

Common Law System

Public versus private law

- Public law includes administrative, constitutional, criminal, industrial and taxation law
- Private law includes contract, tort and administrative law

Three senses of the common law

1. The common law as a system of law
 - Adversarial as opposed to inquisitorial
 - Precedent is important as opposed to civil law systems which rely on codes
2. The common law as a source of law
 - Law made by judges as opposed to that made by parliament
3. The common law as a division of law
 - The rules of common law as distinct from the principles of equity or statutes

	Common Law	Civil Law
Origins	English customary law	Roman law, codes and legislation which are applied to new cases
Legislation	Very specific and aimed at limiting judicial power, strict methods of statutory interpretation used	Legislation is most important, with judicial decisions filling in gaps and aiding interpretation
Legal writing and doctrine	Less popular and focuses on examining and categorising judgements	Common and very influential on legal principles and legislation
Legal education	Cases	Codes and doctrine
Judges	Appointed after service as lawyers	Diverge into apprenticeship after university
Judicial decisions	Precedent based	Legislation based
Judgements	Long-winded and well known	Anonymous and very short

Development of the Common Law

Customary Law in Pre-Nomad England

- Customary law refers to law that develops from the customs within a particular society or within a group in a particular society
 - It is not based on any written law but arises through, and is enforced by, its recognition and general acceptance
 - It covers aspects of a society concerning everyday existence, and varied between kingdoms and tribes as habits and attitudes varied
 - It is unwritten law, followed through being passed on to future generations by spoken word

- Roman Britain
 - Prior to the Roman invasion in AD 43, the Celts ruled in Britain
 - The Celts consisted of different tribes and each tribe was ruled by a Celtic chief, and each had a different customary law (borne from the recognition and acceptance of customs)
 - As opposed to the sophisticated written/codified system of Roman law that had developed during the period of the Roman Republic
 - Despite the Roman occupation, the Celts used their own customary law, and Roman law only applied to Romans in Britain
- Angles, Saxons and Jutes
 - During the two centuries following the Roman withdrawal, Britain was invaded across the North Sea by the Angles, the Saxons and the Jutes
 - The invading Angles and Saxons became known as the Anglo-Saxons, and they brought with them their own customary law
 - The cultural differences between the Anglo-Saxons and the Celts meant that their customary law differed significantly from the various forms of Celtic customary law
 - Existence within these tribes was harsh, and thus the customary law reflected that
 - The customary law was applied through general meetings of members of the tribe rather than through formal court procedure
 - This meant that as these tribes became more civilized over the centuries, following the withdrawal of the Romans from Britain, the customary law changed to reflect this greater civilization
 - It remained unwritten law
 - It was not until after the Danish invasion of parts of the east of England in the 9th century that some aspects of Anglo-Saxon law became written
 - **Although this was an attempt to strengthen unity between Anglo-Saxon Kingdoms, the Doms (Danish) did not have any significant influence on the development of a common law of England because the centralization of the administration of justice was yet to be achieved**
 - Centralization of justice in England was an important issue in the eventual development of a common law
 - A common law in England did not start to develop until after the Norman Conquest in 1066

Following the Norman Conquest

- Battle of Hastings 1066 (William I)
 - Harold, the last Anglo-Saxon King of England, suffered defeat at the Battle of Hastings and was killed

- William, Duke of Normandy, defeated King Harold and became known as 'William the Conqueror', the first Norman King of England
- William did not attempt to make any significant changes to the existing Anglo-Saxon law as William claimed to be the legitimate successor to the English throne and, from a practical point of view, it would have been extremely difficult to replace the existing Anglo-Saxon customary law with Norman Law
- Following the Conquest, all of the land in England was taken over by the Normans and the Normans applied their own land law and introduced continental feudalism to England
 - **The introduction of Norman land law and its assimilation with feudalism had an important influence on the development of the early common law in England**
 - This is because disputes over large areas of land were brought before the King's courts for determination. The decisions of the King's courts started to be followed in future disputes and this was the beginning of the common law
 - Development of a body of land law that could be applied consistently to disputes concerning land throughout England
- Following the Conquest, William introduced a strong central government, which provided the basis for a centralised system for the administration of justice in England
 - **The administration of centralised justice through the King's courts created the basis for the unification of laws from across England and contributed to the emergence of a common law throughout England**
 - Though local customary laws still played a crucial role in everyday rural England

➤ Henry II

- The reign of Henry II from 1154 to 1189 was 'one of the most critical epochs in the history of the common law' (Phucknett)
- **The first treatise on the laws of England was written during his reign, the first book written on English law and procedure**
 - It represented a significant step in the emergence of common law
- Another significant step involved the reforms introduced by Henry II concerning the administration of both criminal and civil law by royal judges
 - Striking the very root of feudal administration because they weakened the power and authority of the feudal lords
 - Henry II also extended the system of itinerant justices and increased the use of juries
- **The whole of the English law was centralised and unified by the institution of a permanent court of professional judges and the use of juries**
- A centralised system was necessary to provide the **institutional structure through which royal judges could start to develop a body of rules which would eventually constitute the common law**
 - The development of a common law also depended on **recognised court procedures such as the writ system and this was only possible through a centralised administration of justice**

- The development of a common law in England **did not** eventuate during the reign of Henry II, but the reforms put in place provided the **platform** for its future development
 - The introduction of the feudal tenure following the Norman Conquest produced a fundamental change in both the economic basis of English society and the administration of government and justice
 - The emergence of feudalism as an economic basis for society resulted in local lords gaining control over both land and political power
 - Feudalism operated as a system of administration based on land tenure and it proved a most effective means of maintaining law and order in England
 - **The development of law around land disputes formed an early type of common law in England**

The Emerging English Legal System

- Henry II created the platform for the emergence of an English legal system, which provided the basis for the development of a common law in England
 - Trial by jury
 - Creation of central courts
 - Writ system
- **Arguably, by the end of the reign of King Edward I, all of the essential elements of the current English legal system, except the Chancery as a court of equity, were in place**
- The Jury
 - Before a jury was established in the early 13th century as a new method of trial, the ancient modes of trial were the ordeals, the wager of law and the trial by battle
 - The ordeals:
 - A brutal ancient process whereby a person accused of committing a crime would be subjected to one of a variety of rituals in order to prove the innocence or guilt of the accused person
 - The wager of law:
 - A character test for the accused person
 - Trial by battle:
 - Parties using another person as their respective champions to fight the trial by battle
- The Central Courts
 - The centralised system provided the basis for the establishment of the central courts, which did not exist prior to the Norman Conquest
 - However, central-administrative institutions did exist in Anglo-Saxon times
 - During the 13th century the Court of the King's Bench evolved. Its jurisdiction was principally connected with the preservation of the king's peace but it also had some concurrent civil jurisdiction with the Court of Common Pleas
 - The Exchequer developed its jurisdiction as a revenue court, and the Court of Common Pleas developed into a court that dealt with the

- The Writ system
 - A writ is a command to a person from a sovereign directing the person to do something or to refrain from doing something
 - **The writ had an important early influence on the development of the common law in England, as a common law action could not be commenced without obtaining the appropriate writ**
 - Henry II established that no court action could be taken against any person in relation to a dispute concerning land unless the correct writ for that form of action was obtained
 - If a writ did not exist that covered the particular circumstances of the dispute, no action could be taken without the consent of the landholder
 - The choice of a particular writ had important procedural consequences because each type of writ required a different method of procedure to be followed both prior to, and during any court action
 - The choice of writ also determined in which court the action would be heard
 - **The early writs were placed on a register and this had a significant influence on the development of a common law in England**
 - The Register of Writs produced a strict, inflexible body of rules
 - The inflexibility of the common law was the basis for the emergence of a separate body of law – the principle of equity
- Magna Carta
 - The meeting between King John and the dissatisfied barons and knights took place on 15 June 1215 and a verbal agreement was reached on many issues concerning the role of the crown
 - **The basis of the rule of law, a fundamental principle of the common law system, had its origins in the document**
- Due Process
 - **The Magna Carta provided that no person can be charged with a criminal offence or be deprived of civil rights or possessions except through the due process – fundament of common law**
 - **The Magna Carta also provided that the Crown was subject to the law, an aspect of the law which still remains today – the government is subject to the law**
- Emergence of Parliament
 - The word 'Parliament' was not used in Norman England until the 13th century, and the early Parliament appeared to be no more than an extended form of the Curia Regis where the aim was generally for the king to obtain additional royal revenue
 - Prior to the 13th C, there was no real sense of nationhood, which was essential for Parliament
 - Feudalism had formed the basis of economic society in England since the Norman Conquest, and its structure did not encourage trade between different parts of the country
 - As a consequence, a sense of nationhood did not exist until the wool trade started to grow and connect various parts of England