

Introduction to Law :

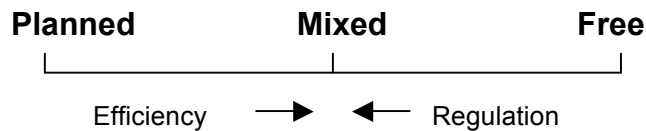
The Nature, Legal System and Sources of Law



Introduction to Law

1. Nature of law

Types of economy:



As a nation-state's economy becomes freer, so entrepreneurial activities are limited (regulated) by laws in order to prevent what the citizens of that nation-state consider undesirable. According to English law, a person is free to do anything, except where the law says otherwise.

Types of legal system

Codified: In a codified system, all foreseeable situations are catered for in a relatively small number of books (typically less than 10). A written constitution setting out the rights and duties of the state and the citizen is an example of codified law.

Most countries whose legal systems (as opposed to laws) derive from Roman law (France, Italy, CIS, Sweden, Germany, etc.) have codified systems.

There are several other countries such as the USA, India, Australia, Canada, New Zealand etc, which are Common Law Countries.

Although these countries have a common law system, some of its law has been codified (e.g. Sale of Goods Act 1979 in England).

Common law: The "Common Law" is said to have been in existence in the UK since "time immemorial" (which now means since 1189). Much of today's common law derives from Roman law, which the Romans brought to Britain over the first to the fifth centuries. The common law cannot be found in any one book or set of books. It is contained in the recorded decisions of the judges.

Binding Precedent: The cases, in which the decisions stating the common law are to be found, are known either individually or collectively as "judicial precedent". Because there is a hierarchy of courts, the decisions of higher courts are said to be "binding" on lower courts, which means that these decisions must be followed. This is known as "**the doctrine of binding precedent**".

Unless a decision is recorded, any statement of law by the judge who made it will be lost. Hence, common law systems rely on a system of **law reporting**. Despite this, law reporting (recording the facts, arguments and decisions in a case) has always been undertaken privately and not by any organ of state.

Most English-speaking countries (USA, Canada, Australia, New Zealand, etc.) have common law systems

Types of law

Substantive law refers to specific legal rules (e.g. the rule which determines whether a person who has signed, but not read, a complicated legal document should be bound by it).

Procedural law refers to the rule[s] governing how a case is brought to and dealt with by a court. (e.g. If there is a criminal as well as a civil aspect to be determined in respect of the same set of facts, then which should be dealt with first? If the damages claimed are less than £50 000, then in which court should the case start?)

Public law: constitutional law, criminal law,

Private law: law of tort (unlawful harm = grievance-remedial process), law of contract (enforcing private arrangements)

International law

Public international law: international treaties, enforceable by economic sanctions, military action

Private international law: the rules of the country where an action is brought as to which country's laws should apply to the action.

2. Sources of law

- International treaties (not always incorporated directly into English law)
- European Union **Directives** and **Regulations**
- **Statute law.** Acts of the UK Parliament
- Subordinate legislation (Parliamentary **Regulations**)
- **Equity (The Law of Trusts):** "Legitimised" judicial discretion exercised according to twelve maxims based on Christian ethics (contained in judges decisions in precedents).
- **The Common Law** the law which has existed from time immemorial, contained in judges decisions in precedents
- **Judicial precedent** the law expressed by judges in resolving particular cases.

3. The notion of legal liability

Terminology

An act which contravenes the criminal law is said to be “**illegal**”, whereas an act which contravenes the civil law is said to be “**unlawful**”. An illegal act is necessarily unlawful, whereas an unlawful act is not necessarily also illegal. Note that attempting, aiding, abetting, procuring, soliciting or counselling a crime are also offences. Conspiring to commit either unlawful or illegal acts is similarly a crime

Criminal procedure

Separate bodies are responsible for investigation (police or other authority), prosecution (Crown Prosecution Service), pronouncement of guilt or innocence (*Magistrates* in less serious cases; the *jury* in more serious cases), and sentencing (the Magistrates or the trial judge).

Investigating authorities have different powers, depending on the severity of the crime thought to have been committed (e.g. failure to return a borrowed or **bailed** item – such as an expensive fur coat; or conspiracy to cause explosions).

Criminal liability

Ultimately, there is no satisfactory definition of a crime. It is often said to be “a wrong against society” (as opposed to a wrong against an individual) and therefore punishable by a fine or imprisonment, or even a death sentence.

Criminal liability hinges on the state of mind of the perpetrator of an act. Killing a person, taking their property, making damaging statements about them, and breaking agreements made with them can all be completely lawful, with absolutely no liability of any sort whatever. They can also be crimes. It all depends on the perpetrator’s state of mind at the time of doing the acts in question. All crimes therefore specify some state of mind (**mens rea**) in which the perpetrator performs the act of the crime (**actus reus**).

Possible states of mind:

- *Inadvertent*: without realising (Crimes committed in this state of mind are known as crimes of “strict” or “absolute “ liability.)
- *Negligent* – careless, less than proper
- *Grossly negligent*: giving no thought to, or not foreseeing the danger
- *Reckless*: foreseeing dangerous consequences, but taking the risk anyway.
- *Intention*: hoping to bring about the circumstances which occurred

Civil liability

Civil liability has to do with a “wrongdoer’s” duties to the “victim” of his wrongdoing. The only remedy known to the common law is **damages**. This is an amount of money theoretically compensating the “victim” (the **plaintiff** in the action) for the losses he has actually suffered through personal injury or property damage, or perhaps merely by virtue of his legal rights having been infringed. Nevertheless, courts also have the power to make orders not based on the common law

Civil remedies

- *Court order*: prohibition - preventing, certiorari - quashing, mandamus - forcing

- **Liquidated damages:** a predetermined or ascertainable sum of money
- **Unliquidated damages:** damages, the amount of which is unknown until calculated by the judge
- **Statutory remedies** (e.g. repossession of mortgaged property)

Equitable remedies

- **Specific performance:** making a party to the action sign a document
- **Injunction:** prevents a person from doing something

Equitable procedures

- **Discovery:** requires a party to disclose information to another
- **Account:** requires a party to account to another for the disbursement of funds
- **Foreclosure** (of mortgage): old-fashioned procedure for possession and sale of mortgaged property by the lender
- **Equitable estoppel**
- **Anton Pillar order:** enables one party to seize the property of another as evidence in the trial

Judicial review

Judicial review of administrative action is a relatively new procedure, under which the theoretically independent judiciary (a judge) reviews a decision taken by some organ of the executive (often local government). The court may uphold the action, or rule it invalid.

Onus of proof

In the UK, the **defendant** to a legal action is presumed to be not guilty (in a criminal case) or not liable (in a civil case) until the contrary is proved. The standard of proof required in each case is, however, different.

In a criminal case, the jury or the magistrates responsible for deciding the matter of guilt or innocence must be “**sure**” that the accused did in fact commit the crime alleged. In practice this means that they must be 90% sure, although magistrates are sometimes criticised for being too ready to convict.

In a civil case, the standard of proof is “**on a balance of probabilities**”. The easiest way to think of this is to imagine scale pans evenly balanced at the beginning of a legal action. If they remain even at the end of the action, then the plaintiff has lost his case. If, on the other hand, the plaintiff has succeeded in tipping the scales in his favour, then he has proved his case on a balance of probabilities: it is more likely that his allegations are true than that the defendant’s version of events is true.

4. Personnel of the law

Attorneys – This is a term that is commonly used for a lawyer in USA. There is fundamentally no difference between an attorney or a lawyer.

Solicitors have a university degree, and must take specialist examinations in law after that. They must also serve two years in articles with a qualified professional before they can become qualified.

A solicitor is a general practitioner, with a good all-round knowledge of the law. If you want legal advice, you would initially approach a solicitor. If the offence is not very serious, or the amount of money in dispute is less than £25 000, then the solicitor can argue the case in the Magistrates Court or the County Court. If the case is more serious, then the solicitor will brief a barrister.

Barristers' training follows a similar pattern, except that they take different examinations and their period of training with a professional is known as "pupillage". A barrister does not charge for his first brief from a solicitor. Barristers are specialists, sometimes in very narrow areas of law (e.g. maritime contracts, planning law, misrepresentation, legal action against lawyers, etc.). They are also primarily litigators, which means that their job is representing their client in court.

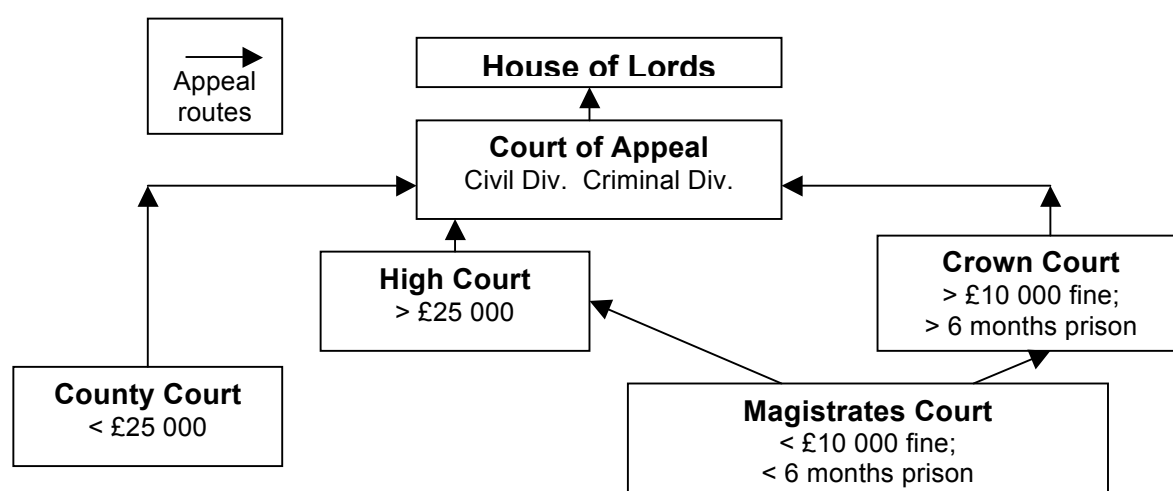
Both solicitors and barristers charge their clients by the hour. The hourly rate can vary from around £100 to £1250.

At one time, barristers' professional rules prevented them from speaking to clients directly: it was always necessary for the client to approach the barrister through a solicitor. Although those rules have now changed, barristers still get most of their business through solicitors and are often reluctant to deal with clients directly. For the client, it means having to pay for two lawyers instead of one. (Ouch!).

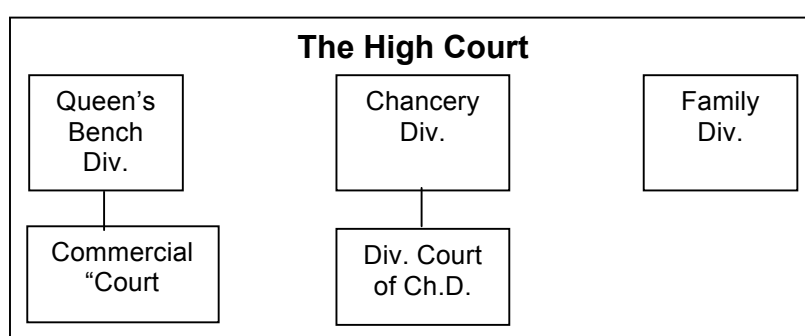
We will examine each of these professions in closer detail in latter part of this course.

Judges have worked as a solicitor or, more likely, a barrister for at least ten years. Judges continue in office during "good behaviour" until age seventy. Judges form part of the **judiciary** and should be free from influence by the **executive** or **legislature**.

5. English Legal System



The hierarchy of courts in England and Wales



Q.B.D. deals with contract, tort and maritime law. Ch.D. deals with property disputes, especially land (which includes anything built on the land), company matters. The Divisional Court of Chancery Division deals with bankruptcies and liquidations. Equity is applied more in Ch.D. than in any other division of the High Court. (Fam.D. is of little interest to bankers.)

The Restrictive Practices Court

Restrictive practice means anything done to erode free competition. (e.g. price-fixing agreements, cartels). This court investigates and rules whether a practice is in fact restrictive. Appeal lies to the Court of Appeal.

Employment law

Any employing organisation in the UK should be aware that there is substantial employment legislation, covering just about every aspect of the employment relationship. There are, naturally tens of thousands of **claims** every year and a special, supposedly quick and easy system was set up to deal with employment disputes. There are **Employment Tribunals** in larger cities across the UK. Appeals from an Employment Tribunal lie to the **Employment Appeals Tribunal** and thence to the Court of Appeal and House of Lords.