Chapter 1

The legal system

Introduction

An English trial is a peculiar process. The achievement of justice is not the main aim of the lawyers or of the judge. The lawyers are adversaries, arguing with every means at their disposal to win the case for the client they represent. If they exchanged clients, they would argue the opposing case with equal enthusiasm. The judge is not an inquisitor searching for truth and justice. He is there to apply the law, regardless of whether or not this leads to the fairest outcome. His job is to obey the rules and see that everyone else does the same.

Despite its adversarial nature, the English legal system seems to achieve justice as effectively as any other. Indeed, English business law, the subject of this book, is one of the United Kingdom’s invisible exports. When two foreign businesses make a contract with each other, perhaps a German company buys goods from a Japanese company, it is common for a term of the contract to state that, in the event of a dispute, English law should apply.

Most people have little idea of how a lawyer argues a case. It is commonly assumed that the strongest argument in a lawyer’s armoury is that a decision in favour of his or her client would be the fairest outcome to the case. In English law this is far from true.

Once the facts of a civil case have been established (and in many cases they are not even in dispute), the lawyers will try to persuade the judge that he or she is bound to decide in favour of their client, whether this is fair or not. The judge is, of course, in a superior position to the lawyers, being in charge of the proceedings. What is often not realised, however, is that judges are bound by very definite legal rules and that it is their duty to apply these rules, no matter how much they might wish not to do so.

These legal rules might well be contained in a statute, an Act of Parliament. Alternatively, they might be found in the growing body of European EU law. However, the heart of English law is the system of judicial precedent. As we shall see, the courts are arranged in a hierarchical structure and the system of precedent holds that judges in lower courts are bound to follow legal principles which were previously laid down in higher courts.

Most of the law examined in this book was made by judicial precedent rather than by statute. This is the case even though some of the areas of law have a strong statutory framework. Amongst other subjects, this book examines company law, partnership law and sale of goods law. The Companies Act 2006 provides the framework for company law, the Partnership Act 1890 for partnership law and the Sale of Goods Act 1979 for sale of goods law. These statutes are the basis of the law in the areas of law concerned. But, when studying company law, partnership law and sale of goods law, it is soon seen that the framework laid down by the various statutes is constantly refined by the process of judicial precedent.
The higher-ranking courts make decisions as to how these statutes should be interpreted, and these decisions immediately become binding upon lower courts. In this way the law remains alive, constantly being refined and updated.

So, having seen that courts must follow legal rules, this chapter begins by considering where those rules are to be found.

Sources of law

Legislation

Legislation is the name given to law made by Parliament. It can either take the form of an Act of Parliament, such as the Sale of Goods Act 1979, or take the form of delegated legislation, such as the Unfair Terms in Consumer Contracts Regulations 1999. The difference lies in the way the legislation was created. To become a statute, a draft proposal of the legislation, known as a Bill, must pass through both Houses of Parliament and then gain the Royal Assent. Many Bills achieve this without significant alteration. Others have to be amended to gain parliamentary approval, and some Bills fail to become statutes at all. Once the Bill has received the Royal Assent, it becomes a statute which the courts must enforce.

Delegated legislation is passed in an abbreviated version of the procedure needed to pass a statute. Once delegated legislation has been passed, it ranks alongside a statute as a source of law which is superior to any precedent. The courts cannot declare a statute void, but they do have the power to declare delegated legislation void. However, this can be done only on the grounds that the delegated legislation tries to exercise powers greater than those conferred by the Act of Parliament which authorised the delegated legislation to be created.

Effect of legislation

A statute is the ultimate source of law. The theory of parliamentary sovereignty holds that the UK Parliament can pass any law which it wishes to pass and that no Parliament can bind later Parliaments in such a way as to limit their powers to legislate. In order to secure the UK’s entry into what is now the European Union, Parliament had to pass the European Communities Act 1972. This statute accepted that in certain areas the UK had surrendered the right to legislate in a way which conflicted with European law. (European law is examined later in this chapter at p. 16.) While the European Communities Act 1972 remains in force, Parliament is therefore no longer truly sovereign. However, parliamentary sovereignty is preserved, in theory at least, because Parliament still retains the power to pass a statute which would remove the limitations imposed by the European Communities Act. To pass such a statute would mean the UK leaving the European Union, and at the present time it seems most unlikely that this will happen.

Judges may not consider the validity of statutes, and they are compelled to apply them. In British Railways Board v Pickin (1974), for example, a person whose land had been compulsorily purchased under the British Railways Act 1968 tried to argue that the statute was invalid, on the grounds that Parliament had been fraudulently misled into passing it. The House of Lords, now the Supreme Court, ruled that such an argument could not be raised in any court.

Furthermore, statutes remain in force indefinitely or until they are repealed. A statute loses none of its authority merely because it lies dormant for many years. In R v Duncan (1944), for example, a defendant was convicted of fortune-telling under the Witchcraft Act 1735, even though the statute had long since fallen into disuse.
A judge, then, must apply a statute, and in the vast majority of cases he or she will find no difficulty in doing so. However, some statutes are ambiguous. When faced with an ambiguous statute a judge must decide which of the two or more possible interpretations to apply.

**Rules of statutory interpretation**

**Literal rule of statutory interpretation**

The literal rule of statutory interpretation says that words in a statute should be given their ordinary, literal meaning, no matter how absurd the result. An example of this rule can be seen in *IRC v Hinchy (1960)*, in which the House of Lords was considering the effect of the Income Tax Act 1952. Section 25 of the ITA stated that any tax avoider should pay a £20 fine and ‘treble the tax which he ought to be charged under this Act’. Hinchy’s lawyers argued that this meant a £20 fine and treble the amount of tax which had been avoided. Unfortunately for Hinchy, the House of Lords decided that the literal meaning of ‘treble the tax which he ought to be charged under this Act’ was that a tax avoider should pay a £20 fine and treble his whole tax bill for the year. The outcome of the case was that Hinchy had to pay £438, even though the amount he had avoided was only £14.

It is almost certain that the meaning applied by the House of Lords was not what Parliament had in mind when the Income Tax Act 1952 was passed. The statute was badly worded. The blame for this must lie with the parliamentary draftsmen. At the same time, however, it must be realised that they have a near impossible task. Skilled lawyers though these draftsmen are, they cannot possibly foresee every interpretation of the statutes they prepare. Once the statute has become law, every lawyer in the land might be looking for an interpretation which would suit his or her client. In *Hinchy’s case* the Revenue lawyers, with typical ingenuity, spotted a literal meaning that had not been apparent before. They then managed to persuade the House of Lords judges that it was their duty to apply this meaning.

Judges who adhere to the literal rule approach do so in the belief that less harm is done by allowing a statute to operate in a way in which Parliament had not intended for a short time, until Parliament has time to pass another amending statute, than would be done by allowing the judges to take over the law-making role altogether, as they would be in danger of doing if they interpreted statutes in any way they saw fit.

**The golden rule (or purposive approach)**

Other judges, though, perhaps the majority, adopt the purposive approach to statutory interpretation. Using this approach the judges use the golden rule to give the words in a statute their ordinary, literal meaning as far as possible, but only to the extent that this would not produce an absurd result.

In *R v Allen (1872)*, for example, the defendant’s lawyers argued that although Allen had married two different women he could not be guilty of bigamy because the crime, as described in the Offences Against the Person Act 1861, was impossible to commit. Section 57 of the Act provides that ‘whosoever, being married, shall marry any other person during the life of the former husband or wife’, shall be guilty of bigamy. Allen’s lawyers argued that this crime was impossible to commit because one of the qualifications for getting married is that you are not already married. Therefore, ‘whosoever, being married, shall marry . . .’ has already defined the impossible. They contended that the section should have read, ‘whosoever, being married, shall go through a ceremony of marriage during the life of the former husband or wife’ shall be guilty of bigamy.
If the judges in this case had used the literal rule they might well have acquitted. Unfortunately for Allen, they used the purposive approach and convicted him. They decided that the literal approach would have produced an absurd result, that they had not the slightest doubt as to what Parliament had meant when it passed the statute, and that Allen was therefore plainly guilty.

It is never possible to say in advance which rule a court will adopt, although the golden rule is currently more in favour than the literal rule. It is also commonly the case that a court uses elements of both approaches.

**The mischief rule**

The mischief rule holds that the judge can take into account what ‘mischief’ the statute set out to remedy. In *Smith v Hughes (1960)*, the Lord Chief Justice, Lord Parker, had to consider whether prostitutes who were soliciting from balconies and from behind windows were soliciting ‘in the street’ within the meaning of s. 1 of the Street Offences Act 1959. Using the mischief rule, he had little difficulty in deciding that they were. The prostitutes were not literally soliciting ‘in the street’, but their behaviour was just the kind which the Act sought to prevent.

The Court of Appeal recently applied the mischief rule in *Wolman v Islington LBC (2007)*. A GLC bye-law made it a criminal offence to park a vehicle with one or more wheels ‘on any part of’ a pavement. The claimant, a barrister, parked his motorbike on a stand in such a way that its wheels were above the pavement but not actually on it. He therefore claimed not to have committed the offence. Applying the mischief rule, the Court of Appeal held that the offence was committed if one or more of the bike’s wheels were either on or over the pavement.

Whichever rule the judges adopt, there is no doubt that, in theory, a statute is the strongest source of law. A lawyer who has a statute on his or her side holds the most powerful card in the game. The lawyer may appear to be inviting the judge to apply the statute, but in effect is ordering the judge to do so. However, we shall shortly see that in practice even the power of a statute can be subject to EU law or subject to another very important statute, the Human Rights Act 1998.

**Minor rules**

Other, less important, rules of statutory interpretation are applied by all judges. The *ejusdem generis rule* (of the same kind rule) holds that general words which follow specific words must be given the same type of meaning as the specific words. For example, the Betting Act 1853 prohibited betting in any ‘house, office, room or other place’. In *Powell v Kempton Racecourse Company (1899)*, the court held that the Act did not apply to a racecourse. The specific words ‘house, office, room’ were all indoor places, and so the general words ‘or other place’ had to be interpreted as applying only to indoor places.

The rule *expressio unius est exclusio alterius* (to express one thing is to exclude another) holds that if there is a list of specific words, not followed by any general words, then the statute applies only to the specific words mentioned. For example, in *R v Inhabitants of Sedgeley (1831)*, a statute which raised taxes on ‘lands, houses, tithes and coal mines’ did not apply to other types of mines.

Until relatively recently, a judge interpreting a statute was not allowed to consider the speeches which MPs made when the statute was being debated. However, in *Pepper v Hart (1993)*, a landmark decision, the House of Lords held that *Hansard*, which records the debates in Parliament, could in some circumstances be consulted if this was the only way to solve an ambiguity.
Judicial precedent

As already mentioned, the doctrine of judicial precedent holds that judges in lower courts are absolutely bound to follow decisions previously made in higher courts.

The hierarchy of the courts

In Chapter 17 the court structure is examined in more depth. (See Figures 17.1, 17.2 and 17.3.) For the purposes of understanding the system of precedent, we need only to know that the courts are arranged in a hierarchical structure and that there are five levels in the hierarchy.

The Supreme Court

The Supreme Court is the highest court in Great Britain and Northern Ireland. It replaced the House of Lords on 1 October 2009, when the 11 Law Lords who used to sit in the House of Lords became the first Supreme Court justices. The court now has a full complement of 12 justices. The Supreme Court justices, five of whom sit in most cases, are not bound by any previous precedents. Furthermore, their decisions are binding on all courts beneath them. In practice, the Supreme Court justices do tend to follow their own previous decisions unless there is a good reason not to. Supreme Court justices also hear appeals from some Commonwealth countries. When they sit in this capacity, the justices are known as the Privy Council. Technically, decisions of the Privy Council are not binding on English courts, but in practice they are usually regarded as having the same authority as Supreme Court decisions. In some particularly important cases seven, or even nine, Supreme Court justices sit, rather than the usual number of five. Seven Law Lords sat in Pepper v Hart (1993), the effect of which we have already considered. In 2008, nine Law Lords sat in a case to decide whether foreign nationals suspected of terrorism could be held in prison without trial. The Supreme Court has no power to overturn a statute.

The Court of Appeal

The Court of Appeal is the next rung down the ladder. Its decisions are binding on all lower courts. They are also binding on future sittings of the Court of Appeal. In Young v Bristol Aeroplane Co Ltd (1944) it was decided that the Court of Appeal could refuse to follow its own previous decisions in only three circumstances:

- First, where there were two conflicting earlier Court of Appeal decisions, it could decide which one to follow and which one to overrule.
- Second, if a previous Court of Appeal decision had later been overruled by the House of Lords (now the Supreme Court), the Court of Appeal should not follow it.
- Third, a previous Court of Appeal decision should not be followed if it was decided through lack of care, ignoring some statute or other higher-ranking authority such as a previously decided House of Lords (now the Supreme Court) case.

Although the principles set out apply to both the Civil and Criminal Divisions of the Court of Appeal, it is generally recognised that the Criminal Division has slightly wider powers to depart from its own previous decisions. It can do so where justice would otherwise be denied to an appellant.

In terms of precedent, the Court of Appeal is the most important court. The Supreme Court hears only about 100 cases a year. The Court of Appeal hears several thousand.
However, the Supreme Court hears cases of greater public importance, and there is no doubt that its decisions have the greatest authority. Generally, the Court of Appeal judges sit in courts of three judges. Sometimes there are five judges sitting, but this does not increase the extent to which the decision must be followed or give any greater power not to follow previous Court of Appeal decisions.

The Divisional Courts

There are three Divisional Courts of the High Court. These courts are appeal courts in which two or three High Court judges sit. Their decisions are binding on other Divisional Courts, subject to the Young v Bristol Aeroplane Co Ltd exceptions, and on all courts below. They are not binding on the Court of Appeal or the Supreme Court.

The High Court

Judges in the High Court are bound by decisions of the Supreme Court and the Court of Appeal. High Court decisions are binding upon all courts beneath the High Court. If there is only one judge sitting in a High Court case, the decision is not binding on other High Court judges. In a Divisional Court of the High Court more than one judge sits. The decisions of Divisional Courts are therefore binding on future sittings of the High Court.

Inferior courts

The decisions of inferior courts (the Crown Court, the county court and the magistrates’ court) are not binding on any other courts. Judges sitting in these courts do not make precedents.

Figure 1.1 shows an overview of which courts bind which other courts.

The binding part of a case

The ratio decidendi, loosely translated from the Latin as ‘the reason for the decision,’ is the part of the case which is binding on other judges. It is the statement of law which the judge applied to the facts and which caused the case to be decided as it was. Despite the great length of most cases, the ratio is often quite simple. For example, the ratio of Partridge v Crittenden (1968), the facts of which are set out on p. 38, might be that ‘magazine advertisements, which describe goods and the price for which they will be sold, are not contractual offers but only invitations to treat’. As you will see when you consider the law of contract, this is a relatively straightforward statement of law.

Ultimately, the ratio of a case will be decided by future courts when they are considering whether or not they are bound by the case.

Partridge v Crittenden was decided by a Divisional Court of the High Court. It would not therefore be binding on the Supreme Court or on the Court of Appeal. However, later sittings of the High Court, as well as county courts, Crown Courts and magistrates’ courts, would be compelled to follow it, unless they were confronted with a statute or higher-ranking precedent to the contrary.

Statements of law which did not form the basis of the decision are known as obiter dicta (other things said). Examples of obiter dicta can be found in most cases. For example, in Partridge v Crittenden Ashworth J said that the fact that the appellant’s advertisement did not directly use the words ‘offers for sale’ made it less likely that Partridge was guilty of the crime with which he was charged – offering for sale a Bramblefinch hen contrary to s. 6(1) of the Protection of Birds Act 1964. This statement of law is obiter, not ratio, because it was not the reason for deciding that Partridge was not guilty.
**Obiter dicta** are not binding on judges, no matter what court they were made in. However, if the judges in the Supreme Court all express the same *obiter*, then a lower court judge would almost certainly follow the *obiter* in the absence of a precedent which he or she was compelled to follow.

Courts which hear appeals (appellate courts) usually have more than one judge sitting. Fortunately, it is an odd number of judges rather than an even number. A majority of judges will therefore decide for one of the parties or for the other. If the decision is unanimous, for instance the Court of Appeal decides 3:0 for the defendant, then the *ratio* of the case can be found in the judgments of any of the three judges. If the court decides for the defendant 2:1, then the *ratio* must be found in the decisions of the two judges in the majority. The decision of the judge in the minority may be persuasive as *obiter*, but it cannot form a *ratio* which will bind future courts.

**Overruling and reversing**

A higher-ranking court can overrule a *ratio* created by a lower-ranking court. The Supreme Court, for example, could overrule *Partridge v Crittenden* and hold that magazine advertisements stating the price at which goods will be sold are always offers. (This is most unlikely, it is merely an example.) If the Supreme Court were to overrule the decision then the *ratio* of *Partridge v Crittenden* would be deemed to have been wrongly decided, and so it could no longer be a binding precedent. When overruling a case, the superior court...
specifically names the case and the rule of law being overruled. A statute may overrule the ratio of a particular case, but the statute will not mention the case concerned.

Many cases are reversed on appeal. Reversing is of no legal significance. It merely means that a party who appeals against the decision of an inferior court wins the appeal. No rule of law is necessarily changed. For example, in the fictitious case Smith v Jones, let us assume that Smith wins in the High Court and Jones appeals to the Court of Appeal. If Jones’s appeal is allowed, for whatever reason, the Court of Appeal have reversed the judgment of the High Court.

Disadvantages of the system of precedent
There are currently 110 High Court judges, 37 Court of Appeal judges and 12 Supreme Court justices. Every sentence of every judgment they make might contain a precedent which would be binding on future judges. It is an impossible task for anyone to be aware of all of these potential precedents. In fact, so many High Court judgments are made that most are not even reported in the Law Reports.

Law reporting is not a government task but is carried out by private firms. The law reporters are barristers and they weed out the vast number of judgments which they consider to be unimportant. Even so, as students become aware when they step into a law library, the system of precedent does mean that English law is very bulky. There are hundreds of thousands of precedents and it can be very hard for a lawyer to find the law he or she is looking for.

Precedent suffers from another disadvantage, and that is that bad decisions can live on for a very long time. Before 1966, a House of Lords decision was binding on all other courts, including future sittings of the House of Lords. If a bad decision was made, then it could be changed only by Parliament, which was generally far too busy to interfere unless grave injustice was being caused. Sometimes a superior court says, obiter, that it thinks a binding precedent should be changed. However, the court cannot change the precedent until it hears a case where such a change would be the ratio of that case. The court cannot choose to hear such a case, it has to wait for such a case to be brought before it.

These disadvantages of the system of precedent are thought to be outweighed by two major advantages.

Advantages of the system of precedent
The first advantage is that the device of distinguishing a case means that the system of precedent is not entirely rigid. A judge who is lower down the hierarchy can refuse to follow a precedent by distinguishing it on its facts. This means that the judge will say that the facts of the case he or she is considering are materially different from the facts of the case by which he or she appears to be bound. This device of distinguishing gives a degree of flexibility to the system of precedent. It allows judges to escape precedents which they consider inappropriate to the case in front of them. For example, if a county court judge strongly wanted to hold that a television advertisement was an offer to sell, it is possible that he or she might distinguish Partridge v Crittenden on the grounds that a television advertisement is materially different from an advertisement in a magazine. Similarly, a county court judge might distinguish Partridge v Crittenden if the wording of an advertisement suggested that a definite contractual offer had been made.

The second and more important advantage of precedent is that it causes high quality decisions to be applied in all courts. Judges in appellate courts have the time and the experience to make very good decisions, often on difficult or philosophical matters. These decisions can then be applied by much busier and less experienced lower court judges,
who do not have to consider whether the legal principles behind the decisions are right or wrong.

Until recently, judges were chosen only from the ranks of barristers. Now solicitors too can become judges. The Bar is a career, rather like acting, which has extremes of success, and very many talented young people enter it. If a barrister gains promotion and becomes a circuit judge, he or she will sit in the Crown Court or the county court. This is an honour and an achievement. Even so, the judge will make no law. He or she will supervise proceedings, decide who wins civil cases, award damages and sentence criminals. However, no matter how brilliant the judge’s analysis of the law might be, it will not form a precedent.

High Court judges are a different matter. They make the law of England from the very first case in which they sit. Every word of their reported judgments is open to scrutiny by the other judges, by lawyers and by academics. If they were not very able, this would soon be noticed.

Almost 50 judges are promoted beyond the High Court to the Supreme Court or Court of Appeal. These days it seems unthinkable that any but the very able should go this far.

It is not only on the grounds of ability that the Supreme Court ought to come to very high quality decisions. Unlike the lower court judges, the justices who sit in the Supreme Court do not decide a case there and then. They read the facts of the case, and hear the arguments of the barristers, and then reserve their judgment. They talk to each other informally to see whether there is a consensus of opinion. If there is a consensus, one of the judges is chosen to write the judgment. If there is no consensus, the minority will write their own dissenting judgments. In a particularly difficult case the process of writing the judgment can take a very long time.

In Airedale NHS Trust v Bland (1993), for example, the House of Lords had to decide whether Mr Bland, a football fan injured in the Hillsborough tragedy, had the right to die. The 17-year-old Mr Bland was injured on 15 April 1989. He was in a persistent vegetative state, kept alive only by a life support machine. His parents wanted permission for the machine to be switched off. The case was presented to the House of Lords on 14 December 1992 and on 4 February 1993 the Law Lords ruled that the machine could be switched off. (They decided that the object of medical treatment was to benefit the patient, and that his being kept alive was no benefit to Mr Bland.) So the five Law Lords took seven weeks to formulate their judgments. Obviously, it would be unthinkable for a busy circuit judge, under pressure to get through cases quickly, to consider such a difficult question at such length.

The system of precedent has a further advantage in that it can lead to certainty as to what the law is. If an appellate court makes a clear decision on a particular matter then lawyers will advise their clients that the law on the matter is settled, and that there is no point in pursuing a contrary argument.

Alternatives to the system of precedent

As already stated, most other countries do not use a system of precedent. France, which is fairly typical of European countries, has a codified system of law known as a civil law system. All of the civil law is contained in the Civil Code, which originated in the late eighteenth century.

French judges, who choose a career as a judge early on, do not feel compelled to interpret the Code according to previous decisions until those decisions have for some time unanimously interpreted the Code in the same way.

Scotland has a mixed legal system. It is based on the civil law system, but has strong common law influences. In Scotland the system of precedent is used, but a precedent does not have quite the same force as in England.
In 1952 the European Coal and Steel Community was set up with the object of preventing any European country from building up stockpiles of steel and coal, the raw materials needed to wage war. Following the success of this, the European Economic Community (EEC) came into existence in 1957. The six original Member States signed the Treaty of Rome. This used to be called the EC Treaty but is now called the Treaty on the Functioning of the European Union. These six original countries were Germany, France, Italy, Belgium, the Netherlands and Luxembourg. Part of the founding philosophy of the Community was to provide an appropriate response to the Soviet Bloc countries to the East. However, the motivation was also economic, in that there seemed to be obvious advantages to the creation of a free market in Europe. The EEC is now known as the European Union (EU). At the time of writing, there are 27 Member States, the original six having been joined by Austria, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Greece, Hungary, Ireland, Latvia, Lithuania, Malta, Poland, Portugal, Romania, the Slovak Republic, Slovenia, Spain, Sweden and the United Kingdom. Croatia, Macedonia, Serbia and Turkey have also applied to join.

The United Kingdom joined the EU in 1973. In order to be admitted as a member, the UK Parliament passed the European Communities Act 1972. This statute agreed that Community law should be directly effective in UK courts.

In 1986 the EU consisted of 12 Member States, all of whom signed the Single European Act. This Act was designed to remove all barriers to a single market by 1992. In addition, the Act introduced a system of qualified majority voting in the European Council, thereby reducing the power of any single State to block developments.

In 1992 the Treaty on European Union (the Maastricht Treaty) was signed by all 15 States which were at that time Member States. The Treaty was more of a statement of political intention than a statement of precise obligations. It proposed co-operation on matters other than purely economic matters, envisaging the creation of a European Union with the three following pillars: the European Community; a common foreign and security policy; and co-operation in the fields of justice and home affairs.

The Treaty of Amsterdam was signed in October 1997 and came into force in May 1999. This Treaty aimed for closer political co-operation between Member States. It incorporated much of the Justice and Home Affairs pillar into the original EC Treaty and gave Member States a greater power to veto proposals which would affect their vital national interests.

The Treaty of Lisbon was signed by all EU leaders in December 2007. However, it could not become effective until all Member States ratified it. In June 2008 Irish voters rejected the Treaty in a referendum. In October 2009, at the second time of asking, they voted in favour of the Treaty. The Treaty became effective in December 2009, although other EU countries have not asked their voters to ratify it by way of referendum.

The Treaty of Lisbon amends the existing Treaties, and has four main aims: to make the EU more democratic and transparent; to make it more efficient; to promote rights, values, freedom, solidarity and security; and to make the EU an actor on the global stage.

The first of these aims involves increasing the power of the European Parliament so that it will be placed on an equal footing with the Commission. As regards most EU legislation, the Parliament and the Commission will approve legislation using a co-decision procedure. A greater role in making EU law will be given to national parliaments in areas where they can achieve better results than the EU. A Citizens’ Initiative will allow 1 million
citizens from several Member States to ask the Commission to introduce new policies. The relationship between the EU and Member States will be clarified, and States which wish to do so will be allowed to withdraw from the EU.

Great efficiency will be achieved by extending qualified majority voting. From 2014, a qualified majority will be achieved if a dual majority of 55 per cent of Member States, and Member States representing 65 per cent of the EU’s population, vote in favour. The EU Commission will be reduced in size and a new President of the European Council will be elected by national governments for a period of office lasting two and a half years. The European Council will be separate from the Council of Ministers, the leaders of which will continue to be elected on a six-month rotating basis. The European Council will not have legislative powers but will guide policy.

The promotion of rights, values, freedom, solidarity and security will be achieved by guaranteeing the principles set out in the Charter of Fundamental Rights, and by giving them legal force. This charter set out principles of human rights to be applied throughout the EU but at present it has no legal force. In addition, the EU will be given a greater role in fighting crime and preventing terrorism. The EU will be made a stronger actor on the global stage by creating a High Representative for Foreign Affairs and Security Policy, and by encouraging the EU to act as a single legal personality.

The provisions of the Treaty of Lisbon will be introduced gradually, and may take about ten years to become fully adopted.

The institutions of the EU

The original EEC Treaty set up four main institutions. These institutions are now known as: the Council of the European Communities; the European Commission; the European Parliament; and the European Court of Justice.

The Council of the European Communities

The Council of the European Communities, generally known as the Council, is not a permanent body. It consists at any given time of the President of the European Commission and one Minister from the government of each Member State. Which Government Ministers will constitute the Council of Ministers depends upon the nature of the measures which the Council is considering. For example, if the measures relate to agriculture, then it will be the relevant Ministers of Agriculture. Often the Council is made up of Heads of Government or the Member States’ Foreign Ministers.

The Council is the main policy-making body of the EU. It passes legislation, in conjunction with the European Parliament, and generally does so under a system of qualified majority voting. However, a Treaty might require unanimity for votes on certain matters, such as the common and foreign security policy, police and judicial co-operation in criminal matters, asylum and immigration policy, economic and social cohesion policy or taxation. Under this system each country is allocated a certain number of votes in relation to its population. The United Kingdom is one of four countries having the maximum of 29 votes. Malta has the fewest votes, with just three. There are 345 votes in total. A qualified majority is reached in two circumstances. First, if 255 (73.9 per cent) votes are in favour. This means that 91 votes can defeat a proposal and so at least four countries must vote against. Second, if a simple majority of Member States approve. Additionally, any Member State can require confirmation that votes representing at least 62 per cent of the total population of the EU were in favour. If it is
discovered that this figure was not reached, then the proposal voted upon will not be regarded as having been accepted.

Article 11 of the Treaty of Amsterdam gives effect to the Luxembourg Accord and allows any Member State to argue that unanimity, rather than a qualified majority vote, should be required on any particular proposal. When such an argument is raised, the Council will delay taking a vote in order to allow the dissenting State to gain the support of other Member States. However, if it is unsuccessful in this, the issues will in any event be resolved by a qualified majority vote.

The European Commission

Twenty-seven individual commissioners are appointed by the Member States to serve in a full-time capacity for a term of five years. When these commissioners act collectively they are known as the European Commission, which is generally abbreviated to the Commission. Each commissioner also has individual responsibility for a particular matter, such as agriculture. The Commission is supported by large executive and administrative systems. The commissioners are expected to act completely independently of their Member States but in practice tend to guard the independence of their Member States. They are selected on political grounds, and all UK commissioners have previously played a leading role in UK politics.

The most powerful position in the EC is the President of the Commission. The President is the figurehead of the EC and has a strong political influence upon it. The Council selects the President and the appointment must then be approved by the European Parliament.

The Commission is involved in broad policy-making. It prepares specific proposals to be submitted to the Council. It drafts secondary legislation in accordance with powers which have been delegated to it. The Commission ensures that the Treaties are observed and has the power to start proceedings against Member States which infringe the Treaties. It commissions research and prepares reports on matters which concern the Community and negotiates with non-Member States on these matters. It also prepares the draft Community budget.

The European Parliament

Members of the European Parliament (MEPs) are elected directly by Member States, using a system of proportional representation. Elections are held every five years. The UK elects 72 out of the 736 MEPs who make up the Parliament. The MEPs do not sit in blocks representing their Member States, but in blocks representing seven Europe-wide political groups. It is perhaps surprising that the European Parliament does not have the power to initiate and pass legislation on its own. Generally, the power to pass legislation is shared by the Parliament and the Council. One of the Parliament’s most significant powers is to approve or amend the EC budget. The Commission prepares a draft budget, which is submitted to the Council and then to the Parliament. The Parliament must approve, amend or reject the budget within 45 days.

The Parliament must approve the Commission when it is first appointed and must also approve the new President. It must also approve the accounts of the Commission and new appointments to the Commission. Article 201 of the EC Treaty gives the Parliament the power to pass a vote of censure to dismiss the Commission. Such a vote must be passed by a two-thirds majority. In January 1999 a vote to remove the Commission on account of nepotism and corruption failed. Two hundred and thirty two MEPs voted for removal, 293 voted against. However, the whole of the Commission resigned in March 1999, on publication of a report made by an investigative committee.
Initially the Parliament had few real powers. It had to be consulted about EC legislation but had no powers to block any legislation. In recent years the power of the Parliament has gradually been extended.

The European Court of Justice

The European Court of Justice (ECJ), which sits in Luxembourg, is made up of 27 judges. These judges are assisted by advocates-general. The judges and advocates are appointed by common consent of the Member States and hold office for a six-year term which may be renewed.

The decisions of the court are signed by all the judges, without any indication that some may have dissented. It is comparatively rare for the full court to sit. Eighty per cent of cases are referred to one of the six chambers, where either three or five judges sit. The number of judges sitting is always odd, so that a majority decision can always be reached. The more important the issues involved, the greater the number of judges sitting. The judgments of the court are available free on its website, but cases typically take between 18 months and two years to be heard.

The advocates-general must act with complete impartiality and independence, in open court, making reasoned submissions on cases brought before the Court. They do not therefore argue the case for one or other of the sides involved. Each case has an advocate-general assigned to it. The advocate-general makes a summary of the facts, an analysis of all the relevant Community law and a recommendation as to what the decision of the court should be. The parties cannot comment on this and the judges deliberate upon it in secret. The Court has no obligation to agree with the advocate-general’s recommendation.

When ready to vote, the most junior judges vote first and then the other judges vote in order of reverse seniority. The Court does not use a system of precedent: it can and does depart from its own previous decisions.

Certain matters may be referred to the Court of First Instance rather than to the European Court of Justice. These matters tend to concern competition law or cases brought by private individuals. The Court of First Instance operates in a very similar way to the way in which the ECJ operates. Article 51 of the EC Treaty provides an automatic right of appeal on a point of law from the Court of First Instance to the ECJ.

Jurisdiction of the ECJ

Apart from hearing appeals from the Court of First Instance, the ECJ has three separate areas of jurisdiction. First, it can express an authoritative opinion on EC law, if requested to do so by a national court, so that EU law is applied uniformly across the EU. Once the ruling has been made by the ECJ, the case returns to the court which asked for the ruling so that that court can apply the ruling. Article 234 of the EC Treaty allows a national court to request an authoritative ruling as to three types of matters: the interpretation of EU legislation; the validity and interpretation of acts of institutions of the Community; and on the interpretation of statutes of bodies established by an act of the Council, where those statutes so provide. Any national court or tribunal may refer a matter within Article 234 to the ECJ if it thinks this necessary to give judgment. Most of the ECJ’s work involves preliminary rulings. The ruling is sought by the court, not by the parties to the case. Although a national court has a discretion to seek a preliminary ruling, a court of final appeal has an obligation to do so where a relevant point of EU law is at issue and where there has been no previous interpretation of the point by the ECJ. However, there is no such obligation where the point is so obvious as not to require a ruling.
The second area of jurisdiction arises under Article 230 of the EC Treaty, which allows the ECJ to review the legality of acts done by the European Parliament or other Community institutions. The ECJ can also review a community institution’s failure to act. This review process is similar to the process of judicial review whereby the High Court ensures that the Government and others do not exceed their powers.

The third area of jurisdiction arises under Article 226, which allows the ECJ to bring actions against Member States to make sure that they fulfil their Community obligations. Article 227 allows Member States to take other Member States to the ECJ for failure to live up to their Treaty obligations.

**Sources of EU law**

**Applicability and effect**

In order to understand the effect of EU law, it is necessary to understand the distinction between the terms ‘direct applicability’ and ‘direct effect’. If EU legislation is directly applicable, it automatically forms part of the domestic law of Member States, without those States needing to do anything to bring the law in. However, this would not necessarily mean that individuals could directly rely upon the legislation in the domestic courts of their own countries. In order for such reliance to be possible, the legislation would have to be capable of having direct effect. Where EU legislation has direct effect an individual can directly rely upon the legislation, either as a cause of action or as a defence, in the domestic courts of his or her country. The Articles of the Treaty on the Functioning of the European Union are always directly applicable, as are EU Regulations, but, as we have seen, this does not necessarily mean that they have direct effect.

No EU legislation can have direct effect unless it satisfies the criteria laid down by the European Court of Justice in *Van Gend en Loos v Nederlands Administratie der Belastingen* (1963). These criteria will be satisfied only if the legislation is sufficiently clear, precise and unconditional, and if the legislation intends to confer rights. Many Treaty Articles do not meet these criteria as they are mere statements of aspiration. Even if Community legislation does meet the *Van Gend* criteria, it may have only direct vertical effect, rather than direct horizontal effect. If it has direct vertical effect it can be invoked by an individual only against the State and against emanations of the State, such as health authorities. A provision which has direct horizontal effect can be invoked against other individuals as well as against the State and emanations of the State.

**Treaty Articles**

The Treaty on the Functioning of the European Union has over 300 Articles. These are directly applicable. Whether or not a Treaty Article has direct effect depends first upon whether it satisfies the criteria in *Van Gend*. As we have seen, some will not satisfy these criteria as they are merely statements of aspiration. Some of the Articles are much more significant than others. Article 141 of the EC Treaty (formerly Article 119) requires Member States to ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work, and the effect of this Article has been highly significant.

Some Treaty Articles, like Article 141, have both direct horizontal and vertical effect, others have only direct vertical effect. Whether or not they have direct horizontal effect will depend upon the wording of the Article and the interpretation of the Article by the ECJ. For example, Article 28 of the EC Treaty, which prohibits restrictions on the free movement of goods, only has direct vertical effect. It can therefore only be invoked by an individual
against the State or against an emanation of the State. One private company could not invoke Article 28 against another private company which was not an emanation of the State.

**Regulations**

Regulations are binding in their entirety and are directly applicable in all Member States without any further implementation by Member States. Regulations have direct effect, sometimes both vertically and horizontally, providing the Van Gend criteria are satisfied. Even if these criteria are not satisfied, a Regulation may have indirect effect. This means that, although an individual cannot invoke the Regulation, the courts of Member States are bound to take account of it.

**Directives**

Directives, which are addressed to the governments of Member States, are not directly applicable. It is therefore left to each individual Member State to implement the objectives of the Directive in a way that is best suited to its own particular political and economic culture. All Directives are issued with an implementation date and Member States are under a duty to implement by this date. If the Directive is not implemented by the due date, the Commission has the power to take proceedings against the Member State in question.

Before the implementation date has been reached, Directives have no effect at all. However, in the **Wallonie ASBL case (1997)** the European Court of Justice held that a Member State should not enact legislation or implement measures that significantly conflict with the objectives of a Directive that has yet to meet its implementation date. Generally, the UK Government will implement EC Directives by delegated legislation. Several statutory instruments which we consider in this book, such as the Commercial Agents (Council Directive) Regulations 1993, were enacted to give effect to Directives. (It is slightly confusing that these statutory instruments are usually called Regulations, given that EC Regulations are a quite different matter.) Once an EC Directive has been implemented by UK legislation then, obviously, an individual can invoke the domestic legislation against another individual. For example, the Commercial Agents (Council Directive) Regulations 1993 are regularly invoked by individuals against other individuals.

There can, however, be a problem if the UK Government either fails to implement a Directive at all, or does not implement the Directive properly. Once the implementation date has been reached, whether or not an unimplemented Directive has direct effect depends first upon whether the Directive satisfies the Van Gend criteria, and second upon the relationship between the parties involved. Where the parties to a legal action are in a vertical relationship (for example, patient and health authority), the Directive is capable of having direct effect. Where the parties are in a horizontal relationship (for example, a consumer suing a shop), the Directive does not have direct effect. In other words, Directives which should have been implemented are capable of having direct vertical effect, but not direct horizontal effect. (This can mean that a person employed by an emanation of the State, such as a worker in the NHS, might have more rights against his employer than a person employed by a person who is not an emanation of the State.) However, when dealing with a case between two individuals, the domestic courts are under a duty to try, as far as possible, to interpret the domestic legislation so as to give effect indirectly to the objectives of the Directive. In situations where it is not possible for the domestic court to give direct or indirect effect to an EC Directive, the remedy of last resort is for the aggrieved individual to sue the Member State for failure to implement. If found to be in breach, the Member State could be ordered to pay compensation to the aggrieved individual.
In *Francovich and Bonifaci v Republic of Italy* (1993) the ECJ held that an individual could be compensated on account of a Directive not having been implemented if certain criteria were satisfied. *Brasserie du Pêcheur SA v Germany* (1996) subsequently established that the three necessary criteria are as follows. First, the rule of law in question must confer rights upon individuals. Second, the breach must be sufficiently serious. Third, there must be a direct causal link between the breach and the damage.

The legal effect of the Treaties, Regulations and Directives is shown in Figure 1.2.

**Decisions**

Decisions are addressed to one or more Member States, to individuals or to institutions. They are binding in their entirety, without the need for implementation by Member States, but only on those to whom they were addressed. In practice, decisions are of little practical importance.

**Recommendations and opinions**

The Commission has the power to make recommendations and opinions. These have no binding legal force. However, where a Member State passes legislation to comply with a decision or an opinion, a national court may refer a case to the ECJ to see whether or not the decision or opinion applies and how it should be interpreted.

**Supremacy of EU law**

EU law can only be effective if it overrides national law. If every Member State were free to pass legislation which conflicted with EU legislation, the EU would be rendered ineffective. In *Costa v ENEL* (1964) the ECJ stated that the Treaty on Rome, as amended, had become an integral part of the legal systems of Member States and that the courts of Member States were bound to apply the Treaty. It also stated that Member States had, by signing the Treaty, limited their sovereign rights, within limited areas, and created a body of law which bound both their citizens and themselves. The case specifically decided that Italian legislation which was incompatible with Community law, and which had been passed after Italy had signed the Treaty, could have no effect.

In *R v Secretary of State for Transport, ex parte Factortame (No. 2)* (1991), Spanish companies sought judicial review of the Merchant Shipping Act 1988, which they claimed breached two Articles of the EC Treaty. The companies asked for an injunction to suspend that part of the Act which was in breach of the relevant Treaty Article. The House of Lords held that injunctions could not be effective against the Crown and refused to grant the injunction. However, the case was referred to the ECJ, which held that UK limitations on the availability of remedies should be overruled and that the injunctions should be available. Subsequently, the House of Lords immediately suspended the operation of the offending part of the Act. A few years after *Factortame*, in *Equal Opportunities Commission v Secretary of State for Employment* (1994), the House of Lords suspended the operation of a section of employment legislation on the grounds that it was in breach of the EU Equal Treatment legislation. However, it should be noted that this power of UK courts to suspend conflicting domestic legislation will only be used sparingly in cases involving serious breaches of directly effective EU legislation.

Whilst the United Kingdom remains a member of the EU, it is arguable that it has surrendered parliamentary sovereignty. However, two points should be noted. First, other Treaties such as those which provided that the United States had direct command over US soldiers based in the United Kingdom, have at some time or other meant that the
Figure 1.2 The legal effect of Treaty Article, Regulations and Decisions

- **Articles of the Treaty on the Functioning of the European Union**
  - Directly applicable (Therefore automatically forms part of law of Member States)
  - Is the treaty article sufficiently clear, precise and unconditional as to satisfy the Van Gend criteria?
    - Yes: Article has direct vertical effect (so can be used against the State or an emanation of the State)
      - May also have direct horizontal effect (so can be used against any legal person), depending upon its wording and interpretation by the ECJ
    - No: Article may have indirect effect

- **Regulations**
  - Directly applicable (Therefore automatically forms part of law of Member States)
  - Is the Regulation sufficiently clear, precise and unconditional as to satisfy the Van Gend criteria?
    - Yes: Has both direct vertical and direct horizontal effect (so can be used against any legal person)
    - No: Article may have indirect effect
    - Courts of Member States must take account of the Treaty Article or Regulation

- **Directives**
  - Not directly applicable, therefore not automatically part of the law of Member States
  - Must be implemented by a certain date
    - It properly implemented: The implemented legislation can be relied upon like any other legislation
    - It not properly implemented: Is the Directive sufficiently clear, precise and unconditional to satisfy the Van Gend criteria?
      - Yes: Has direct vertical effect but not direct horizontal effect (so can only be used against the State or an emanation of the State)
        - Domestic courts are under a duty to give indirect horizontal effect to the Directive
      - No: Has no direct effect
        - It this is not possible an aggrieved party may be able to bring a Francovich type of claim
United Kingdom did not have true parliamentary sovereignty. Second, the UK Parliament could vote to repeal the European Communities Act 1972 and leave the EU. It must be said, however, that this option becomes increasingly unlikely and would become virtually impossible if full monetary union were ever achieved.

The Human Rights Act 1998

First, it should be noted that the European Convention on Human Rights is not a creation of the EU. The Convention was drawn up in 1950, before the EU was created. The United Kingdom ratified the Convention in 1951. Before the Human Rights Act 1998 (HRA 1998) came into effect, in October 2000, the Convention could not be directly enforced in the UK courts. It could be enforced only by taking a case to the European Court of Human Rights in Strasbourg.

Section 2 of the Human Rights Act 1998 now requires any court or tribunal which is considering a question which has arisen in connection with a Convention right to take into account any decision of the European Court of Human Rights. This court sits in Strasbourg and is quite separate from the European Court of Justice, which sits in Luxembourg. Section 2 of the Act preserves parliamentary sovereignty because the UK courts merely have to take into account decisions of the European Court of Human Rights. The UK courts are not absolutely bound by these decisions. This point was emphasised by Lord Phillips, the President of the Supreme Court, in *R v Horncastle (2009)*. He said that when senior UK judges had concerns about whether a decision of a Strasbourg Court sufficiently appreciated or accommodated particular aspects of the UK process, a UK court could decline to follow the decision of the Strasbourg Court, giving reasons for this course of action. Lord Phillips thought that, if this happened, the Strasbourg Court would then be given the opportunity to reconsider the aspect of its decision which had caused the problem.

Section 3 HRA 1998 requires that all legislation is read and given effect in a way which is compatible with the Convention rights, but only in so far as it is possible to do this. Any precedent-making court has the power in any legal proceedings to make a declaration of incompatibility, stating that any legislation is incompatible with Convention rights. However, such a declaration would not invalidate the legislation in question. It would give the relevant minister the option to revoke or amend the legislation. The minister could, however, leave the incompatible legislation in place. If the European Court of Human Rights delivers an adverse ruling, the relevant minister has the same powers to revoke, amend or leave in place the incompatible legislation. Any court can declare delegated legislation, but not statutes, invalid on the grounds of incompatibility. However, this is not the case if the Parent Act, which authorised the legislation in question, provides that the legislation should prevail even if it is incompatible. Whenever a new Bill is introduced into Parliament, s. 19 HRA 1998 says that the relevant minister must make a statement to Parliament, before the second reading, declaring that the legislation either is compatible or is not. If the minister states that the legislation is incompatible, he or she must state that the Government intends to proceed with it anyway. The minister does not need to state the way in which the legislation is incompatible.

Section 6(1) HRA 1998 provides that it is unlawful for a public authority to act in a way which is inconsistent with a Convention right, unless the public authority could not have acted differently as a result of a UK Act of Parliament. This section will have a major effect on many UK businesses, as a public authority is defined as including persons whose functions are functions of a public nature. It follows that businesses such as private schools,
private nursing homes and private security firms will all be regarded as public authorities for the purposes of the HRA 1998. If a public authority breaches a Convention right a victim of the breach may bring legal proceedings against it for breach of a new public tort.

The rights conferred by the Convention are as follows.

- The right to life (Art. 2).
- The right not to be subjected to torture or inhumane or degrading punishment (Art. 3).
- The right not to be held in slavery or servitude or required to perform forced or compulsory labour (Art. 4).
- The right to liberty and security of the person (Art. 5).
- The right to a fair trial (Art. 6).
- The right not to be convicted of a criminal offence which was created after the act was committed (Art. 7).
- The right to respect for a person’s private and family life, home and correspondence (Art. 8).
- The right to freedom of thought, conscience and religion (Art. 9).
- The right to freedom of expression (Art. 10).
- The right to freedom of peaceful assembly and to freedom of association with others (Art. 11).
- The right to marry and form a family (Art. 12).
- The right to have the Convention applied without discrimination (Art. 14).

Article 15 allows departure from the Convention in time of war. Articles 1 and 13 have not been incorporated into UK law.

The United Kingdom has also agreed to be bound by protocols, which give the right to peaceful enjoyment of possessions, and outlaw the death penalty.

Forty-seven States have signed the Convention on Human Rights and there are 47 judges in the plenary Court of Human Rights, one judge representing each State. This plenary court almost always delegates the hearing of complaints to Chambers. Each Chamber has seven judges plus an additional judge who represents the State against which the complaint is being made. The Chambers themselves set up Committees of three judges. These Committees sift through complaints and dismiss as soon as possible those which are completely unfounded. The European Court of Human Rights is very much a court of last resort. Article 35 of the Convention requires an applicant to the court to prove four things:

- that the complaint involves a breach of the Convention by a country which has ratified it;
- that the breach happened within that country’s jurisdiction;
- that all domestic remedies have been exhausted; and
- the application has been made within six months of these being exhausted.

However, if domestic remedies are unsatisfactory, then the court can deem them to have been exhausted. The court cannot enforce its judgments but can order ‘just satisfaction’ amounting to the payment of compensation and costs. The court does not use a system of precedent. The Human Rights Act 1998 has already had a significant impact on many areas of UK law. Both government ministers and senior judges who supported the passing of the HRA 1998 have recently said that it is being applied too widely, both by judges and those in official positions.
Chapter 1 The legal system

Civil law and criminal law

The distinction between civil and criminal liability is fundamental to English law. The courts themselves are divided into civil courts and criminal courts, and the two sets of courts have quite different purposes. The civil courts are designed to compensate people who have been injured by others. The criminal courts are designed to punish people who have committed a crime.

Table 1.1 shows the essential differences between civil and criminal law.

Despite the differences shown in Table 1.1, it is quite possible that the same wrongful act will give rise to both civil and criminal liability. For example, if a motorist injures a pedestrian by dangerous driving then both a crime and a tort (a civil wrong) will have been committed.

The State might prosecute the driver for the crime of dangerous driving, and if the driver is found guilty he or she will be punished. The driver would probably be banned from driving, and might also be fined or imprisoned. The injured pedestrian might sue the driver in the civil courts for the tort of negligence. If the driver is found to have committed the tort then he or she will have to pay damages to compensate for the pedestrian’s injuries.

The different functions of the civil and criminal courts can be further demonstrated if we consider what would have happened if the driver’s behaviour had been much worse.

Let us now assume that the driver was very drunk, driving very badly, and that the pedestrian was killed. Under the criminal law the driver would be charged with the more serious crime of murder.

<table>
<thead>
<tr>
<th>Table 1.1 The differences between civil and criminal law</th>
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<tbody>
<tr>
<td>Purpose of the case</td>
</tr>
<tr>
<td>Criminal: To punish a wrongdoer</td>
</tr>
<tr>
<td>Civil: To compensate a person injured by an unlawful act</td>
</tr>
<tr>
<td>The parties</td>
</tr>
<tr>
<td>Criminal: The state prosecutes a defendant, e.g. R v Smith</td>
</tr>
<tr>
<td>Civil: An individual (the claimant) sues an individual (the defendant) e.g. Smith v Jones</td>
</tr>
<tr>
<td>The outcome</td>
</tr>
<tr>
<td>Criminal: The defendant is either acquitted or convicted</td>
</tr>
<tr>
<td>Civil: The claimant either wins the case or does not</td>
</tr>
<tr>
<td>The consequences</td>
</tr>
<tr>
<td>Criminal: If convicted, the defendant will be sentenced</td>
</tr>
<tr>
<td>Civil: If the claimant wins he or she will be awarded a remedy</td>
</tr>
<tr>
<td>The courts</td>
</tr>
<tr>
<td>Criminal: The case will first be heard in the magistrates’ court or the Crown Court</td>
</tr>
<tr>
<td>Civil: The case will first be heard in either the county court or the High Court</td>
</tr>
<tr>
<td>The facts</td>
</tr>
<tr>
<td>Criminal: Decided by the magistrates or by a jury</td>
</tr>
<tr>
<td>Civil: Decided by the judge</td>
</tr>
<tr>
<td>The law</td>
</tr>
<tr>
<td>Criminal: Decided and applied by the judge or by the magistrate, on the advice of the clerk to the court</td>
</tr>
<tr>
<td>Civil: Decided and applied by the judge</td>
</tr>
<tr>
<td>Burden and standard of proof</td>
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<tr>
<td>Criminal: The prosecution must prove the defendant’s guilt, beyond reasonable doubt</td>
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<tr>
<td>Civil: The claimant must prove his or her case on a balance of probabilities</td>
</tr>
<tr>
<td>Examples</td>
</tr>
<tr>
<td>Criminal: Murder, theft, false trade descriptions, misleading price indications</td>
</tr>
<tr>
<td>Civil: Negligence, trespass, breach of contract, disputes as to ownership of property</td>
</tr>
</tbody>
</table>
Figure 1.3 An outline of the effect of the Human Rights Act 1998

Section 2
UK courts must take account of decisions of the European Court of Human Rights
But they are not bound to follow these decisions

Section 3
As far as possible, all UK legislation must be interpreted in a way which is compatible with Convention rights
What if UK legislation is not compatible?
Delegated legislation
Does the Parent Act state that the delegated legislation is to prevail even if it is incompatible with Convention rights?

Section 19
Before second reading of a Bill in Parliament, Minister must state compatibility or incompatibility with the Convention
If incompatibility is stated, there is no need to explain or amend the Bill

Section 6
Public bodies (widely defined) may not act in a way which is incompatible with a Convention right
This is not the case if the public body could not have acted differently on account of a UK statute

Any court may declare the legislation invalid
Precedent-making court can make a declaration of incompatibility

Any precedent-making court can make a declaration of incompatibility
The relevant minister has the option to amend the incompatible legislation
serious offences of causing death by reckless driving and of driving with excess alcohol. The purpose of charging the driver with these more serious offences would be to punish him or her more severely. If convicted the driver would almost certainly be imprisoned.

However, the civil courts would not order the defendant to pay more damages merely on account of his or her behaviour having been worse. In fact, if the pedestrian was killed, the damages might well be less than if he or she had been badly injured. Damages payable to a pedestrian injured so badly that nursing care would be required for the rest of his or her life might well exceed £1 million. They would take account of the cost of the claimant’s nursing care, as well as pain and suffering and loss of earnings. If the driver was killed instantly, no damages would be paid in respect of nursing care or pain and suffering. A pedestrian who was not injured at all could bring no claim for damages.

This example demonstrates the different purposes which the two sets of courts are trying to achieve. The criminal courts are designed to punish bad behaviour. The worse the behaviour, the greater the punishment. Once it has been established that the defendant’s behaviour has been such as to incur civil liability, the civil courts are not concerned with the heinousness of the defendant’s behaviour. They are concerned with the extent of the injuries or losses which the claimant has suffered.

Crimes which cause injury to a victim will also give rise to a civil action. However, ‘victimless’ crimes will not. Possessing a controlled drug, for example, is a crime, but the fact of the defendant’s possessing the drug does not directly injure anyone else.

Most civil wrongs are not crimes. A person who breaks a contract or trespasses on another’s property might well be sued, but will not have committed a crime. Notices on private land which state that ‘trespassers will be prosecuted’ are misstating the law. Trespassers commit a tort and might be sued for it. However, they generally do not commit a crime and so they cannot be prosecuted.

Common law and equity

A hundred years after the Norman conquest, King Henry II began the process of applying one set of legal rules, the common law, throughout the country. The decisions of judges began to be recorded, and subsequent judges followed them, in order to provide a uniform system of law known as the common law.

The common law grew to have several defects and to counter these people seeking a remedy could petition the Chancellor, the highest-ranking clergyman, to ask him to intercede. This justice dispensed by the Chancellor, and later by judges under the Chancellor’s control, became known as equity.

Equity was not designed to be a rival system to the common law system. Originally, it was intended to supplement the common law, to fill in the gaps. Gradually, however, equity developed into a rival system.

The Judicature Acts 1873–75 merged the two systems of law. These Acts created the modern court structure, designed to apply common law and equity side by side in the same courts. Even today, however, equity still has an influence on English law. The administration of law and equity was fused, but the separate rules of each branch of the law lived on.

From a student’s point of view it is sufficient to say that certain matters are still ‘equitable’ and that there are two main consequences of this. First, certain remedies are equitable in nature and are therefore awarded only if the court considers it equitable to award them. Second, some relationships, such as the relationship between partners in a firm, are governed by equitable principles and therefore require very high standards of honesty and openness.
Features of the English legal system

The English legal system is unlike that of any other European country.

Antiquity and continuity

English law has evolved, without any major upheaval or interruption, over many hundreds of years. The last successful invasion of England occurred in 1066, when King William and his Normans conquered the country. King William did not impose Norman law on the conquered Anglo-Saxons, but allowed them to keep their own laws. These laws were not uniform throughout the kingdom. Anglo-Saxon law was based on custom, and in different parts of the country different customs prevailed.

In the second half of the twelfth century, one set of legal rules, known as ‘the common law’, began to be applied throughout England. Since that time, English law has evolved piecemeal. For this reason the English legal system retains a number of peculiarities and anomalies which find their origins in medieval England.

English law does not become inoperative merely because of the passage of time. When we study the law of contract we shall see that two ancient cases, Pinnel’s case (1602) and Lampleigh v Brathwaite (1615), are still important precedents. Although these cases have been refined and developed by subsequent cases, there would be no reason why a modern lawyer should not cite them in court. In the same way, statutes remain in force indefinitely or until they are repealed.

Occasionally, a litigant springs a major surprise by invoking an ancient law. In 1818 the defendant in Ashford v Thornton (1818), who was accused of murder, claimed the right to have his case settled by battle. Trial by battle had been a method of resolving disputes shortly after the Norman Conquest (as described below) but had fallen into disuse before the end of the thirteenth century. In Ashford v Thornton the offer of trial by battle was declined and so the defendant was discharged. The Appeals of Murder Act 1819 was hurriedly passed. Until Parliament passed this Act, trial by battle still existed as a possible means of settling some types of legal disputes.

The adversarial system of trial

The English system of trial is adversarial. This means that the lawyers on either side are adversaries, who ‘fight’ each other in trying to win judgment for their clients. The judge supervises the battle between the lawyers, but does not take part. Recent reforms of the civil justice system now require the judge to manage the case rather than to leave this to the lawyers. The judge will therefore set timetables for the completion of certain stages of litigation and try to encourage co-operation on certain issues. Despite this judicial case management, a trial is still conducted on adversarial lines. Today the battle is metaphoric, but in the early Middle Ages many disputes were resolved with a Trial by Battle. The parties would fight each other, both armed with a leather shield and a staff, and it was thought that God would grant victory to the righteous litigant. If either of the parties was disabled, or too young, or too old, he could hire a champion to fight for him. This was no doubt considerably more entertaining than a modern trial, but eventually it came to be realised that it was not the best way to achieve justice. Lawyers replaced the champions. However, the idea of a battle survived, and a trial is still a battle between the lawyers, even if the shields and staves have given way to witnesses and precedents.
Most other countries have an inquisitorial system of trial, where the judge is the inquisitor, determined to discover the truth. A French examining magistrate, for example, has enormous powers. He or she takes over the investigation of a criminal case from the police and can interrogate witnesses. He or she can also compel witnesses to give evidence and can surprise witnesses with other witnesses, hoping that the confrontation will point the finger of guilt.

When a French case reaches court, it is often all but decided. By contrast, no-one can ever be certain of the outcome of an English trial. The lawyers will fight each other on the day and either side might win. The judge should be disinterested in the outcome, merely ensuring that the lawyers fight by the rules.

Absence of a legal code

In most European countries the law has been codified. This means that the whole of the law on a particular subject, for example the law of property, can be found in one document or code. As we have seen in this chapter, the bulk of English law has been made by judges in individual cases.

Occasionally, Parliament codifies an area of law with a statute such as the Partnership Act 1890. Such an Act aims to take all the relevant case law on a particular subject and to codify it into one comprehensive statute. However, as we shall see, the vast majority of English law remains uncodified. Nor does Britain have a written constitution, as most other democratic countries have.

The law-making role of the judges

In most European countries the judges interpret the legal code. In doing this they do not themselves deliberately set out to create law. Earlier in this chapter, when we studied the doctrine of judicial precedent, we saw that the decisions of judges in the High Court, the Court of Appeal and the House of Lords must be followed by lower-ranking judges. So these senior judges are constantly creating the law.

Importance of procedure

In the Middle Ages a claim would fail if the correct court procedure was not rigidly adhered to, even if the substance of the claim was perfectly valid. To some extent this is still true today. If a litigant fails to follow the correct procedure, it is possible that his claim will be struck out. Recent reforms of the judicial process have attempted to reduce the importance of procedure. However, in cases which involve a substantial claim there is no doubt that procedure remains very important.

Absence of Roman law

The Romans occupied England from 55 BC to 430 AD. Roman law was extremely sophisticated by the standards of its day. The other European countries which were part of the Roman Empire have retained elements of Roman law. However, English law has almost no Roman law influence, although Roman law is still taught as an academic subject at some English universities.
Other features

Two other features of the English legal system are worth mentioning. First, the legal profession is divided, lawyers being either barristers or solicitors. Second, in almost all criminal trials the innocence or guilt of the accused is decided by laymen, rather than by lawyers or judges. If the accused is tried in the Crown Court, it will be a jury which decides whether the accused is guilty. If the crime is tried in the magistrates’ court, it is generally a bench of lay magistrates who make this decision.

The legal profession

Unlike other European countries, England has two different types of lawyers – barristers and solicitors. There are currently about 12,000 practising barristers, about 32 per cent of whom are female and 11 per cent of whom are from ethnic minorities. The main job of barristers is to argue cases in court. However, the role of the practising barrister is much wider than merely acting as an advocate. Barristers spend a considerable amount of time giving written opinions, in which they state what they consider the law to be. They also draft statements of case, the formal documents which the parties must exchange before a case is heard in court. Barristers tend to specialise either in criminal law or in a particular branch of civil law. They have rights of audience in all civil and criminal courts. Until 1990, barristers had an exclusive right to be heard in the higher courts, but now some solicitors also have rights in such courts.

Senior barristers are known as Queen’s Counsel, and they generally appear in court with a junior barrister assisting them. Since June 2005 they have been appointed by a Queen’s Counsel selection panel. Queen’s Counsel, or QCs as they are usually known, can charge higher fees than other barristers, in recognition of their expertise.

Traditionally, barristers operate from chambers, which are offices where several barristers are allocated work by a barrister’s clerk, who also negotiates the barrister’s fees. Under the ‘cab rank’ rule a barrister, like a taxi, is supposed to provide his services to any client. Theoretically, therefore, any barrister is available to any client whose solicitor asks that the barrister should be engaged. This is not always true, as some barristers’ fees are beyond the means of many clients and because barristers’ clerks, who arrange what cases a barrister can take, are skilled at deflecting unwanted cases. It often happens that when a particular barrister has been engaged he is not available when the case starts because another case in which he is appearing has not finished in time. The client is then allocated a different barrister. Many barristers do not practise, but work in industry or commerce or for local government or the Civil Service. The Legal Services Act 2007 has allowed barristers and solicitors to work together in partnership.

There are about 116,000 practising solicitors, almost 11.5 per cent of whom are from ethnic minority groups. Almost 45 per cent of practising solicitors are women, a percentage which is increasing annually. Solicitors, many of whom work in very large partnerships, are the first point of contact for a client with a legal problem.

A solicitor in a one-person business should have a good idea of most areas of law and should know where more information could be found if needed. In the larger firms solicitors would tend to specialise in one particular area of law. Solicitors routinely give their clients legal advice, enter into correspondence on their behalf, draft wills, and draw up documents which transfer ownership of land.
Until 1990, solicitors were allowed to argue cases only in the magistrates’ court and the county court. Now the barristers’ monopoly right to appear in the Crown Court and appellate courts has been removed by statute, and solicitors who have gained the necessary advocacy qualifications can represent clients in any court. However, barristers still perform the vast bulk of advocacy work in these courts. Whereas solicitors have gained rights of audience since 1990, they have lost their monopoly rights to perform conveyancing and to obtain grants of probate. The Administration of Justice Act 1985 allowed licensed conveyancers to practise. It was widely predicted that this would be disastrous for many small firms of solicitors, but this does not seem to have been the case. However, the Legal Services Act 2007 has allowed non-lawyers to own law firms, and many have suggested that this prospect of ‘Tesco Law’ will be very damaging to small high-street firms.

The Legal Services Act 2007

The Legal Services Act received Royal Assent in 2007. However, it will not fully come into force until 2012. The Act sets up a new framework of regulation for legal services in England and Wales and is probably the most significant reform of legal services ever to have been made. Part 1 of the Act sets out the Act’s eight regulatory objectives, namely:

(a) protecting and promoting the public interest;
(b) supporting the constitutional principle of the rule of law;
(c) improving access to justice;
(d) protecting and promoting the interests of consumers;
(e) promoting competition in the provision of services;
(f) encouraging an independent, strong, diverse and effective legal profession;
(g) increasing public understanding of the citizen’s legal rights and duties; and
(h) promoting and maintaining adherence to the professional principles, which are set out in s. 1(3).

The professional principles set out in s. 1(3) require ‘authorised persons’, that is to say those who can offer ‘reserved legal services’, to act with independence, integrity and confidentiality; to maintain proper standards of work; to act in the best interests of clients; and to act in the best interests of justice when litigating in court.

Part 2 of the Act has created a Legal Services Board (LSB), which aims to maintain and develop standards relating to the legal profession. The LSB has a duty to promote the eight regulatory objectives set out in Part 1 of the Act, and to establish a Consumer Panel. It is independent from the Law Society and the Bar Council, which are now called ‘front-line’ legal regulators.

Part 3 of the Act sets out the ‘reserved legal activities’ which can be carried out only by lawyers. These matters are advocacy in court, formally conducting litigation, and charging for the preparation of probate papers. Other, minor, reserved legal activities can be carried out by notaries or commissioners for oaths.

Part 5 of the Act will allow lawyers to work in ways which are not currently allowed. ‘Legal Disciplinary Practices’ will allow barristers and solicitors to work together and will also allow a quarter of their staff to be non-lawyers. Alternative Business Structures (ABS) will be able to be set up as companies, partnerships or limited liability partnerships. In an ABS, lawyers and non-lawyers will, for the first time, be able to work together to provide both reserved legal activities and other services. In such businesses non-lawyers
will be able to exercise professional, management and ownership roles. As long as an ABS has been licensed by an approved regulator, such as the Law Society, it will be able to offer the ‘reserved legal activities’ described above. These ‘reserved legal activities’ will of course need to be carried out by lawyers. However, any other activities will be able to be carried out by those who are not legally qualified. Businesses such as the AA and HBOS are already offering extensive legal services. When Part 5 is in force, it seems very likely that many non-traditional legal services providers will employ non-lawyers to carry out much of the background work which was traditionally carried out by lawyers. This has caused several distinguished commentators to fear that lawyers, if they are to be able to compete, will have to give up much of the work which they have traditionally done, or accept much reduced salaries for doing it. The legal services market is estimated to be worth about £19 billion annually. It seems very likely that banks, insurance companies and large retailers will try to take over a large share of the market. Lawyers will probably have to change their outlook and their business structures to compete effectively. However, it should be remembered that the LSA does not provide for complete deregulation of legal services providers. Any new ABS will need to apply for a licence if any non-lawyer has a material interest in the ABS or is able to control it. A licence will be granted only to businesses which are competent to provide legal services. Furthermore, any non-lawyer who owns more than 10 per cent of an ABS will be subject to a fitness-to-own test. It should also be remembered that the demise of the legal profession was widely predicted, not least by the profession itself, when in the late 1980s solicitors lost their monopoly rights to write wills and practise conveyancing. Such predictions have been proved spectacularly wrong.

Part 6 of the Act sets up the Office for Legal Complaints (OLC), which will take over dealing with complaints against lawyers. The LSA 2007 is intended to allow non-lawyers to do much of the work currently done by lawyers and thereby to lead to innovation, price reductions and greater access to legal services. The extent to which it will achieve these objectives will not be known for some years.

The judiciary

There are five main levels in the judicial hierarchy. Supreme Court Justices sit as judges in the Supreme Court. Lords Justices of Appeal sit in the Court of Appeal. There are currently 37 Lords Justices of Appeal and 12 Supreme Court justices. There are also 110 High Court judges, who sit in the High Court and sometimes in the Crown Court.

It is convenient to consider the judges who sit in the High Court, the Court of Appeal and the Supreme Court as distinct from judges who sit in lower courts. The High Court is generally not an appeal court. The Court of Appeal and Supreme Court do not try cases but only hear appeals. The further up the hierarchy the judge is sitting, the more importance he is likely to attach to the precedent which he is creating.

There are currently 653 circuit judges, who try criminal cases in the Crown Court and civil cases in the county court. In the Crown Court these circuit judges are assisted by some 1,300 part-time judges called recorders. In the county court they are assisted by around 440 district judges and 780 deputy district judges. Circuit judges and district judges do not create precedents. Their role is therefore confined to trying the cases which they hear. They supervise the proceedings in court, and in civil cases decide the facts of the case if they are in dispute and award damages and costs. In criminal cases in which a judge sits the facts
Chapter 1 The legal system

will be decided by the jury, but the judge will supervise the proceedings. He will also sum up the law to the jury, so that they can reach the correct verdict, and pass sentence if the accused is convicted.

Nineteen per cent of judges are female and four and a half per cent are of minority ethnic origin. In the precedent-making courts the judges are almost exclusively white and male. Only three such judges are from a minority ethnic background and only nineteen are female.

Ninety-seven per cent of all criminal cases are decided in the magistrates’ court, rather than in the Crown Court. Most magistrates are lay magistrates, meaning that they are not legally qualified. However, there are currently 134 district judges (magistrates’ court) and they are assisted by 103 deputies.

There are somewhere around 30,000 lay magistrates, who are not paid a salary. Although they are not legally qualified, upon appointment lay magistrates do receive training on matters such as decision-making, stereotyping and avoiding prejudice. Magistrates generally sit as a bench of three, and are advised about the law by the legally qualified clerk of the court. As well as deciding whether or not a person accused of a crime is granted bail, magistrates try cases, deciding whether an accused is innocent or guilty and passing sentence on those who are convicted. They also conduct committal proceedings when a defendant is committed for trial to the Crown Court. Lay magistrates must live or work in the area in which they serve, must have a good knowledge of the local community, must be of good character and have personal integrity. Generally, they must be between the ages of 27 and 65. Most people are eligible to become magistrates, but those in the police or the armed forces are not.

Judicial review

Judicial review is a legal procedure which allows the Administrative Court to examine whether a public law decision, or the exercise of discretionary power by a public body, is legal. The definition of public body includes government ministers and has been held to cover decisions of private bodies which make decisions that affect the public.

The court can grant one or more of the following remedies:

- An order that overrules the original decision.
- An order that forces the decision-maker to do something.
- An order which prevents a decision-maker from doing something which is not legal.
- State the legal position between the parties.

Judicial review has become increasingly important in recent years as the number of applications has increased dramatically. Businesses are increasingly either applying for judicial review or are subject to judicial review proceedings. A business might apply, for example, on the grounds that a decision taken by a government minister affects the running of the business.

Juries

In the Crown Court the jury decides whether the accused is guilty or not guilty. This decision is based on the judge’s summing up, which explains the relevant law to the jury. It is therefore said that juries decide the facts of the case. A judge can direct a jury to acquit an
accused, but cannot direct them to convict. Juries do not give an explanation for their decisions. If a jury acquits, an appeal cannot overturn this acquittal. This enables juries to bring in ‘perverse acquittals’ if they think that the circumstances of the case so demand.

Juries play little part in civil cases. The absolute right to trial by jury in the Crown Court for an indictable (serious) offence has also been breached. In March 2010 four men were convicted of armed robbery in the Crown Court, without a jury, because there were serious concerns about jury nobbling. Since then, two other trials for indictable offences have been earmarked for trial in the Crown Court without a jury. However, in the near future it is highly unlikely that more than a handful of such trials will be tried without a jury each year.

Essential points

- Legislation is the name given to law made by Parliament.
- The literal rule of statutory interpretation says that words in a statute should be given their ordinary, literal meaning, no matter how absurd the result.
- The golden rule gives the words in a statute their ordinary, literal meaning as far as possible, but only to the extent that this would not produce an absurd result.
- The mischief rule holds that the judge can take into account what ‘mischief’ the statute set out to remedy.
- The doctrine of judicial precedent holds that judges in lower courts are absolutely bound to follow decisions previously made in higher courts.
- The ratio decidendi, loosely translated from the Latin as ‘the reason for the decision’, is the part of the case which is binding on other judges.
- Statements of law which did not form the basis of the decision are known as obiter dicta (other things said).
- A higher-ranking court can overrule a ratio created by a lower-ranking court.
- The United Kingdom joined what is now the EU in 1973. In order to be admitted as a member, the UK Parliament passed the European Communities Act 1972. Under this statute the United Kingdom agreed to apply EU law in UK courts.
- The Human Rights Act 1998 requires that all legislation is read and given effect in a way which is compatible with the Convention rights, but only in so far as it is possible to do this.
- The English courts are divided into civil courts and criminal courts, and the two sets of courts have quite different purposes.
- The civil courts are designed to compensate people who have been injured by others. The criminal courts are designed to punish people who have committed a crime.
- Unlike other European countries, England has two different types of lawyers – barristers and solicitors.
- Judicial review is a legal procedure which allows the Administrative Court to examine whether a public law decision, or the exercise of discretionary power by a public body, is legal.
- In the Crown Court the jury decides whether the accused is guilty or not guilty.
Practice questions

1. What are the three main rules of statutory interpretation? What is the effect of these rules?

2. What is the effect of the *ejusdem generis* rule and the rule *expressio unius est exclusio alterius*?

3. What is meant by the doctrine of judicial precedent?

4. What are the five main levels of the courts, for the purposes of precedent?

5. What is meant by *ratio decidendi* and *obiter dicta*? What is the significance of the distinction? What is meant by overruling, reversing and distinguishing?

6. Find a case concerning the Human Rights Act 1998 either in a newspaper or on the Internet. Which articles of the Convention did the case concern? Describe the outcome of the case or, if it has not yet been decided, state what you think the outcome of the case might be.

7. Describe how the system of judicial precedent operates. Do you consider that the advantages of the system outweigh the disadvantages?

Task 1

Draw up a report for your employer, briefly explaining the following matters:

(a) The main rules of statutory interpretation.

(b) The way in which the system of judicial precedent operates.

(c) The ways in which EU law is created and the effect of EU law in the United Kingdom.


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