

# 1. Understanding the English Legal System

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## 1. *What is Law?*

Societies and their subcultures govern themselves by countless sets of rules, written or unwritten. Without these codes of acceptable behaviour, there would be no society, no order, only chaos and anarchy. We conduct our lives according to all manner of learned or agreed rules of conduct. These include our own internalised moral code, unconsciously followed rules of etiquette and expectations of civilised behaviour. We may adhere to the tenets of a religion and a particular church. We may belong to a private organisation, such as a political party or a sports club with its own constitution and membership rules but none of the codes, however complex, carries the force of law. The constitution of the California Parent Teachers' Association is lengthier and much more complex than the Serious Crime Act 2007 but it is not law. It cannot be interpreted or enforced by a court.

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What then is special about legal rules? A rudimentary definition of law, within the English legal system, is a rule that is backed by a sanction for its breach, ultimately enforceable by a court, a tribunal or other public body with enforcement powers. There is considerable overlap between non-legal rules and the law. For instance, the basic rules of most major religions are astonishingly similar. Most of them condemn murder and so do all legal systems, although what constitutes murder and how it is punished differs from one legal system to another. In another overlap, dropping litter in the street would be condemned by most people as anti-social behaviour but it is also illegal and subject to a fine enforceable in a criminal court. Nevertheless, many forms of anti-social behaviour, such as spitting in a crowded street, might offend people as a breach of the rules of civilised behaviour but are not illegal. Again, we must

distinguish between the immoral and the illegal. Adultery is not illegal, though it is a breach of many people's religions or moral codes. Some MPs and peers think adulterous behaviour should have legal ramifications. They attempted but failed to amend the Family Law Bill 1996, to allow the judge to take account of such 'faults' on the part of divorcing couples.

Sanctions for breach of the law take many forms, apart from the obvious example of sentences passed for breaches of the criminal law. When part of the Merchant Shipping Act 1988 was found by the European Court of Justice (ECJ), in the *Factortame* cases, to be in breach of the Treaty of Rome, the operation of the offending sections of the Act had to be suspended and the UK government had to compensate Spanish fishermen who had been prevented from plying their trade in UK coastal waters. If I breach my contract with you, you can ask a civil court to compensate you by awarding damages against me, to or enforce my obligations under the contract. If a government minister makes a new set of regulations, they can be quashed by the High Court if she failed to follow procedure prescribed in the enabling Act of Parliament which gave her the power to make the regulations, such as consulting affected parties.

## 2. Distinguishing Between Different Types of Law

### Substantive and Procedural

- 1-002 While the former prescribes, proscribes and regulates areas of human activity, the latter sets down rules for the manner of enforcing substantive law. The Theft Acts and many leading cases define what conduct and mental elements constitute the offence of theft but the procedures for arresting the suspect, questioning, charging, and trying him are contained in several quite different statutes (Acts of Parliament), cases and sets of procedural rules.

### Private and Public

- 1-003 The former governs relations between private citizens or bodies, the latter applies to public bodies which are publicly regulated and often publicly funded, such as the departments of local and central government and public services, such as the Highways Agency. Dicey, one of the UK's most famous constitutional lawyers, declared in 1885 that our law did not recognise this distinction, since all public bodies were equally bound by the ordinary law of the land, enforceable in the ordinary courts. While it is true to say that the

English legal system does not provide a separate court structure for adjudicating on disputes arising with public bodies, as does the French legal system, the twentieth century, especially the period since 1981, saw the massive growth in a body of law regulating the conduct of public bodies which English lawyers would now acknowledge as public law. The study of public law is a requirement for entry to the legal profession and it covers such topics as regulating police behaviour and the judicial review (a check by the High Court) of the legality of decisions taken, and rules and policies made by public bodies.

### **Domestic and International**

Our domestic law is applicable in and enforceable by the courts of England and Wales and, sometimes, throughout the UK. Public international law is contained in conventions and treaties devised and agreed to by countries concerned to regulate activities in which they have a common interest or which take place across national boundaries, covering everything from air traffic to drug trafficking. Its interpretation and enforcement may be the task of an international court recognised in or established by such a treaty. Frequently, detailed laws giving practical effect to treaty requirements are enacted into domestic law. Our Misuse of Drugs Act 1971 provides domestic law in accordance with the requirements of the international conventions on narcotics.

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It is important to understand that Community law, often referred to as EU law, and the law of the European Convention on Human Rights are not foreign law. They have been incorporated into UK law but in different ways, as explained in Chapters 3 and 4.

### **Civil and Criminal**

Private civil law regulates relations between private persons or bodies and civil law is usually invoked only by those parties seeking to protect their private rights or interests. For instance, if I commit a tort against you by, say, negligently backing my muck spreader over your gatepost, the State, as such, has no interest in taking me to court to sue for damages on your behalf but you may sue me in a civil court. The State just provides the law and the courts. Similarly, if I unfairly dismiss you, you may take me to an employment tribunal to ask for compensation but if you choose not to enforce your legal right to protection by the civil law, that is your prerogative. The State is not going to step in if you do not act. Having said that, elements of the State, such as government agencies, have a vast range of statutory and common law powers to invoke the civil law against private individuals and, of course, a private party may take a civil court action against an element of

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the State, such as suing the police over a death in custody, but all of these activities between citizen and State are subject to the rules of public law as well.

By contrast, a criminal offence is a wrong against the State and punishable as such, in the criminal courts. Criminal law is a type of public law. The State has no interest in pursuing your civil claim for damages but if you are a victim of a crime, such as theft, the State may prosecute the offender, whether or not you wish to take action against him. The aim of taking a criminal case to court is to punish the wrongdoer, rather than to compensate, although our judges and magistrates may attach a compensation order to any sentence they pass. Just to confuse you, in English law, victims of crime retain the right of private prosecution and so may prosecute the offender in the criminal courts, if the State chooses not to prosecute.

I know that my explanation may have confused the distinction, rather than clarified it but, in studying law, you will soon be able to recognise the difference. Suffice it to say that virtually all the foundation subjects studied in a law degree, such as tort, contract, land law, equity, most of public law and Community law are elements of civil law. Most of the criminal law we study is taught under the heading of “criminal law”. A true story may help to distinguish.

### ***A story from the student world: my bike***

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When I was a law student, I was cycling to college to sit the last of my finals when a car driver knocked me off my bike. The police arrived on the scene and took details of the accident and interviewed her and the witnesses. She was prosecuted in criminal proceedings in Kingston Magistrates’ Court, pleaded guilty to the offence of careless driving and was fined. My solicitor, acting on my behalf, threatened to sue her in civil proceedings in Kingston County Court for damages for the losses I had suffered, as a result of her negligent driving, a tort. I needed the cost of a new bike and damages for the pain and shock of my injuries. Luckily, the driver’s motor insurance company, acting on her behalf, agreed to settle out of court for the sum claimed by my solicitor. This was typical. As we shall see, the vast majority of civil disputes are settled out of court by the parties or their representatives. What is also typical was my solicitor’s tactic of waiting for the outcome of the criminal case before threatening a civil action against her. A civil case is much easier to prove than a criminal one. The civil *quantum* (standard) of proof is lower so my solicitor knew that the driver’s criminal conviction would make the civil case easy to prove. To help matters, the police had given him their file of statements, taken as criminal evidence, to use as civil evidence. (Incidentally, I

*DISTINGUISHING BETWEEN DIFFERENT TYPES OF LAW*

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still had to sit my private international law exam, in shock, with my right arm dislocated and my gashed knee bandaged. What cruel lecturers I had.)

***Civil and criminal cases: getting the language right***

Here is a list of the correct terminology used in most civil and criminal cases. Try to get it right. 1-007

**CIVIL**

**CRIMINAL**

The claimant

The prosecutor

sues

prosecutes

the defendant

the defendant

in the county court or High Court.

in the magistrates' court or Crown Court.

Most cases are settled without a trial, as no defence is entered.

Most cases are heard without a trial, as the defendant pleads guilty.

If a defence is entered, the case goes to trial and it is heard before a single judge, who determines fact and law. In exceptional cases, a jury decides.

If the defendant pleads not guilty the case goes to trial and is heard by a district judge (magistrates' court) or lay magistrates, who determine fact and law. In the Crown Court, the jury determines issues of fact (the verdict) and the judge rules on points of law.

If the judge finds the case proven, she enters judgment for the claimant.

If the magistrates or jury find the case proven, they bring in a verdict of guilty and convict the defendant.

She may make an order, such as an award of damages, against the defendant.

The magistrates or judge may pass sentence on the defendant e.g. a fine.

If the judge does not find the case proven, she enters judgment for the defendant.

If the magistrates or jury find the case is not proven, they acquit the defendant.

In either case, if the losing party appeals, she becomes 'the appellant' and the other side 'the respondent'. If she seeks judicial review, she becomes 'the applicant'.

### 3. What is the English Legal System?

1-008 The study of the English legal system applies to the powers, procedures and activities of the group of courts and statutory tribunals in England and Wales and the people who work in them and/or whose job it is to resolve legal problems. The State is the United Kingdom, comprising Great Britain (England, Wales and Scotland) and Northern Ireland. The legal systems of Scotland and Northern Ireland are separate. They have distinct court structures, different procedures and sometimes apply different rules of substantive law, as explained in the next chapter. The Isle of Man and the Channel Islands are not part of the UK. They are self-governing Crown Dependencies. They are part of the group of islands known, *geographically*, as the British Isles.

We speak of the English legal *system* as if it were a coherent structure with the constituent parts working in a smooth, interrelated fashion but it is very important to bear in mind that no-one has custom-designed it. Think of it more as a heap of *Lego* bricks, some of which are joined together, than a sophisticated construction of *Lego Technic*. It has been given to us in little boxes, over the last ten centuries, and parts have been deconstructed and reconstructed from time to time. We fiddle with it. For instance, in the 1990s, Lord Woolf was asked to consider how to enhance access to justice by reforming civil procedure and in 1999–2001 Lord Justice Auld was asked to consider reforms to the practices, procedures and rules of evidence applied by the criminal courts but no-one ever examines the workings of the whole English court structure. We take it for granted that we need two levels of first instance court (trial court). We take it for granted that we need both a Court of Appeal and the House of Lords or Supreme Court because it has been that way beyond living memory. Only students in tutorials and essays are tortured with such questions. The general issues paper of the Civil Justice Review, published in 1986, raised the radical question of whether we really need both the county courts and the High Court dealing with civil trials and the Master of the Rolls asked this again, in 2005.

It is true to say, however, that, considering nothing much had happened in the English legal system since the 1870s, we have scrutinised and reconfigured an enormous number of bricks in our

*Lego* pile since 1985, largely thanks to the radical Conservative Lord Chancellor, Lord Mackay and his Labour successors, Lord Irvine and Lord Falconer.

## Hallmarks of the English Legal System

### ***The common law***

The English legal system is a 'common law' legal system. This means that many of our primary legal principles have been made and developed by judges from case to case in what is called a system of precedent, where the lower courts are bound to follow principles established by the higher courts in previous cases. The term 'common law' historically distinguished the law made by judges in the royal courts in Westminster and commonly applicable throughout the kingdom, from canon law (ecclesiastical law) and the local systems of customary law which predominated until 1066 and survived beyond. This is examined in the history chapter.

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Judge-made law is at least as important to us as statute law made by Parliament. For instance, there is no statute telling us that murder is a crime and defining it for us. It is a common law crime. The required guilty act, of causing death, and the necessary degree of guilt, malice aforethought, have been prescribed and defined, over the centuries, by judges. Similarly, the law of negligence was the invention of a judge who wanted to find a remedy for a woman who had suffered gastro-enteritis when she drank from an opaque bottle of ginger beer, wherein lurked the decomposing remains of a stray snail. She was given the ginger beer and thus had no contract with the retailer or manufacturer and we can assume that Mr Slimey Snail was not a pet, endowed with his own third party liability insurance, so the judge, Lord Atkin, decided that, as a matter of principle, she should have a right to damages against the manufacturer, as they owed her a duty of care. Thus, he invented what became the law of negligence.

### ***Adversarial procedure***

Another of the hallmarks of the English legal system and all common law systems is that basic trial procedure is essentially adversarial. This means that the two parties to the case are left to their own devices to prepare and present their cases unaided by the court. Crass comparisons are made between this typical common law procedure and the type of 'inquisitorial' procedure, with officials of the court involved in the fact finding process, which is said to be a hallmark of continental European legal systems. As we shall see, however, our trial system has not always been adversarial, and inquisitorial

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elements are appearing at many points in the system. Also, it is wrong to label European procedural systems as inquisitorial.

***Jury trial and orality***

- 1-011 Historically, certainly since 1215, jury trial was central to the English legal system in both criminal and civil cases, although its use in civil cases is now rare and it is confined to the most serious cases in the criminal courts. The need to argue cases before a jury has shaped our rules of evidence, procedure and substantive law and has meant, historically, that most arguments were presented to the court orally, by the parties, through oral examination and cross-examination of witnesses. Again, the emphasis on orality is rapidly disappearing, with the admission of more and more written statements and documentary evidence in hard copy and electronically retrievable form. Since 1995, in civil cases, lawyers now have to present the court with a skeleton argument, so the advocate's art of oral story-telling has been replaced by a scene in a typical civil court room where all heads are face-down in 'the bundle' of preserved documents and the 'skeleton', flicking through to make cross-references, incomprehensible to the casual observer. It has taken some fun out of court watching, because it is difficult to follow the story.

***Lay magistrates***

- 1-012 The bulk of criminal cases are heard in magistrates' courts, mostly by lay justices. There are around 29,000 of them and no other legal system makes such heavy use of laypeople as decision-makers. In exporting the common law, we exported the concept of magistrates but they tended to be professionals. When you add to them the thousands of lay arbitrators, tribunal panel members and jurors, you start to realise how many important decisions are taken by laypersons in the English legal system.

## ***4. The Mother of All Common Law Systems***

- 1-013 Just as England has been called 'the mother of parliaments', because so many others have been modelled on the UK Parliament, so I would call the English legal system the mother of all common law legal systems, worldwide. We exported the common law and our legal system, along with the English language, into our old colonies and the Commonwealth. The common law daughters of the English legal system include the US, Canada, Australia and New Zealand but we maintain our direct link with the living common law of many Commonwealth countries, both



dependent and independent, through the Judicial Committee of the Privy Council. This court sits in London and is the highest court of appeal for those jurisdictions. Since it is mainly composed of law lords (from 2009, Justices of the UK Supreme Court) you can see that this provides for harmonious development of principle throughout all of these common law jurisdictions. Decisions of the Judicial Committee are persuasive and not binding precedents on the English courts but they are heavily influential, since everyone realises that when those senior judges metamorphose back into law lords they are hardly likely to contradict legal principles which they carefully established when doing their job as privy councillors.

This common law cross-fertilisation is by no means confined to Commonwealth countries, however. (See Cooke). Certain areas of the common law, such as tort and criminal law, have developed globally, with judges in the courts of one country regularly persuaded by the reasoning of their brethren in another jurisdiction. You only have to flick through the pages of an English text on criminal law to see how other countries tackle some of the interpretive problems facing our criminal courts. Where no precedent exists, English judges may well be persuaded by a precedent from America, Australia or Canada. At the same time, English common law is still alive throughout the US, even in forms which have been replaced in England. For instance, the actions constituting an attempted crime in California are determined by old English case law, replaced in England by the Criminal Attempts Act 1981. Throughout the US, crimes are divided into felonies and misdemeanors, a distinction which we disposed of in 1967. They also chose to retain the harsh felony murder rule. Californian property law uses concepts straight out of medieval English property law, abolished by the English in the Law of Property Act 1925. If you buy property in the US, you may be astonished by quaint concepts and ancient English terminology.

Apart from judicial borrowing of precedents, there is a ceaseless interchange between academics in the common law world, in terms of writing, thinking, teaching and research. If you want to read the best of English legal history, you have to turn to American journals and books. American legal history is English legal history.

### **The Comparison with Other European Systems**

Since, in our popular rhetoric and our legal analysis, we are always comparing ourselves with continental legal systems, notably the French and since we, along with all other EU Member States, now have to absorb Community law into our domestic legal systems, we students of the English legal system need to understand something

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more about another major “family” of laws, the ‘Romano-Germanic’ family, as David and Brierley describe it, in *Major Legal Systems in the World Today*. Apart from Ireland, a common law country, the legal systems of all our EU partners are, historically, members of that other major family.

### **Different Roots**

**1–015** The Romano-Germanic family was developed by scholars in the European universities from the Renaissance of the twelfth and thirteenth centuries. There was a need for an autonomous law, independent of canon (Church) law, to replace inadequate and bitty customary law. Scholars latched onto Roman law as a neat pre-existing body of rules and set about refining it. Law was seen as a fairly abstract body of principles of justice, and its teaching was linked to the teaching of philosophy, theology and religion. It emerged from France and Italy but was taught in this way in Spain, Portugal, Scandinavia, even Oxford and Cambridge. The teaching of national law was not taken up until the seventeenth and eighteenth centuries. The flexibility and abstract nature of this civil law refined and taught in Europe can be contrasted with the rigidity of the common law rules developing in the Westminster courts. Eventually, Roman law was translated into the basis of national laws for practical application. This could not be done in England because the rules of common law, devised and applied by the courts, were already too entrenched. From the thirteenth to the sixteenth centuries, the law as taught in European universities had considerable influence. Jurists, not governments, developed the law so the countries of the Romano-Germanic family had jurists and legal practitioners who took their concept of law, approach and reasoning from Roman law.

The study and refinement of Roman law naturally progressed to its codification. Codes were developed independently but the most influential of these was the Napoleonic Code of 1804. The French code was received in Belgium, the Netherlands, the Rhenish provinces, Luxembourg, Poland and Italy. Thanks to colonisation by the Spanish, Portuguese, French and Dutch, elements of Romano-Germanic law spread throughout South America, parts of North America (Louisiana and Quebec) and Africa. The French influence extends to Turkey, Egypt, Iran, Syria, Iraq, Japan, Taiwan, Vietnam and Cambodia. The Romano-Germanic family can, then, be seen alongside the common law family, as populating a large part of the world. Certain countries have a mixture of the two. Examples are Scotland, Israel, South Africa, Zimbabwe and Botswana.

Because the French Napoleonic Code was absorbed into so many legal systems, this made France an even more fecund mother of

legal systems than the English. Notice that Germany did not adopt the French code but devised one of its own, so some comparativists talk of a French family and a German family.

### **And Different Branches**

The same divisions of law can be found throughout the Romano-Germanic legal systems and some of them, such as ‘the law of obligations’, are alien to the common lawyer. 1-016

### **Written constitutions**

The UK is one of only three countries in the developed world without a written constitution. As a consequence, we lacked any clear notion of fundamental rights until very recently. There is almost no awareness amongst the public at large of what the UK constitution amounts to. There is no talk of fundamental constitutional rights, as is common in Germany and France, and as is drummed into each small child’s memory in the US, because we do not think we have any. Indeed, we have only spoken in terms of human rights in the last few years, since the Human Rights Act 1998 came into force, in October 2000. In all our European partner states, along with all of England’s common law daughters, the legality of the law of the land can be tested against a written constitution in a special constitutional court and struck down if it offends against some constitutional requirement. In the UK, on the other hand, we are used to the idea that the law of our land is untouchable. Parliament is supreme and, prior to 1973, only Parliament could undo what a previous parliament had done. Maybe it is this inability to conceptualise any law superior to that made by Parliament which partly explains why we reacted so badly to the effrontery of the rulings of the European Court of Justice (ECJ) in the *Factortame* cases, which resulted in the suspension of those sections of the Merchant Shipping Act 1988 that flew in the face of the Treaty of Rome. Similarly, the Blair government reacted coolly in December 2004, when the law lords condemned the Anti-Terrorism, Crime and Security Act 2001 as contravening the European Convention on Human Rights (see Chapter 4). 1-017

### **Public law and private law**

Romano-Germanic legal systems all recognise the distinction between public and private law which, historically, English common law did not acknowledge. The French, for instance, have a separate set of courts, headed by the Conseil d’Etat, administering a separate body of public law developed by those courts to a sophisticated level by the first half of the twentieth century. French law has, in this respect, been highly influential over Belgian and Dutch law. 1-018

Those countries also have courts which are modelled on the Conseil d'Etat. In the English legal system, however, the development of public law was stifled, until the enactment of the Crown Proceedings Act 1947, by the rule that the Crown could not be sued, and until 1981 by the difficulties in applying for judicial review. It is only since the 1960s that we have acknowledged the separate existence of a body of public law, worthy of being taught as an independent subject. We still do not have a separate set of public law courts, along French lines, and this suggestion was rejected by the Legatt Review in 2001, but at least we now list all applications for judicial review to be heard in the administrative court by specialist judges, with a simplified procedure, which has allowed the rapid development of a coherent body of public law.

### ***The concept of law***

1-019 The very way in which law is conceived of in the legal systems of the Roman-Germanic family is radically different from the way we approach it and it has developed in the common law countries, and this goes a very long way towards explaining why Community law and the judgments of the ECJ were so much easier, in the early days, for our European partners to assimilate than for us. This is how David and Brierley, in their classic analysis, explain la différence:

“In countries of the Romano-Germanic family, the legal rule is formulated, characterised and analysed in the same way. In this family, in which doctrinal writing is held in high esteem, the legal rule is not considered as merely a rule appropriate to the solution of a concrete case. It is fashionable to view with a certain disdain, and as casuistic, the opposite view which places the rule of law at the level of concrete cases only. Digests of decided cases, form books and legal dictionaries are certainly useful working instruments for practitioners, and they provide much of the raw material for jurists in their work. But these compilations do not enjoy the high prestige associated with legal scholarship. The function of the jurist is to draw from this disorganised mass first the rules and then the principles which will clarify and purge the subject of impure elements, and thus provide both the practice and the courts with a guide for the solution of particular cases in the future.” (p.94)

In common law countries, just about the opposite is going on. The initial approach is one of pragmatism in individual cases, rather than abstract principle. The common law is developed, whether the judges are dealing with a judge-made law or interpreting a statute, on a case by case basis. The concern of the judge is to find the solution to the instant case. When a sufficient body of case

law has developed, through the application and extension of judicial reasoning in the system of precedent, then it may be possible to elevate these judicial rulings to the level of principle. Examples of this abound. In public law, the principles of natural justice have developed in this way. The judges have, on a case by case basis, extended the right to a fair hearing in an unbiased tribunal from hearings in the inferior courts to all manner of decisions by administrative bodies.

Because judicial reasoning is such an important source of law, we are heavily dependent on law reports. Academics certainly comment on judicial reasoning but scholars cannot be said, for the most part, to be the source of legal doctrine themselves. Indeed, there was a convention that judges did not cite living authors. The exception is that, where there is no precedent, the courts will resort to examining what are known as “books of authority” by the early writers in the common law, from the seventeenth and eighteenth century, and it is now quite common for judges to refer to modern textbooks or articles.

### **Sources of law and the judicial approach**

The primary source of law in the Romano-Germanic legal systems is undoubtedly codified law, the drafting and interpretation of which is influenced by, or is the task of, academic jurists. In common law countries, we depend on a mixture of judge-made law (common law) and statute, as interpreted by judges, whose reasoned opinions we must read in the law reports. If we take the French legal system as a contrasting example, we can see that the judge is not considered to be a source of law. Indeed, following the revolution, judges’ powers were curtailed and they were prohibited from creating binding rules of precedent, as art.5 of the Code Civil now stipulates. Of course, this is constitutional theory but in reality, French judges have had to make law, to a certain extent, and some critics say that the notion that they do not make law is an academic myth. While even the judgments of the Cour de Cassation are not meant to form binding precedents, they are followed by the lower courts in most cases. Certainly French public law is almost entirely judge-made since it was developed after the Napoleonic era of codification. The French ambivalence is illustrated by the way law is taught. Textbooks emphasise codified law (legislation), with cases relegated to footnote illustrations, yet tutorials concentrate on case commentaries.

The nature of a judgment in French law could not be further from its English counterpart. Whereas some of our leading House of Lords decisions contain the reasoned opinions of five Law Lords, distinguishing and applying a long list of precedents and stretch-

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ing through over 100 pages in the law reports, French judgments, even emanating from the Cour de Cassation, rarely amount to two pages. They are in the form of a syllogism: they set out the facts, the legal issue in context and the conclusion, without, usually, citing any previous case authority. Because judgments are so short, they are normally published accompanied by academic commentary. All this is explained by Dadamo and Farran, in *The French Legal System*.

### **Procedural differences**

- 1-021 We most commonly see the English legal system contrasted with European systems in terms of procedure, notably criminal procedure. Broadly speaking, European systems were characterised by common lawyers as 'inquisitorial', with the examining magistrate, then the court, taking a significant part in fact-finding and examining witnesses. This caricature was contrasted with the adversarial or accusatorial system, which the common law population likes to emphasise is so much fairer, with the judge acting as an unbiased umpire, permitting both sides to prepare and present their cases and examine witnesses, independent of court interference. Both the English and continental legal systems have recently departed from the purity of their respective models, however, especially with the procedural changes of the 1980s and 1990s. One significant difference, which should be mentioned at this point, however, is that, whereas English advocates were used to arguing most of their case orally in civil proceedings, until being required to produce skeleton arguments from the 1990s, European advocates are much better trained in reducing their arguments into writing.

### **Bad Europeans**

- 1-022 I have endeavoured to explain at some length the contrast between the English legal system and the Romano-Germanic systems of our EU partners for two reasons. First, we need to see where the English legal system sits, in worldwide terms, and secondly, we need to understand why Community law (EU law) seems a bit more difficult for us to get used to than for our European counterparts. Community procedural law and its concept of law are derived directly from the French legal system, the mother or sister of all the other EU legal systems, apart from Ireland and Germany.

The French influence can be seen in Community procedure. French is the working language of the court. Lawyers' oral submissions are strictly limited to 30 minutes' argument. Common lawyers, trained in the tradition of oral advocacy, have to be helped by the Court's staff to reduce their arguments into writing. The roles of the advocate-general and judge-rapporteur are modelled on the French. They have no common law equivalent. The system of

references for preliminary rulings under Art.234 EC bears a direct similarity to references of questions of law from the French inferior courts to the Cour de Cassation. Again, there is no common law equivalent. The early judgments of the European Court of Justice (ECJ) looked just like French judgments, with very little reasoning and no precedents cited. This was one of the most difficult aspects of Community law for the common lawyer to comprehend but the ECJ has now changed. For the sake of consistency, it takes serious account of its own precedents and cites them in its judgments, and reported decisions contain much more reasoning than they formerly did, thus looking much more like common law judgments. The ECJ certainly accepts and applies broad principle in the same way that a court in a Roman-Germanic legal system would.

As I explained above, all other Member States have written constitutions which spell out the relationship between domestic law and Community law, and citizens of all other Member States are used to having their statutes measured against a higher form of law, their constitution. We are not and, in the way in which British politicians reacted to some ECJ judgments, we showed that we simply did not appreciate that our enacting of the European Communities Act 1972 was a very significant derogation from the supremacy of the UK Parliament.

## 5. Keeping up-to-date with the English legal system

Most of the law changes frequently and this subject changes most. Like all law books, this one, finished in 2008, will be out of date by the time you read it. Here are some tactics for keeping up-to-date. 1-023

- Never read out-of-date law books. They are as dangerous as last week's cream cakes. A search on *Amazon* or the publisher's website will indicate the latest edition.
- Show tutors/examiners that you have kept up to date by reading a quality newspaper, such as *The Times*, *The Financial Times*, *The Guardian* or *The Independent*. *The Times* has the greatest legal content, with a law supplement on Thursdays and an email bulletin available on Tuesdays and more articles online. It also contains brief reports of recent cases, to help you keep up with all your legal studies. They are produced much more quickly than any other hard copy set of law reports. *The Guardian* contains useful analysis of social issues in the legal system, as does *The Independent*. If you cannot buy

a paper, read them online. You can also search old newspapers in various subscriber databases, which most libraries have, or on *LexisNexis*. By keeping up to date with the news, you can make the law more interesting for yourself by understanding how law is about real people, in the real world. Law is not just in books.

- Take yourself to court. The courts are a free source of daily entertainment, Mondays to Fridays. Justice in England and Wales is meant to be open to the public. Courts and tribunals are everywhere. Go and see how law operates in the real world, in solving people's disputes and responding to their offences. In this way you will learn a lot about procedure, the court structure, lawyers, magistrates and judges.
- Regularly browse the legal news journals, such as *The New Law Journal*, *Legal Action*, the Law Society's *Gazette* or *The Lawyer*.
- Visit relevant websites and check on 'What's New?' and the press releases. The most useful departmental website is that of the Ministry of Justice, in charge of the courts and tribunals, procedure, human rights, legal aid and legal services, magistrates, judicial diversity, corrections and youth justice. The criminal justice system and Youth Justice Board have their own sites.

### WEBSITES RELEVANT TO THE ENGLISH LEGAL SYSTEM (CHECKED IN 2008)

- 1-024 Administrative Justice and Tribunals Council: <http://www.ajtc.gov.uk/>  
Association of Women Barristers: <http://www.womenbarristers.co.uk/>  
Association of Women Solicitors: <http://www.womensolicitors.org.uk/>  
Attorney General: <http://www.attorneygeneral.gov.uk/>  
Bar Council: <http://www.barcouncil.org.uk/>  
British and Irish Legal Information Institute: <http://www.bailii.org/>  
Central Office of Information, including govt. press releases: <http://www.coi.gov.uk/>  
Centre for Effective Dispute Resolution (ADR): <http://www.cedr.co.uk/>  
Citizens Advice: <http://www.citizensadvice.org.uk/>  
Civil Justice Council: <http://www.civiljusticecouncil.gov.uk/>  
Community Legal Service: <http://www.clsdirect.org.uk/>  
Criminal Cases Review Commission: <http://www.ccrcc.gov.uk/>  
Criminal Courts Review: <http://www.criminal-courts-review.org.uk/>  
CJOnline: <http://www.cjsonline.org>  
Crown Prosecution Service: <http://www.cps.gov.uk/>



Department for Constitutional Affairs, the predecessor of the Ministry of Justice, a very informative archive <http://www.dca.gov.uk>

European Court of Human Rights: <http://www.echr.coe.int/echr/>

European Union institutions and documents, including European Commission and European Court of Justice: <http://europa.eu/>

European Commission Representation in the UK, for EU news, publications, info and free email newsletter: <http://ec.europa.eu/unitedkingdom/>

Her Majesty's Courts Service: <http://www.hmcourts-service.gov.uk/>

Home Office: <http://www.homeoffice.gov.uk/>

International Courts of Justice are best accessed via the United Nations website: <http://www.un.org/>

Intute Social Sciences, including law: <http://www.intute.ac.uk/social-sciences/>

Judicial Appointments Commission: <http://www.judicialappointments.gov.uk/>

Judicial Studies Board: <http://www.jsboard.co.uk/>

Judiciary: <http://www.judiciary.gov.uk/>

JUSTICE: <http://www.justice.org.uk/>

Justices' Clerks' Society: <http://www.jc-society.com/>

Law Commission: <http://www.lawcom.gov.uk/>

Lawlinks, links to legal internet resources: <http://www.kent.ac.uk/lawlinks/>

Law Society, including the Gazette: <http://www.lawsociety.org.uk/home.law>

LAWTEL (a subscription database): <http://www.lawtel.com>

Legal Abbreviations: <http://www.legalabbrevs.cardiff.ac.uk/>

Legal Action Group, including items from *Legal Action*: <http://www.lag.org.uk/>

LexisNexis Butterworths, the legal publisher's website, with links to LexisNexis, the very comprehensive international database of legal material. Many university law libraries subscribe: <http://www.butterworths.co.uk/>

Legal Services Commission: <http://www.legalservices.gov.uk/>

Legal Services Research Centre (of the Legal Services Commission): <http://www.lsrc.org.uk/>

Liberty: <http://www.liberty-human-rights.org.uk/>

Office of Public Sector Information, including Acts of Parliament and statutory instruments: <http://www.legalservices.gov.uk/>

National Statistics: <http://www.statistics.gov.uk/>

Parliament, including all bills and information on the legislative process: <http://www.parliament.uk/>

Privy Council: <http://www.privoy-council.org.uk>

Review of Tribunals: <http://www.tribunals-review.org.uk/>

## UNDERSTANDING THE ENGLISH LEGAL SYSTEM

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Scottish Parliament: <http://www.scottish.parliament.uk/home.htm>  
Sweet and Maxwell, law publishers, including podcast updates of this book: <http://www.sweetandmaxwell.co.uk/>  
UK Government, links to all departments: <http://www.direct.gov.uk/en/index.htm>  
US Supreme Court: <http://www.supremecourtus.gov/>  
Welsh Assembly: <http://www.wales.gov.uk/index.htm>  
Westlaw, another very comprehensive subscriber database: <http://www.westlaw.co.uk/>

### BIBLIOGRAPHY

- 1-025 The Rt. Hon. Lord Cooke of Thorndon, K. B. E., *Turning Points of the Common Law* (1997).  
C. Dadamo and S. Farran, *The French Legal System* (1996).  
R. David and J. E. C. Brierley, *Major Legal Systems in the World Today* (1985).  
H. P. Glenn, *Legal Traditions of the World* (2007).  
T. Honoré, *About Law: An Introduction* (1995).  
Department of Constitutional Affairs, *A Guide to Government Business involving the Channel Islands and the Isle of Man, August 2002*. The website is still correct, in 2008, though the DCA has been replaced by the Ministry of Justice: <http://www.dca.gov.uk/constitution/crown/govguide.htm>

### FURTHER READING

- 1-026 If you want to read a really entertaining and wide ranging book, giving you a brilliant introduction to English law in general, you cannot do better than G. Rivlin, *Understanding the Law* (2006).  
The best comprehensive texts on ELS are:  
S. H. Bailey, J. P. L. Ching and N. W. Taylor, *Smith, Bailey & Gunn, The Modern English Legal System* (2007, 5th edn.).  
M. Zander, *Cases and Materials on the English Legal System* (2007, 10th edn.).