



English legal system – an overview

Learning objectives

By the end of this chapter you should:

- appreciate the characteristics of law;
- be able to identify sources of law and explain the different processes of law-making;
- understand the various meanings of the term common law;
- know in outline the structure, composition, and jurisdiction of the courts;
- be able to explain the impact of membership of the European Community (EC) and the European Convention on Human Rights; and
- have an overview of the bodies and personnel of the law.

Introduction

The study of the English legal system involves two different, but related processes. First, a student must learn a large body of factual material about the fundamental concepts of law, the sources of English law and the institutions and the personnel of the law. You will encounter the material in this chapter during your study of the English legal system but you will find that the material also underpins an understanding of other substantive modules, such as Contract, Tort, and Criminal law. This information contains the 'basic tools' that a law student needs to start to understand law and how it operates.

Second, such knowledge is essential to the next process which involves a critical evaluation of the operation of law and its institutions; it is one thing to say what the law is, but quite another to explain if the law or an institution is operating effectively. A sound knowledge base is needed to found critical studies of the legal system or of the 'law in action'.

This chapter seeks to provide an overview of the law and the English legal system, introducing fundamental legal concepts and the terminology of law, which can seem somewhat mysterious in the early days of legal study. Some general themes or issues arising out of the basic information are outlined in this chapter preparatory to a more detailed discussion in later chapters.

1.1

What is law? – Some basic ideas

cross reference

Chapter 3,
'Human rights and fundamental freedoms' and the difficulties caused by the meaning of 'public authority' under the Human Rights Act 1998.

Much of law is concerned with definitions: who is an employee, what is a public place, or what is a business?

Many disputes coming before the courts require determination of such an issue. For example, in s.6 of the Caravan Sites Act 1968, a duty was placed on county councils to provide gypsies with adequate accommodation; (note that this provision of the Caravan Sites Act 1968 has now been repealed). Immediately it must be determined who falls within the term 'gypsies'. In its ordinary meaning, 'gypsies' refers to people of Hindu descent, alternatively known as Romanies. However, s.16 defined 'gypsies' as 'persons of nomadic habit of life, whatever their race or origin'. It may be seen that the definition in the 1968 Act raises a further definitional issue of what is meant by 'nomadic'. Originally, the word 'nomadic' meant tribes moving from place to place to find pastures for the purposes of grazing livestock. How does the word apply to modern travellers; must they be moving from place to place for an economic purpose or merely be travelling for any purpose? Can an individual be a nomad or must there be a group?

Such questions exercised the Court of Appeal in *Regina v South Hams District Council and Another, ex parte Gibb* [1994] 3 WLR 1151 and further see Lord Millet's comments in *Construing Statutes* (1999) 20 Stat LR 107. The important point is that problems of definition

cross reference

See chapter 4, 'The interpretation of statutes'.

are common in law. As seen above, there are various meanings that may be given to a particular word. In a statute, Parliament may leave a word undefined or indeed may provide a definition which may be narrower or broader than the meaning of a word in its everyday usage. It is for lawyers to interpret words and if such is not clear then to argue the point before a court.

Indeed, the meaning of many of the terms we are to consider in this chapter depends upon the context in which the term is used. For example, see later the variable meaning of the term common law.

A definition of law itself has proved elusive and much academic comment exists on the problems of devising a complete definition. Rather than exploring these sometimes esoteric arguments, by way of introduction a number of features associated with law are identified to highlight some of the characteristics of law in a practical sense.

The features associated with law are:

- a basis for recognising what is law, as opposed to, for example, the rules of a game or a moral code;
- a defined area where the law applies, such as in a state or other defined geographical area, and when law comes into operation; and
- the content of the law in terms of rules, principles, and doctrines.

1.1.1 Recognised as being law

The law of England and Wales primarily comes from two sources: Parliament and the courts. In relation to law made by Parliament, as long as a bill is passed by the House of Commons and the House of Lords and receives the royal assent, the resulting Act of Parliament is recognised as law. Equally, cases decided by the courts which interpret Acts of Parliament or develop the common law are recognised as a source of law. Originally, the law made by judges through case law was the most important source of law, as Parliament met infrequently. However, with the ascendancy of Parliament as the lawmaker, legislation increasingly became the main source of law.

Morality and the law may coincide, but not necessarily. Using morality as a guide to what should be subject to legal intervention is problematic. The difficulty, of course, lies in defining what is immoral. Religion may give guidance, but not all members of a society will necessarily agree on what is, or what is not, immoral. Attempts have been made to identify criteria against which to judge whether conduct should attract legal intervention. For example, John Stuart Mill in *On Liberty* said, '[t]he only purpose for which power can be rightfully exercised over any member of a civilised community against his will is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.' But this principle in itself calls for judgements as to what constitutes harm and who falls within the category of 'others'.

Morality may underpin law, for example, the law of contract may be seen as based upon the moral principle that a person should fulfil his promises. Theft is considered immoral and is also illegal, being a criminal offence under the Theft Act 1968. However, not every immoral act will constitute a criminal offence or a civil wrong. For example, prostitution may be considered immoral but being a prostitute is not a crime in itself; however, many activities associated with prostitution are criminal, e.g. soliciting. It is arguable that morality is not the key for recognising law. Indeed, a law which is considered to be immoral may nonetheless be

law. On this view morality does not, therefore, determine what is law. This may be labelled as a positivist approach.

However, it should be noted that some legal scholars, the natural lawyers, argue that a law-making process which fails to recognise a moral dimension to law is fundamentally flawed. Lord Steyn in a recent lecture identified the tyrannies of Nazi Germany, apartheid in South Africa, and Chile under General Pinochet as demonstrating ‘that majority rule by itself, and legality on its own, are insufficient to guarantee a civil and just society. Even totalitarian states mostly act according to the laws of their countries.’ In Europe, the European Convention on Human Rights seeks to ensure that the laws of signatory states protect human rights and fundamental freedoms, thus giving a moral core to laws. Further discussion of the positivist/natural law debate goes beyond the ambit of this book and these important issues may be further pursued in a course on jurisprudence.

For our present limited purposes, and taking a positivist approach, what is, or what is not law, depends upon the source from which it emanates. A doctrine, principle, or rule is a law if it comes from a recognised validating source, such as Parliament or the courts. So, for a bill (a draft Act of Parliament) to become law, it must be passed by Parliament and receive the royal assent of the monarch. This is the recognised way in which an Act of Parliament is made. Equally, decisions made by the courts are recognised as part of the law of England and Wales.

1.1.2 Geographical area and commencement

Laws apply to a defined geographical area usually corresponding to the territorial limits of a state. The United Kingdom, comprising England, Wales, Scotland, and Northern Ireland, is a state. However, in the United Kingdom there is not a single legal system. English law and the English legal system apply in England and Wales. Many aspects of the law and legal system of Scotland are markedly different from those of England and Wales; to some extent, the same is true of Northern Ireland. In relation to an Act of Parliament it will apply to the whole of the United Kingdom unless the Act indicates otherwise. Some statutes may be arranged in parts, with one part applying to England and Wales, another part applying to Scotland, and yet another applying to Northern Ireland.

Generally, in interpreting statutes the courts presume that an Act of Parliament only applies to the United Kingdom, unless extra territorial operation of the Act is expressly or impliedly provided for by the Act in question. It is possible for Parliament to pass laws which apply to acts committed outside the United Kingdom. For example, murder is triable in England and Wales wherever the offence is committed by a British subject, see s.9 of Offences against the Person Act 1861. This provision does not extend to Scotland. Legislation has been specifically enacted to allow the courts of the United Kingdom to try homicides committed abroad by non-British subjects under the War Crimes Act 1991.

Another major source of law is the law created by judges; this, too, is only applicable within England and Wales. The common law, that is judge-made law, does not operate in Scotland. Indeed, Scotland has a separate criminal law and procedure and areas of civil law, such as contract and tort, are different from those laws applying in England and Wales.

1.1.3 The commencement of Acts of Parliament

An Act of Parliament comes into force at the start of the day on which the Act receives the royal assent (see s.4 of Interpretation Act 1978), unless the Act provides otherwise. If an Act is not to come into force on the day of the royal assent then it is necessary to look at the Commencement section of the Act which will specify when the Act is to come into force. This may be done by: (a) stipulating a date when the Act becomes operative; or (b) stating that an Act is to be brought into force, or parts of it are to be brought into force, by statutory instrument to be made by a minister.

Generally, Acts of Parliament operate from the day they come into force and in this way only affect the future. This is not to say that Parliament cannot pass an Act which has retrospective effect, applying to past conduct; Parliament may do so if such an intention is made clear in an Act of Parliament. However, retrospective effect is considered to be objectionable as rights already accrued may be affected and previously lawful behaviour may become criminal and subject to a penalty. In the interpretation of Acts of Parliament by the courts it is presumed, in the absence of a clear intention to the contrary, that a statute is not to have retrospective effect. It may be noted that by Article 7 of the European Convention on Human Rights retrospective criminal law is prohibited. However, judge-made law does operate retrospectively. As to how judge-made law operates in England and Wales see below (paragraph 1.2.3).

1.1.4 The content of law

Criminal offences and civil wrongs

Glanville Williams, in *Learning the Law*, stated that:

the distinction between a crime and civil wrong cannot be stated as depending upon *what is done*, because what is done may be the same in each case. The true distinction resides, therefore, not in the nature of the wrongful act but in *the legal consequences that may follow it*.

example

If a person punches another then the legal consequences that may follow are twofold: first, the crime of, at least, battery may have been committed; and second the tort of battery may have been committed. In this way one act may lead to two separate legal consequences, being prosecution for a crime in the criminal courts and civil proceedings to obtain remedies in respect of a civil wrong.

It is important to note that the criminal law and civil law serve different purposes. The criminal law provides a system for the punishment of wrongdoers by the state. Under such a system the purpose is to maintain social order by deterring behaviour which violates other members of society's personal security and property rights. The focus is on the wrongdoer, or defendant, and once convicted questions arise as to how to deal with the wrongdoer. In essence, the criminal justice system is punitive; a wrongdoer may be punished by the infliction of a fine or a period of imprisonment. However, the courts have a wide array of sentencing powers and elements of sentencing are designed to have a rehabilitative effect on the wrongdoer, so it is not a wholly punitive system.

While the person who has been subjected to a battery may derive some comfort from an assailant being punished, he or she may have suffered losses in the form of pain, suffering, possible medical or dental costs, and time off work. The civil law provides a system for the compensation of such losses; in this case, the tort of battery would provide a remedy. So losses suffered due to the commission of the tort of battery would be compensated by the award of a remedy of damages. Under the civil law the focus is upon the person who has suffered loss and damages are intended, as far as money can, to put the person in the position they would have been in had the wrong not been committed: i.e. put the innocent party financially in the position they would have been in had the wrong not been committed.

The great branches of English law are the civil law and the criminal law. The civil law creates a system of rights and remedies for regulating interaction between members of society. Historically, the main areas of the civil law were the laws of contract and tort. These areas provide examples of how the system of rights and remedies operate. Treitel, in *The Law of Contract*, defines a contract as ‘an agreement giving rise to obligations which are enforced or recognised by law’. Thus, obligations may be created by the parties’ agreement and should a party fail to perform their side of the agreement the other will have remedies for this failure. The main remedy is that of damages which are designed to compensate for the loss caused to the innocent party.

The law of tort encompasses a number of situations where the law imposes a duty to act in accordance with a certain standard. The duty does not depend upon there being a contract. Examples of torts are negligence, nuisance, assault and battery, trespass, and defamation. Law may be classified in various other ways, for example, public law and private law or substantive and procedural law.

1.2

Common law and equity

Another important classification of law that will be encountered in the early stages of a law course is that of common law and equity.

1.2.1 Common law

The term common law gives rise to difficulty as it has several meanings, so any meaning depends upon the context in which the term is used.

- Common law may mean the law created by the common law courts in contrast to the law created by the Court of Chancery, which was called equity.
- Common law may mean all the law created by the courts, including the law of equity, as opposed to the law created by Parliament, that is legislation. In this sense, common law may be also termed ‘judge-made’ law.
- Common law may refer to a legal tradition which defines the English legal system and other derivative legal systems as opposed to the civilian legal tradition exemplified by the systems of mainland Europe. Apart from England and Wales other examples of a common law tradition are to be found in the legal systems of the states of the United States (with the exception of Louisiana), Canada, and Australia. Common law in this sense refers to forms of

law-making, particularly judge-made law which is governed by the doctrine of judicial precedent. The characteristic feature of the civilian systems is that law is to be found in codes made by the legislature. The civilian tradition is seen in the legal systems of France and Germany. While the French law of contract is codified and to be found in legislative form, the English law of contract is to be found mainly in the decisions of judges as reported in the law reports. As will be seen, a first issue when reading cases is to determine what the law is, as judges will not usually clearly state the rule upon which a decision is based.

It is not suggested that codification is unknown to English law; the Sale of Goods Act 1893 was an example of codification. Many areas of English law are a mix of legislation and case law.

1.2.2 Equity

The first point to note about equity is that it is a body of law developed by the judges, subject to the doctrine of precedent and in this sense is the same as other judge-made law. However, the origins, development, and the substance of equity are very different to those of the common law. Equity developed because of the rigidity of the common law; the price of certainty is sometimes injustice. To remedy injustices, it was possible to petition the Chancellor as 'keeper of the King's conscience', acting on behalf of the king as the fountain of justice. At first, equity was merely the Chancellor acting according to conscience. There was no system and therefore no certainty; it was said that equity depended upon the 'length of the Chancellor's foot', meaning that who was Chancellor determined the type of justice dispensed. Eventually from this process developed the Court of Chancery to administer equity. This court may be contrasted with the common law courts – Common Pleas, Exchequer, and King's Bench – which administered the common law.

The Chancellor was commonly an ecclesiastic and equity was based upon moral principles which eventually crystallised as a body of law governed by the doctrine of precedent. Equitable jurisdiction encompassed 'fraud, accident and breach of confidence'. Fraud in equity included many instances of sharp practice, whereas the common law concept of fraud was based on intent to deceive. Accident referred to mistakes, for example, in relation to written documents which equity could correct. Breach of confidence contained the main equitable jurisdiction relating to trusts as well as issues relating to the abuse of trust and confidence.

Having two jurisdictions, one common law and one equitable, administered by separate courts, operating side by side inevitably led to conflict. Ultimately it was determined that where common law rules and equitable rules conflicted then the rules of equity were to prevail.

example

In the law of property and the law of contract you will see the operation of the common law rules and those of equity. At common law merely part-paying a debt does not discharge the full debt, even if coupled with a promise by the creditor that the part-payment does discharge the full debt. (You will discover in contract that the reason why there is no discharge is that the debtor gives no consideration for the promise, i.e. gives nothing in return as they are doing less than they are bound to do.) However, a principle of equity, that of estoppel, was used to prevent a creditor going back on a promise to accept less in circumstances where a debtor had relied upon the promise, even though no consideration had been provided. See *Hughes v Metropolitan Railways* (1877) 2 App Cas 439 and *Central London Property Trust v High Trees House Ltd* [1947] KB 130.

By the 1800s, equity was beset by major problems (Dickens' novel, *Bleak House*, gives a flavour of the operation of equity at this time). Amongst these was an unduly complex and extremely slow procedure and where a party sought both common law and equitable remedies, it was necessary to commence proceedings in both the common law courts and the Court of Chancery. The Judicature Acts 1873–75 reformed this situation by fusing the administration of law and equity, so that both legal and equitable remedies could be awarded by the same court. The old common law courts and the Court of Chancery were replaced by the High Court (see later).

1.2.3 Common law – in the sense of judge-made law

At one time, judges adhered to the declaratory theory of the common law. This stated that there was no such thing as judge-made law. When the judges made decisions, they were merely declaring what the law was and had always been, as if the law mysteriously existed in the ether. This concealed two important points. First, judge-made law is retrospective; a statement of law in a later case applies to situations that may have already occurred. So, for example, if at the time an act takes place there is no clear law governing it but a later case then makes clear that the law does apply to such an act, then the law as clarified will retrospectively apply. This is objectionable as citizens have no way of knowing what the law is at the time of the act. The declaratory theory said the law had always been there and that the later judge merely declared what it was.

Second, it may be argued that unelected judges should not be making laws in a democratic society. Again the declaratory theory masked this.

The declaratory theory is now seen for what it is, a fiction, and this has been recognised by the courts. Lord Lloyd in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 said:

[n]obody now suggests that the common law is static. It is capable of adapting itself to new circumstances. Is it then capable of being changed? Or is it only capable of being developed? The common-sense answer is that the common law is capable of being changed, not only by legislation, but also by judicial decision. This is nowhere clearer than when a long-standing decision of the Court of Appeal is overruled. Indeed in a system such as ours, where the Court of Appeal is bound by its own previous decisions, the main justification for the existence of a second tier appeal is that it enables the House to redirect the law when it has taken a wrong turning.

While judges do make law they do so within limits. C. K. Allen, in *Law in the Making*, explained the limits to judicial law-making in the following terms, 'the creative power of the courts is limited by the existing legal material at their command. They find the material and shape it. The legislature may manufacture entirely new material.' One writer likened judge-made law to a tapestry, all that the judges may do is insert stitches here and there when enabled by litigation to do so, that is when a dispute raising the area of law is brought before the courts. The insertions are limited by the surrounding fabric and judges must ensure that they are consistent with the existing body of law. In this sense judges make partial and piecemeal changes to the law, this is not however to say that judges do not make significant changes to the law. Parliament, on the other hand, can remove and replace sections of the tapestry or undertake sweeping reforms of the law by wholly replacing the fabric.

While there is no formal doctrine of the separation of powers in the British constitution the constitutional role of judges is to administer the law and that of Parliament is to make laws. This generalisation, of course, needs to be qualified by the judges' role in relation to the common law. Traditionally, judges, in developing the common law, have adopted a low-key role in relation to law-making, avoiding as far as possible controversial issues of policy so as to avoid accusations of undemocratic activity. The development of the law of contract, tort, and, to a lesser extent, property do not generate great public interest. Judicial law-making is thus more active in areas not attracting attention. However, the process of interpretation of statutes and the role expected of judges under the Human Rights Act 1998 clearly does raise potentially controversial issues.

Judges must also operate within the doctrine of binding precedent, which means that like cases must be decided alike. Courts are arranged hierarchically and a judge in a lower court must follow the law as laid down by the higher courts. There are two elements to the doctrine of precedent:

- the search for a principle of law on which a previous case was decided and application of the principle to the instant case if the facts of the cases are sufficiently similar; and
- the doctrine of *stare decisis*, indicating when one court is bound by a principle of law coming from another court.

This system promotes certainty and allows lawyers to consult case law in the knowledge that, for example, principles stated in the House of Lords must be applied by the lower courts, such as the Court of Appeal or the High Court. Under this system, when a principle of law is established it operates both retrospectively and prospectively, in the sense of applying to the future.

When a higher court overrules a precedent set by a lower court, the change is both retrospective and prospective. This may operate unfairly should people have conducted their affairs in accordance with the law which has now been overruled. In some jurisdictions, such as the US, there is a practice of prospective overruling. With prospective overruling the newly established legal principle applies only to the future; the overruled principle of law remains in place for events and transactions occurring before the decision in the instant case and, depending upon the type of prospective overruling, to the facts of the instant case itself.

The House of Lords considered the temporal operation of judicial decisions in *Re Spectrum Plus Ltd (in liquidation)* [2005] 2 AC 680, exploring the arguments for and against prospective overruling. It was acknowledged that prospective overruling was not a practice in the English legal system. This, it was argued, was consistent with the judicial role as deciding what the law is and applying it to a set of facts, as opposed to Parliament's role of making law. However, Lord Nicholls said that exceptionally the House of Lords could alter judicial practice (the practice of judicial precedent derives from the common law and judges have the power to modify this practice) and prospectively overrule. Such overruling may be necessary:

to serve the underlying objective of the courts of this country: to administer justice fairly and in accordance with the law. There could be cases where a decision on an issue of law, whether common law or statute law, was unavoidable but the decision would have such gravely unfair and disruptive consequences for past transactions or happenings that this House would be compelled to depart from the normal principles relating to the retrospective and prospective effect of court decisions.

It is to be noted that Lord Nicholls suggested that this exceptional practice could potentially apply both to judge-made law and to the interpretation of statutes, however, in respect

dissent

when a judge disagrees with a decision reached by the other judges in a case the judge is said to dissent

of the latter category Lords Steyn and Scott **dissented**. See also *Awoyami v Radford and Another* [2007] All ER (D) 183.

Judge-made law is different in form to the law made by Parliament. As W. Twining and D. Miers note in *How to Do Things with Rules*, statute law is in a fixed verbal form whereas judge-made law is in a non-fixed verbal form. This means that the text in a statute is fixed, unless amended by a subsequent Act of Parliament, whereas judge-made law has first to be ascertained from a case and may be clarified or developed in later cases. This leads to a difference in approach to the interpretation of the law. Lord Reid, commenting on the nature of case law in *Broome v Cassell & Co Ltd* [1972] AC 1027, said:

experience has shown that those who have to apply the decision to other cases and still more those who wish to criticise it seem to find it difficult to avoid treating sentences and phrases in a single speech as if they were provisions in an Act of Parliament. They do not seem to realise that it is not the function of . . . judges to frame definitions or to lay down hard and fast rules. It is their function to enunciate principles and much that they say is intended to be illustrative or explanatory and not to be definitive.

Most of English Law comes from legislation and case law, in the sense of judge-made law. The judicial role is to interpret the former and to develop the latter.

1.3

Parliament and legislation

Legally, Parliament is the supreme law-making body and may make laws on any subject it chooses. To become an Act of Parliament a bill must pass through the House of Commons and the House of Lords (subject to the Parliament Acts 1911–49) and then receive the royal assent.

Sir Ivor Jennings, in *The Law and the Constitution*, wrote that Parliament could legislate to outlaw the smoking of cigarettes on the streets of Paris. While legally this is possible as a consequence of the doctrine of parliamentary supremacy, politically and practically Parliament would be ill-advised to do so, not least because there would be no means of enforcing such a law.

Treaties may be entered into by the government of the UK in the name of the Crown. Examples of treaties entered into by the UK are the Treaty of Rome 1957, which established the European Economic Community, and the European Convention on Human Rights 1950. However, while such treaties bind the UK in international law, they form no part of domestic law unless incorporated by Act of Parliament. Obligations under the treaties mentioned above have been incorporated into domestic law by the European Communities Act 1972 and the Human Rights Act 1998, respectively. That is not to say the international treaties that remain unincorporated into English law have no effect. There is a presumption of statutory interpretation that Parliament does not intend to legislate in contravention of an international treaty to which the UK is a signatory. Of course, this is only a presumption and should Parliament by clear words indicate an intention not to comply with a treaty obligation then the courts must give effect to this intention.

In making laws, Parliament is not bound by past parliaments nor may it bind future parliaments. This means that no Act of Parliament may be entrenched i.e. made impossible to repeal. To amend or repeal any Act of Parliament, no special procedure is required; the

cross reference

Chapter 3, 'Human rights and fundamental freedoms' and chapter 4, 'The interpretation of statutes'.

amending or repealing Act must, as stated above, pass through both Houses of Parliament and receive the royal assent. However, it may be the case that for a future Parliament to repeal or amend some statutes, for example, the European Communities Act 1972 and the Human Rights Act 1998, very clear legislative words would be required.

Once an Act of Parliament has been made then its validity may not be questioned in the courts or by other bodies, see *British Railways Board v Pickin* [1974] AC 765.

example

The Hunting Act 2004 made it an offence to hunt wild animals with dogs, except in limited circumstances. The Act was passed using the Parliament Acts 1911–49 when the House of Lords failed to pass the bill. In *Jackson v Attorney General* [2006] 1 AC 262 a challenge to the validity of the Act was mounted. The argument in essence concerned the procedure for the making of the Hunting Act 2004. The Parliament Act 1911, which allows a bill to become an Act without the assent of the House of Lords after a delay, was passed by the House of Commons and the House of Lords and then received the royal assent. The Parliament Act 1949, which shortened the time that a bill may be delayed, was passed using the Parliament Act 1911. It was argued that the Parliament Act 1911 delegated power to the House of Commons to pass legislation without the assent of the Lords, but by passing the Parliament Act of 1949 the Commons had sought to enlarge its powers. This was in contravention of the established principle that powers conferred on a body by an enabling Act (i.e. here the Parliament Act 1911) may not be enlarged or modified by that body unless there are express words authorising such enlargement or modification. In other words, the argument was that the Parliament Act 1949 should have been assented to by the House of Lords, without such assent it was not valid and any legislation made under it was likewise invalid.

This was rejected by the House of Lords. Lord Bingham said that ‘the overall object of the 1911 Act was not to delegate power: it was to restrict, subject to compliance with the specified statutory conditions, the power of the Lords to defeat measures supported by a majority of the Commons...’ The Hunting Act 2004 was validly enacted.

Note the challenge was not on the substantive ground that the Hunting Act 2004 was bad legislation. Such a challenge would also fail as English law does not recognise such a ground of challenge.

Should statute law and case law conflict then statute law will prevail. Case law cannot repeal an Act of Parliament, whereas it is clear that an Act of Parliament may alter, in whole or part, case law.

The effect of legislation may be outlined in the long title to an Act. An Act of Parliament may create new law or may affect existing law. You may find references in the long title to an Act that the Act is intended to repeal legislation, amend existing legislation or case law, consolidate legislative provisions, or codify an area of law. Table 1.1 explains and gives examples of the types of legislation.

The role of judges in relation to Acts of Parliament is to give effect to the intention of Parliament which is to be collected from the words used in the statute. As Lord Diplock said in *Duport Steel v Sirs* [1980] 1 WLR 142:

... Parliament makes the laws, the judiciary interpret them. When Parliament legislates to remedy what the majority of its members at the time perceive to be a defect or a lacuna in the existing law (whether it be the written law enacted by existing statutes or the unwritten common law as it has been expounded by the judges in decided cases), the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not

Table 1.1

Table of legislation – explanation and examples

Types of legislation or legislative provision	Explanation	Examples
Repealing	An Act of Parliament does not cease to be law due to the passage of time or by falling into disuse. For a statute or a statutory provision to cease to be law it must be repealed by a further Act of Parliament. A schedule of repeals is a usual feature of an Act of Parliament. Additionally, the Law Commission (see later) keeps statutes under review and will seek to repeal obsolete Acts of Parliament	The Larceny Act 1916 was repealed by the Theft Act 1968 A provision of the Caravans Sites Act 1968, s.6, was repealed by the Criminal Justice and Public Order Act 1994 See the Statute Law (Repeals) Act 2004
Amending	An Act may seek to amend existing statutes or alter the common law	The Law Reform (Frustrated Contracts) Act 1943 amended the existing common law on the frustration of contracts
Consolidating	Consolidating legislation brings together in one Act of Parliament all the statutory provisions on a particular subject area. It is designed to make the law easier to find	The long title to the Employment Rights Act 1996 simply states that it is 'An Act to consolidate enactments relating to employment rights'
Codifying	Whereas consolidation concerns bringing together statutory provisions, codification is designed to bring all law, statutory and case law together in a single statute. Such Acts make the law easier to find	The Sale of Goods Act 1893 was a codifying measure. Subsequently, the Act was amended and the Act and amendments were consolidated in the Sale of Goods Act 1979. Many areas of English law are not codified, e.g. criminal law, contract, and tort

for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral.

Lord Diplock is emphasising the separation of powers between Parliament and the courts. The role of judges is to interpret law made by Parliament and they must be careful not to encroach on this law-making function. But although the language used by Parliament to express its legislative intention is paramount, as will be seen later, the judges are able to use other aids to interpretation in establishing the purpose of Parliament.

Parliament may empower other persons or bodies to make law on its behalf. Examples of such include government ministers, government departments, and local authorities. This is an important source of law as it allows Parliament to concentrate on principles and leave details to be supplied by delegated legislation. The power to make delegated legislation is given in an Act of Parliament (which is referred to as the parent or enabling Act). Unlike

cross reference

Chapter 4, 'The interpretation of statutes'.

primary legislation, the validity of delegated or secondary legislation may be challenged in the courts if the maker has acted *ultra vires*, which is beyond the powers given by the parent Act.

The inputs involved in the process of parliamentary law-making are neatly summed up in the following quotation of Lord Hailsham in *R v Shivpuri* [1987] AC 1, (a case which is further discussed in chapter 5 on judicial precedent):

... as one of the authors of the decision in *Reg. v. Smith (Roger)* [1975] A.C. 476 I must say that I had hoped that my opinion in that case would be read by Parliament as a *cri de coeur*, at least on my part, that Parliament should use its legislative power to rescue the law of criminal attempts from the subtleties and absurdities to which I felt that, on existing premises, it was doomed to reduce itself, and, after long discussions with the late Lord Reid, I had reached the conclusion that the key to the anomalies arose from the various kinds of circumstance to which the word 'attempt' can be legitimately applied, and that the road to freedom lay in making an inchoate crime of this nature depend on a prohibited act (the so called, but ineptly called, 'actus reus') amounting to something more than a purely preparatory act plus an intent (as distinct from an attempt) to carry the act through to completion. When the Criminal Attempts Act 1981 was carried into law, and I read section 6 which abolished altogether the common law offence except as regards acts done before the commencement of the Act, I was happily under the impression that my hopes had been realised, and that my carefully prepared speech in *Reg. v. Smith* would henceforth be relegated to the limbo reserved for the discussions of medieval schoolmen. It was therefore with something like dismay that I learned that the ghost of my speech had risen from what I had supposed to be its tomb and was still clanking its philosophical chains about the field, and that the new Act had formed a tilting yard for a joust of almost unexampled ferocity between two of the most distinguished professors of English criminal law in the United Kingdom.

In a nutshell, Lord Hailsham felt that the common law had reached an impasse and it was for Parliament to remedy this difficulty. Parliament passed the Criminal Attempts Act 1981, abolishing the common law offence. However, the House of Lords in *Anderton v Ryan* [1985] AC 560 interpreted the Criminal Attempts Act 1981 in such a way that it resurrected the approach in *R v Smith (Roger)*. This interpretation was then the subject of academic criticism by, amongst others, Professor Glanville Williams in an article entitled, 'The Lords and Impossible Attempts, or *Quis Custodiet Ipsos Custodes?*' (1986). The House of Lords usually follows its previous decisions but in *R v Shivpuri* it departed from its decision in *Anderton v Ryan* as it considered it to be wrong. Diagram 1.1 shows the law-making bodies and the forms that law may take.

Relationship between the law of the UK and the law of the European Community (EC)

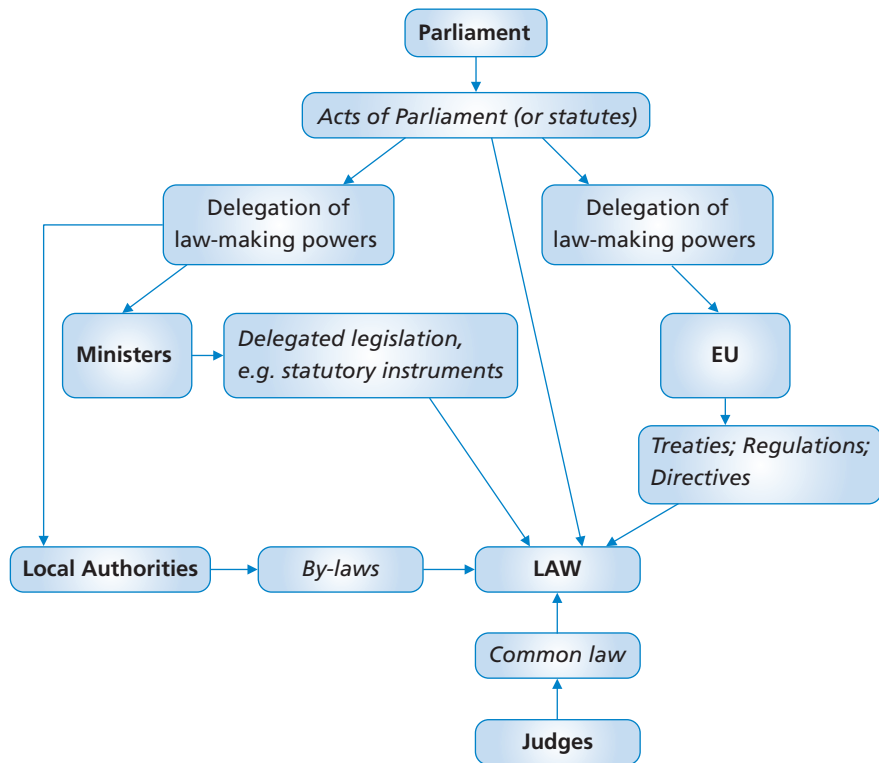
When the UK government signed the treaties giving membership of the European Communities for the treaty obligations thereby undertaken to have effect under UK law, it was necessary for an Act of Parliament to be passed incorporating such obligations. The law-making institutions of the European Community (EC) were empowered to make laws for the UK by reason of the European Communities Act 1972. The effect of this Act is that in areas of law affected by the European Community there is interaction between two legal systems, that of the domestic system of the UK and that of the European Community. It was decided by the Court of Justice of the European Communities that in instances of conflict between national law and Community law, Community law was supreme, *Costa v ENEL* [1964] ECR 1125.

Diagram 1.1

Law-making bodies and forms of law

cross reference

Law-making is considered in further detail in chapter 2.

**Key**

Law-making bodies (**bold**)

Forms of law (*italics*)

Relationship between the law of the UK and the European Convention on Human Rights

The Convention on Human Rights operates under the Council of Europe. The political element is the Committee of Ministers, consisting of a representative from each signatory state and the judicial body is the European Court of Human Rights. A key point to note is that the Council of Europe is distinct from the institutions of the European Community. The jurisdictions of the Court of Justice of the European Communities and the European Court of Human Rights are distinct and must not be confused.

The Human Rights Act 1998 incorporated Convention rights into English law. By the Act the English courts must take into account any judgment, decision, declaration, or advisory opinion of the European Court of Human Rights; note that while such judgment, decision, etc. must be considered by the domestic courts, they need not be followed. The Human Rights Act 1998 does not provide a yardstick by which to strike down legislation which is not in conformity with the Convention. Instead, the Act requires that the courts seek to interpret and apply primary legislation and subordinate legislation, as far as is possible, in a way which is compatible with the Convention rights. If it is not possible to read the legislation so as to be compatible with Convention rights then the domestic court must make a declaration of incompatibility, throwing the onus upon the government to introduce amending legislation in Parliament.

Criminal law and civil law – terminology, differences, and themes

1.4.1 Criminal

In criminal trials the burden of proof is upon the prosecution to prove the defendant's guilt. This means that the onus falls on the prosecution to prove all the ingredients of a crime with which a defendant is charged; a defendant is innocent until proven guilty. The standard of proof is that the prosecution must prove the defendant's guilt beyond reasonable doubt. Note that in certain instances the burden of proof is placed upon a defendant, for example, if the defendant raises a defence of insanity or diminished responsibility. However, the standard of proof, when a defendant has the burden of proof, is the lesser civil standard of balance of probabilities.

The criminal courts of trial are the magistrates' courts and the Crown Court. In the former courts, questions of fact are determined by the magistrates whereas in the Crown Court, findings of fact are made by a jury, consisting of twelve people.

A characteristic of the criminal process is that it is said to be adversarial. The process is not a process to necessarily discover the truth of what happened but one to test the strength of the case against an accused. It is important to understand how the rules of criminal procedure and evidence govern this process and to consider if it is fair to both sides. An issue that needs to be borne in mind is the relative resources of the state, as prosecutor, on one side and the defendant on the other: are the parties on a level playing field?

The adversarial process is often compared with the inquisitorial process practised in mainland European criminal justice systems, where responsibility for a criminal case is assumed by an investigating magistrate. The magistrate plays a much more active role in a case, unlike under the English model where the judge is largely passive, relying on the parties to present a case and certainly has no role in the investigation of a case. It is a matter of some debate as to which system is fairer to a defendant, with greater safeguards built into the adversarial model. Of course, whatever the rules it must always be borne in mind how they operate in practice.

The criminal justice system in recent years has been the subject of major changes. As well as being somewhat of a political battlefield there is a constant drive to make the process more efficient and thereby save costs. In 2006, the Lord Chancellor, Lord Falconer, in a paper entitled 'Doing Law Differently' (Department of Constitutional Affairs at: www.dca.gov.uk/dept/doinglawdiff.htm/), suggested that not all criminal offences, serious and not so serious, need be treated in the same way e.g. be subject to lengthy court proceedings. Other methods of dealing with low-level offences, such as anti-social behaviour, may be dealt with more speedily where guilt is admitted by the use of, for example, cautions or conditional cautions.

cross reference

See further chapter 6, 'The criminal process', 6.3.7.



thinking point

It can be readily understood that a major concern in the drive for efficiency in criminal justice is to save costs. Are there dangers, and if so what, in diverting criminal cases from proceeding to court?

1.4.2 Civil

In civil trials the burden of proof is placed upon a party who makes an allegation of fact. Usually a claimant will have the burden of proof and the standard of proof is that of the balance of probabilities i.e. the facts alleged must be more likely to be true than not. It is important in studying substantive subjects, such as contract and tort, to note any special rules relating to burden of proof.

example

In the law of contract, note the following situations where the ordinary burden of proof is reversed:

- s.11(5) of the Unfair Contract Terms Act 1977 provides that where an exemption clause is subject to the test of reasonableness under the Act then it is for the person who relies on the clause to show that it is reasonable; and
- where it is alleged that a contract has been formed between family members then the law presumes that there is no intention to create legal relations and on this basis no contract. It is for the person who alleges that there is a contract to rebut this presumption.

cross reference

Chapter 8, 'The civil process'.

The adversarial model was also seen as the basis for civil justice but this has been weakened following introduction of the Civil Procedure Rules which allow a judge to manage a case, rather than to leave such to the parties.

1.4.3 Terminology

In civil cases, a person commencing proceedings against another is termed a claimant (in the older cases you will encounter the term plaintiff), while the person against whom proceedings are brought is termed a defendant.

In criminal cases, a prosecution will be undertaken by the state in the name of the monarch (Regina or Rex) against a defendant or accused. Note that in some older cases a prosecution before a magistrates' court would be made in the name of a police officer involved in the case. Often such cases were appealed to the Divisional Court of the Queen's Bench Division of the High Court and are reported under the names of defendant and prosecutor, e.g. *Brutus v Cozens* [1972] 1 WLR 484.

It is to be noted that the terminology is not interchangeable, so in a civil trial a defendant is not prosecuted for a breach of contract or commission of a tort; equally if a judge finds that a defendant has committed a breach of contract or a tort the defendant is said to be liable as opposed to criminal trials where a defendant may be guilty.

Classification of the courts

Courts are divided into superior courts and inferior courts.

A superior court is one with unlimited jurisdiction, both in a geographical and monetary sense. An inferior court has limited jurisdiction. The superior courts are the House of Lords, Court of Appeal, High Court, Crown Court, Privy Council, and Employment Appeal Tribunal; the inferior courts include the magistrates' courts and the county courts. The major differences between the courts relates to their powers in relation to contempt of court and to the supervision of the inferior courts by a superior court, i.e. the High Court.

Constitutional Reform Act 2005

When the relevant provisions of this modernising Act come into force the courts will undergo certain changes. The House of Lords will become the Supreme Court of the United Kingdom. At present there is already a Supreme Court, which consists of the Court of Appeal, the High Court, and the Crown Court; these courts will under the reformed system become the Senior Courts of England and Wales (the Supreme Court Act 1981 which governs the Court of Appeal, the High Court and the Crown Court is to be renamed the Senior Courts Act 1981). The present judges of the House of Lords, the Lords of Appeal in Ordinary, will be retitled Justices of the Supreme Court. It is expected that the Supreme Court of the United Kingdom will replace the House of Lords in October 2009.

Overview of the composition and jurisdiction of the courts

It is evident in studying the system of courts that it was not planned. The courts system has simply grown, quite often to meet specific needs. Note it is not possible to classify courts as criminal or civil courts as some courts exercise both criminal jurisdiction and civil jurisdiction. However, the organisation of the courts allows for some specialisation. When studying the courts, seek to identify:

- the courts where cases commence;
- the courts in which appeals are heard; and
- the courts that exercise both **first instance** and appellate jurisdiction.

a court of first instance

A case will commence in a court of first instance (i.e. a court of trial). This jurisdiction is also termed original jurisdiction. Decisions of courts may be challenged on appeal and erroneous decisions corrected. Courts hearing appeals are said to have appellate jurisdiction.

In explaining the courts below a brief indication is also given of the judges who sit in particular courts.

Information on the judiciary may be found at www.judiciary.gov.uk/. This basic information on the courts and judges is necessary for an understanding of how the doctrine of judicial

cross reference

See chapter 12 on 'The judiciary' and the chapters on criminal and civil procedure.

precedent operates and background for informing your understanding of the substantive areas of law.

(Note – The following descriptions of the jurisdiction of the courts only deal with the courts of England and Wales and courts having an effect on the English legal system.)

1.5.1 Magistrates' courts

Magistrates' courts are presided over by Justices of the Peace (alternatively termed magistrates). Cases are normally heard before a bench of two or three Justices of the Peace, s.121 Magistrates' Court Act 1980. Justices of the Peace need not be legally qualified, so they may be advised about matters of law by a justices' clerk. District Judges (Magistrates' Court) also sit in magistrates' court and replaced stipendiary magistrates. Unlike lay justices, who are unsalaried, District Judges (Magistrates' Court) are legally qualified and salaried. A District Judge (Magistrates' Court) carries out the same criminal and civil work as that of a lay magistrate but may sit alone when hearing a case, s.26 Courts Act 2003.

The magistrates' courts have predominantly a criminal jurisdiction but also have an important civil jurisdiction.

Criminal jurisdiction

All criminal cases commence in the magistrates' courts, but not all cases are tried there. Where a defendant is charged with an indictable offence which is only triable on indictment a magistrates' court must send the defendant to the Crown Court for trial. If an indictable offence is triable either way then a magistrates' court must determine the mode of trial i.e. whether a defendant is to be tried in the Crown Court or a magistrates' court. If a defendant is charged with a summary offence (or the offence is triable either way and the case is suitable for summary trial and the defendant consents to such trial) the magistrates may try the defendant.

Where a magistrates' court's jurisdiction relates to offences committed by children and young persons it is referred to as a youth court.

Terminology

Criminal offences are classified as either indictable offences or summary offences, depending upon the seriousness of the offence. Schedule 1 of the Interpretation Act 1978 provides that:

- (a) indictable offence means an offence which, if committed by an adult, is triable on indictment, whether it is exclusively so triable or triable either way;
- (b) summary offence means an offence which, if committed by an adult, is triable only summarily.

The classification is an essential element in the process of deciding where an offence is to be tried i.e. via a summary trial in a magistrates' court or a trial on indictment in the Crown Court.

All common law offences are indictable, as are offences created by statute if the statute specifies a penalty to be imposed following trial on indictment.

example

Section 8(2) of the Theft Act 1968 provides, 'A person guilty of robbery, or of an assault with intent to rob, shall on conviction on indictment be liable to imprisonment for life.'

All summary offences are created by statute and are identified in a statute by specification of a maximum penalty which may be imposed following summary conviction.

example

Section 12(2) of the Theft Act provides the following penalty for taking a motor vehicle, the guilty person 'shall... be liable on summary conviction to a fine not exceeding level 5 on the standard scale, to imprisonment for a term not exceeding six months, or to both'.

Finally, some indictable offences are triable either way, i.e. may be tried on indictment in the Crown Court or tried summarily in a magistrates' court. Such offences are readily identifiable. First, where a statute creates an offence, alternative penalties are specified, one following summary conviction and the other following conviction on indictment. Second, Schedule 1 of the Magistrates' Courts Act 1980 lists offences which are triable either way.

cross reference

See chapter 6, the criminal process'.

Indictable offences may be:

- triable only on indictment in the Crown Court; or
- triable either way in the Crown Court or magistrates' court.

Summary offences may only be tried in a magistrates' court, unless linked to a trial on indictment.

**thinking point**

Trial in the Crown Court is more time consuming and costly than trial in the magistrates' courts. The classification of offences determines where a trial may take place. By reclassifying offences as summary, trial costs may be saved. Is such an approach defensible?

Civil jurisdiction

Jurisdiction is given by statute and consists primarily of licensing, family proceedings, and the care and adoption of children. Certain civil debts, for example in relation to income tax, may be recovered in a magistrates' court.

1.5.2 Crown Court

The basic position in the Crown Court is that proceedings will be before a single judge. The judge may be a High Court judge, a circuit judge, a recorder, or a District Judge (Magistrates' Court). On hearing an appeal, a judge of the High Court or a circuit judge or a recorder shall sit with not less than two nor more than four Justices of the Peace, ss.8 and 74 Supreme Court Act 1981.

The Crown Court is part of the present Supreme Court and has jurisdiction throughout England and Wales; it is one court that sits in various locations. While it is a superior court it is subject in certain instances to the supervisory jurisdiction of the High Court (see later).

Trial on indictment

The main jurisdiction of the Crown Court is to that of trial on indictment, before judge and jury, s.46 Supreme Court Act 1981. Following the Criminal Justice Act 2003, it is possible for a judge to sit without a jury where there is a danger of jury tampering, s.44, and in complex fraud trials, s.43 (not yet in force).

Committals for sentence

A defendant tried before a magistrates' court may be committed for sentence to the Crown Court. This may occur where a defendant who is 18 or over is found guilty following summary trial of an offence which is triable either way and the magistrates' court is of the opinion that given the gravity of the offence or offences its sentencing powers are inadequate.

Appeals

There are various rights of appeal to the Crown Court from the magistrates' courts, including:

- against sentence where a defendant pleads guilty;
- against sentence or conviction where a defendant pleads not guilty; and
- against licensing decisions.

Additionally, in certain instances appeals to the Crown Court may come from the decisions of local authorities and other bodies.

1.5.3 County courts

In practice, the work of a county court is carried out by circuit judges, one or more of whom is assigned to each county court district, and by district judges and deputy district judges. The following judges may sit in a county court: every circuit judge, every judge of the Court of Appeal, every judge of the High Court, and every recorder, s.5 of County Courts Act 1984, district judges and deputy district judges, ss.6 and 8 of County Courts Act 1984.

The county courts are a creation of statute and, in consequence, jurisdiction is given by statute. The county courts are governed by the County Courts Act 1984 and deal exclusively with civil cases.

While much of the jurisdiction of the county courts is the same as for the High Court there are limitations as to subject matter, financial limitations, and territorial limitations.

A county court has concurrent jurisdiction with the High Court, that is has jurisdiction over most of the civil claims which may be the subject of proceedings in the High Court. The jurisdiction of the county courts includes the following:

- subject to limited exceptions, a county court may hear and determine any action founded on contract or tort, s.15 of County Courts Act 1984;
- provided the High Court has not been given exclusive jurisdiction, a county court may hear and determine an action for the recovery of a sum recoverable by virtue of any enactment, s.16 of County Courts Act 1984;

- actions for recovery of land and actions where title is in question, s.21 of County Courts Act 1984;
- equity jurisdiction, s.23 of County Courts Act 1984. Note that this jurisdiction is subject to a £30,000 limit; and
- probate, s.32 of County Courts Act 1984 again subject to a £30,000 limit.

Jurisdiction is also conferred on the county courts by other statutes, for example:

- by s.33 of Matrimonial and Family Proceedings Act 1984 a county court may be designated as a divorce county court and such court shall have jurisdiction to hear and determine any matrimonial cause, but may only try such a cause if it is also designated as a court of trial. Every matrimonial cause must commence in a divorce county court and shall be heard and determined there unless it is transferred to the High Court.

Commencing proceedings – county courts or High Court

As was seen in criminal cases, the jurisdictional limits of the magistrates' courts and Crown Court separate serious from less serious cases. This is done on the assumption that a fuller treatment should be given to serious cases. The same is true of the trial of civil cases.

In the civil process, the two courts of trial are the county courts and the High Court. At one time, whether an action for contract or tort proceeded in a county court or the High Court was determined on the basis of the amount of the claim. This was seen as not being the best use of resources, especially where the claim was relatively straightforward. Moreover, this took no account of the difficulty of a case. Even cases with a relatively small monetary value may give rise to novel and complex points of law, which may have a significant impact on other cases. In consequence, the Lord Chancellor was given power to reallocate business between the High Court and county courts by s.1 of Courts and Legal Services Act 1990. This reallocation was effected by the High Court and County Courts Jurisdiction Order 1991 (SI 1991 No. 724).

The important point to note is that if a county court has jurisdiction, then by Article 4 of the 1991 Order, proceedings may be commenced in either a county court or the High Court. The 1991 Order abolished many restrictions on the jurisdiction of the county courts. For example, the county courts now have unlimited jurisdiction in relation to cases concerning tort and contract. So, in relation to such cases, a claimant has a choice of the court of trial but it is not a completely free choice. The basic principle in Article 4 is qualified in the following ways:

- a case should commence in the High Court taking into account, (i) the financial value of the claim or the amount in dispute; (ii) the complexity of the facts, legal issues, remedies, or procedures; (iii) the importance of the claim e.g. does it involve a point of law of general public interest;
- a case cannot commence in the High Court unless the value of the claim is more than £15,000; and
- if a case concerns personal injuries it must not commence in the High Court unless the claim is worth £50,000 or more.

(See Practice Direction – How to Start Proceedings – The Claim Form (2000) PD 7A; Articles 4A and 5 High Court and County Courts Jurisdiction Order 1991 (SI 1991 No. 724).)

Importantly, cases commenced in a county court or the High Court may be transferred from one court to the other where appropriate under ss.40–42 of County Courts Act 1984.

Small claims jurisdiction

The county courts have an important jurisdiction in relation to small claims. In general, where a claim is for not more than £5,000 then it may be allocated to the small claims track. The procedure involved should allow litigants to appear without legal representation. The hearing is to be informal and the court may adopt a proceeding that it considers to be fair; the strict rules of evidence do not apply.



thinking point

A significant point to consider is that if a whole class of case is disposed of by the small claims procedure in the county court with little or no opportunity of appeal, there is a danger that divergences may arise in the interpretation of the law in different parts of the country. Additionally, as these cases are unreported such 'law' will be unknown. This tendency is reinforced by the periodic raising of the small claims monetary limit, thus bringing more cases within the small claims jurisdiction. Do you think the significance of the above points is outweighed by other factors such as the time and costs savings associated with the small claims jurisdiction?

There is a limited appellate jurisdiction whereby circuit judges may hear appeals from the decisions of district judges.

1.5.4 High Court

High Court judges, alternatively known as puisne judges, sit in the High Court. Judges are referred to as Mr Justice, or Mrs Justice, which may be abbreviated to J as in, for example, Smith J. The judges are attached to divisions of the High Court. As at 1 April 2008, there were 17 High Court judges attached to the Chancery Division, 73 to the Queen's Bench Division, and 19 to the Family Division. Each Division is headed by a senior judge: in the Chancery Division, the Chancellor of the High Court; in the Queen's Bench Division, the President of the Queen's Bench Division (note the Lord Chief Justice is also part of the Division); and in the Family Division, the President of the Family Division, s.5 of Supreme Court Act 1981. At first instance one High Court judge sits to hear a case.

The High Court is mainly a civil court (note the important criminal jurisdiction exercised by the Queen's Bench Division). It is comprised of three divisions: the Queen's Bench Division; the Chancery Division; and the Family Division, s.5 of Supreme Court Act 1981. The divisions allow for specialisation and this is further achieved by specialist courts within the Divisions. Within the Queen's Bench Division there are specialist courts: the Administrative Court; Admiralty Court; Commercial Court; and Technology and Construction Court. There are specialist courts also attached to the Chancery Division, for example, a Patents Court. It is particularly important to appreciate that the High Court has both first instance (original) and appellate jurisdiction. The main statute governing the High Court is the Supreme Court Act 1981. The jurisdiction of the High Court is based in part upon statute and is in part inherent,

Table 1.2*Jurisdiction of the High Court*

Queen's Bench Division	Chancery Division	Family Division
Jurisdiction includes cases concerning contract and tort. Also, the following specialist courts fall within the Queen's Bench Division:	Jurisdiction includes cases concerning:	Jurisdiction includes cases concerning:
Administrative Court Main jurisdiction is public and administrative law cases including, judicial review, statutory appeals, and habeas corpus	property; the execution of trusts; the administration of the estates; bankruptcy; partnerships;	all matrimonial causes and matters; legitimacy; proceedings under the Children Act 1989; adoption;
Admiralty Court Jurisdiction over cases concerning maritime issues, such as collision of ships	probate business, other than non-contentious business; and companies.	non-contentious probate business; s.30 of the Human Fertilisation and Embryology Act 1990;
Commercial Court Jurisdiction includes cases concerning business document or contracts; the export or import of goods; insurance; banking and financial services; and arbitration	Patents Court Hears issues concerning patents; see Patents Act 1977 and Supreme Court Act 1981, s.6	all proceedings under the Child Support Act 1991; all proceedings under ss.6 and 8 of the Gender Recognition Act 2004; and all civil partnership causes and matters.
Technology and Construction Court Jurisdiction over technically complex cases, such as building cases		

as the result of the development of the old common law courts; see s.19 of Supreme Court Act 1981. At first instance the High Court has unlimited civil jurisdiction of a general nature. The Table 1.2 gives an indication of the subject matter of the jurisdiction of each division (see s.61 and Schedule 1 of the Supreme Court Act 1981).

**thinking point**

Note the possibility of the creation of a unified first instance civil and family court. In 2005 a consultation paper was published by the Department for Constitutional Affairs on this issue. It has been seen civil cases may commence in the High Court, in a county court, or in relation to family proceedings a magistrates' court (indeed in relation to matrimonial causes, domestic proceedings and children, jurisdiction is split amongst magistrates' courts, county courts, and the High Court). The consultation paper explored the benefits of a unified first instance civil and family court either as one court, or as two separate courts. Identified benefits included: removal of jurisdictional boundaries; greater flexibility in the allocation of judicial resources; greater transparency in the court system; aiding access to justice particularly for litigant in person; and financial savings consequent upon more efficient use of resources. What problems might be encountered in creating such a first instance jurisdiction?

Appellate jurisdiction

The High Court also acts as a court of appeal in certain instances. A major appellate function in criminal cases is exercised by the Divisional Court of the Queen's Bench Division. Appeals are heard following summary trial before a magistrates' court by way of case stated where it is alleged that the decision is wrong in law or was given in excess of jurisdiction, s.111 of Magistrates' Courts Act 1980. In addition, an appeal from a magistrates' court to the Crown Court following summary trial may be further appealed, by defence or prosecution, by way of case stated to the **Divisional Court** of the Queen's Bench Division, s.28 of Supreme Court Act 1981. The grounds once again are that the decision is wrong in law or is in excess of jurisdiction.

Divisional Court

Divisional Courts consist of two or more judges, s.66(3) of Supreme Court Act 1981

Supervisory jurisdiction

The Queen's Bench Division of the High Court exercises supervisory jurisdiction by means of judicial review. Judicial review is described in *Halsbury's Law of England* as 'the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties'. The process does not look at the merits of a case and in this sense is not an appeal; rather, it concentrates on the process by which a decision is made. A decision-making body must act within its powers and in accordance with the rules of natural justice.

1.5.5 Court of Appeal

Judges in the Court of Appeal are termed Lords Justices of Appeal (abbreviated to LJ singular or LJJ plural). Usually three Lords Justices of Appeal will hear an appeal, although in some instances a case may be heard by a two-judge Court of Appeal. When a difficult or important point of law is to be decided then a five judge Court of Appeal may be convened. For example, see *R v James (Leslie)* [2006] QB 588 discussed in chapter 5 on 'The doctrine of judicial precedent'.

The Court of Appeal is in most instances an intermediate appeal court, i.e. not a final court of appeal.

Court of Appeal (Civil Division)

The jurisdiction of the Court of Appeal (Civil Division) is wholly appellate. The civil appeals process is somewhat complicated and you may find useful as a starting point the following web address: http://www.hmcourts-service.gov.uk/infoabout/coa_civil/routes_app/index.htm/ which indicates the routes of appeal and highlights the questions that need to be considered in determining where an appeal is to go. Appeals from the county courts and the High Court are governed by Civil Procedure Rules, Part 52 and Practice Direction 52 – Appeals.

The Practice Direction states clearly the routes of appeal in tabular form in paragraph 2A1. The principle for the destination of appeals is based upon the seniority of judges, the type of claim, and the nature of the decision reached by the court.

Cross reference

See chapter 9, 'Criminal and civil appeals'.

Court of Appeal (Criminal Division)

The Court of Appeal (Criminal Division) has appellate jurisdiction.

Appeal following conviction on indictment before the Crown Court

Such an appeal only lies: (a) with the leave of the Court of Appeal; or (b) if the judge of the court of trial grants a certificate that the case is fit for appeal (s.1 Criminal Appeal Act 1968). The Court of Appeal may allow an appeal and quash the conviction if it thinks that the conviction is unsafe. By s.7 of Criminal Appeals Act 1968 where the Court of Appeal allows an appeal against conviction it may order that an appellant be retried if it appears to the Court that the interests of justice so require.

Appeal against sentence following conviction on indictment

An appeal may be made to the Court of Appeal against sentence (not being a sentence fixed by law). Such an appeal against sentence lies only with the leave of the Court of Appeal unless the judge passing sentence grants a certificate that the case is fit for appeal.

Other appeals

Under Part 1 of the Criminal Appeal Act 1968, appeals may be heard where a person has been found to be not guilty by reason of insanity or where there has been a finding that a defendant is unfit to stand trial. An appeal may be heard against any order or decision of the Crown Court made in respect of contempt of court.

In the past, following trial on indictment only a defendant had a right of appeal. However, this situation has changed significantly.

The Attorney General may refer a case to the Court of Appeal, with leave of the Court of Appeal, where he considers that the sentence is unduly lenient, ss.35 and 36 of Criminal Justice Act 1988. The court may quash any sentence passed and substitute such sentence as the Court of Appeal thinks appropriate for the case.

Should an accused be acquitted following trial on indictment, the Attorney General may refer a point of law to the Court of Appeal for the opinion of the court. Importantly, the opinion given does not affect the acquittal of the defendant. (Note the cases are named Attorney General's Reference and sequentially referenced according to number and year, for example, Attorney General's Reference No. 1 of 2006).

Under the Criminal Justice Act 2003 in relation to certain serious offences the prosecution may appeal to the Court of Appeal for an order quashing a defendant's acquittal following trial on indictment and ordering a retrial.



Should prosecutors have a general right of appeal against acquittal?

1.5.6 House of Lords

The House of Lords is the ultimate court of appeal in the United Kingdom, hearing both civil and criminal appeals. There are presently 12 Lords of Appeal in Ordinary (the maximum that may be appointed) two Lords are normally appointed from Scotland and one from Northern Ireland. The court usually consists of 5 law lords (presently called Lords of Appeal in Ordinary) but in important cases 7 law lords may sit, as in *Re Spectrum Plus Ltd (in liquidation)* [2005] 2 AC 680 and *Kay and Others v Lambeth London Borough Council* [2006] 2 AC 465.

Civil appeals

An appeal lies to the House of Lords from:

cross reference
See 9.2.2, leap-frog appeals.

- any order or judgment of the Court of Appeal, (Administration of Justice (Appeals) Act 1934, s1(1)); and
- the High Court under the ‘leap-frog procedure’, (Administration of Justice Act 1969, ss.12–15).

Criminal appeals

Either the defendant or the prosecutor may appeal from:

- any decision of the Court of Appeal (Criminal Division), (Criminal Appeal Act 1968, s.33); or
- any decision of the High Court in a criminal cause or matter, (Administration of Justice Act 1960, s.1(1)(a)).

Leave to appeal is required from the court below or if refused, by the House of Lords. Leave to appeal will only be granted if the court below, that is the Court of Appeal (Criminal Division) or the High Court, has certified that the case raises a point of law of general public importance; and if it appears to that court or the House of Lords that the point is one that ought to be considered by the House of Lords.

example

For many years persons involved in law or the criminal justice system were barred from sitting on juries. In 2004, the law was amended to allow police officers, judges, lawyers, and others in the criminal justice system to sit on juries. In 2007, an appeal to the House of Lords was launched by defendants following conviction in the Crown Court on the ground that the involvement of jurors who were part of the prosecution system, i.e. a police officer and a Crown Prosecution Service lawyer, had denied them a fair trial under Article 6 of the European Convention on Human Rights. The Court of Appeal had decided that there was no breach of Article 6, but had certified that the cases raised a point of law of general public importance. See further chapter 11, ‘The jury’.

1.5.7 Judicial Committee of the Privy Council

The membership of the Judicial Committee of the Privy Council is made up mainly of Lords of Appeal in Ordinary and others who have held high judicial office, sometimes from commonwealth countries. The governing statute is the Judicial Committee Act 1833.

The Judicial Committee of the Privy Council acts as a court of appeal from commonwealth countries, in relation to 'devolution issues' under the Government of Wales Act 1998, the Scotland Act 1998, and the Northern Ireland Act 1998, and in respect of certain admiralty and ecclesiastical appeals.

Decisions of the Judicial Committee of the Privy Council while not binding on the English courts are persuasive and can have an important impact upon the development of English law.

1.5.8 Court of Justice of the European Communities

The Court of Justice of the European Communities, alternatively known as the European Court of Justice (abbreviated to ECJ), is composed of one judge from each of the Member States, together with a number of advocates general. While the judges decide cases brought before the court, the advocates general have an advisory role, assisting the court by providing a non-binding opinion on cases. The composition and jurisdiction of the court is governed by Articles 220–245 of the European Community Treaty.

The jurisdiction of the ECJ encompasses preliminary rulings and direct actions. Preliminary rulings result from requests by the national courts of Member States in relation to matters such as the interpretation of the Treaty or decisions on the validity and interpretation of acts of the institutions of the Community. Direct actions include proceedings taken against Member States for failures to fulfil obligations imposed by the Treaty.

The ECJ is not an appeal court. The court will rule on the legal point which will be referred back to the national court which must then give effect to the ruling by applying it to the facts of the case in question.

Due to a heavy caseload, the ECJ is assisted by a Court of First Instance of the European Communities. This court has a limited jurisdiction but includes preliminary rulings on specified matters. Decisions of the Court of First Instance may be appealed to the ECJ.

One of the roles of the ECJ is to ensure that community law develops in a consistent way. The preliminary ruling procedure is a mechanism which enables national courts to establish that domestic law is compliant with Community law. Community law thus impacts upon the development of the laws of the UK.

1.5.9 European Court of Human Rights

This is a completely separate court to the ECJ and it is a common mistake for students to confuse the two courts. The Court of Human Rights has jurisdiction over all cases involving the interpretation or application of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950). The composition of the Court is currently 46 judges with a judge from each Contracting State; judges are independent and are not appointed in a representative capacity. The Parliamentary Assembly of the Council of Europe elects judges from a list of 3 proposed by each state. The jurisdiction of the court covers 'all matters relating to the interpretation and application of the Convention and the protocols'. Chambers of 7 judges deal with the majority of cases, but a case may be referred to a Grand Chamber of

17 judges where it raises ‘a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance’. Information on the operation of the court may be found in Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms. See www.echr.coe.int/

The UK as a signatory of the Convention for the Protection of Human Rights and Fundamental Freedoms must comply with the obligations undertaken. The European Court of Human Rights has been asked to consider whether the UK has breached its obligations. In consequence of a finding of contravention of the Convention, English law has had to be amended.

Additionally, it will be seen in chapter 3 Human Rights and Fundamental Freedoms, that the courts of the UK are obliged to consider the decisions of the European Court of Human Rights where relevant to the determination of Convention rights.

1.6

Legal personnel and bodies

Government and the English legal system – the Ministry of Justice

Responsibility for aspects of the legal system has vested in various government departments in the recent past; the Lord Chancellor’s Department became in 2003 the Department of Constitutional Affairs, which in 2007 assumed certain responsibilities from the Home Office to become the Ministry of Justice. The Ministry of Justice has responsibility for the following areas:

- policy in relation to the criminal, civil, family, and administrative justice system, including the Law Commission;
- sentencing policy, probation, and prisons;
- the courts and tribunals;
- support for the judiciary;
- legal aid; and
- constitutional reform.

Further detail on the work of the Ministry of Justice is available at: www.justice.gov.uk/whatwedo/whatwedo.htm/

1.6.1 Lord Chancellor

For centuries the Lord Chancellor has played a pivotal role in the English legal system. The role of the Lord Chancellor encompassed membership of the government as a Cabinet minister, a law-making role as a member of the second legislative chamber the House of Lords, and as head of the judiciary, including sitting as a judge in the House of Lords. Additionally, the Lord Chancellor either appointed judges or recommended judges for appointment. The potential conflicts in the functions of the Lord Chancellor clearly ran counter to any concept

cross reference

See further chapter 12, 'The judiciary'.

of a separation of powers. In consequence, the role of the Lord Chancellor has been greatly altered by the Constitutional Reform Act 2005.

1.6.2 The Attorney General

The Attorney General is a member of the government who advises the government on matters of law. The Attorney General and a deputy, the Solicitor General, are termed the Law Officers. In relation to criminal offences the Attorney General may prosecute, or take over the prosecution, in very important cases. By statute, the consent of the Attorney General is required for the prosecution of certain offences. The offences are ones which raise considerations of public policy, national security, or relations with other states. The Attorney General is answerable for the Director of Public Prosecutions.

The role of the Attorney General was identified in the White Paper on *The Governance of Britain* (2007, CM 7170) as one to be renewed to ensure public confidence. Critics have claimed that there is a conflict of interest in the Attorney General being a member of the government and also providing legal advice. The proposal to give the Attorney General power to block prosecutions in the national interest has attracted much critical comment.

1.6.3 The Director of Public Prosecutions

The Director of Public Prosecutions is head of the Crown Prosecution Service. The duties of the director, carried out through the Crown Prosecution Service, include: the taking over of all criminal proceedings (except for specified proceedings) instituted on behalf of a police force; the commencement and conduct of criminal proceedings in any case which 'appears to him to be of importance or difficulty' or 'it is otherwise appropriate for proceedings to be instituted by him'; and to take over a prosecution which has already commenced (including private prosecutions undertaken, for example, by a member of the public). See the Prosecution of Offences Act 1985. Note that by statute the consent of the director is needed for the prosecution of certain offences.

1.6.4 Crown Prosecution Service (CPS)

Prior to 1986 prosecutions were instituted by the police force investigating a crime. This situation led to a divergence in approaches to prosecution and a lack of objectivity in the decision to prosecute. It was decided that to promote consistency and to separate the investigative process from the decision to prosecute that a national Crown Prosecution Service should be created. The Crown Prosecution Service (CPS) was created by the Prosecution of Offences Act 1985.

1.6.5 The Lord Chief Justice

The Lord Chief Justice under the Constitutional Reform Act 2005 has approximately 400 statutory duties. These include being the President of the courts of England and Wales, the head of the judiciary of England and Wales, and President of the Court of Appeal (Criminal Division).

1.6.6 Legal Services Commission

The issue of access to justice is vital to the fair operation of a legal system. Rights may be established, but if unknown or unenforced then they become meaningless.

How disputes are resolved depends upon having access to advice and the mechanisms for dispute resolution. Inextricably bound up with this is the question of funding. It was once said that civil courts, like the Ritz hotel were open to all; the point being, of course, that access is a question of cost. The government has expressed concerns over spiralling legal aid costs, particularly in relation to criminal cases.

The Access to Justice Act 1999 established the Legal Services Commission which was given functions relating to:

- the Community Legal Service; and
- the Criminal Defence Service.

Community Legal Service

The purpose of the Community Legal Service is: first, the promotion of the availability to individuals of legal services, such as providing general information about law and legal services, gaining legal advice, assistance in preventing or otherwise resolving disputes, and providing help in relation to legal proceedings not relating to disputes; and, second, 'in particular, for securing (within the resources made available, and priorities set...) that individuals have access to services that effectively meet their needs', s.4 of Access to Justice Act 1999. This service deals with the civil legal aid programme.

Criminal Defence Service

The purpose of the Criminal Defence Service is to secure 'that individuals involved in criminal investigations or criminal proceedings have access to such advice, assistance, and representation as the interests of justice require'. Criminal legal aid is delivered through the Criminal Defence Service.

Further information and links are available at: www.legalservices.gov.uk/

1.6.7 Law reform

As you will quickly discover, the law is dynamic, with new cases clarifying points of law and Parliament amending laws every year. The latter is the main method of law reform, with Parliament passing amending, consolidating, codifying, or repealing legislation.

The drivers of law reform are many. It has been seen that the judges may indicate the need for Parliament to pass legislation to resolve a problem in the common law. Pressure groups may campaign for a change to the law. Events may compel Parliament to legislate, for example, the successful appeals following miscarriages of justice in criminal trials in the 1990s led to the passing of the Criminal Appeal Act 1995. Two kinds of law reform agencies may be employed either to investigate or instigate changes in the law. First, there are ad hoc bodies such as royal commissions and departmental committees. For example, see the Royal Commission on Criminal Procedure 1981, Cmnd 8092, which criticised the process by which the decision

to prosecute was taken. This led ultimately to the creation of the Crown Prosecution Service. Second, there are permanent bodies, such as the Law Commissions established by the Law Commissions Act 1965. The 1965 Act established two Law Commissions, one for England and Wales and one for Scotland. By s.3 the duty of each is:

to take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law...

This is achieved by reviewing the existing law, preparing a consultation paper for circulation to lawyers and other interested parties or bodies and finally the production of a report and if necessary a draft bill. While the Commission has been successful there are obstacles to the reform of the law, especially the securing of parliamentary time for the enactment of the proposals.

example

In recent years, the Law Commission has produced reports on *Unfair Terms in Contracts*, Cmnd 6464; *Post-Legislative Scrutiny*, Cmnd 6945; and *Participating in Crime*, Cmnd 7084.

In 2008, the Law Commission considered the High Court's power to judicially review decisions in the Crown Court, except in 'matters relating to trial on indictment' as stated in s.29(3) Supreme Court Act 1981. As the extent of the exclusion is uncertain, this has given rise to expensive litigation. The Law Commission is looking at how this problem could be resolved and 'how this review of jurisdiction [by the High Court] could be best transferred to the Court of Appeal (Criminal Division) to streamline procedures in criminal cases through a single line of criminal courts' (see, e.g.: www.lawcom.gov.uk/judicial_review.htm/). This could ultimately alter the jurisdiction of the High Court.

cross reference

See chapter 9, 'Criminal and civil appeals', 9.1.10.

Information on the Law Commissions and reports may found at: <http://www.lawcom.gov.uk/index.htm/>

1.6.8 Lawyers

In England and Wales, lawyers are divided into two professions: solicitors and barristers. Lawyers are involved in the provision of legal services, for example, advice, conveyancing, and representation before the courts, but they are not the only source of legal services. Indeed, the story of lawyers and the provision of legal services since the late 1980s has been one of increasing choice and because of competition lower costs but at the same time one of the protection of the quality of service. As will be seen, the reform of the legal professions and the efficient provision of legal services is ongoing.

Summary

- Defining law is problematic but it is important to recognise the sources from which law emanates, the geographical extent of law, and when law commences.

- The term common law has various meanings which depend upon the context in which it is used.
- Law made by Parliament, on the one hand, and law made by judges, on the other, differ in a number of important respects.
- The courts are arranged hierarchically and act as courts of first instance (or trial) or courts of appeal. The courts are not arranged as civil or criminal courts but exercise jurisdiction in relation to civil proceedings or criminal proceedings or both.
- Criminal and civil proceedings have different terminology, different rules relating to burden and standard of proof and different outcomes.



Questions

- 1 What is the difference between a crime and a civil wrong?
- 2 What is the meaning of the term 'common law' and what are the characteristics of a 'common law' legal system?
- 3 Explain the concept of parliamentary supremacy.
- 4 What is the significance for English law of the European Convention on Human Rights?
- 5 What factors determine whether:
 - (a) a criminal case commences in a magistrates' court or the Crown Court; and
 - (b) a civil case commences in a county court or the High Court?
- 6 What are the functions of the:
 - (a) Ministry of Justice;
 - (b) Crown Prosecution Service;
 - (c) Legal Services Commission; and the
 - (d) Law Commission?



Further reading

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