The Oxford Legalism Project

The Foundations of Law: Legalism in the Ancient World, Europe, and Asia

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Contents

The Foundations of Law ................................................. 2
The nature of law ...................................................... 3
Contexts ........................................................................ 4
The role of law .......................................................... 5
Conclusion ...................................................................... 5
The presentations ....................................................... 6

SESSION ONE: Concepts and Categories .......................... 7
Centres of Law: Duties, Rights, and Pluralism in Medieval India
Ideas of Law in Hellenistic and Roman Legal Practice

SESSION TWO: Property and Protection ......................... 9
Aspects of Non-State Law: Early Yemen and Perpetual Peace
The Evolution of Sanctuary in Medieval England

SESSION THREE: Exporting and Importing Law ............... 11
The English Medieval Common Law: Aspirations of Experts and
Expectations of Litigants
Rightful Measures: Irrigation, Land, and the sharî`ah in the
Algerian Touat

SESSION FOUR: Styles of Legalism ................................ 13
Guns, Rhetoric, and Buddhism: a Sixteenth-Century Burmese
Law Report
An Obsessive ‘Law of Things’ in French Cambodia

SESSION FIVE: Legalistic Thought ................................. 15
Legal Performances in Thirteenth- and Fourteenth-Century France
Custom, Combat, and the Comparative Study of Laws: Montesquieu Revisited

Participants
THE FOUNDATIONS OF LAW: LEGALISM IN THE ANCIENT WORLD, EUROPE, AND ASIA

Maitland has described the English common law as arising ‘with marvellous suddenness’ in the eleventh and twelfth centuries; he was referring to the creation of professional courts, royal legislation, a legal profession, and a science of law. There have been extensive debates about why and how this occurred, including continuities with earlier medieval laws and the Roman tradition, and consideration of the broader social and political landscape of twelfth-century England. But the common law was not unique, although the form it took in England was distinctive. Legal systems pre-dated it in the classical world, China, and India, to name just a few. Can further light be shed upon the emergence of the common law by comparison with them? This is the question addressed in a workshop held at St John’s College, Oxford on 6-7 June 2011, as part of the Oxford Legalism Project.

A number of assumptions are commonly made about law, especially when considering familiar examples from the Western world. Firstly, law is generally regarded as useful, even necessary, for an ordered society; it might be an instrument of power in the hands of a government or ruler. If we adopt a model of society in which social control is imposed by a leader on his following (after Max Weber, for example) we see law as the product of state power and look for explanations and causes in the interests of the ruler or ruling classes. What was it, we might ask, that prompted Henry II, or his advisers, to set up and promote the King’s Courts in late-twelfth century England, for example? Alternatively, we might regard law as useful for society and seek out the social ‘need’ for regulation and evidence of popular consent. What was it about forms of land-holding that needed clarification and systematization? If we adopt a more Durkheimian model of society in this way, we tend to regard law as developing from custom and mirroring social norms. The keynote speaker, Bruce Frier, undermined almost all these assumptions in his description of Roman law. Asking boldly what good it did the Romans, the law he depicted, far from mirroring social reality or forming a coherent, socially useful system, developed its own, obscure logic, particularly in the hands of the jurists. What seems initially to have been an overwhelmingly academic exercise nevertheless developed its own momentum, laying the foundations for the great Justinian codification, whose influence on subsequent legal thought, including the English common law, is well documented.

So what questions should we ask about the common law or any other form of law? If we need to move beyond functionalist or political explanations, what are the foundations of law? It is apparent that legal codes and legalistic thinking and argument are found the world over, although they are by no means universal. Comparisons between systems that pre-dated the rise of the common law, in ancient Greece, Rome, and Hindu India, as well as subsequent examples from Asia, the Islamic world, and Europe help us to identify common themes and features, revealing as much about what law is as where it comes from.

Within the examples presented during the workshop, as well as those documented by historians and anthropologists elsewhere, it becomes apparent that what is common is a style of thinking, a legalistic way of organizing and bestowing meaning on the world. Methods of dispute resolution may, for example, invoke law, but not always: people steal each other’s chickens the world over, and societies work out means of resolving the ensuing disputes, but only some of these involve an appeal to rules or laws.
some of these involve an appeal to rules or laws. Law may be employed in government, but Maoist China, as well as most non-literate societies, seem to have preferred to do without it. Law, that is, can function as a means of organizing and thinking about social life and government, but only some societies find it compelling to develop, borrow, or invoke forms of law in order to do so.

Such comparisons then shed light on wider issues about what law is and how it may be distinguished from codes of morality, from custom and social norms, and from the commands of the ruler. Thus, we may address many of the questions central to jurisprudence, but from a social and historical perspective, taking into account a much wider range of examples of law than a purely philosophical enquiry would do.

This comparative project is an ambitious one, bringing together a broad range of experts to participate at the workshop, each presenting case studies that would highlight both contrasts and common threads. Synopses of each paper are contained in the following section. Here we highlight some of the main themes that emerged from the comparisons.

The nature of law
Looking for common threads amongst disparate examples, the term ‘legalism’ has emerged as a useful way to characterize the form of thought inherent in examples of law, along with a number of cases that we might regard as hovering on the margins of law. The term was used by Lloyd Fallers, an anthropologist who wrote on Africa in the 1960s about the Basoga of Uganda, who had set up their own courts in the shadow of the British colonial legal system. Without a formal set of written laws or precedent, they nevertheless employed a distinctly legalistic form of argument, defining marriage, notions of acceptable behaviour between kin and non-kin (also the subject of complex definitions), and the boundaries of adultery. Fallers drew parallels with the legal reasoning described by H. L. A. Hart in The Concept of Law. For him, legalism comprised several things, but the main criteria were an appeal to rules that stand apart from practice (that is, rules one can ‘formulate’), the explicit use of generalizing concepts, and a disposition to address the conduct of human life in these terms. It is a narrower idea than law in the grand sense of Recht or droit, with the implication of ‘right’ and ‘justice’, but it is broader than Gesetze or Loi, with their implications of written law or statutes. Legalism is, thus, closer to Hart’s vision of law than to that of Dworkin, and a useful way of identifying commonalities across different contexts.

Generalizing concepts include terms like ‘buyer and seller’, ‘owner’, and ‘property’, but also terms like ‘paternal uncle’ or ‘younger brother’, to whom expectations and duties attach in many societies. Once the world, or a part of it, is described by reference to such concepts it becomes amenable to the elaboration of rules: John of Wallingford ought to give Mary of Abingdon £100, not because she is a poor widow whose son perished in mysterious circumstances in John’s employ, but because he has signed a contract to buy her land which was executed in the proper form. Their relation is one of ‘buyer’ and ‘seller’ and the notion of a ‘contract’ or, more precisely, a contract concerning land, involves rules about due execution.

Rules can also define categories: in both the Roman and Tibetan empires rules about compensation specified different amounts of blood money for different classes of people, and in this way they were a means to define social status. The early common law and the development of a system of precedent provide a good example of how this worked in practice. Judgments in the early King’s Courts concentrated on a number of common themes, often concerned with forms of property ownership, use and possession, and related categories of personal relationships, including succession, guarantee, widowerhood, wardship, and so on. Eventually, the reporting of cases led to a system of precedent, whereby rules could be abstracted from individual judgments. What the Basoga were doing in Uganda was not so different, although the practices that Fallers described had not evolved into a complex
system with anything akin to the common law’s doctrine of precedent and its attendant jurisprudence.

Abstract categories and general rules also tend to lead to the development of a jurisprudence. Within what we might call ‘complex’ legal systems we find more refined distinctions, and rules about rules. A jurisprudence may also be developed to account for the tensions that arise when law meets real life. Laws and categories can, of course, only ever approximate the complexity and particularity of real life, and a mismatch between category and fact arises in any legal system. So do the inefficiencies of judgments made according to laws. A legalistic discourse (jurisprudence) can account for the legal choices that need to be made when law meets real life. The way this is done varies: dharmasastra reasoning is not that of Islamic fiqh; the common law style is not that of civil law. But it is common, for example, to find an apparent exception to a rule being treated as illustrating a different rule or as modifying the rule first stated. In this way the potential for law (or, more precisely, lawyers and judges) to rationalize experience and its forms is endless.

Simple legal systems do not work so obviously like this: the mismatch of category and fact may be dealt with as a matter of politics, dishonesty, or chance. Nonetheless, the existence of categories and rules may give rise to a distinctive form of argument (the rights and duties of ‘kin’, for example, may be contrasted with those of ‘neighbours’) to produce a legal argument about right conduct. Again, medieval England may provide an example: Edmund’s tenth-century code contains a whole list of nested conditionals concerning the feud. It is a system of rules and exceptions to rules which can be compared with the arguments about rules and exceptions that would be held three centuries later in the King’s Courts, in the context of the ‘professional’ common law, with its specifically jurisprudential culture.

**Contexts**

It is, of course, tempting to look for contexts and causes of these moves to create laws and categories and to reason in legalistic terms. Literacy seems an obvious candidate. Work on literacy in early Europe is plentiful, and the historian Frederic Cheyette has convincingly linked the dramatic development of French laws and legalistic reasoning in the twelfth century with the spread of literacy. He uses similar arguments to the anthropologist Jack Goody about the ways in which literary concepts and writing are conducive to the formulation of abstract, generalizable, and objectified law. Written rules can take on a life of their own, amenable to arguments about applicability and exceptions, to counter-rules and subtle distinctions, and are less easily forgotten or misremembered than oral principles.

Nevertheless, even in worlds well supplied with writing, law may be mainly oral, as with the early English common law. Glanville of course explains, uncomfortably, that the law was not written down; nor was writing all that prominent in legal practice, and without the yearbooks we would not know very much about it. A more extreme case would be the Sinai Bedouin of more recent years. There was not a scribe or a sheet of paper in sight, but a very legalistic scheme of both substantive and procedural rules that might interest even a professional lawyer. Equally, some literate societies, like those on the Tibetan plateau, seem to have been reluctant to articulate social rules or norms of government in the form of laws. In the case of literacy, causation is at best partial and often indirect.

A similar level of ambiguity exists in relation to states and empires, which are often attributed with or linked to the development of law. Empires often spread law or impose law on their subjects (though we need to remember that not all empires resembled the nineteenth-century European versions, least of all with respect to law). However, just as often, people seek out complex legalism for themselves as a mark of status or of moral inclusion in a wider world. Villages in the western Islamic world, for example, looked to the Islamic shar‘i‘ah, a form of law ill-suited, in many ways, to their particular property and community arrangements, but associated with status and value in their religious world; certain classes amongst the populations of the Macedonian polities
sought out the status offered by the Romanist ius commune. Simple systems too are untidy: medieval German cities borrowed quite simple law from so-called mother cities; the early fori and coutumes of southern Europe look oddly similar to each other. In none of these cases was law simply imposed by rulers. Complex legalism is not necessarily linked to power nor, indeed, to space.

There is a tendency to think that if law is not the product of empires and state-building it must be linked to smaller communities. It develops as a part of custom and practice, rather than being imposed with the commands of the ruler: this is Durkheim’s rather than Weber’s view of the social world. But legal systems are not always linked to bounded communities, nor vice versa. The western Islamic world (the Maghreb in North Africa) is full of community-based law codes that all look alike. They have been borrowed from a common source, although they claim to be entirely distinct. In the eastern Islamic world (the Mashriq in Arabia and thereabouts) colloquial law is entirely different, and communities of the same size and shape as in the Maghreb and with the same productive base, are not at all the focus of law.

Law may, then, be associated with literacy (as is very often the case) or with the centralization of power (including the King’s Courts in twelfth-century England). But it may also be associated with the desire of small communities to protect themselves from empires or alternatively to participate in what they regard as a superior intellectual system; or it may more closely be associated with the world of religious intellectuals (as it was in Hindu India and the Islamic world). None of these seems to be either a necessary or a sufficient condition for the development of law.

**The role of law**

Even in cases of simple legalism laws stand apart from practice. They do not reduce to the particular event, problem, or clash of interests. As authors from at least Lon Fuller to Frederick Schauer have said of laws in our world, they offer ‘general’ rules. They do so, what is more, in general terms, which in legal practice can appear as what John Finnis called ‘costumes and relationships’ into which reality is fitted. John of Wallingford and Mary of Abingdon thus appear as ‘buyer’ and ‘seller’; Ali Muhammad appears as ‘escort’ or ‘guarantor’, not as, say, Charisiah’s husband, and Marcus Lucius appears as an ‘owner’ of property, not as a fat man standing 5’6’ in his sandals. Without the ‘costumes and relationships’ the relations amongst such people would take quite different forms: the realities they live in would be very different.

Law may define people out as much as define them in. But typically it defines persons, things, and relationships in such a way that it sets what Lyons calls justificatory ‘thresholds’. If I use what is generally regarded as your property you may be able to argue that I have stolen it or ought to offer you compensation, or ought to return it by appealing to the laws of theft or tort or restitution, that is, in terms that go beyond our personal histories. Equally, I may be able to justify my actions in the same terms — I didn’t intend permanently to deprive; you have suffered no pecuniary damage; the property is replaceable.

Laws can set up and define relations between people who have never met each other or who live at other ends of the world. It is a means to apprehend or manage the human world conceptually and morally. The foundations of legalism, if not of all law, lie in a propensity to classify, which affords a public language for what would otherwise remain merely private discomfort or confusion.

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**Conclusion**

There was nothing inevitable about the emergence and development of the common law, but equally it was not a wholly distinctive and unique phenomenon. Not only are there continuities with continental systems, which could, of course, be linked to the
influence of Roman law, but the workshop demonstrated that we can find parallels in styles of thought, argument, and organization in Hindu India, medieval Burma, and the Islamic world. Most obviously, in all these cases what we call legalism involves a mode of classifying and organizing the world according to categories, generalizations, and explicitly formulated rules. On the other hand, while legal systems are generally associated with literacy and often linked to the centralization of power, this is not universally the case.

The common law developed into what we have called a complex legal system, in terms of its jurisprudence, what Maitland called the ‘science of law’, as well as its notorious procedural rules. As such, it is comparable with both Hindu and Islamic law, as well as the works of the Roman jurists. It was a distinctive form of legalism, but in its most basic forms it resonates with the activities of rule-makers, judges, scholars, administrators, even tribespeople and villagers, from across the world and throughout history.

*The presentations*

The participants were all concerned to work out the assumptions that underpin legal practice and concepts in the cases they were concerned with, and to ask what the implications of those assumptions are. The following summary places the presentations in pairs, illuminating five distinct aspects of legalism.
CONCEPTS AND CATEGORIES

The workshop opened with two presentations that discussed the concepts at the heart of some of the most important ancient legal systems.

**Centres of Law: Duties, Rights, and Pluralism in Medieval India**

*Donald R. Davis, Department of Languages and Cultures of Asia, University of Wisconsin, Madison*

The idea is widespread that some legal systems are based on duties and others are based on rights. The latter systems are often attached to political theories such as those of Locke and Hobbes (and to some extent their predecessors in figures such as Ockham and Gratian), which culminated practically in the revolutions in France and America in the late-eighteenth century. The language of rights has since come to dominate the discourse of legal theory, while duties-based systems are acknowledged as increasingly archaic and exotic. Rights discourse has become so persuasive and ingrained, indeed, that alternative paradigms are hard to conceive any longer. Even legal pluralism, an approach that emphasizes law’s multiple social locations and empirical diversity, suffers from a projection of rights assumptions into all normative domains.

In this presentation the system of Hindu law in medieval India was examined for clues about how to rethink legal pluralism when a duties-based mode of discourse forms the centre of legal thought and practice. It began with the premise that all legal systems contain strands of both rights-thinking and duties-thinking. However, systems based on rights accept dispute or disagreement (how do we justly distribute or assess rights when they conflict?) as the fundamental problem of law, the issue that law must resolve. Duties-based systems, by contrast, focus on doubt or dilemma as law’s major problematic (how do we justly fulfill our duties in a particular situation?). Both dispute and doubt colour every legal system, but their differential emphasis in legal thinking has important effects in the practice of law.

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In medieval India, jurisprudence was centered first on a notion of debts and a set of corresponding duties that both individuals and communities must fulfill. Conflict, too, found a place in legal theory, but at a subordinate, though practically important, level. Examining both theoretical and practical evidence from about the mid-twelfth century onward, this presentation showed how the vocabulary of doubt (samsaya, sankha, samdeha, etc.) took shape in multifaceted legal practices and how it interacted with ideas and practices of dispute resolution (vyavahara). This provided both a critique of current formulations of legal pluralism and an indication of a possible way forward in articulating this important concept of legal theory.

**Ideas of Law in Hellenistic and Roman Legal Practice**

*Georgy Kantor, Faculty of Classics, University of Oxford*

Very different vocabularies of law, right, and justice (such terms as Latin lex, ius and iura, justitia, regulum, and Greek nomos, nomonom, thesme, dike, dikaios, philanthropia) were used in Hellenistic and Roman legal and administrative practice (both
governmental’ and ‘non-governmental’]. This presentation examined these concepts alongside the rules and regulations that were actually issued and enforced by imperial and royal governments, local communities, and private associations. Secondly, it considered the extent to which modern attempts to understand law and justice and to classify types of legal rules can properly be applied to Roman and Hellenistic material circa 300 BC–AD 250.

This bears a superficial resemblance to the old search for a ‘spirit of Roman law’ (von Jhering’s Geist des römischen Rechts, 1852 onward) or to analyses of the principles of Roman jurisprudence (most notably Schulz’s Principles of Roman Law, 1936), but the aim was quite different. It was neither to establish the underlying ‘mindset’ nor to unpack ideas about what is just, but instead to understand the significance in practice of terms such as ‘law’ and ‘justice’, and to compare this with modern terminology and modern concepts. The presentation concentrated on the Hellenistic and Roman period, to about AD 250, for which the ideas of legal thinkers can be compared with abundant (if rather unevenly spread) documentary material from different regions of the Graeco-Roman world.

This is of particular comparative interest for historians dealing with other periods and settings and for anthropologists, since during the Hellenistic period we can explore understandings of ‘law’ and ‘rules’ at many different levels, from empire to village or trade association, rather than just at the city-state level characteristic of the preceding age. It is, in particular, apparent that a formal and technical, but uneven terminology developed, with tensions between the wording and source of certain rules. ‘Rules of recognition’, in Hart’s terms, were formulated but abandoned as the Athenian city-state, for example, came under the influence of imperial Rome. Legalistic rules and terminologies, that is, may be inconsistent or develop in tension with one another, even within a sphere of common political and cultural influences.
Common concerns with property and protection within very different settings were apparent in the next two presentations. Parallels can, thus, be seen between tribal Yemen and Anglo-Saxon ideas that survived into the interesting period during which Anglo-Saxon law was replaced by the nascent common law.

The assumptions underpinning such ‘customary’ law are more those of the natural law theorist Pufendorf, let us say, than of Kant. The rules at issue are more prominently secondary, in Hart’s terms, than primary. Although the law of the tribes is centrally concerned with the rightness of coercion, it is not in itself any more or any less coercive than, say, contractual or commercial law of a kind that typically fails to coincide with simple state enforcement. Indeed, parallels are available with the logic of public international law as it stood until recently. The contradictions in Kant’s view of public right or Recht and of cosmopolitan right were thus drawn out and, on the basis of the Yemeni material, an alternative was proposed which depends upon mutual recognition of the right to protect others.

The Evolution of Sanctuary in Medieval England

Thomas Lambert, Faculty of History, University of Oxford

In the late twelfth century the shape of English sanctuary customs was set in a form that would persist until the reign of Henry VIII. Criminals who fled to a church were allowed forty days’ safety within, after which they had either to surrender themselves to secular justice or to seek exile – to ‘abjure the realm’. This system’s generosity to miscreants goes beyond almost all comparable
European practices, almost all precedent within England, and most of what was prescribed by canon law. The presentation explained the long- and short-term factors that led to the establishment of English sanctuary. In doing so it challenged modern assumptions that law implies uniform enforcement within an undifferentiated sovereign space.

Church sanctuary in the early medieval period formed part of a wider pattern of people and places offering protections, primarily in the context of feud. A sanctuary — sacred or secular — gave protection to a supplicant for a limited time (the length of time varied among cases), creating an enforced truce during which settlement could be negotiated. Such limited protections were little use where the state insisted on punishing offenders with execution, as tenth-century laws did for theft: Anglo-Saxon sanctuary was for private feuds, not public crimes. It is striking that the establishment of abjuration in the late-twelfth century, and the emergence of a standardized period of sanctuary for the Church as an institution, roughly coincides with the introduction of execution by the state for all cases of homicide. More generally, royal punishment was finally displacing the remnants of a system based on protections and private feuding.

With the abolition of the system in which it operated, the ecclesiastical privilege of sanctuary was threatened. However, probably because of Becket’s murder, the Church was in a strong position to update its rights in line with legal changes. The solution of forty days’ protection alongside the option of abjuration reflects this. The forty days allowed for the possibility that negotiated settlement following clerical intercession might still be important, whilst abjuration drew on older customs of safe conduct so as to maintain both the moral integrity of the king’s realm, through exile of the miscreant, and the effectiveness of the Church as an agent of mercy. That this settlement became fossilized in the practice of the later Middle Ages, rather than disappearing like most earlier forms of sanctuary, is a testament to the emergence in the twelfth century of a formally legalistic age.

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SESSION THREE:
Exporting and Importing Law

In the next two presentations the early inclination of the common law to export itself to wider contexts was contrasted with the inclination of small North African communities to borrow legal codes and forms from the wider Islamic world.

The English Medieval Common Law: Aspirations of Experts and Expectations of Litigants

Paul Brand, All Souls College, University of Oxford

The beginnings of the English Common Law as a national legal system go back to the last quarter of the twelfth century. It is also from this period that we can trace the continuous history and development of the Common Law as a system of legal ideas and rules. These two aspects — of power, perhaps, and of knowledge or juristic thought — are seldom connected carefully. The presentation focused attention on a number of different aspects of the Common Law as seen by those involved in its operation, particularly during the period between its creation and the first decade of the fourteenth century.

The presentation examined, first, the changing expectations which the king and his advisers, who had themselves created the Common Law and continued to monitor its functioning, appear to have had of the Common Law courts and of the Common Law as a set of legal ideas. It then discusses the aspirations and ideals, expressed mainly through judicial oaths of office and letters of appointment of royal justices, about the ways in which the justices of the royal Common Law courts should and would exercise their judicial functions, and at other evidence from the official records of the law courts and unofficial law reports about how royal justices conceived their role within the legal system and of how they saw that system and the law it enforced. This much involves the ‘managers’ of law. Can we say much of law’s ‘consumers’?

The Common Law plainly ‘exported’ itself as much as being forcibly imposed by kings.

The Common Law plainly ‘exported’ itself as much as being forcibly imposed by kings, and we are fortunate to have material that allows us to consider how this occurred. As elsewhere in Europe, and in Burma, for instance, but in rather few other cases, a set of specialists came to mediate the connection between legislation and power. By the second half of the thirteenth century there is clear evidence of the existence of not just individual professional lawyers but also of a legal profession. The paper examines what the evidence of law reports and litigation between professional lawyers and their clients suggests of the way in which lawyers envisaged their role in the legal system and about the working of the system as a whole. Finally, the presentation looked at the system from the outside: to use the evidence of individual complaints and petitions directed against legal abuses or judicial corruption or asking for legal reforms to suggest how non-professionals saw the Common Law both as a system of courts and as a system of legal rules.

Rightful Measures: Irrigation, Land, and the shari‘ah in the Algerian Touat

Judith Scheele, All Souls College, University of Oxford

There seems to be a common assumption that law is imposed from above, and that study of the ‘legalization’ of a given society is the study of
spreading state influence. Avoidance of law, or even adherence to unwritten ‘custom’ (in itself a legal category), hence tends to be described as either resistance or backwardness. Yet a number of examples from the periphery of universalizing legal systems – from Tibet, for instance, or the margins of the Islamic world, let alone from early Europe – suggest that there was often a keen demand on the ground for law, and in particular for written law. Title deeds, grants, and donations often provide the earliest form of documentation, and people were keen to obtain these where they could.

This presentation offered a case study from the Touat, a group of oases in southern Algeria, where, historically, state control was weak or absent. Nonetheless, locals attempted to follow Islamic law as best they could, and went to considerable lengths to pay legal experts, scribes and qâdîs (Islamic ‘judges’) in order to fulfill the requirements of the sharî`ah. This meant serious expense and inconvenience on the ground, for life in the Touat depended on collective irrigation systems. Islamic law mostly treats property in real estate (land, and also water subject to ‘containment’) as alienable, individual, and quantifiable, while collective irrigation relies on common ownership and proportional measurements. Much effort had to be expended to reconcile the two. Nonetheless, there seems to have been little doubt among Touatis that only the sharî`ah could provide the proper terms and categories of transactions, and render them legible, valid, and durable. In contrast to the common narrative of formal law as an imposition, the Touat, so to speak, ‘imported’ legalism voluntarily.

Law, here, was not conceived as the result of encroachment by outsiders, nor as an expression of centralized power, but rather as an opportunity for gaining access to a larger political and economic field of action, or becoming part of a larger world based on claims to universal truth and permanence. People drafted documents and clung to them, even where their practical value was questionable, as a means of constituting the local as part of a wider moral world. The analysis rests on a series of local documents so far unstudied by Western scholars: title deeds, irrigation registers, and late-eighteenth, early-nineteenth century collections of legal cases (nawâzîl) brought before regional qâdîs, to illustrate the voluntary legalism of the Touat oases, and discuss its significance for comparable cases elsewhere.
Styles of Legalism

Two very different styles of legalism were examined in the following two presentations, albeit from a similar part of East Asia. The first concerns a medieval kingdom in Burma, which developed a legalistic mode of conflict resolution with the employment of professional lawyers, something that is rare outside Western Europe and the parts of the world inspired by the common and civil law models. The second is an example of the latter in colonial Cambodia, where the administration reified bureaucratic regulations so that they became social objects in their own right.


Andrew Huxley, School of Law, School of Oriental and African Studies

Lord Kyaw Thu’s Precedent is brief. It describes events around 1578, when King Bayinnaung of Pegu ruled a vast empire, and in 1870 it was published in the first salvo of Burmese ‘native press’ works, which concentrated on indigenous legal and political theory, yet it has not attracted scholarly attention. It belongs to the ‘precedent’ (pyat-ton) genre, which mixes judgment tales from classical literature with law reports from recent dynasties. The oldest such law reports are found in inscriptions from thirteenth-century Pagan, but Lord Kyaw Thu’s Precedent, as the oldest surviving manuscript text, rewards attention. This presentation aimed to reconstruct the legal milieu of imperial Pegu from Kyaw Thu’s text and from three laws passed by Bayinnaung’s grandson in 1607. As well as prescribing the dress lawyers must wear, and which suburb of the capital they should live in, these prescribe a canon of acceptable courtroom rhetoric.

Bayinnaung (r.1551–82) was the first local ruler to employ muskets, which helped him conquer most of Burma, Thailand, and Laos. While it lasted, the Pegu Empire aspired to a rule of law, and one of Bayinnaung’s titles was ‘Dhamma King’. That notoriously difficult word ‘dhamma’ is here at the legal end of its spectrum of meanings. Bayinnaung knew what legal policies the tradition demanded of a Good King, and his speech in the Kyaw Thu litigation tells us something of this. The King appointed Kyaw Thu to hear the fourth appeal in a dispute over political succession. Kyaw Thu’s judgment employs a style of legal reasoning by maxim, limitation, and counter-maxim. For example, ‘Handing it over conveys the ownership’ is a maxim against which he must argue; he nullifies it by adding the limitation ‘But not when children cohabit with their parents’, then cites the counter-maxim, ‘Where heirs are left out, and where the property is divided unlawfully, there must be careful accounting’.

Bayinnaung’s empire was populated by Buddhists. To what extent did Buddhism influence the law that Bayinnaung imposed on or offered to his subjects? Some historians argue that Buddhism was not fully integrated into Burmese law until the 1760s. In the field of legal philosophy, at least, it happened much earlier. Southeast Asian Buddhist law took its organizing concepts (social contract, ethical kingship, and lists of legal maxims) from classical literature, which is to say from the Pali scriptures. Kyaw Thu contains different levels of classical influence, which the presentation illustrated and analysed.
An Obsessive ‘Law of Things’ in French Cambodia

Sarah Womack, Faculty of History, University of Oxford

Much recent discussion in the historical anthropology of law has addressed law as abstraction. It has handled justice, community, and power as elements that belong to the spirit of law rather than to the paper of it, and addressed specific laws as almost incidental by-products of an essentially intangible labour. It has failed, in short, to consider laws as social objects. And these are not abstract. The presentation argued that laws may, in fact, be the enemies of abstraction, and that their fundamental appeal lies often in their ability to make the theoretical physical in the most straightforward sense. It approached the discussion of law through a discussion of specific laws — of the tedious, everyday, micromanual administrative laws that make up the vast bulk of what modern-day lawmakers produce.

These laws in French Cambodia seem to express a frustrating encounter ... between a small European population and an environment that would not conform to the ideal patterns of metropolitan Paris.

This presentation examined the laws of things in colonial Cambodia (1865–1953) as material interventions in a concrete environment. The overwhelming majority of what has been written about colonial law approaches it as a representation, whether accurate or invented, of abstract categories already existing. Administrative laws in Cambodia and their dynamic reciprocity with the management of water and with the various forms of urban motion suggest that this is exactly wrong for most of colonial lawmakers. Laws, in this case, did not represent anything; instead they created, and were meant to create, new circumstances and relationships, and to do so physically.

Laws of persons were largely uniform in the French empire, but laws of things gave free play to administrative ambitions locally. They specified everything from the dimensions of water-faucets to the functioning of bicycles. However, little effort was made to promulgate these laws in French Cambodia, and they seem to express primarily a frustrating encounter, in a poorly funded part of empire, between a small European population and an environment that would not conform to the ideal patterns of metropolitan Paris. Engaging with recent discussions by Guha, Anderson, Scott, and Benton on the nature of colonial lawmaker and its role in constituting states and a ‘state vision’, this presentation asserted the centrality to an historical anthropology of the state and legalism both of laws of things and of laws as themselves things.
SESSION FIVE: Legalistic Thought

Legal Performances in Thirteenth- and Fourteenth-Century France

Hannah Skoda, St John’s College, University of Oxford

In the thirteenth and fourteenth centuries, legalism grew rapidly in northern France. This presentation analyzed critical and often humorous responses to such developments and the contemporary imagery of law. It suggests a new approach to a period which is often seen as transitional in the development of legal process, and it shows such developments to have provoked a deep uneasiness and a sophisticated popular awareness that law could threaten the very values it claimed to uphold.

A basic paradigm is commonly used of the period: the systematization of law in the interests of authority (as in Gauvard’s work); written law and the proliferation of ‘custumals’; and the prevalence of an inquisitorial system (De Carbonnières). This legalism is assumed to have gradually diminished levels of violence, or at least reconceptualized violence as a tool of the law rather than interpersonal vengeance, and the ‘performance’ of law is seen (for instance by Esther Cohen) as a spectacle to reinforce authority and community. Growth in the scope of law did indeed increase awareness of its role. But certain ‘meta-performances’, which drew attention to their own theatricality, criticized the performance of law more generally. These critiques provide insights into contemporary understandings of the raison d’être of law, and reveal the perceived relationships and contradictions among legalism, political morality, and religious ethics.

Self-consciously dramatized illegitimate events surrounded the practice of law, such as the ‘rescousse’, when a popular figure was rescued from execution. Such meta-performances give far-reaching critiques of the relationship between law and authority, and raise the problematic notion of equity (with concomitant theological discussions) where legal process is shown to allow outwitting justice. Many performances dramatize the relationship between the law and the common good, demonstrating that, despite the claims of legal authorities, legalism can undermine communities.

Legalistic Thought

The final two presentations examined some of the ways in which a model of legalistic thought was appropriated in post-medieval Europe, on the one hand subject to ridicule and criticism within legal theatrical performances in early modern France, while later it was taken far more seriously by one of the most influential historians of the eighteenth century.
Custom, Combat, and the Comparative Study of Laws: Montesquieu Revisited

Malcolm Vale, St John’s College, University of Oxford

Why Montesquieu (1689–1755)? Is he relevant? If one purpose of the present project is to look at the comparative study of laws, in particular of forms of law beyond the great traditions such as Roman or Islamic or English common, then he certainly is. Here was a thinker who not only sought to compare legal concepts, but actually produced, perhaps for the first time, a properly comparative study of laws in both theory and practice.

Montesquieu was a practising lawyer for much of his life, and we need to bear this in mind when tracing the origins and nature of his ideas, and the kind of language and conceptual framework in which he expressed them. What is more, there was a clear historical dimension to his work. He can be considered as a legal and constitutional historian of France as well as a philosopher of law, and (precociously) as a student of societies across the world. In his Defence of L’Esprit des Lois he wrote: ‘this work has as its aim the laws, customs and various usages of all the people of the Earth. One could say that the subject is immense, since it encompasses all the institutions received among men’. This approach made him, in some respects, if not an anthropologist then, as Durkheim pointed out in 1892, at least a social scientist avant la lettre.

The concern of this presentation was not with whether or not Montesquieu got things right historically, nor with how and where his arguments may be deficient, but rather with questions such as how and why he came to write what he did, especially from the standpoint of historical thought and its relationship to other disciplines; what were the major sources and influences on which he drew, and to what results have his pioneering approaches led. Is his approach still a valid one? What, if anything, can we learn from it? He was concerned, as are several contributors here, with custom, or rather customs, and their nature; he was also concerned (intriguingly) with combat, especially in the form of the judicial duel, or trial by battle, to which he attributed a formative role in the evolution of French law; and he was an astute and perceptive student of comparative law and even, in embryo, of something that resembles socio-legal studies.
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The Foundation

The mission of the Foundation is to study, reflect on, and promote an understanding of the role that law plays in society. This is achieved by identifying and analysing issues of contemporary interest and importance. In doing so, it draws on the work of scholars and researchers, and aims to make its work easily accessible to practitioners and professionals, whether in government, business, or the law.

The Oxford Legalism Project

The Oxford Legalism project brings together lawyers, classicists, and orientalists with anthropologists and historians who work on the empirical study of law and legalism around the world. It is coordinated by Fernanda Pirie with fellow anthropologists Paul Dresch and Judith Scheele and historians Hannah Skoda and Malcolm Vale. A series of seminars running over two years has been funded by St John’s College, and will lead to the publication of three edited volumes and a monograph on the topic of legalism. The workshop on the Foundations of Law will lead to the first volume, entitled Legalism: Anthropology and History.

Fernanda Pirie is a University Lecturer and the Director of the Centre for Socio-Legal Studies at the University of Oxford. Formerly a practising barrister in Lincoln’s Inn, she is now an anthropologist, specializing in the law of Tibet. She is undertaking an anthropological study of the Bar of England and Wales.