INTRODUCTION TO ENGLISH LAW

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LE LIVRE INCONTOURNABLE POUR LES ÉTUDIANTS EN DROIT

L'essentiel du cours
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CHAPTER 1

Introduction to the English Legal System

Whether you are M2 or L1 French law students, you are now somehow familiar with the French legal system, which belongs to the Civil Law country category. As you know, it follows the inquisitorial model and is based on codes, with two main branches known as Public and Private Law, to mention a few but rather salient aspects. You also have been informed that the English legal system, sometimes referred to as the Common Law system, is quite different, which is indeed very accurate as far as the sources of law, the principle of precedent, and the organisation of the courts are concerned. This chapter is hence primarily dedicated to these fundamental notions as a basis to better understand subsequent chapters. We, therefore, strongly recommend you not to skip it!

1 The sources of English Law

What we call English law today aggregates various domains: canon law, Common Law, Equity, legislation, and until recently, EU legislation. We shall leave aside canon law and EU legislation (both very interesting topics but a little bit apart from our subject) to concentrate on what constitutes the core of English law sources.

Before going forward, please note that we shall here refer to ***English*** and not ***British*** law. For historical reasons, the United Kingdom of Great Britain and Northern Ireland, its official name, does not have a unified judicial and legal system,

Scotland and Northern Ireland maintaining a kind of relative independence. At the end of this textbook, you will find some useful legal information regarding Scotland (and other countries).

- The five meanings of Common Law
- Equity
- Legislation
- So, what is precisely Common Law?

The expression 'Common Law' might seem difficult to grasp, as it actually encompasses five different potential meanings. It is thus important to distinguish its various interpretations.

1. In its most simple significance, the term 'Common Law' refers to such laws that are common to the realm. The sentence 'Murder is an offence under the Common Law of England' induces that killing someone constitutes a criminal wrong all over the country.
2. Common Law is also to be understood as the law developed by judges through their cases, a practice which is usually dated back to the very beginning of the English legal system upon the arrival of William I in 1066 (1066-1087), though in reality much credit must be given to another king, Henry II (1154-1189).
3. Later on, Common Law is a term that started to be used to distinguish it from Equity.
4. As well as from the laws made by Parliament.
5. Last but not least, Common Law globally designates those countries that have adopted (though they may also have adapted it) the English legal system, such as Australia, Canada, India, Kenya as well as the United States of America, to name a few.

As points 3, 4 and 5 will be subsequently examined in further detail, let us focus on interpretations 1 and 2.

Historically, when William the Conqueror became King William 1st of England, he promised to respect his new country's customs and rules. Therefore, this is the very first meaning of Common Law: those laws common to an entire kingdom. With time, this definition lost its relevance to acquire a more modern sense: Common Law is such laws observed everywhere in the UK.

However, Common Law is more than that and also refers to the specific place of judges within the judiciary and the legislative. Judges in the English legal system actually hold a special status: their task is not only to apply and interpret the legislation voted upon by Parliament, but also, depending on the matter, ***to make the law, to shape it***. This is why they are sometimes called 'law-makers'.

Understanding whether a statement is an offer or an invitation to treat; correctly applying the notion of intention to create legal relationships, or the 'but for test'; defining marriage or the concept of negligence, necessarily imply to refer to cases and the principles that judges have developed over the years (not to say centuries). In the aforementioned examples, it was not Parliament that enacted laws to legislate on such specific topics but judges who based their opinions on customs and practice. Consequently, cases make up an essential part of the English legal system: they do not only facilitate the interpretation of a statute but may be laws *per se*.

> This is hence one meaning of Common Law: a series of cases that must be known—just as you know specific Code Articles by heart—and is considered as law, even if not enacted by Parliament. In such circumstances, you now understand that it is impossible to put French *jurisprudence* on an equal footing with English case law.

Equity

With time, Common Law as above defined proved to be occasionally inadequate and weak. Little by little, to remedy such insufficiency, a parallel way of judging legal issues began to develop by petitioning the King's Lord Chancellor, 'keeper of the King's conscience'. As a Chief Secretary of State and a clergyman, Lord Chancellor heard disputes, which he tried to solve less formally and judicially, focussing on what was ***fair or not***, what was ***equitable or not***. This is the origin of the term Equity.

At some point, the Court of Chancery was set up, thereby affirming the practice of Equity but also leading to severe conflicts with Common Law courts that had difficulty in accepting such a competitor. After yet another clash, it was held that in case of conflict between Equity and Common Law, Equity should prevail[1]. That did not quite stop the antagonism between the two courts, and we have to wait for the very important *Judicature Acts* of 1873 and 1875[2], which completely reorganised the court system, for it to settle down.

1. *Earl of Oxford's case* (1615) 21 ER 485.
2. https://www.legislation.gov.uk/ukpga/Vict/54-55/53/enacted

Since then, there have been no more Common Law courts on the one hand and Equity court on the other hand, but only a uniform system of courts, equally applying Common Law and Equity principles, with accordingly different types of remedies (damages are Common Law remedies, for example, where an injunction is an equitable one). Just as before 1873, in case of conflict between Equity and Common Law, ***Equity prevails***[1].

> Equity is hence a significant source of English civil law, to be clearly identified when necessary, and not developed by parliamentarians but by judges.

Legislation

The English Parliament has long been an essential actor in England (now the UK)'s political and legal life. It comprises two houses, the House of Lords and the House of Commons.

The upper house, better known as the House of Lords, gathers the Lords Spiritual (*i.e.* the most important bishops of the Church of England) and the Lords Temporal (*i.e.* members of the peerage, be they life peers, the vast majority, or hereditary peers), with a total of 789 sitting members[2] who are not elected but instead appointed for most of them.

Conversely, the lower house, the House of Commons, comprises 650 MPs, duly elected by a simple majority vote in a general election to be called every five years, except if triggered earlier[3].

As any democratic country, the UK is extremely attached to its Parliament, where a bill can potentially become an Act after three readings in both houses and votes in its favour. Once the two houses have identically approved a bill, it is time for it to receive Royal Assent, which today has become automatic.

The fact that an Act[4] is an emanation of an elected body makes it superior to any other form of law: consequently, an Act of Parliament overrules Common Law and Equity in case of conflicts between the two in relation to the same legal area.

1. S. 25 (11) of the *Judicature Act* 1873, now in Section 44 of the *Supreme Court of Judicature (Consolidation) Act* 1925: 'Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the Rules of Equity and the Rules of the Common Law with reference to the same matter, the Rules of Equity shall prevail.'
2. As of 2023.
3. The next general election should take place in 2024, following the last general election in December 2019.
4. Please note the capital letter.

The primary sources of English law are the Acts of Parliament and cases originating from the courts, whether they are classified as Common Law or Equity. In case of conflicts between courts and Parliament, statute law (another term for Acts of Parliament) overrules Common Law and Equity.

2 The organisation of the courts

We have not quite finished with Common Law, as it is now necessary to examine the concept of precedent. However, to do so, we must first focus on the various courts. Unlike France and most other Civil Law countries, there is no such distinction between administrative and private law/courts in most Common Law nations. The only real difference in Common Law States is between ***the criminal order and the civil one*.**

a. The civil order

b. The criminal order

a. The civil order

Concerning the civil order, depending on the matter and the amount involved, the issue will start with a statement of claim brought in front of a Family Court (if the issue relates to family matters), a County Court (if the civil dispute is a minor one), or the High Court (if the civil claim is regarded as a complex one). The High Court is divided into three divisions: the Chancery Division hears civil cases while the King's Bench Division deals with more commercial and administrative cases, and the Family division, as implied by its name, examines family related-matters.

Starting with the Family Court or the County Court, and if an appeal is possible from there[1], the claim will then be potentially examined by the High Court. If another appeal is allowed, the dispute will then be heard by the Court of Appeal in its Civil Division and, last but not least, eventually by the Supreme Court[2].

Should the matter start directly in front of the High Court and appeals be subsequently granted, it will be up to the Court of Appeal in its Civil Division and then the Supreme Court to have their say on the matter.

1. There is no automatic right of appeal (otherwise referred to as leave) in most Common Law countries.
2. Former House of Lords, until the *Constitutional Reform Act* 2005, entered into force in 2009. https://www.legislation.gov.uk/ukpga/2005/4/contents

Therefore, there might be four to three levels of jurisdictions hearing a civil action. Please note that there is no 'way back', as is typically the case in France: the Supreme Court cannot send a case back to the Court of Appeal to implement its decision. When a case reaches the Supreme Court level, it is the final stage.

b. The criminal order

Concerning the criminal order, all issues start with Magistrates' Courts, which categorise the offences into summary (not that serious), either-way (intermediate in their seriousness), and indictable-only (extremely serious) types.

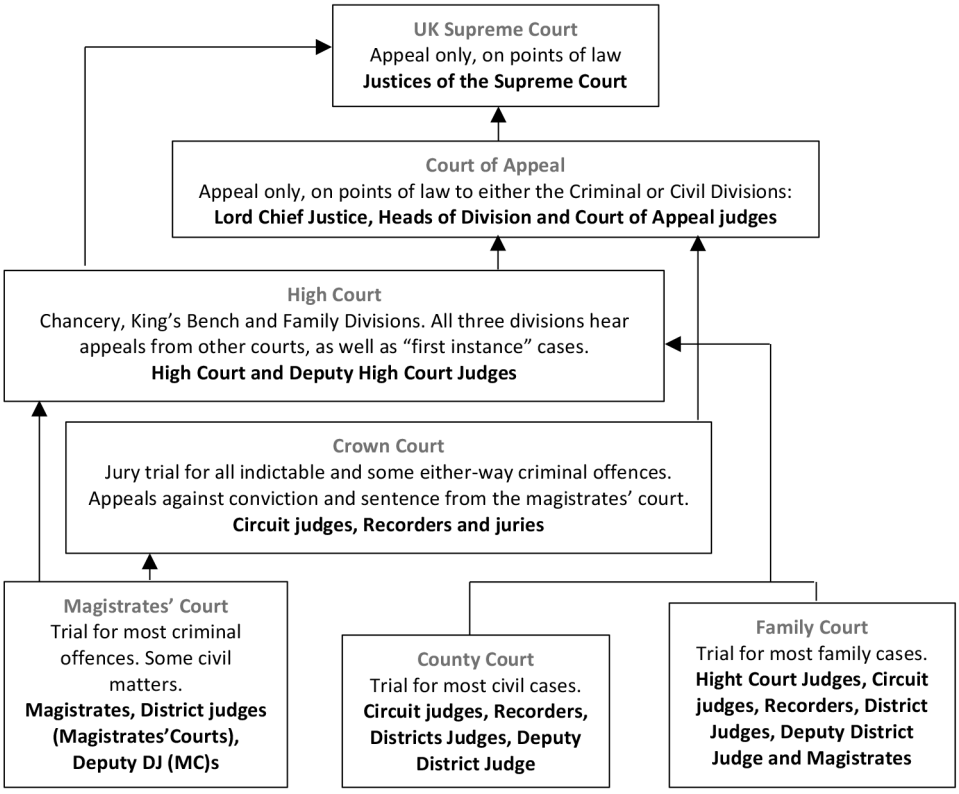
Magistrates' Courts examine all summary offences while all indictable-only offences proceed in front of (we say they are committed to) the Crown Court. Either-way offences, as the name suggests, may remain at the level of Magistrates' Courts or reach the Crown Court[1].

If a trial hence starts at the level of a Magistrates' Court, depending again on whether or not an appeal is granted, the issue may then be heard by the Crown Court, followed by the Court of Appeal in its Criminal Division, and potentially by the Supreme Court.

If the trial starts at the level of the Crown Court, then all potential appeals will be heard by the Court of Appeal in its Criminal Division, followed by the Supreme Court. Therefore, there might be, just as with civil proceedings, four to three levels of jurisdictions hearing a criminal action.

1. See more explanations in the chapter dedicated to Criminal Law.

The Structure of the Courts



3 The principle of precedent

Once the structure of the courts is clear, and the notion of Common Law has been explained, it is time to turn to the principle of precedent, another essential feature of the Common Law system, closely connected to what we have just seen. The idea is simple and relies on analogy: ***cases based on similar facts and raising the same points of law should be treated alike.***

Two Latin expressions are all important to remember, as they constitute the cornerstone of the system: ***stare decisis*** and ***ratio decidendi***. However, it is possible to depart from a precedent (not to respect it) for specific reasons.

a. *Stare decisis*

b. *Ratio decidendi*

c. *Stare decisis + ratio decidendi* = precedent

d. Departure from a precedent

a. *Stare decisis*

The basic principle of *stare decisis* – 'Let the decision stand' or 'Stand by what is decided'—implies ***strictly respecting the hierarchy of the English court system***.

As a consequence:

- The decisions held by the Supreme Court (SCUK) are binding on all inferior courts[1] in the system, with the exception, since 1966[2], of the Supreme Court itself. It means that if and when the Supreme Court rules on one specific legal aspect, the Court of Appeal is under the obligation to respect such a legal conclusion. It also means that the High Court and the County Court (taking the example of the civil order) will be under the same duty to respect the SCUK's ruling.
- The Court of Appeal[3] is hence bound by the previous decisions of the Supreme Court if based on the same facts. Contrary to the Supreme Court, the Court of Appeal is usually bound by its own previous rulings under the 'self-binding rule'[4].
- The High Court is also under the obligation to follow the decisions of the Supreme Court and the Court of Appeal; its own previous decisions are usually followed, but this is not mandatory.
- The Crown Court is bound by all superior courts' decisions; as far as its own decisions are concerned, it enjoys some flexibility[5].
- Inferior courts, *i.e.* the Magistrates' and County Courts, must also respect the decisions coming from superior courts, *i.e.* the Supreme Court, the Court of Appeal and the High Court, but are free to depart from their own previous decisions.

The notion of precedent can hence be summarised as follows: ***what is held upstream must be respected downstream***. However, this is not all, as the notion of *ratio decidendi*, 'the reason for deciding', has to complete the mechanism.

1. Superior courts include the Supreme Court, the Court of Appeal, the High Court and the Crown Court. The County Court and the Magistrates' Court are inferior courts.
2. *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234.
3. In its Civil and Criminal Divisions, though the self-binding rule is slightly different in its application in the Criminal Division, as a person's liberty might be at stake.
4. With nevertheless some exceptions, especially when there is a conflict between two decisions held by the Court of Appeal. See *Young v Bristol Aeroplane Co Ltd* [1944] KB 718, which lists the exceptions.
5. Such previous decisions are regarded not as binding but persuasive (influential but not mandatory).