Chapter 2 Identifying features of the English legal system

Contents

Introduction

This chapter indicates many of the distinctive features of the English legal system and builds on the ideas discussed in the latter part of the first chapter. In the first chapter we emphasised the need to be conscious of certain characteristics of legal study to inform our particular efforts. In particular we indicated that we could adopt a range of perspectives and that when we want to understand the operation of law in a legal system we inevitably face a choice as to what we include as suitable material. Do we want to take the accepted rules and principles of legal doctrine as given? (Some call this a 'black-letter approach' – 'the law is simply the law'). Or do we want to set these in context– and if so what perspective should you take, what assumptions do you use to organise the material to make sense of the diverse accounts?

Note the difference between the internal and the external, between the participant and the 'observer' – the difference between:

- accepting law as a normative phenomenon, where normative precepts or ideals – statements of *oughts* – are appropriate language
- and the world of facts, where statements of *is* are the proper expression.

There are others who appear to see law in negative terms, as required only by the failings of human society (anarchists, Marxists). They associate law and the operations of the legal system closely with coercive governmental structures which compel humans into artificial associations, where law distributes a structure of unearned benefits and enforces unjust relationships. Others, rejecting the coercive image of law see it as an expression of societal ideals, as articulating principles and standards of human

worth (human rights etc.), and the legal system as providing an array of protective devices for citizens to use.

As examples of 'external' perspectives we could note those of the sociology of law, Marxism and of many feminists or critical race scholars who have felt excluded from the historical development of the legal system.

Essential reading

- Cownie and Bradney, Chapter 1: 'What is "the English legal system"?'
- Slapper and Kelly, Chapter 1: 'Law and legal study'
- Holland and Webb, Chapter 1: `Understanding the law', 1.3 `What is Law?'

Learning outcomes

By the end of this chapter and the relevant readings you should be able to:

- identify several key features of the English legal system that differentiate it from others
- outline the difference between common law and civil law (Roman law) traditions
- explain the difference between the adversarial legal process of English law courts and the inquisitorial process that operates in many continental European countries
- discuss the principles and objectives which, in your view, 'ought' to guide legal processes
- begin to use fundamental concepts and questions as reference points in further reading.

2.1 Judging the operation of the English legal system

We have a pragmatic task: it is intellectually satisfying to explore the diversity of perspectives, but we have limited time and limited energy. Our questioning is necessarily rather limited. But, whatever our theoretical inclinations, we accept that a legal system is *a complex of operations, processes, human actions, institutions and ideals*.

Given that it is a human creation we can ask if the legal system is a **rational enterprise and what kind of rationality is involved.** Many jurists argue that the legal system cannot be just any kind of purposive activity: it must be rationally controllable, and the institutional operations should be understood not simply as ways of getting things done, but as 'normative'. In other words, they should express values and be ethically guided. Furthermore the rationality that runs through it should be **humane** – i.e. it should be oriented towards achieving justice.

What criteria could we use?

Justice, however, is a contestable concept. Therefore we must ask a series of questions and keep asking them, for example:

- What principles ought to guide the legal processes?
- What objectives should be kept in mind?
- What ethical and professional ideals are involved?

Students are constantly asked to **evaluate** and **think critically** about particular institutions and processes. Your evaluations and criticisms should be made by reference to suggested objectives of the criminal and civil justice processes and the various interests that these systems are attempting to serve. In your reading of the recommended materials, therefore, a fundamental question that should always be at the back of your mind is:

- To what extent to is a particular institution or process achieving broad objectives and/or serving the interests of those involved in the process.

Within the **criminal justice** process, for example, some of the more important objectives suggested are:

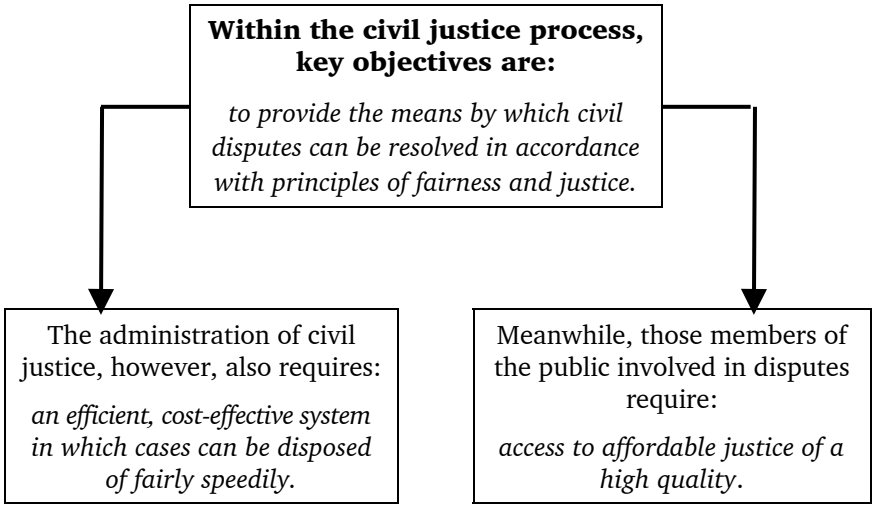
- to punish wrongdoers
- to protect society
- to deter people from breaking the law.

However, at the same time it is an important requirement that the police, prosecutors and judiciary should act fairly and consistently.

There are also obligations:

- to the accused
- to victims
- to the wider society to process cases speedily, but
- not to interfere with civil liberties.

What of civil justice? The Victorian novelist Charles Dickens once said that 'the one great principle of the English Law is to make business for itself' (*Bleak House*, 1971, p. 58), and many complain today of the excessive cost and complexity of the process. In diagrammatic form we can suggest that:



It will be clear that many of the objectives of both the criminal and civil justice system appear to conflict and that a balance must be found between competing requirements. For example, in criminal cases, the desire to apprehend the guilty may conflict with the need to protect civil liberties and observe due process considerations.

How is this balance to be found? How do we know if a satisfactory balance is operating? This is usually difficult. In civil justice, for example, the majority of litigants settle their cases out of court in order to achieve a speedier and less costly resolution of their case. Is this a success or failure of the civil justice system and how do we evaluate the extent to which these outcomes are just and fair?

Summary

We began this chapter by looking at some of the broader issues underlying a study of the law: in particular what the purposes of the law are, and how we can judge whether it is achieving them. This provides a foundation for the more detailed consideration of the nature of the English legal system.

2.2 General features of the English legal system

Essential reading

- Slapper and Kelly, Chapter 1: 'Law and legal study', pp. 1–9

So far we have stressed the multitude of perspectives possible and the universality of our concerns. In later chapters, and throughout your studies, you will be studying specific areas of operation, for example contract and criminal law, trusts and land law, and perhaps administrative law. Before plunging into particular topics there are various general features and key concepts that you should master. You should be aware of the differing sources of law and the particular importance for the understanding of the English legal system of the distinction between **'common law'** and '**civil law**' (or 'Roman law', as it is sometimes called) systems, and between the adversarial and inquisitorial methods of investigation; you should also have an understanding of the development and meaning of 'equity'.

Activity 2.1

Read Slapper and Kelly, Chapter 1: 'Law and Legal Study'.

(a) What do the authors mean by 'critical, analytical thought'?

(b) What is the distinction between common law and equity? Between common law and civil law systems?

(c) What is the importance of the notions of ''separation of powers' and 'rule of law' to legal study?

(d) What importance do the authors give to the advent of the Human Rights Act of 1998?

Feedback: see page 56.

2.2.1 What makes the English Common Law so distinctive?

English law has a number of distinctive features. The following list is adapted from R.C. Van Caenegem's *Judges, Legislators & Professors: Chapters in European Legal History*.

- The importance of the judges and the lack of prominence of academics (jurists).

By contrast, in Italy, where the academic study of the Roman digests laid the foundation for an intellectually rich study of law, professors of law were the spokespersons of law, holding out interpretations of the *corpus juris*.

> In England, from the second half of the twelfth century down to the great reforms of the nineteenth, the judges made and controlled the common law, regarding legislation as an interference and a nuisance and bothering very little about jurisprudence. (p. 69)

- The idea that English common law reflects national identity.

This implies something greater than the mere fact that each country has its own laws. There is something unusual about the development of the English legal system. Sometimes this is referred to as the common law 'reflecting the pragmatic spirit of the English', or 'the tendency to rely upon common sense'. As the famous American scholar Laski put it in an exchange of letters with the judge and legal scholar O.W. Holmes, the English mind:

> is full of real insights, can never concentrate on any subject, never argue about it abstractly, is always driven to the use of a concrete illustration, is rarely logical and about eight times out of ten patently in the right. (*Holmes-Laski Letters*, Harvard, 1953, p. 303)

But was this mode of thinking elitist or that of a democratic spirit of the people? Van Caenegem says:

> Was this 'judgement-finding' in the common-law courts and the other central organs of justice democratic? Again the answer on the whole must be negative, although some doors were ajar for ordinary people. Certainly in the English judicial tradition there was nothing like the mass assemblies of the Athenian democracy. Popular justice like the people's courts of the agora was unknown. Nor were the judges ever elected by the people. They were appointed from the ranks of the successful serjeants at law, an intellectual elite who had gone through many years of training and success at the bar and whose recruitment was at certain times limited to the sons of the aristocracy and the gentry. There was, however, a popular element in the jury (even though it was limited to landowners), for the judges had to put the important questions of fact to them, at least in the common law courts, and this had to be done in terms that were understandable to the layman and free from the esoteric jargon that judges and serjeants used among themselves. Another democratic element was the openness of the proceedings, although it should not be forgotten that the dealings of the court were held in a very strange language – a medieval provincial French dialect – and were therefore quite inaccessible to all except a few dozen initiates. Also the very high cost of litigation to this day has been a severe hurdle for those who decide to take their case to law. Nor was justice easily accessible in geographical terms because of the excessive centralisation of the courts and their activities in London… Another criterion of the democratic nature of a legal system is, of course, its cognoscibility. On this point, the common law scored very badly, for it was and is uncodified, buried in a "myriad of precedent, that wilderness of single instances", and even worse, in the bosom of the judges who guarded

serjeants at law – ancient term for senior lawyers

cognoscibility – capability of being understood

patriciate – aristocracy

> the unwritten fundamental principles of the common law, against whom not even clearly formulated statutes stood a chance – a situation remindful of the Roman patriciate who kept the formulae of the law secret. Might the justices of the peace have provided a democratic element? Hardly…'

- English law as a 'seamless web'

– the idea that there was always an answer, that law existed even if you could not immediately find it.

- The rule of exclusion.

In interpreting statutes or legislation, the English judiciary adopted a rule that specified that one could not look at material beyond the legislation to determine its meaning.

You may note that the choice between interpreting a statute by reference to the language contained in the statute alone, or by using extrinsic sources, such as records of debates in the Parliament or committees, or records of what the framers of the bill intended it to means, is a fundamental tension in all common law systems. It has particular resonance in the questions of interpreting a written constitution. Should we interpret by reference to what we can historically show the framers had in mind, or should we give the words only the meaning that they can bear on their own? But then which time frame does one consider? The time the constitution was written or now?

- The lack of a written constitution.

Note the theory of parliamentary sovereignty, i.e. that Parliament is an absolutely sovereign legislature (but is this now compromised by EU and International Conventions?). Van Caenegem expressed the traditional view in 1987:

> The theory of parliamentary sovereignty, i.e. that Parliament is an absolutely sovereign legislature, is built on two pillars. The first is that no parliament can bind a future parliament or be bound by a previous one. There are no laws that parliament cannot make or unmake and no consideration of morality or natural law can prevail against a clear statute emanating from Westminster. The second is that no judge can condemn a law and refuse to apply it on the ground that it is incompatible with the constitution or the fundamental principles of the common law; that would be a usurpation of the legislative function by the judiciary. (*Judges, Legislators & Professors*, pp. 21–22)

Another consequence of this was the *relative lack of judicial review*. In the broad sense judicial review means control by a higher judicial body (such as in appeal cases or review of executive discretion). In the narrow sense it means the control exercised by the courts over the constitutional character of legislation, implying the power of judges to annul laws (or stop their application) as being contrary to some article of the constitution.

- Prosecution and verdict in criminal trials.

The **jury trial** became the most distinctive aspect of the common-law world. Historically the prosecution of offenders in the English system lay not with any state official but with the jury of the venue, a jury of peers of the accused. The jury decided whether there was enough *prima facie* evidence to warrant a criminal procedure against the accused. Two juries were involved: one – a grand jury – decided whether to prosecute or not, while another, the petty jury, decided whether the prosecuted person was guilty or not. The 20th century saw a marked decline in the role of the jury, the almost total disappearance of the jury from civil trials and a reduction in the number of criminal trials that involve a jury.

peers – equals

- An uncodified law.

This is the clearest difference between English law and the continental or civil law system. There have been numerous movements to codify English common law but they have never succeeded.

A tradition dominated by judges

Legal education was seen as a practical affair, a matter of skilled pleading and learning the ways of the courts. In part this was a consequence of the minor role that jurists played in the common law. **In the English tradition the judges are the *oracles* of the law** (to use Blackstone's phrase). Jurists – professors of law and of the theoretical study of law – have a marginal role. The English common law was the handiwork of judges and judges gloss it in future judgements.

The continental European situation is the result of the central role of the interpretation of the code of the Emperor Justinian. Roman-based legal science was the province of professors. By contrast with the Continent's Roman-based legal scholarship, English law was based on custom, revealed by precedent; the judges, reconciling precedents in the practice of the courts, and not the jurists, were the oracles of the law. Young people who wanted a career in law did not go to a university to learn law-book texts and hear the professors' interpretation of the meaning of those texts. They went instead to live in one of the Inns of Court, where they listened to barristers and judges and learnt the law by seeing it in action in the courts. To learn the law was to engage in an **apprenticeship**, witnessing the practice of the courts and learning the pleas.

As late as 1882 (when he became the Vinerian Professor at Oxford) Dicey set out his inaugural lecture in the form of a question: 'Can English law be taught at the universities?' He meant the question rhetorically, for he believed that not only could it be so taught, but that it must be in order to make it more rational, consistent and adaptable to new social developments. But there were many, and there still are some individuals, who consider that the common law is best learnt in practice and that university level courses are only a gloss on the real learning process. The issue is apparent in a variety of guises: is a law degree to be seen as a preparatory course for entering the legal profession and therefore it should concentrate on the particular needs of the profession? Or should it emphasise wider more general skills and be seen as a branch of liberal education?

You may note that the University of London was the first university to create a Bachelor of Laws as an undergraduate degree in the common law in the 1890's. From the beginning, external students have been able to sit for its examinations.

Summary

The English legal system is the original common law system. The common law of England has come out of hundreds of years of development, beginning with Anglo-Saxon customs (in the period up to 1066) and the impact of the Norman rationalisation and centralisation of authority. Over the subsequent centuries it grew through complex processes of recognising and rationalising the multitude of judicial decisions that the judges of the central courts created. In studying the common law it is important to appreciate that it is a complex historical product with a number of distinctive features.

2.3 The common law tradition

The English legal system is the original common law system, so an understanding of the nature of the common law is vital. The common law is often referred to as a tradition (it has also been referred to as a 'mystery', as 'growing organically', as 'inherently irrational', as 'defying logic', as 'particularistic', as a 'lady', and as 'chaotic'). Certainly the contemporary common law system can only be understood as a historical creation, with features that may reflect the contingencies and accidents of history, rather than any rational design.

Different meanings have been attached to the expression 'common law'.

2.3.1 The historical perspective

The development of the law of England and the distinction between the common law and equity

The traditional picture of the development of English law begins with the customs of Anglo-Saxon society. Custom is said to have its roots in the life of the people and reflect the social structure of that way of life. The daily conditions of life were rather grim: most of England was covered by dense forests and the population was largely illiterate. Hence law was local custom, largely unwritten and understood as a set of orally transmitted rules. As a body of rules their content seems to have been directed at preventing bloodshed by recognising elementary rights to property and personal freedom and substituting compensation for the rigours of blood feud as revenge for injury. Stating who had what rights to occupy and use land was a crucial task. Christianity had also been introduced, and was having an impact.

In 1066 the Norman French baron William defeated the Saxon King Harold at the battle of Hastings and conquered England, becoming King William I. The historians Pollock and Maitland (*History of English Law*, 2nd edn Vol. I, p. 79) said:

> The Norman Conquest is a catastrophe which determined the whole future of English Law. We can make but the vaguest guesses as to the kind of law that would have prevailed in the England of the thirteenth century or the nineteenth had Harold repelled the invader.

Subsequent legal mythology often presents a narrative that claims that William was a political conqueror but left the local laws alone.

In reality, after the Norman conquest local laws, however slowly, gave way to a general law of the country, which became known as the common law. Immediate effects involved:

- the introduction of the official languages of continental Europe, namely Latin and the official and popular hybrids known as Norman-French and Anglo-Norman
- separate Ecclesiastical courts (dealing with religious matters and people in religious service)
- a general principle of landholding.

William insisted that all land was held by his grace (which still persists in the notion of 'free-hold', where the owner still holds of the crown). As communications improved so did the spread of central administration and a centrally administered 'law'. The fact

that a central body was attempting to develop law as a means of administering the country changed the character of law and the legal institutions.

Over time the King's courts became the most important forum for the resolution of disputes between citizens (as we see in Chapter 3). The law of the King's Judges became the Common Law (*Commune Ley*) as distinct from the local customs. The Judges, however, tried to recognise 'general' customs, a wise move in terms of getting acceptance of their decisions. Where there was no general custom the decisions of these Judges came to form new law (as indeed was the case when they adopted custom). The development of the common law was linked to procedure. An action could only be brought in these courts by obtaining (purchasing) a **writ**. Soon, however, the forms of such writs became fixed, and only Parliament could approve a new type of writ designed to meet a claim that could not be accommodated within the existing writs and forms of action. If there was no writ to cover your precise problem, unfortunately it was very difficult for the courts to listen to you. (This was recognised by the Latin phrase *ubi remedium ibi jus*, which translated in practice as no right could be recognised in the common law unless a writ existed that provided a remedy for its breach). This created a rigid legal system and caused considerable hardship to many individual litigants. In response a practice grew of petitioning the King (as the 'fountain of justice') for justice in the individual case. The petitions were dealt with by the chancellor, who in this period was a man of the church and who was regarded as the 'conscience' of the King. In due course a formal procedure for such petitions evolved, culminating in a Court of Chancery, presided over by the Lord Chancellor, applying a system of rules known as 'equity' rather than the common law of the ordinary courts.

Writ: a document carrying the royal seal that was, in effect, an order of the sovereign commanding the performance of some act.

2.3.2 The development of equity

The Court of Chancery was often called a 'court of conscience' (there was and still remains a key phrase that a man must come to equity 'with clean hands', that is not himself guilty of wrongdoing in the case). It is true that it was often effective in remedying injustices, but the existence of parallel jurisdictions brought problems and injustices of its own. Chancery developed procedures separate from, but at least as complex as, those of the common law courts. It also accepted the operation of its own precedents. Hence it is actually wrong to consider that equity depended on a free discretion by the particular judges; instead it is best to see judges dealing in equity exercising a particular aspect of the normal 'judicial discretion' (see Chapter 5). Certainly procedure again became important and a litigant had to be sure of the classification of the rule he sought to have applied, in order to commence his action in the right court. The equity of the Chancery Court became a set of rules almost as precise as those of the common law. In the case of conflict between the two systems, the rules of equity prevailed. Parliament sought to put an end to these divisions with the Judicature Acts 1873-1875, which established a unified system of courts that were charged with applying both the common law and equity.

Students who later come to study equity as a particular module sometimes confuse 'equity' with the idea of natural justice. Although that was the origin of the Chancery jurisdiction, it has long since disappeared from the rules of equity. The rules of equity are just as capable today as those of the common law of producing resolutions of disputes that may be viewed as just or unjust.

Indeed the Court of Chancery has been historically an object of great criticism. Take the words of C.K. Allen (from *Law in the Making*, 6th ed. 1958, p. 403).

> The history of the Court of Chancery is one of the least creditable in our legal records. Existing nominally for the promotion of liberal justice, it was for long corrupt, obstructive, and reactionary, prolonging litigation for the most unworthy motives and obstinately resisting all efforts at reform… Charles Dickens did not exaggerate the desolation which the cold hand of the old Court of Chancery could spread among those who came to it 'for the love of God and in the way of charity'.

Famous nineteenth century novelist Dickens was himself a court reporter for some years. He was extremely critical of many aspects of the legal and prison system, and the Court of Chancery comes in for a particular battering in his great novel *Bleak House*.

Today, since the two types of rules are applied by the same courts, it may be apt to see equity as simply another form of the law.

There are, nevertheless, certain distinctive features. Firstly, while common law rules are available to plaintiffs as of right, equitable remedies are **discretionary** in the sense that they are subject to some general conditions of availability. For example, there is no absolute right to specific performance of a contract. Secondly, the existence of parallel systems of rules, the one based on formal procedures, the other based originally on the idea of substantial justice, has allowed some judges to invoke the tension between the two systems as a source of judicial creativity in developing the law to meet new situations. For example, Lord Denning has used this device in relation to the enforceability of promises and in relation to contracts affected by mistake.

2.3.3 Common law and statute law distinguished

The phrase common law is also used to denote the law applied by the courts as developed through the system of precedent without reference to legislation passed by Parliament. Statutes have only relatively recently become the most prolific source of law in England and Wales. For most of the development of the common law system the majority of the law was applied by the courts independently of any statutory source. The constitutional fiction was that the judges merely declared what the law was, as though it was already there and merely needed to be discovered. It is more usual today to admit that the courts *create* law, although there are jurisprudential scholars, such as Ronald Dworkin (*Law's Empire*, 1986), who hold to complex arguments that judges evolve the law out of existing principles and constructive interpretation of existing sources. An important aspect is the argument that the common law is a tradition of judicial responsibility and a barrier to arbitrary decision-making.

Common law as a 'family' of legal systems

As explored further later in this chapter, a wider meaning still of 'common law' is a description of a group of related legal systems. The English legal system was exported around the world during the colonial period. The legal systems, for example, of the USA,

Australia, New Zealand, Singapore, Malaysia and most of the Commonwealth countries, are all based on English common law although they may mix in local customary law, religious based law or other influences. What makes them all part of the common law legal family is not exactly similar rules or propositions but rather a working jurisprudence. As Justice Story declared in *Van Ness v Pacard* (1829, 2 Pet. at 137):

> The common law of England is not taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright: but they brought with them and adopted only that portion which was applicable to their situation.

In the view of Chief Justice Shaw of Massachusetts, in *Norway Plains Co. v. Boston & Maine Railroad* (1845, 1 Gray, at 263) the flexibility of the common law ensured its adaptation:

> It is one of the great merits and advantages of the common law, that instead of a series of detailed practical rules, established by positive provisions, and adapted to the precise circumstances of particular cases, which would become obsolete and fail, when the practice and course of business, to which they apply, should cease or change, the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy.

We may not necessarily agree with his precise listing of the basis of the common law but we may accept this image of flexibility.

Today we can talk of two great secular legal families for the legal systems of continental European countries, which were also exported around the world. One of these is the common law system. The other family is usually described as the civil law system, of which the most influential has been that of France, because by producing the *Code civil* Napoleon gave to France the first modern European legal system, which was copied elsewhere. In practice each jurisdiction may mix their secular legal tradition with local customary or religious traditions.

2.3.4 Criminal law, civil law, and public law

Criminal law

We all tend to have some understanding of what criminal law is. It is the embodiment of the power of the state to punish people for actions, or failures to act, which are deemed contrary to the interests of society as a whole or the powerful interest groups that have assumed control of the legislative process. As early liberal writers, such as Thomas Hobbes (1651), agreed, there is a basic controversy about criminal law in that it is the infliction of evil (punishment) in the name of the state's duty to protect its citizens from wrongful harm. We can see criminal law as a species of public law, in the sense that prosecutions of those accused of committing crimes are (with rare exceptions) brought by public officials in the name of the state. Today the state has the dominant role in investigating and prosecuting crime, but in the past crimes were much more usually seen as a particular loss or injury to an individual. There is a close connection between civil wrongs (called 'torts') – for which the individual would be able to claim compensation – and crimes. In many legal systems the two actions take place concurrently, but they are usually separated in the English legal system. Therefore any such compensation would

normally be claimed by civil action in the civil courts, though in a criminal trial the courts have power to award compensation to persons injured, payable by a person convicted at trial (s 35, Powers of Criminal Courts Act 1973, as amended by the Criminal Justice Acts of 1982, 1988 and 1991).

Civil law

The term civil law is used to refer to the continental European family of legal systems (also known as Roman law systems because of their heritage in legal reasoning and centrality of the use of codes dating back to the codes of the Roman Empire), civil law is also the title of one category of English law. In one sense civil law is all law other than criminal law, and thus by civil law, today we often mean English *private* law.

Public law

The expression public law has existed for some time, but had little significance other than to indicate that the subject-matter in some way involved a public authority. Continental European legal systems, on the other hand, had developed the idea of public law into a separate and specialised body of rules applicable only to cases involving the administration. English law has not yet taken such a radical step. In many cases the term public law is loosely used to refer to Constitutional and Administrative law.

Summary

In understanding the common law there are a variety of uses of key terms that you need to understand. These need to be carefully distinguished and will provide a structure to guide further study.

2.4 Substantive law and procedure

2.4.1 The importance of procedure

The distinction between substantive law and procedure is, in simple terms, the distinction between the rules applicable to the merits of a dispute (substantive law) and the rules governing the manner of resolution of a dispute (procedure). For those who practise law the rules of procedure are very important, but at the academic stage of legal studies the focus is on the substantive rules. It is nevertheless important to have some understanding of procedure, because procedure can affect the application of the substantive rules. In fact, the rules of procedure were in the past of great significance in shaping the substantive rules, since English law, from the time when it was necessary to frame one's action within the form of an existing writ, has proceeded from the existence of a remedy to the establishment of a right. It might almost be said that procedure came before substantive rights.

Activity 2.2

Consider the following extract on the nature of common law thought. From Roger Cotterrell, *The Politics of Jurisprudence*, (Butterworths, 1989, pp. 23–25).

Having described the common law developing as the law of common jurisdiction applied by the royal courts, as distinguished from various kinds of special or local law, Cotterrell acknowledges that much later, the term came to refer frequently to judge-made or judge-declared law in contrast to legislation. He then asks general questions about the nature of this law.

As you read the extract, make notes on whether Cotterell sees this law as easily discoverable, or whether it is a rather more mysterious process.

No feedback provided.

The character of common law thought

> But how far is this common law an affair of rules? Here, as in many other inquiries about classical common law thought, it is important to avoid imposing on the common law tradition modern interpretations reflecting views about law derived from wholly different theoretical premises… To write of common law as a system of rules […] is to impose just such an alien conception on it. A commentator remarks on the surface 'chaos' of judicial decisions, underlying which is, however, 'an internally coherent and unified body of rules'. But he goes on to note that principles of law stand behind these rules and, in common law thought, are more important than them […]. In fact, however, it is probably more true to common law tradition to see its essence not in rules at all. 'To represent it as a systematic structure of rules is to distort if, it is to represent as static what is essentially dynamic and constantly shifting' […]. The idea of common law as principles of law seems more appropriate for capturing this shifting, dynamic character, if only because principles suggest flexible guidelines for legal decision-making rather than rules which control.
>
> Much more lies behind all this than a terminological quibble. As Brian Simpson has noted, if common law's existence is thought of in terms of a set of rules 'it is in general the case that one cannot say what the common law is' […]. This is because it is impossible to mark out conclusively such a rule-set corresponding to common law. While some continental writers have interpreted the common law as a 'complete, closed and logically consistent' system […], Simpson seems on much firmer ground in saying: 'As a system of legal thought the common law is inherently incomplete, vague and fluid' […]. Thus for Jeremy Bentham, the great English legal reformer, who insisted that law should be a matter of clear rules, common law was no more than 'mock law', 'sham law', 'quasi-law'. Judicial development of law exemplified 'power everywhere arbitrary' […]
>
> Issues of the clarity and completeness of law therefore arise. Common law resides in judicial decisions rather than rules. But something stands behind the decisions, justifying them, guiding them and giving them authority as law. For the American jurist Pound, common law is 'a mode of treating legal problems' rather than rules. But principles of common law shape rules […] Pound also identifies the spirit of common law in distinctive institutions: 'supremacy of law, case law and hearing of causes as a whole in open court'. Associated with these are the institution of trial by jury and 'judicial empiricism' […] – pragmatic case-by-case decision-making guided by past judicial precedents; a method of working that, for Pound, 'combines certainty and power of growth [of law] as no other doctrine has been able to do'. But still it can be asked what, if anything, unifies these institutions and what gives them legal authority or legitimacy.

> Common law's unity has been attributed to 'the fact that law is grounded in, and logically derived from, a handful of general principles; and that whole subject-areas such as contract or torts are distinguished by some common principles or elements which fix the boundaries of the subject. The exposition and systematisation of these general principles, and the techniques required to find and to apply them and the rules that they underpin, are largely what legal education and scholarship [in the common law environment] are all about' […]. Indeed, a long tradition of thought sees the classical essence of common law in broad legal guidelines, as much concerned with how to reach proper judicial decisions […], as with the specific, content of them. On this view it is best seen as 'a method of legal thinking […] or of deciding disputes. A. V. Dicey using terms similar to those of the eminent eighteenth century jurist Sir William Blackstone […], wrote at the end of the nineteenth century of common law as a 'mass of custom, tradition or judge-made maxims' (Dicey 1959, p. 23-4).
>
> Maxims of common law symbolised the broad guidelines which could be considered to underlie and direct loosely individual decisions.
>
> One writer examining a crucial period of common law development in the first half of the seventeenth century remarks that maxims 'were the essential core of the common law, woven so closely into the fabric of English life that they could never be ignored with impunity'; as 'high level general principles or fundamental points of the law' they were used in interpreting the past decisions of the courts – evaluating their significance – as precedents to be applied to new cases (Sommerville 1986, p. 94). Maxims, indeed, were far more important than precedents themselves. In modern times, as legal doctrine became more detailed and complex, these maxims lost their force and have ceased to be of much practical significance. But they point to the enduring idea that the heart of common law is not in specific decisions or in rules distilled from them but in broad notions which are difficult to unify or systematise, but which may, indeed, in some way, be 'woven into the fabric of life'.
>
> Because many of these notions are extremely hard to pin down, the unifying element of common law often seems mystical. Sometimes in classical common law thought it is portrayed as a vague historical destiny, a working out in history of an obscure but immanent logic of the law, or a kind of superhuman wisdom reflected in the collective work of the common law judges throughout the centuries but impossible for any single person to possess. Thus, for Blackstone, law is 'fraught with the accumulated wisdom of ages (quoted in Postema 1986: 63). And Coke CJ, early in the 17th century, wrote: 'we are but of yesterday… our days upon the earth are but as a shadow in respect of the old ancient days and times past, wherein the laws have been by the wisdom of the most excellent men, in many successions of ages, by long and continual experience… refined, which no one man (being of so short a time) albeit he had in his head the wisdom of all the men in the world, in any one age could ever have effected or attained unto. And therefore… no man ought to take upon him to be wiser than the laws' (Calvin's Case 1608 7 Co Rep 1, 3.).

According to Blackstone I *Commentaries* p. 68, *Maxims in Law* were somewhat like axioms in geometry. They are principles and authorities that become part of the general customs or common law of the land and bind judges when it is argued that they apply to a case. Examples: 1. *Actore non probante reus absolvitur* (When the plaintiff does not prove his case the defendant is absolved). 2. *Argumentum ab impossibili plurmun valet in lege* (An argument deduced from authority is the strongest in law Co. Litt. 92). 3. *Bona fides non patitur, ut bis idem exigatur* (Natural equity or good faith does not allow us to demand twice the payment for the same thing. Dig. 50, 17, 57). 4. *Caveat emptor* (Let the purchaser beware). 5. *Cogitationis poenam nemo patitur* (No one is punished for merely thinking of a crime). 6. *Commodum ex injuri su non habere debet* (No man ought to derive any benefit from his one wrongdoing. Jenk. Cent. 161.). Hundreds of maxims developed over time.]

This extract may be hard to grasp at first reading but repays re-reading several times. What Coke is saying, in modern English, is this: 'The law has been developed over a very long period by a lot of very wise people, and we should not assume that we know better than them'. There are many who disagree with this cosy picture. The poet Tennyson said of the common law in *Aylmer's Field*: Mastering the lawlesss science of our law, -- That codeless myriad of precedent, The wilderness of single instances…. He seemed to

indicate that the lay person could not understand the process and that it was irrational. Many share his view!

2.4.2 The role of the common law judge

Historically, the common law tradition has always placed the judiciary at the centre of things. Judicial decisions are seen as constituting the written law – as a body of precedents and reported decisions that constantly need to be rationalised and developed into a coherent 'system'.

The authority of the common law is found in the judgments of courts deliberately given in causes argued and decided. As Lord Coke put it in the preface to his 9th Report,

"it is one amongst others of the great honors of the common law that cases of great difficulty are never adjudged or resolved *in tenebris or sub silentio suppressis reationibus*, but in open court: and there upon solemn and elaborate arguments, first at the bar by the counsel learned of either party, (and if the case depend in the court of common pleas, then by the sergeants at law only;) and after at the bench by the judges, where they argue (the presiding judge beginning first) seriatim, upon certain days openly and purposely prefixed, delivering at large the authorities, reasons, and causes of their judgments and resolutions in every such particular case, (*habet enim nesio quid energia viva vox*:) a reverend and honorable proceeding in law, a grateful satisfaction to the parties, and a great instruction and direction to the attentive and studious hearers".

This bedrock of judicial activity is contrasted to the legislative process of making statute law and those decisions that constitute judicial interpretations of statutes and other forms of legislation.

The common law tradition entails a particular approach to the discovery, interpretation, and (where necessary) the *making of law* as practised in contra-distinction to the jurisprudence of countries influenced by Roman law and the later European codes (such as the *Code Napoléon*).

Consider this further extract from Cotterrell, p. 25:

> According to the declaratory doctrine of common law, judges do not make law. They are in Blackstone's words, 'the depositories of the laws, the living oracles who must decide in all cases of doubt' […].

The authority of law is seen as a traditional authority. The judge expresses a part of the total, immanent wisdom of law which is assumed to be already existent before his decision. The judge works from within the law which is 'the repository of the experience of the community over the ages'... Thus, even though he may reach a decision on a legal problem never before addressed by a common law court, he does so not as an original author of new legal ideas but as a representative of a collective wisdom greater than his own. He interprets and applies the law but does not create it, for the law has no individual authors. It is the product of the community grounded in its history. Judicial decisions according to Matthew Hale writing in the seventeenth century do not make law 'for that only the King and parliament can do', but are *evidence* of law, and 'though such decisions are less than a law, yet they are a greater evidence thereof than the opinion of any private persons, as such, whosoever' […]. Thus the judge is spokesman for the community about its law – but a particularly authoritative spokesman.

Blackstone differentiates the role of the legislator versus the role of judges and the courts in Book I, Sect. III of *Commentaries on the Laws of England*: "How are these customs and maxims [i.e. common law WM] to be known, and by whom is their validity determined?" The answer is, by the judges in the several courts of justice. They are the depositories of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land… not delegated to pronounce a new law, but to maintain and expound the old one… And indeed, these judicial decisions are the principal and most authoritative evidence that can be given of the existence of such a custom as shall form a part of the common law.

2.4.3 How legal doctrine is built up in common law cases

The common law is said to be 'inductive' and 'empirical' in nature. Thus it proceeds (at first) in an incremental way, laying down its rules on a case-by-case basis, inferring a general principle only after a plenitude of precedents justify that inference; it is reluctant to extend its chains of reason or principle beyond what actual experience has demonstrated to be wise.

In older textbooks the common law is often presented as a specific form of rationality which is democratic in its composition, in that it has come out of the resolution of countless small and large scale disputes. Its statements thus succeed as 'good law' because they retain public support over time, are particularly logical in their relations to real life (because they are a response to legal argument which has taken place in the resolution of real disputes concerning actual parties argued before specific courts), and disdainful of legal theory (because it looks backwards to its precedents, not forwards to hypothetical instances). Historically, the common lawyer operating within English legal system was suspicious of statutes. Although recognising the supremacy of Parliament, the common lawyer sought to restrict legislative intent by interpreting the wording of statutes strictly and precisely and was openly disdainful of codification.

The common lawyer valued the certainty of the law as a great goal; though historically this certainty often produced injustice in individual cases. As noted above, the more conscience-based set of outcomes called 'equity', arose which sought to ameliorate the harshness of the common law. Equity, however, has not sought in modern times to replace the doctrine of precedent and the rules of recorded discretion with unpredictable *ad hoc* decision making.

2.4.4 The civil law tradition

In contrast with the common law, the continent of Europe has been directly or indirectly influenced by Roman law (civil law), with its emphasis upon a *code*. Civil law is said to be 'deductive' in nature because it proceeds from an exhaustive code of propositions in accordance with which all subsequent experience must be judged. In this picture, the civil lawyers of Europe are said to favour accessibility over certainty. They stress that the law should be available to all, easily understandable, and kept (so far as possible) out of the hands of a priestly class. Precedent is not dispensed with but its hold is looser than in the English legal system.

Civil law systems tend to use a career judiciary who operate more courts, including inexpensive tribunals (staffed by younger judges) which can informally hear disputes involving smaller amounts than the English system. A broad 'purposive' approach is encouraged towards the interpretation of enacted words and phrases, and consistency is considered less important than doing justice to the individual parties. It is not uncommon for Codes to be deliberately vague and general in their choice of language, the better to allow individual cases to be decided upon their merits.

Self assessment questions

1 What does it mean to say that law is a 'normative' phenomenon?

2 When did the Anglo-Saxon period of English legal history come to an end?

3 Has there ever been a successful attempt to codify English law?

4 State five characteristic differences between the common law (English) legal systems and the civil law (Roman law) systems.

5 Why has it been argued that the common law system is 'democratic'?

No feedback is provided, as you can find the answers to all these questions by looking back in the text.

2.5 'Adversarial' *vs* 'inquisitorial' proceedings

Essential reading

- Zander, *Cases and Materials on the English Legal System*, Chapter 4: 'The trial process'

Many commentators have remarked that if any one feature could be taken as the cornerstone of English legal procedure it is the *adversarial* (or accusatorial) nature of the proceedings as contrasted with the *inquisitorial* nature of civil law systems.

2.5.1 Proceedings of an English court

At the apex of this adversarial system lies the traditional picture of the English court – an arena wherein a contest is waged between parties in which one emerges the winner. In the inquisitorial procedure the **court** takes charge of the case even to the extent of framing the legal and factual issues to be disputed. In the adversarial system the **parties** dictate, within the constraints of traditional forms and packages – such as writs, forms of action and pleadings – the form, content and pace of proceedings. The pre-trial proceedings are arranged such that by the time of the trial each side should have gained as much information as possible both to support their own case and to exploit any weaknesses in the opposition's arguments. The agent of the court (i.e. the judge) should stand back and wait for the case to proceed to trial. During the trial the judge in civil cases and the judge and jury in criminal cases should allow him/herself to be guided, at least initially, as to the relevance of questions of fact and law by the parties' advocates. The judge should take a procedural 'back seat' and intervene only to ensure that fair play is operating – or where the public interest is at stake.

The proceedings are dominated by the advocates for the parties with, as in the case of criminal cases, the prosecution trying to build a strong case against the defendant and the defence, in turn, endeavouring to demolish the prosecution's case. Throughout this procedure witnesses are examined and cross-examined using a variety of tactics available to the skilled advocate. Some use subtle means to cause witnesses to react in a certain way, others use bullying tactics to obtain the same result from nervous participants.

The success of a case, therefore, often rests upon the ability of an advocate to manipulate proceedings and not just the weight of evidence. As the eminent English commentator, Jacob (*The Fabric of English Civil Justice*, 1987, p. 16) stated with respect to civil cases, the adversarial system 'introduces an element of sportsmanship or gamesmanship into the conduct of civil proceedings, and it develops the propensity on the part of lawyers to indulge in procedural manoeuvres.'

The system rests upon a number of assumptions – specifically that:

- both parties are represented
- the lawyers representing each party are efficient and equally matched
- the lawyers will promote their clients' interests.

English lawyers do not owe a general duty to ensure that justice is done or to enable the court to find the truth. Their only obligation to the court is not to mislead the court on questions of law or fact. How then does the truth emerge? Only as a consequence of the fact that each side is intent on winning the case.

All lawyers are officers of the court and are under a number of general duties as a consequence. Ethically, there is only one overriding duty, that of candour. A Lawyer must never knowingly deceive or mislead the court. This serves the crucial role of binding together the lawyers and the judges in a common trust. But although some commentators may wish to argue that this gives the lawyers a positive duty to strive for justice, in fact it only gives a negative and procedural duty, not to strive for creating injustice.

But the adversarial system often produces unexpected and, according to some observers, unjust results due to the manner in which evidence can be presented. The outcome, therefore, hinges upon the events of the trial itself as much as the gathering of evidence *beforehand*, since the courts only judge what is presented before them and, especially when juries are present, the way it is presented. With the exception of the Coroner's Court, proceedings in the English courts do not take the form of investigations into the matters brought before them, unlike the inquisitorial system which basically entails an examining judge conducting his or her own investigation, often in conjunction with organisations such as the police, before any trial takes place. The inquisitorial procedure appears more obviously oriented as a search for the truth, taking into account all aspects of the matter, and consequently a substantial number of cases do not reach the trial stage. Those that do go to trial often reach that point with far greater certainty as to the outcome than in courts using the adversarial system.

For an understanding of how important it is to grasp the fundamental issues consider Zander, *Cases and Materials*, Chapter 4: 'The trial process'. This chapter deals with the trial and the particular characteristics of the common law tradition, i.e. the adversarial method, as compared to the inquisitorial system adopted in civil law jurisdictions.

Summary

The adversarial nature of the English trial is characteristic. It places control over the direction of the trial in the hands of the parties and their advocates, and the judge has limited grounds for intervening. The system has been criticised, not least for its reliance on the assumption that the parties' advocates are reasonably well-matched in terms of skill, and that they perform their task conscientiously. This compares with the civil law systems, in which the judge actively controls the proceedings and makes his or her own inquiries (hence this is known as an 'inquisitorial' system). Both systems have their 'pros and cons' and it is up to you to make your own judgement of their relative merits.

Reminder of learning outcomes

By this stage you should be able to:

- outline key features of the English legal system that differentiate it from others
- outline the difference between common law and civil law (Roman law) traditions.
- explain the difference between the adversarial legal process of English law courts and the inquisitorial process that operates in many continental European countries.

2.6 Review of fundamental issues

These fundamental notions of the common law and the adversarial/inquisitorial distinction need to be understood when studying particular topics, such as judicial reasoning, or the nature of the civil or criminal justice process. It cannot be stressed enough how important it is to strive for an integrated and coherent overview of the subject matter. All too often the examiners receive answers which demonstrate that candidates have taken an isolationist or topic-picking approach which does not enable them to show the depth of understanding required for good marks. All the questions asked reward answers that reveal a student's ability to show interconnections and 'foundational' knowledge; although the examiners may ask questions that directly test such 'foundational' or interactive understanding. Take two questions from the May 2000 exam paper:

- Question 1
  What do we mean when we speak of the 'common law?'
- Question 2
  'The adversarial system lies at the root of all problems of the English civil justice system. Real reform can only be achieved by abandoning the adversarial system.' Discuss this statement in the context of the Woolf reforms of civil procedure.

The first of these questions invites a discussion that would reveal the student's basic understanding of the identity and range of legal study. Students are studying for the LLB degree via the External Programme of the University of London in more than 70 countries throughout the world. Why? Part of the answer lies in the role the common law plays as one of the two great secular legal families.

2.6.1 What are legal 'families'?

The term legal families refers to coherent similarities that group together the various legal systems in the world into distinguishable 'traditions' or 'families'. Some of these families derive from religion (for example, the Islamic and Talmudic legal systems); others are associated with particular political and social ideologies (for example, common law, civil law or Roman law, and the now declining socialist law). These families are not rigidly distinguished from each other but there are sufficient significant differences to define them, based on the following basic characteristics:

- objectives of the legal system
- sources of law
- legal reasoning and methodology
- structure of pre-court and trial proceedings.

2.6.2 The distinction between the common law and the civil law traditions

We have already noted that the two legal families that have dominated, and continue to dominate, 'western' legal systems are the civil law and common law systems. The origins of the first lie in Roman Law and the *code civil* of nineteenth century France, while the common law derives from medieval English civil society. The transplantation of both legal families throughout the western world and beyond was assured by the French and British empires.

As a key feature of their tactics of rule, the British established the rule of law in their colonies. Although not officially recognising that the societies they took colonial control of had 'legal systems', under British rule the courts used a mixture of English law and local customs and traditional belief. The British avoided interfering with local customs. They banned practices deemed contrary to natural justice, such as human sacrifice or infanticide. But they respected local beliefs, particularly in disputes about land, debt, marriage and inheritance. It was generally felt that the jurisprudence of the common law helped in this flexibility of recognising different sources and practical decision-making.

History is of vital importance in explaining why many of the cardinal features of the two legal families are different: their separate developments spanned many centuries. However, even as 'ideal types' they are far from polar opposites. Both have as their overall objective *the establishment of systems for the just resolution of disputes and the maintenance of social order*. The differences lie in the means and structuring of the process whereby such ends are achieved.

In the legal systems of today there is no pure example of either the civil law or common law system. All relevant legal systems in the western world are to greater or lesser degrees hybrids of these two models or of other legal families. While New Zealand and Australia, for example, may be seen as predominantly common law jurisdictions there are demands for both to recognise the traditional law 'law' of their pre-European inhabitants; Malaysia combines the common law with Islamic law, particularly with respect to family law for its Malay citizens; South Africa combines the civil and common law with allowance for local customary laws.

Here are some of the features that distinguish the common law and civil law families (derived from David and Brierley, 1985).

Characteristics of common law systems

The **common law family** is usually defined by reference to the following characteristics:

- A concern to determine legal disputes according to their individual circumstances and the relevant judge-made case law, rather than applying general statements of legal principle.
- A traditional picture of common law that presents the source of law as being found in the texts of individual judgments. There was never, therefore a single authoritative statement of the common law. It was thus, in important aspects, always 'unwritten' yet 'written'.
  What does it mean to talk of law being both written yet unwritten? It is crucial to keep emphasising the nature of the common law tradition. In his *Commentaries on the Laws of England* (1765-9) Blackstone was careful to describe the common law as 'unwritten law' as contrasted to the written law of statutes or codes. He was familiar with the common law as a form of oral tradition derived from general customs, principles and rules handed down from generation to generation by the

court lawyers and judges who participated in a common life by eating and drinking in one of the Inns of Courts to which all had to belong. Eventually this oral tradition was reflected in the reports of the decisions of the important court and the 'knowledge' was then stored in a 'written' form, namely the Law or Case reports. You should note, however, that there was no organised system of court reporting until the late nineteenth century and prior to that all reports were private initiatives (made by barristers who were in the courts and circulated privately for a fee to supplement the barrister's income). Moreover, the relationship of the Law Reports and the common law is not straightforward. For *it is not said that the words of the Law Reports are the common law, but that the decisions of the courts as reflected in the law reports provide authorities for what the common law can be argued to be*. In other words, and this is the 'mysterious' bit, the common law is always something more than what is written down! What is written down are pragmatic instances of judges articulating what they take the law to be. So when one is looking for the law in a case one reads the words, but the law is always something more than the words that one reads! It is always accepted that the law is open to development and better articulation.

In addition, modern common law legal systems have substantial bodies of highly detailed legislation, which comprise another primary source of law.

- Common law applies to all legal persons including the state. Traditionally there is no division between public and private law.
- The adoption of an inductive form of legal reasoning whereby legal principles are derived from the texts of many single judgments.
- A litigation system in which the trial is the distinct and separate climax to the litigation process.
- Courtroom practice which may be subject to rigid and technical rules.
- The fact that the parties to the dispute essentially control proceedings and there is an emphasis on the presentation of oral argument by counsel. The role of the judiciary is more reactive than proactive. Given the parties' opportunity and responsibility for mounting their own case the system is more participatory.
- The fact that the judiciary possesses an inherent power to adjudicate separate from the executive or political process. While the judiciary may be paid by the state, they exercise a separate power free from political interference.
- The fact that the expense and effort of determination of disputes through litigation falls largely on the parties.

Characteristics of civil law systems

The **civil law family** is usually defined by reference to:

- A concern to determine legal disputes according to pre-determined legal principles established to maintain social order.
- The source of law being found in authoritative statements of basic legal principles – for example, the Civil and Criminal Codes – issued by the state and propounded upon by legal scholars.

- The separation of public law (concerning relations between the individual and the state) and private law (between individuals).
- The adoption of a deductive form of legal reasoning whereby pre-existing general statements of legal principle are applied to the specific circumstances of individual cases.
- In litigation, the fact that no rigid separation exists between the stages of the trial and pre-trial in court cases. Legal proceedings are viewed as a continuous series of meetings, hearings and written communications during which evidence is introduced, witnesses heard and motions made.
- Rules relating to courtroom practice which are intended to be minimal and uncomplicated.
- A less conspicuous role played by lawyers, with an emphasis on written submissions rather than oral argument. The judiciary in theory and practice play a more organisational and inquisitive role. The greater directorial role of the judiciary allows less room for the parties to direct their own case. In this sense the system is more hierarchical than participatory.
- The fact that as officers of the state the judiciary possesses no separate and inherent power to adjudicate.
- The fact that a greater proportion of the effort and expense of dispute determination through litigation falls on the state.

It is the combination of these elements within each of the two families of common law and civil law and their respective court procedures and practices which permit the shorthand descriptors of 'adversarial' and 'inquisitorial' to be used. In the classical adversarial form of trial:

> … the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large … So firmly is all this established in our law that the judge is not allowed in a civil dispute to call a witness whom he thinks might throw some light on the facts. He must rest content with the witnesses called by the parties. (See *Jones v National Coal Board* [1957] 2 QB 55, 63-64 per Denning LJ.)

2.6.3 Has there been a gradual convergence of legal systems?

Key words currently are globalisation and interdependency. They denote the economic, technological and social trends that have made the idea of discrete and impervious national states, societies or legal systems seem over-simplifications, if not actually redundant. As the barriers separating societies have dissolved so – it is argued – have the identifying features of the common law and civil law families been weakened. Legal systems are exposed to, and sometimes actively seek out alternative practice and procedure as well as the jurisprudence of other systems. In the English legal system we think of the daily impact of European Union Law and now we see the incorporation into English law of the European Convention on Human Rights by the Human Rights Act 1998, which came fully into force in October 2000. Generally speaking, International law, including international commercial environmental and human rights law, are amalgams of the principles, substance and practice of both common law and civil law systems.

According to this view, characteristics of the legal systems associated with the two families have gradually converged. Others, however, argue that certain fundamental presumptions and essential structural features of the legal families are so divergent that there are 'irreducible differences' between them. Any common law system may well have adopted non-adversarial features and there is currently great interest in adopting alternative practices and concepts (such as customary forms of dispute resolution, or 'restorative justice').

In a number of respects, the distinctions between the common law and civil law systems seem to be weakening.

The pre-eminence of legislation

Statutes that are comprehensive and detailed in style and content now comprise a highly significant source of law in common law systems. While case law still dominates in certain areas, such as tort law, a vital aspect of the common law lies in the way common law judges engage in the interpretation and application of legislation.

Judicial use of legal principle

Especially in the superior courts judges refer to legal principles – whether framed in statutes or 'found' in common law – when interpreting or applying the law. Legal principles that may originally have been induced in classical common law style are now applied to the circumstances of individual cases in a deductive fashion. Such principles include for example:

- the neighbourhood principle in tort law
- natural justice in administrative law
- implied terms in contract law
- constructive trusts in property law.

Judicial activism in trial and pre-trial court practice

Traditionally the common law judge had limited power over the direction or substance of the case, in reaching a conclusion and writing a judgment, was limited by the facts presented and the arguments raised by the parties. In comparison, the judge in a conventional civil law inquisitorial model is expected to pursue actively whatever avenues will result in resolution of the disputes, in a continuous process of inquiry encompassing trial and pre-trial stages. Judges in several common law jurisdictions – such as those of New Zealand and Australia – are becoming more active in defining the issues in dispute and moving cases forward to a hearing. As we shall see when we look at reforms in the civil justice process (see Chapter 11 of this guide and associated reading), there has recently been a development of process management discourse and case management techniques in common law courts. In part these are reactions to the procedural excesses of adversarial litigation.

Assisted and alternative dispute resolution processes

The development of judicial activism has been mirrored by an increased use of court related alternative dispute resolution (ADR) processes. The main forms of ADR are:

- arbitration
- conciliation/mediation, and
- early independent evaluation and report.

Arbitration and expert referral are adjudicative in nature. With arbitration the parties to the dispute choose an arbitrator to determine their dispute. The process is private and does not result in the legal announcing of principles to guide parties not involved in the proceedings. Other processes are facilitative and involve assisting parties to reach a decision. Some processes, such as conciliation, may be facilitative in the information gathering stages and adjudicative or evaluative in the final stages. Sometimes these processes are regarded as external to the court system as an additional system; but often they are used to resolve disputes commenced within the court system. Some commentators believe that the growing use of these processes has an additional effect, in that exposure to these processes may be changing the model of judicial determination so that there is more emphasis on facilitative communication.

2.6.4 Problems with the adversarial system of litigation

To emphasise an earlier point, in broad terms, the present adversarial system of conducting proceedings refers to a system in which the parties, and not the judge, have the primary responsibility for defining the issues in dispute and for carrying the dispute forward. *The system is based not only on substantive and procedural law but also on an associated legal culture and ethical base*. The base in legal culture is important. In reviewing the merits of the adversarial method. Farrar and Dugdale (1990, p. 68) drew upon American research to suggest two direct advantages:

- it may reduce the element of bias in the decision maker (in the adversarial process such a person may make up his mind later and on fuller evidence than he would in an inquisitorial process
- it may lead the lawyer for a party with a weaker factual case to put forward a fuller version of the facts than he would in an inquisitorial context.

However, they considered the most significant aspect of the research was that:

- the adversarial process was more acceptable to the parties
- and this was true for both sets of people in the study, i.e. those brought up in the American system and those brought up in the French.

The term ‘adversarial’ does not have a precise meaning. Litigation and other dispute resolution processes used in common law systems are a blend of adversarial and non-adversarial elements and processes that do not fall into any particular category of legal system. In its simplest form the adversarial system of litigation is claimed to have a number of consequences, which have been challenged as counterproductive or inefficient. For example, it has been said that:

- the system, due in large part to its emphasis on the final hearing, is about winning and losing – each party has responsibility for advocating its own case and attacking the other party’s case. This puts an emphasis on confrontation; moreover under this ‘sporting’ theory of justice the result may be (as with competitive sport today) a result of the level of financial resources that a team can deploy. Those with the highest–paid lawyers (or who can bring in highly specialised ‘teams’) may win the game

- the lawyer's role is strictly partisan – the lawyer has a duty to represent the interests of his or her client and is not ethically accountable for the client's goals or the legal means used to attain them, although the lawyer does have certain countervailing duties to the court – this gives lawyers an incentive (and perhaps even an obligation) to exploit any advantages the legal system allows for their clients
- the evidence supplied by 'expert witnesses' may be 'fashioned' to suit a particular line of argument
- the judge is responsible for ensuring that the proceedings are conducted fairly – this makes judges sensitive about limiting the issues and arguments raised by parties and putting other controls on proceedings, in case that is considered biased or unfair
- the judge is not responsible for how much evidence is collected, how many different arguments and points are put to the court or how long the proceedings take
- the judge adjudicates questions of fact and questions of law submitted to the court, but is not responsible for discovering the truth or for settling the dispute to which those questions relate
- giving the parties control of proceedings may be a cause of expense and lead to great delay; sometimes this is used as a tactic by one side to 'force' a settlement out of court, but sometimes just a consequence of both sides analysing and complicating the materials produced by the other side in a continual cycle.

These and other features of the adversarial system have been criticized as contributing to (among other things) excessive costs and delays, over-servicing, a lack of accountability and an unduly confrontational approach to dealing with disputes. Lord Woolf in his final report to the Lord Chancellor (1996) on the civil justice system in England and Wales identified defects in the adversarial system of litigation, as practised in those jurisdictions as follows:

- it is too expensive – costs often exceed the value of the claim
- it is too slow in bringing cases to a conclusion
- it is too unequal – there is a lack of equality between the powerful, wealthy litigant and the under-resourced litigant
- it is too uncertain – it is difficult to forecast what litigation will cost and how long it will last
- it is incomprehensible to many litigants.

Paradoxically, some of the same features of the adversarial system of litigation which some would identify as problems are defended by others as benefits of the system.

For example, in response to the criticism that the judge's power to find the truth is limited, others maintain that 'truth is best discovered by powerful statements on both sides of the question' (Denning LJ in *Jones v National Coal Board* [1957] 2 QB 55, 63, citing Eldon LC in *Ex parte Lloyd* [1822] Mont 70, 72) as provided for in adversarial proceedings or that, in any case, the ultimate purpose of the adversarial system is not to determine the truth but to resolve the dispute between the parties.

Control of litigation by the parties and the strictly partisan role of the lawyer, seen by some as causing problems through adversarial excesses, may be seen by others as producing significant benefits by contributing to an open and participatory form of dispute resolution consistent with the traditions of libertarianism and democracy. Most lawyers can point to cases where their 'point scoring' or full discovery uncovered the 'smoking gun' in the case or, at least, gave litigants the satisfaction of their day in court.

Similarly, the passive role of the judge in adversarial litigation may be seen as an appropriate means of ensuring that judicial impartiality and neutrality, upon which the legitimacy of the process is largely based, are preserved as paramount. The trial focus of the adversarial system may have benefits in providing a date, once fixed, by which the matter will be resolved. This may be an advantage compared to European systems where the dispute resolution process does not have such a distinct focal point and can drift.

The adversarial system has also been criticised for its indirect effects. Strictly, the adversarial system relates only to a small part of dispute resolution – trials in courts. However, it has a wide–ranging impact and affects all other stages of proceedings in courts, the role and proceedings of tribunals, other dispute resolution procedures used by courts and tribunals, and forms of dispute resolution outside courts and tribunals.

Self-assessment questions

1 In what circumstances can a judge in an English trial be expected to intervene in the proceedings?

2 What is the distinction between the 'inductive' reasoning used in common law systems and the 'deductive' reasoning of civil law systems?

3 Give three arguments in support of the adversarial system of proceeding in trials.

4 Give two examples of alternative dispute resolution (ADR).

5 Sum up what you understand by the 'common law' in no more than 50 words.

6 In the English legal system, only one kind of court carries out investigations into the matters before it. Which kind?

7 In the adversarial common law trial, what duties are the parties' advocates under?

8 State three grounds for thinking that there is convergence between common law and civil law approaches.

Summary

Enough has been said above that it should seem obvious to repeat that studying English law is joining a tradition, that of the common law with its own language and ways of doing things. However, many of the features of your legal study will remain a dark mystery without this fundamental awareness!

Given the centrality of courts to the development of the common law the next chapter will look at the role of courts before moving on to ideas of precedent and the interaction of the court hierarchy.

Reminder of learning outcomes

- discuss the principles and objectives which, in your view, 'ought' to guide legal processes
- begin to use fundamental concepts and questions as reference points in further reading.

Sample examination questions

Remember the questions mentioned towards the end of Chapter 1, for example:

'What do we mean when we speak of the common law?'

The complexity of the answer should be clear! It is perhaps unwise at this stage of reading to demarcate a separate examination question on the common law as it can not be repeated enough that is essential to appreciate the tradition of the common law as the foundation of all your legal studies on English law!

References

Allen, C.K. (1958) *Law in the Making*. Oxford, Oxford University Press, 6th edition.
Cotterrell, R. (1989) *The Politics of Jurisprudence*. London, Butterworths.
Dickens, Charles (1971) *Bleak House*, Harmondsworth, Penguin.
Dworkin, R. (1986) *Law's Empire.* Harvard University Press.
David, R. and Brierley, J. (1985) *Major Legal Systems in the Word Today.* London, Stevens & Sons, 3rd edition.
Farrar, J.H. and Dugdale, A.M. (1990) *Introduction to Legal Method*. London, Sweet & Maxwell, 3rd edition.
Holmes, O.W. (1953) *The Holmes–Laski Letters.* Harvard University Press.
Jacob, J.I.H. (1987) *The Fabric of English Civil Justice*. London, Sweet & Maxwell.
Pollock, F. and Maitland, F.W. (1923) *History of English Law*. 2nd edition, Cambridge, Cambridge University Press.
Thompson, E.P. (1990) *Whigs and Hunters: Origin of the Black Act*. London, Penguin Books.
Woolf Report (1996) *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales.* London, HMSO.
Van Caenegem, R.C. (1992*) Judges, Legislators & Professors: Chapters in European Legal History*. Cambridge: Cambridge University Press.

Feedback to activities: Chapter 2

Activity 2.1 *It is important to get used to using foundational concepts. They can provide frames of reference that you then use to criticise or defend certain practices and processes. As the noted social historian E.P. Thompson put it in* Whigs and Hunters: Origin of the Black Act *(Penguin Books 1990, p. 266)*

> *'I am insisting only upon the obvious point, which some modern Marxists have overlooked, that there is a difference between arbitrary power and the rule of law. We ought to expose the shams and inequities which have been concealed beneath this law. But the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good. To deny or belittle this good is, in this dangerous century when the resources and the pretensions of power continue to enlarge, a desperate error of intellectual abstraction.'*