Common Law

Norman Conquest – 11th Century... ‘1066 and all that’

- Gradual emergence – mix of existing and Norman institutions and administration;
- Aim: concentrating the power and role of the King.

How? Where? Legitimacy?

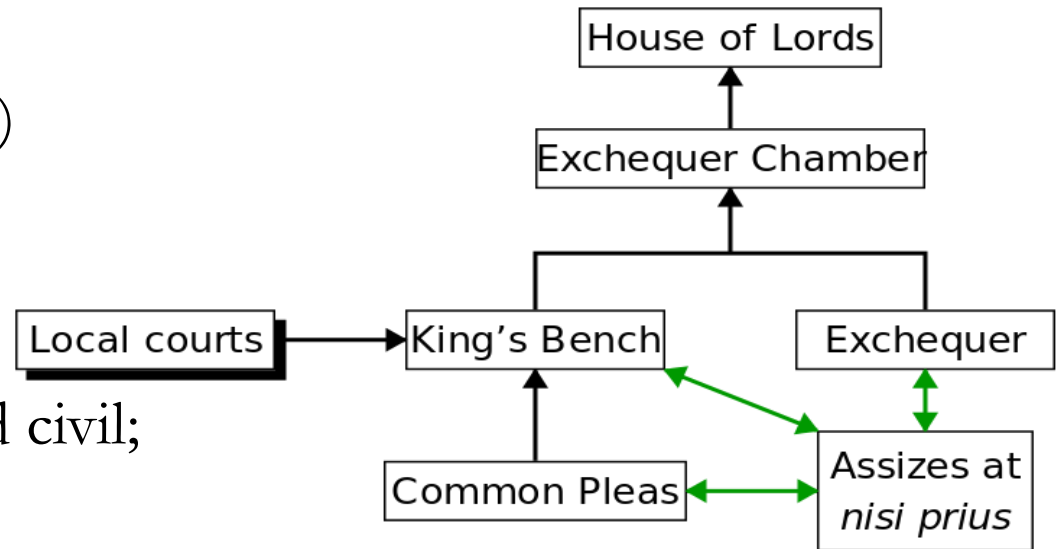
- Advisory boards and dispute settlement deploying the law of the King – the Curia Regis in 1100s;
- Across the country – travelled with the King.
- Effective and efficient; court records kept from 12th century.



Development of the Common Law

Establishment of courts of the common law:

- Exchequer (tax & finance)
- Assize (criminal & civil)
- Common Pleas
(civil, mostly land)
- King's Bench (criminal and civil;
Against King's peace)



→ Appeal

→ Referral for trial

Judges selected the customary law deemed “reasonable” and most common through the country – recorded and enforced in future case law.

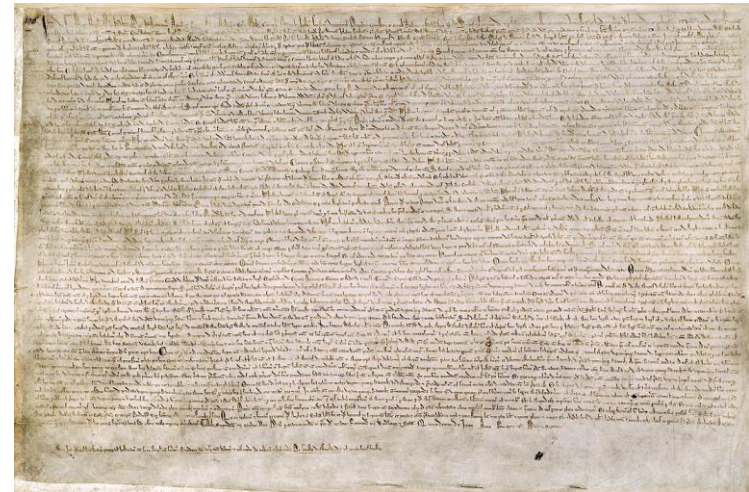


The Magna Carta (1215)

Medieval Latin for "the Great Charter of the Liberties"

Why?

- To stave off rebellion of barons;
 - Set out key rights;
 - Fixing the place of the Court of Common Pleas in Westminster.
-
- Protection of church rights, protection for the barons from illegal imprisonment, access to swift justice, and limitations on feudal payments to the Crown.



The Common Law and Equity

Alongside the common law:

- Based on the notion of fairness and good faith in the application of the law and settlement of disputes;
- Justice (what is fair and right under natural law);
- Supplements and fills gaps in the common law.

Example of equitable decisions: correcting a property line or ordering someone to do something to prevent damage.



Development of the Common Law: 13th – 17th Century

Demise and abolishment of local assemblies;

Establishment of Parliament (from Magna Carta) to collect and level taxes (amongst others);

Establishment
(and abolition – 1398-1941) of
Star Chamber (supplement to
common law and equity
courts);



1533: Split from Catholic Church; 1688: Glorious Revolution



Development of the Common Law: 19th to 20th Century

(Re-)Establishment of local courts – why?

Judicature Acts 1873-1875

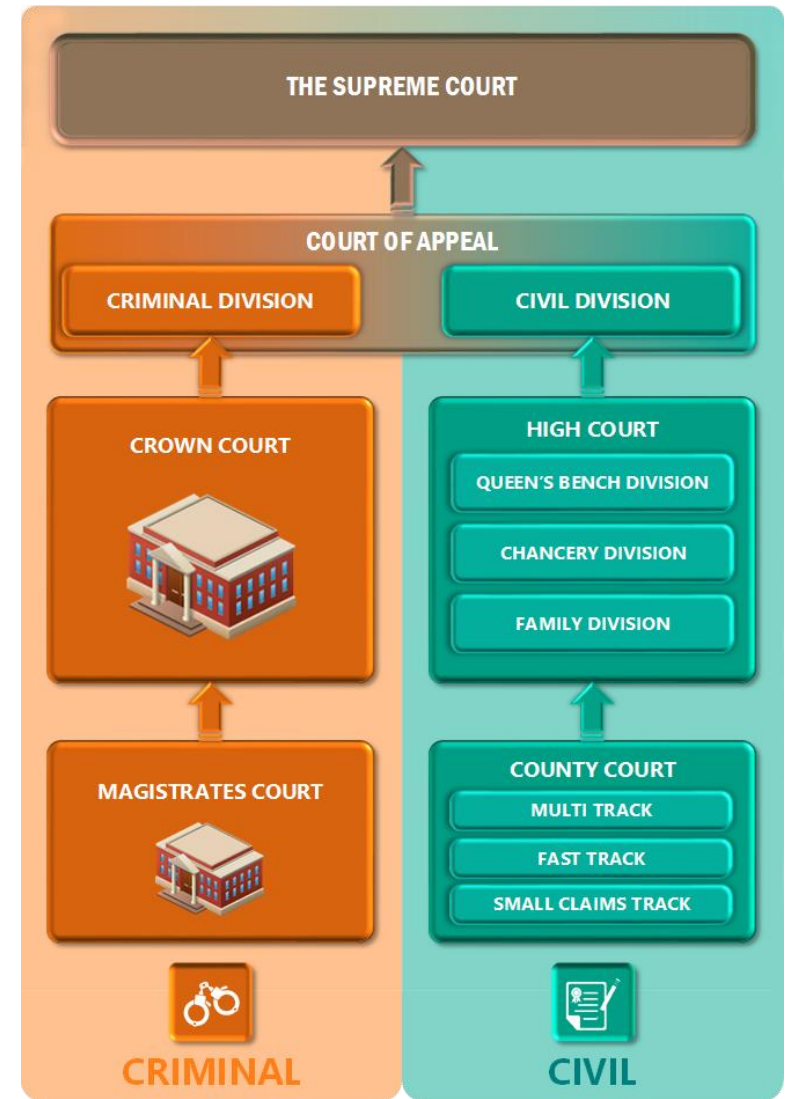
- Established current (more or less) court structure;
- Abolished the Court of Exchequer, King's Bench, Court of Common Pleas (Assize abolished in 1971);
- Transfer of power and jurisdiction to the High Court (with five specialist divisions);
- A Supreme Court of Judicature was created consisting of the High Court of Justice and the Court of Appeal;
- House of Lords as the highest court of appeal.



Development of the Common Law: 19th to 20th Century

Supreme Court of the United Kingdom:

- Established in 2009 via Part 3 of the Constitutional Reform Act 2005;
- Replaced the House of Lords;
- Final court of appeal
- Hears appeals on arguable points of law of general public importance (most important);
- Leader in the common law world.



Key Characteristics of the English Common Law

Uncodified – no comprehensive compilation of legal rules;
an unwritten (UK) constitution

A key role for the judge and judicial precedent;

An adversarial system of dispute resolution;

Parliamentary sovereignty: acts of Parliament are valid (and constitutional) and not subject to review by the courts; only Parliament can act to amend the law.

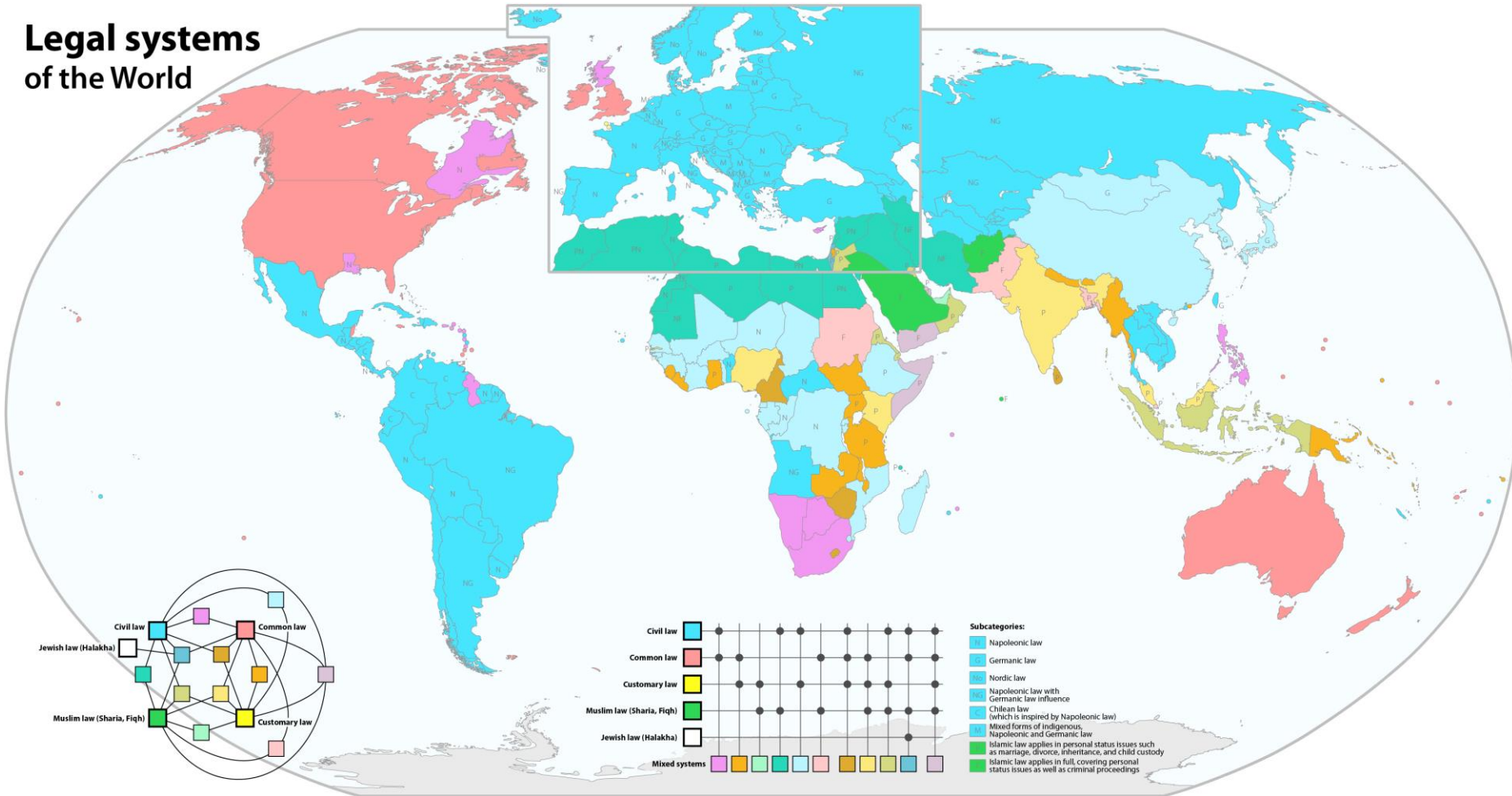
Aims for certainty, consistency and uniformity.



Spread of the Common Law

What can we see from this map?

Legal systems of the World



Next Session: 16/11/2018

Readings for next week: Chapters 1-3.

Topics to be covered during this course: Chapters 1-8





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