The following are materials for the course English for lawyers.

1. CENTRAL FEATURES OF THE ENGLISH LEGAL SYSTEM

Legal content
1.1 The characteristics of English law
1.2 Common law and equity
   1.2.1 The development of common law
   1.2.2 The growth of equity
1.3 Classifications of law
   1.3.1 Criminal and civil law
   1.3.2 Substantive and procedural law

Aim
To provide an introduction to some of the central features of the English legal system and a background to your study of the subject. Much of the knowledge gained during the reading of this chapter will be applied throughout the book. Some of the topics will be examined more fully in later chapters.

Language content
Grammar: grammatical terms - noun, verb, adjective, adverb; identifying different grammatical forms of lexical items in texts; use of prepositions
Oral function: asking for meaning of words
Vocabulary: dictionary use - recognising dictionary order of words; finding appropriate (legal) meaning of words

1.1 The characteristics of English law

The United Kingdom does not have a single legal system. The law in Scotland was influenced by Roman law and is different from the law of England, Wales and Northern Ireland.

The English legal system is centralised through a court structure which is common to the whole country. It is hierarchical, with the higher courts and judges having more authority than the lower ones. Some important characteristics of English law are:

English law is based on the common law tradition. By this we mean a system of 'judge made' law which has continuously developed over the years through the decisions of judges in the cases brought before them. These judicial precedents are an important source of law in the English legal system. Common law systems are different from the civil law systems of Western Europe and Latin America. In these countries the law has been codified or systematically collected to form a consistent body of legal rules.

English judges have an important role in developing case law and stating the meaning of Acts of Parliament.

The judges are independent of the government and the people appearing before them. This allows them to make impartial decisions.
Court procedure is **accusatorial**. This means that judges do not investigate the cases before them but reach a decision based only on the evidence presented to them by the parties to the dispute. This is called the **adversarial** system of justice. It can be compared to the **inquisitorial** procedure of some other European systems where it is the function of the judges to investigate the case and to collect evidence.

**Legal exercises**

1. Look at the statements below then read the text to decide whether they are true (T) or false (F).
   - a. The law in Scotland is the same as the law in England,
   - b. English law has evolved gradually,
   - c. Most of English law has been codified,
   - d. The common law was developed by the judges,
   - e. The judiciary is not independent of the government,
   - f. The court structure of the English legal system is the same throughout the country,
   - g. All the courts in the system are of equal authority,
   - h. English judges collect evidence in the cases before them.

2. The aim of the following questions is to help you to begin to understand the legal implications of the characteristics of English law. Write short answers to each question below and use them as a basis of a discussion. Compare your answers to those given in task 1.
   - a. Would a codified system of law make the law more (i) certain, or (ii) flexible?
   - b. Why is it important for judges to be independent?
   - c. What is the disadvantage of an adversarial system of justice?

**Oral work**

You may not understand all the key words in these discussion questions. How will you ask your teacher for an explanation? Here are some possible ways:
   - a. ‘Excuse me, can/could you tell me what "codified" means?’
   - b. ‘I'm afraid I don't know what "accusatorial" means.’
   - c. ‘I'm not sure what "flexible" means. Does it mean "adaptable"?’

Imagine that you do not understand the following terms. Ask each other for an explanation.
   - a. evolve
   - b. independent
   - c. centralised
   - d. hierarchical
   - e. precedent
   - f. impartial

If you are working on your own you should use your dictionary to look up any key words you do not understand.

**Research**

1. Find out whether the legal system in your country is adversarial or inquisitorial.
1.2 Common law and equity

This is a complex subject and we will deal with it in outline only. Our main purpose is to draw a distinction between common law and equity and the way the courts apply the rules of these two areas of law. The differences arise from their historical development. First let us consider what we mean by the words 'common law'. You should be aware that they will carry a different meaning according to their context.

It is law which is common to the whole country - national law in contrast to local law.

It is law which is based on judicial decisions (case law) in contrast to the law which is made by Parliament (statute law).

It distinguishes the common law legal systems based on precedents from civil law jurisdictions based on civil codes.

It comprises the rules developed by the common law courts in contrast to the rules developed by the courts of equity.

1.2.1 The development of common law

In Saxon times before the arrival of William the conqueror there were courts in various parts of the country applying local customs and some written laws developed by Saxon kings. This opened a new era. At first the Saxon Kings used the existing local courts to help them rule the country, but soon the began to send their own judges around the country to hear cases locally. This enabled them to control the country better and also allowed them to compete with the local courts for the fees paid by litigants. The royal courts began to offer better methods of trail which were so successful that eventually all law courts came under royal control. Hence at the same time the common law was developing and the judges were beginning to travel the country, courts of common law came into existence.

1.2.2 The growth of equity

Consider these questions:

a Why did the need for equity arise?

b Do the rules of equity remain different from the rules of common law?
Equity developed because in many situations there was no legal remedy available at common law. Let us now consider the question - do the rules of equity remain different from the rules of common law? To answer this question we must remember the purpose of equity which is to achieve justice and fairness. To do this the courts have developed a set of rules to govern the application of equity. These are called the 'maxims' of equity. They are different from the rules which apply in the common law and these maxims are the reason why we continue to distinguish between common law and equity. There are many equitable maxims of which the following are just brief examples:

a Equity will not suffer a wrong to be without a remedy. Equity will only intervene when there is no adequate common law remedy. b Equity follows the law. Equity recognises legal rights and does not take the place of the common law. c He who comes to equity must come with clean hands. A litigant who has behaved unfairly in the dispute will be denied an equitable remedy. d Equitable remedies are discretionary. Litigants do not have a right to an equitable remedy. The courts will decide whether to grant a remedy after considering the individual circumstances of each case.

These examples illustrate the wider principles and interests which the courts will consider before granting an equitable right or remedy. One of the most important features of equity which distinguishes it from common law is the maxim that equitable remedies are discretionary.

Language notes: grammatical terms and vocabulary

1. Parts of speech
Look at the following grammatical terms and parts of speech.

Noun: e.g. law, England
Verb: e.g. (to) study, (to) compare

Do you know of any others? Name them and give examples.

2. Word formation.

Adjective: e.g. independent, legal

Adverb: e.g. independently, legally

Pronoun: e.g. it, she

Preposition: e.g. on, at
You will need to know these terms when using a dictionary but notice that abbreviations are used, for example n., vb., adj., adv., pron., prep.
Where necessary, use your dictionary and complete the table below:

<table>
<thead>
<tr>
<th>Noun</th>
<th>Verb</th>
<th>Adjective</th>
</tr>
</thead>
<tbody>
<tr>
<td>a..............</td>
<td>to petition</td>
<td></td>
</tr>
<tr>
<td>history</td>
<td>x</td>
<td>b</td>
</tr>
<tr>
<td>equity</td>
<td>x</td>
<td>c</td>
</tr>
<tr>
<td>x</td>
<td></td>
<td>d*</td>
</tr>
<tr>
<td>e..............</td>
<td></td>
<td>specific</td>
</tr>
<tr>
<td>g..............</td>
<td>to abolish</td>
<td></td>
</tr>
<tr>
<td>litigant</td>
<td>h,........</td>
<td>x</td>
</tr>
</tbody>
</table>

1. Give the opposite of c.

3. In legal English you will come across some specialist vocabulary which you may not know. Check that you understand the following items, either by asking someone else or by using an English-English dictionary. (NB: It may sometimes be necessary to consult a specialised law dictionary.

a litigant
b equitable
c injunction (can you find the meaning in the text?)
d contempt of court
e to prevail
f to supersede
g to bring an action

If it took you a long time to find the words in a dictionary you should do the exercises which follow.

4. Dictionary exercise

Number the following words in the order you would expect to find them in a dictionary:

apply, unitary, federation, ascend, united, separate, systems, union, endure, appellor, commission, crime, appellant, committee, application, commit, criminal, ascertain.

If this exercise took you longer then three minutes or you had more than two mistakes, you should repeat the exercise with the following list of words:

resolution, procedural, discharge, proceeds, libel, liability, licence, appoint, profitable, process, profit, proceed, liable, repeal, procedure, respondent, represent, resolve.

5. Cloze activity

Using the words in the box complete this brief summary. Gaps may need one or more words.

Common law Court of Chancery conflict redress Supreme court of Judicature prevail Middle Ages remedy relief Judicature Act common law court the laws of equity

Equity came into being in the (a) ...................... because (b) ..............
was not always able to give (c) ...................... to all litigants. The Court of Chancery provided equitable (d) ...................... when it thought that
the common law (e) ...................... was inequitable. Until 1875 there
were two courts - the (f) ...................... and the (g) ...................... The (h)
6. Case references

A common method of learning in law by way of a case study, but before doing so let us look at the way cases are reported.

As judicial decisions form an important part of the law it is necessary that they should be available to lawyers and the public. The judgments in the higher courts are published in a series of law reports the most common of which are:

All England Law Reports
Weeky Law Reports
Queen’s Bench King’s Bench
Appeal Cases Chancery
Criminal Law Reports

There is a standard form of reference which tells the reader where the report of an individual case may be found. This reference contains the year in which the case was published, the name of the publication in abbreviated form and the page number at which the case can be found. In addition, when the case reports for a single year are contained in more than one volume of a publication the number of the volume will appear before the name of the publication. So, for example, a case reported at [1979] 3 All ER 365 will be found in the third volume of the All England Law Reports for the year 1979 at page 365.

You will notice the use of square brackets; this signifies that knowing the year is essential to finding the case report. If the case is cited with the year only and not the reference, round brackets are used, for example Donaghue v. Stevenson (1932). A final point you should remember at this stage is that case names are always highlighted in some way. In most books this will be by italics but if you are writing by hand you should underline the case names. It is important that you get into the habit of doing this from the start of your legal studies.

Where will the following cases be reported?

**1.2.3 Case study: Miller v. Jackson [1977] QB 966**

**The facts:** The plaintiffs owned a house adjoining a cricket ground. Cricket had been played on the ground for a long time before the house had been built. The plaintiffs complained of damage caused by cricket balls and loss of enjoyment of their property. They brought an action against the cricket club for private nuisance seeking damages (the common law remedy) and an injunction (an equitable remedy) to prevent cricket being played on the ground. The cricket club argued that it had done everything that was possible to stop the balls coming into the plaintiffs' garden, including erecting a fifteen foot high fence.

**Held:** The cricket club were liable to the plaintiffs for private nuisance. An award of damages was made against them but a majority of the Court of Appeal refused to grant an injunction preventing the playing of cricket.

**Per** Lord Denning MR: 'The court when deciding whether to exercise its equitable jurisdiction and grant an injunction must have in mind that it is under a duty to consider the public interest. Where the effect of granting an injunction would be to prevent cricket being played on a ground where it had been played for seventy years or so, the special circumstances are such that the public interest must prevail over the hardship of the individual householders who were deprived of the ability to enjoy, in peace and quiet, their house and garden while cricket was being played.'

Can you see the difference in the court's approach to the common law remedy and the equitable remedy? In order to be awarded damages the plaintiffs only had to prove that the defendants were liable in nuisance. Having proved this the court had no power to withhold the common law remedy (although the judges will determine the amount to be paid by the defendants). In contrast, because equitable remedies are discretionary, the court could refuse to grant an injunction because it considered it would not be just and fair to do so.

Before concluding this introduction to equity you should be aware that although it was originally a flexible body of rules, the criticism that 'justice is as long as the Chancellor's foot' can no longer be justified. Justice is a subjective concept - what may appear just to one person would not be to another. Judicial decisions, and therefore the law, based on the individual judge's idea of justice creates uncertainty and in itself leads to injustice. Similar cases must be treated similarly if justice is to be achieved. Accordingly equity has developed over the years into a consistent body of rules which eliminates as far as possible a subjective and arbitrary application of its principles.

**Text notes**
1.4 people bringing a legal action
1.5 responsible
1.6 money paid in compensation
1.7 as stated by
1.8 Master of the Rolls, the Head of the Court of Appeal
1.9 i.e. changed with each new Chancellor
1.10 explained in the rest of the sentence
1.11 based on opinion, not on reason

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**1. Structure of the text**

14 The case study (Millers/. Jackson) follows several stages which are listed below. Try to identify each stage by giving line numbers:
2. Vocabulary

Everyday words are often used in legal vocabulary but they convey a very specific meaning which may be different from the meaning you already know. For example, 'held' (see Miller v. Jackson) is used in legal terminology to introduce the judgment in a case. Look at the following words from the text:

a nuisance
b remedy
c interest

Can you find the legal meanings in your English-English dictionary?

3. Language note: prepositions

16 Using the right preposition can be a problem. Complete the short case study below by using some of the prepositions which were used in Miller v. Jackson.
The plaintiffs owned a house next door (a) ................................ the defendant's factory. Sometimes black smoke from the factory chimneys would blow across the plaintiffs' garden. The plaintiffs sued the owners of the factory complaining (b) .................... damage caused (c) ................. plants in their garden (d) ................... the smoke and loss of enjoyment of their property. They sought (= past tense 'to seek') damages and an injunction to prevent the defendants using their premises as a factory.

**Held:** That the owners of the factory were liable (e) .................... the plaintiffs (f) ................... the tort of private nuisance. The plaintiffs were awarded damages (g) ................... the loss of their plants and granted an injunction restricting the use of the defendants' property. It was reasonable that the defendants should use their premises as a factory but not (h) ................... a way which would cause nuisance (i) ................... adjoining property. The injunction would apply until the defendants were able to control the smoke (j) ................... their chimneys.

4. Vocabulary

17 Complete the passage by choosing the correct words from the list which follows it.

Before the Norman Conquest the law in England was (a) .................... Fear of the power of local (b) .................... led Henry II to create a (c) ................... royal court in London called the (d) .................... (e) ................... from this court would travel the country hearing (f) ................... and (g) ................... cases. The central court in London (h) ................... the legal issue in a case and this would be applied to the (i) ................... in the regional courts. In this way a (j) ................... system of law was developed which was (k) ................... to most
parts of the country.

Equity was developed by the Court of (I) ....................It introduced new (m) ....................to provide (n) ....................for disappointed litigants. The common law courts were (o) ....................from the Court of Chancery until a single court was established by the (p) ....................Act 1873. Each branch of the (q) ....................Court of Judicature can administer (r) ....................law and (s) ....................However, the difference between the two is still important because of the (t) ....................of equity. These illustrate that equity is based on (u) ....................and (v) ....................

5. Legal analysis

18 Read the facts of the following case and prepare a short judgment based on your knowledge of the maxims of equity. You should do this by following the procedure outlined in the exercise on structure given in question 14 on p. 9. Discuss your decision with other members of your group and be prepared to justify it by reference to the maxims. You should then compare your arguments with the decision of the Court of Appeal summarised in the Answer Section. If you are working on your own prepare instead a written judgment, also by following the exercise on structure given in question 14 on p. 9.

D. & C. Builders v. Rees [1965] 3 All ER 837

The defendants owed the plaintiffs £482 for building work. The defendants consistently refused to pay the money until, knowing the plaintiffs were in financial difficulty, they offered to pay £300 to settle the debt. The plaintiffs reluctantly accepted. They then sued for the recovery of the outstanding debt of £182. Their action was based on the law of contract which allows a creditor to recover payment of a debt even after accepting part payment in full settlement. The defendants claimed the protection of the equitable doctrine of promissory estoppel which in some circumstances will prevent a person from going back on a promise - in this case the promise to accept £300 as full payment of the Rees's debt.

1.3 Classifications of law

There are many ways in which the law can be classified. Here we shall limit our discussion to the difference between criminal and civil law and substantive and procedural law.

1.3.1 Criminal and civil law

A simple distinction between the criminal law and the civil law is that the latter^{27} regulates the relationships between individuals or bodies and the former^{28} regulates the legal relationships between the state and individual people and bodies.
The first practical difference is seen in the parties to the legal action. A civil case will involve two (or more) individual people or bodies whilst the parties to a criminal case will be the state and an individual person or body.

Later you will learn how this difference is reflected in the terminology and procedure of the law, but first let us look at an example of both criminal and civil law.

First, the civil law. Examples of this include the **law of contract**, **tort** (literally meaning 'wrong') and **property**. Consider the following situation.

You decide to buy a radio from a local shop. You pay the correct price and take the radio away. You have entered into a contract with the owner of the shop. After two days the radio fails to work.

This is a common situation and usually the shopkeeper will replace the radio or return your money. If not, you may wish to take legal action to recover your loss. As the law of contract is part of the civil law the parties to the action will be you (an individual) and the owner of the shop (an individual person or body).

Now let us look at some examples of the criminal law. This is the law by which the state regulates the conduct of its citizens. Criminal offences range from the petty (e.g. parking offences) to the very serious (e.g. murder, rape). Look at the following situation.

You are driving your car at 70 m.p.h. in an area which has a speed limit of 40 m.p.h. You are stopped by a police officer and subsequently a case is brought against you for dangerous driving.

This is a **criminal offence**. The parties to the action will therefore be the state (in the form of the prosecuting authority) and you (an individual).

A further point to make is that although the division between civil and criminal law is very clear, there are many actions which will constitute a criminal offence and a civil wrong. Let us look again at the situation where you are driving your car too fast. Suppose that while you were doing this you knocked over and injured an elderly lady. You will have committed a **criminal offence** (dangerous driving) and a **civil wrong** (negligence).

You should be aware that in the hypothetical situation, whilst the one act can constitute both a criminal offence and a civil wrong, the legal consequences under the criminal and civil law will be different. You would be prosecuted by the state in the criminal courts for dangerous driving and sued by the injured party in the civil courts for negligence. The two actions will be totally separate.

### 1. Vocabulary

In order to check your understanding of some of the important terms in the passage, on a separate sheet of paper complete the table below by placing the following words and phrases in the correct column:

- civil wrong, crime, Crown Court, guilty, plaintiff, life imprisonment, to convict, defendant, to prosecute, conviction, liable, county court, judgment for the plaintiff, prosecutor, punishment, to punish, offence.

<table>
<thead>
<tr>
<th>Civil</th>
<th>Criminal</th>
</tr>
</thead>
<tbody>
<tr>
<td>civil wrong</td>
<td>crime</td>
</tr>
</tbody>
</table>


2. Vocabulary

Use the words in the box to complete the following sentences. Try to remember the words from the previous exercise.

<table>
<thead>
<tr>
<th>injunction</th>
<th>conviction</th>
<th>liable</th>
<th>prosecutor</th>
<th>defendant</th>
<th>legal consequences</th>
<th>plaintiff</th>
<th>sued</th>
<th>defendant</th>
</tr>
</thead>
</table>

a. A criminal case is brought by a ....................
b. The person charged with the criminal offence is the .....................
c. The party bringing a civil action is the ......................
d. A civil action is brought against the .........................
e. A court order not to do something is an ......................
f. The defendant in a civil case is ...................by the plaintiff.
g. A successful criminal prosecution will result in a ....................
h. If the plaintiff is successful the defendant will be found ...................
i. The distinction between crimes and civil wrongs relates to the of the act.

3. Differences in vocabulary between criminal and civil law

Below, in note form, is an outline of criminal and civil proceedings. Some gaps have been left for you to complete. Fill them in.

\[
\text{Crim. Proc.:} \\
\text{Prosecutor (a)...................defendant }\rightarrow \text{(if def. guilty) conviction }\rightarrow \text{(b)...................or } \rightarrow \text{(c) ................... or } \text{ id) ...................} \\
\text{Civ. Proc.:} \\
\text{(e)................... (f) ................... }\rightarrow \text{(if pi. successful) liable }\rightarrow \text{(g) ........... or } \rightarrow \text{(h) ................... or, (i) ...................} \\
\]

4. A further difference between civil and criminal law is the way that cases are cited.

The language for naming cases is very formal. In citing all cases in your daily studies it is usual to pronounce the ‘v.’ in both criminal and civil cases as 'and'.

What is wrong in the following situation and why?

Bob has been charged with murder and is sued in the county court. The plaintiff is successful in the action and Bob is found liable. He is punished by being ordered to pay the plaintiff £10,000 in damages.

Are the following cases civil or criminal?

a. Gibson v. Manchester City Council;
b. Leaf v. International Galleries;
c. R. v. Bateman;
d. Leach v. Ft.
1.3.2 Substantive and procedural law

Substantive law lays down people's rights, duties, liberties and powers.’ By this is meant the actual content or substance of the law. Procedural or adjectival law is also a set of rules. As you read the next passage think about these questions:

1. Discussion
   Why was procedure so important in the past? b Is procedure still important today?

2. Are the following statements true (T) or false (F)?
   a The rules of civil procedure are codified,
   b None of the rules of criminal procedure have been codified,
   c In the past legal rights depended mainly on abstract principles,
   d Procedure is not important today.
   e Lines 12-15 mean: ’nowadays the principles of law should control procedure’.

3. Legal exercise

   Consider the following situation.

   Thomas has been charged with murder. He is pleading 'not guilty' to the charge. His trial is taking place at Fenbury Crown Court. The leading prosecution witness is PC Boot. In his evidence he states that he saw Thomas running away from the scene of the crime. Thomas has evidence which suggests that PC Boot was at home at the time that he said he saw Thomas but the judge refuses to let Thomas's lawyer question PC Foot about this. When Thomas gives his evidence the judge allows the prosecuting lawyer to question him. During the questioning the prosecuting lawyer tells the court that Thomas has previously been found guilty of a serious criminal offence.

   How has the procedure of the trial disadvantaged Thomas?
2. The constitution

Legal content

2.1 Definition and purpose
2.2 Characteristics of the British constitution
2.2.1 The nature of the constitution
  1.2.3 The sources of the constitution
  1.2.3 The constitutional role of the judiciary
  1.2.3 Parliamentary sovereignty
  1.2.3 Separation of powers
  1.2.3 The rule of law
  1.2.3 Judicial review

Aim
To examine the constitutional framework of the English legal system and to provide an introduction to the concepts which form the basis of the system of government in the United Kingdom. Particular emphasis will be placed on the constitutional role of the judiciary and some comparisons made with the role of the judiciary in other countries. The final section will consider some recent areas of debate arising from the nature of the British constitution.

Language content
Grammar: dealing with complex sentences (using signpost words); constructions of the type 'ought not to have taken
Vocabulary: inferencing meaning from context; forming antonyms
(un-, in-, im-) Oral function: asking for repetition
Study skills: notemaking symbols

2.1 Definition and purpose

A constitution is a set of rules which define the relationship between the various organs of government and between the government and citizens of a country. Its purpose is to set the parameters of governmental power and the rights and duties of the citizens. Therefore, the constitution of any individual country will determine the system of government in that country. Before we go on to examine the nature of the British constitution it is important that you have a clear understanding of what is meant by the 'organs' or 'institutions' of government. In this context we mean the
executive, the legislature and the judiciary. In addition, in the United Kingdom, the monarch has an important constitutional role as head of state.

Vocabulary

1 The four 'organs' of government mentioned are:
   a the monarch; b the executive; c the legislature; d the judiciary.
   Use an English-English law dictionary to check the meaning of these terms.

Research

2 The executive is a broad term which includes the officials of government departments, but in the United Kingdom the collective name for the principal executive body is 'the Cabinet' which is made up of ministers of the Crown; for the legislature it is 'Parliament'. Individual members of the legislature are called 'Members of Parliament'. What titles are given to these groups/individuals in the government of your country?

2.2 Characteristics of the British constitution

2.2.1 The nature of the constitution

1. Research. Find out answers to the following questions

a When was the American constitution first written?

b Can it be changed?

c Does the United Kingdom have a written constitution as the USA does?

d Who can alter the rules of the British constitution?

2. Based on your answers to the questions in Task 1. Are these statements true or false?

a An unwritten constitution can be easily changed,
b There are no legal remedies which the British courts can apply to protect the rights of the subjects,
c Parliament has no power to make laws to protect individual rights.
d Parliament must follow a special procedure to alter any constitutional laws,
e There are no documents containing constitutional laws in the United Kingdom.
f An unwritten constitution is more flexible than a written constitution.

A number of issues relate to the earlier definition of a constitution - the extent and control of government power and the protection of the rights of the citizens. Under a written constitution these are very clearly stated; for example, the constitution of the United States gives American
citizens the right, *inter alia,* to free speech, peaceful assembly and privacy. Any law passed in contravention of these and other constitutional rights, can be struck down by the American courts as unconstitutional and therefore void. Equally they can enforce the provisions of the constitution. The courts in the United Kingdom do not have this power. In the remainder of this chapter we will examine the reason for this and the relationship between the judiciary and the other organs of government.

**Legal exercises**

1. In countries with a liberal democratic system of government much emphasis is placed on the protection of individual freedom and rights. Can you think of six 'rights' which may be considered important in these countries?

2. Write a short essay of 150 words on the nature of the constitution in your own country. It should state whether the constitution is written or unwritten. If it is the latter what is the reason for this and how are individual rights protected? If the former, when did it come into existence and why? What are the provisions relating to the machinery of government and the protection of human rights?

Your essay should consist of four paragraphs each beginning as follows:

**Paragraph 1:** 'The constitution in (country) is written/unwritten . . . (follow on with historical reasons).'

**Paragraph 2:** 'The main features of (country's) constitution are . . . '

**Paragraph 3:** 'The constitution recognises a number of individual rights which include . . .'

**Paragraph 4:** 'The provisions in the constitution for protecting these rights are . . .'

**2.2.2 The sources of the constitution**

Having established that the constitution of the United Kingdom is not contained in any one single document we now need to look at the sources of the constitution. Other than the statutes mentioned in the preceding text, these can be found in custom, case law, books of authority, European Community law (since 1972) and, most important, constitutional conventions. These are informal or 'moral' rules - a code of practice for government which has evolved over the years. They are primarily concerned with the relationship between the Crown (or monarch) and the executive, and the executive and the legislature. The following text provides some examples of these conventions.

By the convention of ministerial responsibility mentioned in the extract each individual cabinet minister is held responsible for all the actions of the civil servants in his or her ministry; it requires a minister to resign if those civil servants make an important mistake. One of the most significant examples of this convention in recent years was the resignation of the Minister for Trade and Industry after one of the civil servants in his department released a confidential document in order to embarrass another minister.

**1. Vocabulary**

If you do not know these words you could use a dictionary. However, it is always a good idea to consider whether enough information can be extracted from the 'unknown' word to enable you to carry on reading without using the dictionary. With each of these words that you do not know, ask yourself the following questions:

1. What part of speech is it?
2. Does it look (or sound) like any other word you know in English or another related language?
3. Is it next to or near a known word which can help you to understand?
Sometimes only question 1 will give you any information and you will want to use a dictionary (knowing the part of speech will be useful to you here). This self-questioning process takes much less time than you might think and will become quicker with practice. You probably already do something like this in your own language when you meet an unfamiliar word.

Let us apply this procedure to some of the words listed:

**tacit**
- **Question 1:** You might think this word is a noun or an adjective.
- **Question 2:** If you know Latin or the word 'taciturn' you will know that the idea of 'not speaking' is involved.
- **Question 3:** It appears to be linked to 'express', but the meaning you probably know of 'express' as in 'express train' is not helpful.

At this point you will either have enough information from question 2 or you will go to your dictionary and discover that 'tacit' means 'understood without being stated'.

**express**
- **Question 1:** It must be an adjective because it is linked by 'or' to an adjective ('tacit').
- **Question 2:** The linking word 'or' could indicate that 'tacit' and 'express' have either similar or contrasting meanings. You will probably conclude that 'express' means the opposite of 'tacit'. Question 3: We have decided that the usual meaning is not helpful, but you might consider the meaning of the verb 'to express', that is 'to state something'.

Sometimes it is not necessary to ask all the questions:

**suffice**
- **Question 1:** Since it follows 'must' it is a verb.
- **Question 2:** It looks like 'sufficient' so it probably means ........................................

Check that you remember some of the key words:
- a The opposite of 'tacit' is..........................
- b A rule which is reached by agreement is called a...........................
- c The head of state in the United Kingdom is called.......................... (several answers are possible).
- d Parliament consists of the House of Lords and.................................
- e The leader of the government is the .................................

**Legal exercises**

2. Which conventions are involved in the following situations?
a The government is defeated on a major issue in the House of Commons. The Prime Minister advises the Queen to dissolve Parliament and a general election is called. The government wins a large majority in the general election but the Queen invites the leader of a minority party to form the next government.

b After a major defeat in the House of Commons the Prime Minister refuses to resign or ask the Queen to dissolve Parliament. A member of the opposition party applies to the High Court for an order forcing the Prime Minister to resign. The High Court grants the order,

c The Environment Party wins a general election on its promise to abolish all motor vehicles. The Abolition of Motor Vehicles Bill is subsequently passed by a large majority in Parliament but the Queen refuses to give the Royal Assent.

3. Discussion and writing

Conventions are not like 'real' laws in that there are no formal rules for their creation and they are not enforceable by the courts. Discuss the following questions with your group. You may find the additional reading references helpful in preparing your answers. If you do not have access to this material you can answer the questions by thinking about why informal rules of behaviour in general, such as social habits, are obeyed and the consequences of a breach of these rules.

a Why are conventions obeyed? b Are all conventions of equal importance? c What do you think would be the consequences of a breach of a convention?

d What is the main advantage of constitutional conventions compared to written constitutional rules?

If you are working on your own write an essay of 150 words on these topics. Use one paragraph to answer each part of the question as in the following essay plan:

Paragraph a: 'Constitutional conventions are ... (follow with a definition). They are obeyed because . . .'.

Paragraph b: 'Not all conventions are of equal importance . . . (follow with examples from the text).'

Paragraph c: 'The consequences of a breach of a convention will depend upon . . . (relate your comments to paragraph b)'.

Paragraph d: 'Constitutional conventions have the advantage of being flexible because . . . (then compare to written constitutions)'.

2.3 The constitutional role of the judiciary 2.3.1

Parliamentary sovereignty

The doctrine of parliamentary sovereignty governs the relationship between the legislature and the judiciary. It was described by A. V. Dicey as follows:

The constitution 27

What the State itself enacts cannot be unlawful because [it] is the highest form of law in this country. It is the law which prevails over every other form of law, and it is not for the court to say that a parliamentary enactment . . . is illegal.

Similar statements have been made by many other British judges. The constitutional position can be summarised thus:

It is often said that it would be unconstitutional for the UK Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the 5 power of
Parliament to do such things. If Parliament chose to do any of them, the courts could not hold the Act of Parliament invalid.\footnote{Madzimbamuto v. Lardner-Burke [1969] 1 AC 645}

**Text note:**

\textbf{21} not having force in law, opposite to 'valid'; pronounced [\textit{in'vaelid}] to distinguish it from 'invalid' (pronounced [\textit{inva'liid}] meaning ill or disabled)

An additional feature of the doctrine of parliamentary sovereignty is that each new Parliament is supreme. The traditional view is that no Parliament can limit the actions of a future Parliament. Much of the debate in this area centres on the issue of a Bill of Rights. Under the traditional view of parliamentary sovereignty a Bill of Rights enacted by one Parliament could be repealed by its successor. We will look at this subject in more detail in the final section of this chapter.

Another recent debate is the impact of Britain's membership of the European Community on the sovereignty of Parliament. We will also examine this in more detail in Chapter 10.

**Legal exercises**

3. To which relationship does the doctrine of parliamentary sovereignty apply?

4. What test do the courts apply to test the validity of legislation in the UK?

5. What legal authority is there for the rule that judges must obey Parliament?

6. Why was the Supreme Court of the United States able to strike down the legislation on racial discrimination in \textit{Brown v. Board of Education}?\footnote{English Law and Language}

7. In 1995 the British government presents the Female Education Bill to Parliament. Section 1 of the Bill states: 'No blue-eyed female child shall receive a full-time education after reaching the age of ten years.' The legislation is approved by a majority of both Houses of Parliament and receives the Royal Assent.

   a Will the British courts be obliged to enforce this law? b Would your answer be different if Britain had a written constitution guaranteeing a right to full-time education up to the age of sixteen years?

28 \textit{English Law and Language}

2.3.2 Separation of powers

Another feature of the British constitution which is relevant to the constitutional role of the judiciary is the theory of the \textit{separation of powers}. This theory was particularly developed by the French political scientist, Montesquieu:

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty . . . Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive however, the judge might behave with violence and oppression. There would be an end to everything, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals. Montesquieu, \textit{De l’Esprit des Lois} (Klincksieck 1982).

The theory has been criticised for being purist - that is, it is an impractical\footnote{22} model to which the British system of government does not conform. For example, members of the executive are also members of the legislature - the head of the judiciary, the Lord Chancellor, is a member of the Cabinet. Equally, the courts perform many administrative functions.

The constitution of the United States was expressly based on the separation of powers - the executive (President), the legislature (Senate/ House of Representatives) and the judiciary (Supreme Court) are discrete\footnote{23} bodies. But even the United States government does not conform exactly to the theory. Each body exercises control over the functions of the others through a
complex system of checks and balances. For example, the President appoints the judges to the Supreme Court but his nominations must be approved by the Senate, and we have already seen that the judiciary has the constitutional right to strike down legislation as unconstitutional.

By contrast, in France, the theory of separation of powers is the reason why the courts do not have the jurisdiction to question the legality of the acts of the executive and the legislature.

It is generally accepted that a precise separation of the functions of government is impracticable. Montesquieu's theory should be seen as prescriptive rather than descriptive, its essence being that no one person or body should have full control of all three functions of government. In particular, the courts should be independent of the executive and the legislature so that the judges can ensure that these bodies do not exercise their powers arbitrarily.

**Text notes:**
8. 'practical' is the opposite of 'theoretical' or, as here, 'purist'
9. notice the dash on the previous line: the second part of the sentence explains the first part, so 'discrete' means 'separate'
10. 'practicable' means 'can be used or done'
11. from the verb 'to prescribe', meaning 'to say what should be done'

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**Comprehension check**

12. Fill in the missing words in the following passage from the list provided below. There are (a) .................. main functions of government. These are the (b) ...............the (c) ....................and the (d) .................... The theory of separation of powers states that these functions should be carried out by (e) ....................bodies. The British constitution does not (f) ....................to this theory. The same people are members of the (g) ....................and the (h) .................... and there are some (i) .................... functions which are carried out by the courts. The distinction is clearer in the constitution of the (j) .................... where the executive, legislative and judicial roles are performed by (k) ....................bodies. The theory is (l) ....................rather than (m) ....................of the liberal system of government, an essential feature of which is that the (n) ....................should be (o) ....................of the (p) .................... independent, legislature, United States, conform, executive, judicial, three, different, prescriptive, executive, judiciary, administrative, legislature, descriptive, legislative, different, executive.

**Vocabulary**

When forming and recognising opposites (antonyms) there are several prefixes which can be used, for example un- (as in 'unknown').

13. The following words, which have been used in Chapters 1 or 2, can be used with the prefixes un-, in-, il- or im- to form their opposites. Write them down using the correct prefix.

<table>
<thead>
<tr>
<th>a lawful</th>
<th>j justice</th>
</tr>
</thead>
<tbody>
<tr>
<td>b familiar</td>
<td>j partiality</td>
</tr>
<tr>
<td>c practical</td>
<td>k equitable</td>
</tr>
<tr>
<td>d legal</td>
<td>l written</td>
</tr>
<tr>
<td>e fair</td>
<td>m practicable</td>
</tr>
<tr>
<td>f valid</td>
<td>n constitutional</td>
</tr>
<tr>
<td>g dependence</td>
<td>o licit * h make</td>
</tr>
</tbody>
</table>

* Not used in the book so far but often found in legal language.
NB: These prefixes often indicate an opposite meaning but the same letters (e.g. im-, in-) also occur in words where this is not the case, for example 'important', 'influence'.

Research

22 To what extent does the government of your country conform to the theory of separation of powers? To answer this question you should identify the three organs of government in your country and find out whether their functions are performed by different people or bodies.

Legal exercise

23 Write a short essay of 200 words on what you understand by the separation of powers and the reasons for maintaining it. You should include a discussion on whether the theory applies to the British constitution and make comparisons with other countries including your own. You may find the following essay plan helpful:

a. Define the theory,
b. The reasons for the theory,
c. To what extent does it apply to the British constitution?
d. Compare with the constitutions of other countries.

2.3.3. The rule of law

After reading sections 2.3.1 and 2.3.2 you should be aware of the two main characteristics of the British constitution. These are:

14. Parliament is the supreme organ of government, and
15. under a somewhat loose application of the theory of separation of powers, the courts are independent of Parliament and the executive.

We shall now develop the constitutional implications of these themes by examining the ways in which the courts can control the actions of the executive. In this context we are talking about the executive in its broad sense as the administrators of the system of government.

It is important to understand clearly that the courts have no power to review the merits of executive action; that is they are not concerned with the question: ‘Is this action right or wrong?’ The question they can ask is: ‘Is this action lawful or unlawful?’ At first the distinction may be difficult to recognise. The aim of these next two sections is to make the distinction clear and to demonstrate how it is reflected in the way the courts can control executive action. First, let us look at the principle of the rule of law:

The rule of law means something more than rule in accordance with the law. The most terrifying dictatorship can rule in accordance with law by enacting laws to give effect to its policies, however inhuman these may be. The rule of law in the sense it is used here really involves certain presuppositions about law itself. The nature and extent of these presuppositions is open to argument but most would agree that the rule of law requires that all power and authority in the state be derived from law, and the notion of equality before the law.

In a dictatorship judges might be understandably reluctant to question the legal basis upon which the dictator and his designates act. In a parliamentary to democracy there is no such reluctance. Thus ministerial powers, however widely phrased, are generally subject to review by the courts and if a minister has acted ultra vires (beyond the powers of) his authority, his action is invalid even if done in complete good faith and in accordance with the public interest. If the police effect an arrest or search premises without the legal powers to do so, the arrest or search is illegal and it will not help the police to show that their action was reasonable or that it was done in good faith.

Hogan, Seago and Bennett, A Level Law (Sweet and Maxwell 1988), pp. 15-16.
You will see from the extract that the principle of the rule of law embodies more than the requirement that government acts within its legal powers but also that it acts in accordance with the recognised principles of liberal democracy.

First let us separate the two aspects of a particular situation.

a. A number of suspected persons had been interned under the statutory powers of the Civil Authorities (Special Powers) Act (Northern Ireland) 1922.

b. During the period of internment fourteen internees have been subjected to ill-treatment during interrogation. There was no statutory authority for these interrogation procedures.

Now let us apply the two original questions to the separate issues:

1 a Is the act of internment right or wrong? Internment is a very controversial procedure. It could be argued that to imprison people indefinitely without them being charged with and found guilty of any conduct which is illegal is an abuse of human rights and therefore wrong. Alternatively it can be argued that such an action by the State is necessary to safeguard the national interest during war or other times of crisis. To examine these arguments is to examine the merits of the procedure and this is not the function of the British courts.

b Is the act of internment lawful or unlawful? There is no doubt that it was lawful under the powers of an Act of Parliament - the Civil Authorities (Special Powers) Act (Northern Ireland) 1922. If an action had been brought before the courts to challenge the validity of internment it would have been determined on this basis.

2 a Were the interrogation procedures right or wrong? Again to answer this question we would need to look at the merits of the procedures which are as controversial as internment. What arguments can you think of for and against such actions?

b Are the interrogation procedures lawful or unlawful? How would the British courts approach this question and what do you think their decision would be?

Oral work

In class or in discussions you will sometimes not hear or understand what somebody says. How will you ask them to repeat it? Here are some possible ways. They are all polite and formal enough to be used with teachers but not too formal to be used with other students.

16. ‘I'm sorry, I didn't quite hear/catch what you said just now about [the rule of law].’
17. ‘Could you possibly repeat your answer to [the last question]?’
18. ‘Excuse me, but I still don't really understand what you said about [Internment]; would you mind going over it again?’

a. Imagine that you did not hear or understand the following items. Ask each other for repetition.
   a examining the merits of the procedure;
   b question 2b;
   c detainees;
   d the separation of powers;
   e how the courts can control executive action;
   f the distinction between 'right' and 'lawful'.

21
Legal exercises

b. How does the rule of law relate to the need to ‘guarantee the courts their political independence’?

c. Discuss the following situation with your group using your knowledge of parliamentary sovereignty and the rule of law. Apply the same analytical procedure which is used in the discussion on internment above. If you are working on your own produce a written analysis in the same form.

The Prohibition of Dogs Act 1993 makes it a criminal offence for an individual to keep a dog as a household pet. William owns a dog contrary to the provisions of the Act. He is charged with the offence at the local police station and then locked in a cell for twenty-four hours. The Act does not give the police the power to detain people charged under its provisions.

d. In the recent case of *Malonev. Metropolitan Police Commissioner* [1979] Ch 344, an action was brought applying for a declaration that telephone tapping authorised by the Secretary of State was illegal and unconstitutional. In dismissing the application Vice-Chancellor Megarry stated:

Vocabulary

**29** Several words and phrases which mean 'legal' or 'illegal', 'allowed' or 'not allowed'. See how many you can find and list them in a table as follows:

<table>
<thead>
<tr>
<th><strong>illicit/not allowed</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Adjective</td>
</tr>
<tr>
<td>Noun</td>
</tr>
<tr>
<td>Verb</td>
</tr>
<tr>
<td>a</td>
</tr>
<tr>
<td>b</td>
</tr>
<tr>
<td>d</td>
</tr>
<tr>
<td>f</td>
</tr>
</tbody>
</table>

**30** Complete the table below, using a dictionary if necessary.
2.3.4 Judicial review

The process of judicial review is a practical application of the rule of law. It forms the basis of a growing body of administrative law which regulates the relationship between the courts, public administrative bodies (including the executive) and individual citizens. Again, you should clearly understand that judicial review does not enable the courts to question the merits of administrative action or the validity of an Act of Parliament.

Some of the grounds for judicial review are illegality, irrationality and procedural impropriety. These are all tests by which the courts have judged administrative actions to be ultra vires (i.e. in excess of power). The effect is to render the action void, that is it has no legal effect. It is treated as if it had never existed.

Lord Greene's statement has been accepted as the standard test for unreasonableness in judicial review cases. It was used to unusual effect in the case of Secretary of State for Education v. Thameside MBC [1977] AC 1014. Under s.68 of the Education Act 1944 the Secretary of State was given powers to give direction to a local education authority which the Minister was satisfied was acting unreasonably. Thameside council proposed to modify its existing education scheme and the Secretary of State sought a court order enforcing the council to comply with his direction to adhere to the original scheme. He was satisfied that the council was acting unreasonably by seeking to change the scheme within a very short period of time.

The Court of Appeal and the House of Lords refused the order; the Secretary of State had misunderstood the meaning of the word 'unreasonable'. Although there were difficulties in setting up the new scheme within the prescribed time, the council's action was not so unreasonable that no reasonable council would do it. The House of Lords went further, declaring that it was the Secretary of State who was acting unreasonably in issuing the direction, primarily because his action was motivated by political considerations.

Language notes

The second sentence in the extract from Lord Greene MR (lines 4-9) is complex but very important. It consists of three parts:

e. 'Once that question is answered in favour of the local authority . . .' The local authority is right so far.

f. '. . . it may still be possible to say that they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it.' The local authority may be wrong.

g. '. . . although the local authority have kept within the four corners of the matters which they ought to consider . . .' The local authority has not taken into account any irrelevant considerations.

In such long sentences it is helpful to read the whole sentence quickly, before and after examining the grammar and vocabulary, in order to understand the overall meaning.

Consider also the construction in lines 3-4: '. . . they ought to have taken into account'. If this appears difficult to you, give yourself some practice with the exercise below along the lines of the following example:
Example: They took irrelevant considerations into account. They ought not to have taken them into account.

19. a The council changed the scheme within a short period, b The Secretary of State issued the direction.

c The police detained him for 24 hours, d They used inhuman interrogation procedures, e The police were in his house without permission.

Legal exercises

20. What is meant by the statement that ‘judicial review is a practical application of the rule of law’?
21. What do you understand by the term *ultra vires*?
22. In what way does the process of judicial review regulate the relationship between administrative bodies and the individual citizen?

To answer the following two questions you will first need to identify the powers which have been given to the relevant authorities. Secondly, look at the actions which have been taken by the authorities, and thirdly compare these to their powers. Look to see if the authorities have done something which they have no power to do or if they have failed to do something which they are required to do.

23. Refer back to question 19 on p. 27. Consider the following situation in the light of what you now know about judicial review.

Marion has a nine-year-old daughter, Alison, who has grey eyes. Alison attends the local village school. One day Marion receives a letter from the local education authority advising her that under s.1 of the Female Education Act 1997 Alison's right to full-time education will cease on her tenth birthday.

Advise Alison on the validity of this action.

24. The Town Redevelopment Act 1994 gives local authorities the power compulsorily to purchase and clear land for 'the building of new housing estates'. It also imposes a duty to 'consult those people who will be affected by any such compulsory purchase'.

Newtown Council vote to compulsorily purchase and redevelop a group of houses which includes a house owned by Mr Stormy. The council issues orders for the immediate demolition of the houses and announces its intention to build a new housing estate and council offices on the site.

Advise Mr Stormy of his legal position.

2.4 Evaluation

In section 2.1 it was stated that the purpose of a constitution was to set the parameters of governmental power and the rights and duties of the citizens. In liberal democratic societies great emphasis is placed on maintaining the correct balance between public powers and the rights of the individual citizens: while it is necessary for governments to regulate the affairs of society this must not be achieved by restricting the basic rights and liberties of the individual. We have seen that in many countries these rights are guaranteed by a written constitution which is enforced by the courts.
Because there is no written constitution in the United Kingdom, the limitations on government power are largely self-imposed, relying on unenforceable conventions and a political culture based on the rule of law. Confidence in these traditional restraints has recently diminished and this has been reflected in an increasing demand for a more formal protection of human rights.

The European Convention on Human Rights is a subject which we will consider in more detail in Chapter 10. We will then also re-examine the debate surrounding the enactment of a Bill of Rights. At this stage you should be aware of the constitutional implications of such an enactment, particularly the impact that it would have on the role of the judiciary and the supremacy of Parliament.

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Vocabulary

Try and find words or phrases with an equivalent meaning to those below.

a basic  

b fixed  

c most of the time  

d caused  

e strengthens  

f in spite of  

g damage  

h alone

Notemaking

Use the outline below to make notes on the excerpt from Dugdale above. You will need to use abbreviations; many of them will be personal but below are some common abbreviations and symbols which you will find useful.

e.g. for example i.e. that is, in other words  

vs. (versus) against  

cf. compare(d), with  

+ (or &) and = same as, like  

:jfc different from, unlike  

--> cause, lead to, so  

caused by therefore because  

I' however  

rise, increase --> fall,  

decrease

> more than  

< less than

NB: Personal abbreviations are not used in the outline so it is longer than usual. [Pers. abbrev. not used in outline --> longer th. usual.]

25. Nature of proposed B. of R.:  

a.  
b.  
c. }
26. L.S. sees need for B. of R. V
   a.  
   b.  e.g.

27. But
28. Arguments vs. B. of R.
   a.  
   b.  
   c)  

29. Conclusion:

Legal exercises

1.12. What effect would a Bill of Rights have on the following constitutional maxims: a) parliamentary sovereignty, b) judicial review?

Use the answers to question 42 above as the basis for a debate on the following proposal:

'A Bill of Rights would increase the protection of human rights in the United Kingdom.'

Choose two teams of three people to present arguments for and against the proposition. The speakers should be allowed five minutes each to present their arguments and they should then answer questions from the rest of the group. A vote should then be taken on which team has presented the most convincing arguments.

To prepare for the debate you will need to reread this chapter very carefully, taking notes on the arguments which could support either side of the debate. The arguments should then be presented in a structured way with each member of the team addressing a particular issue. These should include:

a) An examination of the features of the British constitution and how these affect the roles of the legislature, executive and judiciary.

b) How are human rights protected under the present system? Are these safeguards adequate?

c) What effect would a Bill of Rights have on the roles of the legislature, executive and judiciary? Would this provide greater protection of human rights?

If you are working on your own write an essay of 500 words analysing the arguments for and against the proposition using the preceding points.

Section 1 of the Protection of Citizens’ Rights Act 1995 states: 'All citizens shall have the right to privacy and freedom from unwanted intrusion into their private lives.'

Detective Sergeant Squeeze is a senior police officer in ' squad. His work brings him into regular contact with a pi businessman, Flash Harry, and on several occasions DS has entertained Flash Harry at his home. A national newspaper Investigator, is publishing a series of articles on business receives information that Flash Harry is not completely horn business dealings. During the course of investigating information one of its reporters takes a photograph of DS : and Flash Harry having dinner together at a London rest.

How does this situation reflect fears in the enactment of a Bill of Rights in the United Kingdom?
3 Sources of law

Summary

Legal content

Case law
1.2.4 The hierarchy of the courts
1.2.5 The binding element in precedents
1.2.6 Evaluation

1.2.6 Statute law
1.2.6 The purpose of statutory interpretation
1.2.6 Aids to interpretation

Aim

To provide an introduction to the law-making processes and to examine the ways in which the judges identify the law. The chapter concentrates on the primary sources of law - case law and statutes - through an analysis of judicial precedent and statutory interpretation. The advantages and disadvantages of these principles will be assessed and some comparisons made with other legal jurisdictions. A practical illustration of the system is provided by case and statute reading exercises.

Language content

Grammar: decoding long sentences (by identifying main clause):
'so' as a pro-form; unreal conditionals Vocabulary: Latin plurals; adjectival suffixes Study skills: bibliographical references

3.1 Case law

In Chapter 1 we looked at the different meanings of the phrase 'common law'. You will remember that one of those meanings is the law which is based on judicial decisions, otherwise known as case law. When we use the word 'case' in this context we mean the legal action or dispute which has been brought to the courts for resolution. The judges decision is the law - hence 'case law'. However, judges are not free to reach any decision they wish to; they are bound to follow certain rules and these rules form the system of judicial precedent.

Judges are bound by the legal rules in previous cases. This is called the principle of stare decisis which means 'stand by what has been decided'. Its purpose is to achieve certainty and consistency in the law, but it is also important that the system should be sufficiently flexible to allow the law to develop and adapt to changing social and economic conditions. Later we will examine the advantages and disadvantages of judicial precedent and assess whether it ensures the correct balance between certainty and flexibility. First, let us examine how the system works in practice.
3.1.1 The hierarchy of the courts

In the English legal system some courts have more authority than others. Judges in the lower courts are bound to follow the decisions of judges in the higher courts. The following text provides an outline of the hierarchy of the courts and the ways in which judges are bound by the decisions of other judges.

Pre-reading exercise

3 Before you read the following passage in detail scan the text in order to identify the seven courts which are mentioned, and list them separately.

The House of Lords is the highest appeal court in the English legal system. Its decisions are binding on all other courts. Until 1966 the House of Lords was also bound by its own previous decisions. In that year the Lord Chancellor, Lord Gardiner, issued a Practice Statement which stated that ‘while treating former decisions of this House as normally binding’ their Lordships would ‘depart from a previous decision when it appears right to do so’.

The Court of Appeal is below the House of Lords in the hierarchy. It is bound by the decisions of the House of Lords and its decisions are binding on all lower courts. It is also bound to follow its own previous decisions except when a previous decision of the Court of Appeal conflicts with a decision of the House of Lords, b there are two conflicting Court of Appeal decisions when it must choose which one to follow, and c a previous decision was given per incuriam (through lack of care - generally when some relevant law was not taken into consideration). These exceptions to the rule that the Court of Appeal must abide by its own previous decisions are called the rules in Young v. Bristol Aeroplane Company (1944), the case in which the rules were laid down.

The court below the Court of Appeal is the High Court of Justice. It is bound to follow the decisions of the House of Lords and the Court of Appeal. Judges of the High Court will normally follow the decisions of fellow High Court judges but they are not absolutely bound to do so.

The court of first instance for criminal cases, the Crown Court, is bound by the House of Lords and the Court of Appeal; the lowest courts in the hierarchy, the county court and the magistrates' courts are bound by the High Court, the Court of Appeal and the House of Lords. No court is bound by the decisions of these lower courts.

Since 1972 when Britain joined the European Community, the position of the European Court of Justice must also be considered. This will be examined in detail in Chapter 10 but you should be aware that it is a court of referral in relation to EC law and not a court of appeal, although its decisions on the interpretation of EC law are binding on British courts.

Text notes:
1 although this court has the same name as the second chamber in Parliament it is a separate body whose members are judges. These judges, known as Law Lords, are also members of the House of Lords in its legislative capacity but, by convention, do not take part in politically controversial debates.
1 judges who are members of the House of Lords
1 refers here to the Court of Appeal
1 the first place (i.e. where a case is heard for the first time)
### The hierarchy of the English courts

**Figure 3.1** The hierarchy of the English courts. *(Source: Hogan, Seago and Bennett, *A Level Law*, Sweet and Maxwell 1988, p. 21.)*

The diagram given in Figure 3.1 should help you to remember this hierarchy of the English court system.

**Comprehension check**

4 Decide whether the following statements are true or false according to the passage above:
   a. Only the High Court is bound by decisions of the Court of Appeal.
   b. The House of Lords is bound by its own precedents.
   c. The High Court must always follow the precedents set by the House of Lords.
   d. English courts are not bound by the European Court of Justice.

### Legal exercises

30. What is meant by the doctrine of *stare decisis*?

31. What was the significance of the 1966 Practice Statement?

32. When may the Court of Appeal depart from its own previous decisions?

33. What is the position of the European Court of Justice in the English legal system?

### 3.1.2 The binding element in precedents

In the course of a judgment a judge will say many things, not all of which are binding. For the purposes of judicial precedent a judgment comprises two parts: the *ratio decidendi* and *obiter dictum* (see the extract below for explanations of these terms). It is the *ratio decidendi* which is binding in later cases. The *obiter dictum* is merely persuasive, that is it may help future judges to reach a decision but they are not bound to follow it.

Before examining these concepts in more detail it is important that you understand the meaning of three words which are particularly relevant to the practice of judicial precedent. These are:
a. Reversing - in most cases the unsuccessful party may appeal to a higher court. The decision of the lower court is said to be reversed if the higher court reaches a decision in favour of the appellant.
b. Overruling - this occurs when a higher court in a later case refuses to endorse the statement of law in an earlier case.
c. Distinguishing - this occurs when the facts of a later case are sufficiently different to justify the court reaching a different decision from an earlier case involving the same legal principle.

You should be sure that you understand the meaning of these words before continuing. Check them in a law dictionary if you have any doubts about their meaning.

Vocabulary

The *ratio decidendi* and *obiter dictum* are the two parts of a legal decision. It is also useful to look at English words which are based on these Latin words.

*ratio* - rational, based on reason.
*dictum* - to dictate, e.g. to 'speak' a letter to a secretary, to 'tell' someone what to do.

Notice that plurals are formed in Latin in a different way from English, e.g.

*ratio* (pi.) rationes
*dictum* (pi.) dicta

If you have not learnt Latin you will need to note the different types of plurals each time you meet a new one.

The following case study will help to illustrate two important principles contained in the text - that the *ratio decidendi* of a case is determined by the courts in later cases and that a judge is only bound when the facts of a later case are sufficiently similar; they may restrict or enlarge the *ratio* in different factual situations.

**Donoghue v. Stevenson: a case study in precedent**

*Donoghue v. Stevenson* [1932] AC 562 is the case from which the modern law of negligence developed. The plaintiff's friend bought her a bottle of ginger beer which had been manufactured by the defendant. She became ill as a result of drinking the ginger beer which contained the remains of a decomposed snail. She sued the manufacturer for compensation for the damage she had suffered. The case was decided, on appeal, in the House of Lords. The leading judgment was given by Lord Atkin. There are two legal principles which can be drawn from the judgment. These can be found in the following extracts:

Text notes:

34. rotten (i.e. very old)
35. animal with soft body and shell

If your Lordships accept the view that the appellant's pleading discloses a relevant cause of action, you will be affirming the proposition that by Scots and English law alike a manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him, with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.
The liability for negligence ... is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law: You must not injure your neighbour, and the lawyers' question: Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

Text notes:

36. in order to
37. this is a reference to one of the Ten Commandments in the Bible
38. in mind
39. here means 'in this way', i.e. 'closely and directly'

Language notes

Excerpt a consists of one very long sentence. This can more easily be understood if you can find the main part of the sentence and then look at the subsidiary clauses (more attention will be paid to this problem in later chapters). The main part here is contained in lines 2, 3, 8 and 9:

... you will be affirming the proposition that a manufacturer of products owes a duty to the consumer to take that reasonable care.

11 Can you identify the three conditions which are mentioned in the subsidiary clauses?

The principle contained in extract a imposes a legal duty on manufacturers to take reasonable care to prevent injury to the life or property of the consumers of their products. The principle contained in b is much wider. It has become known as the 'neighbour principle', creating a general legal duty to avoid foreseeable harm in all areas of activity.

The House of Lords found for the plaintiff in this case. It was clear that the case established a precedent for future cases involving manufactured products which caused injury to the consumer's person or property. Some writers argue that this narrow legal principle was the ratio decidendi of the case and that the broader neighbour principle was obiter dicta and therefore not binding but merely persuasive. This is a debatable assertion – the neighbour principle has been the basis of many successful legal actions involving different factual situations.

A direct application of the principle can be found in the judgment of Denis Henry QC in the case of Tutton & others v. A. D. Walter Ltd. [1986] QB 61. The plaintiffs kept bees near land farmed by the defendants. The defendants sprayed their land and crop of oil seed rape with insecticide, killing the bees. The defendants knew the insecticide was dangerous to the bees but they failed to give the plaintiffs adequate warning of the spraying. The plaintiffs sued the defendants, basing their action on Lord Atkin's neighbour principle in Donoghue v. Stevenson. Note how the judge applies the principle to the specific facts of the case.

Per Denis Henry QC:

I turn then to apply Lord Atkin's test in Donoghue v. Stevenson [1932] AC 562, 580. First: was spraying a noticeably yellow oil seed rape field with Hostathion likely to injure bees? Clearly the answer must be yes. Second: was this reasonably foreseeable? Again, yes, the defendants knew both of the 5 dangers, and of the presence of the bee keepers within the area (the latter from a previous spraying incident the year before). It is not a case where the defendants were ignorant of the presence of bee keepers. Third: ought then the defendants to have had the bee keepers in their contemplation? Again, the answer to that is not only yes, they ought to, but in the event they did; there is the instruction the defendants gave to Mr. Moon to warn the bee keepers. There is no suggestion that the defendants were ignorant of the existence of any of these plaintiffs.

I therefore conclude that the plaintiffs were owed a duty of care.
Comprehension check

12 Note 26: What would ‘the former’ refer to in this instance?

This case is a good example of a simple application of the neighbour principle and clearly illustrates the point made in the extract on p. 48 that judges in later cases may apply a ratio in different factual situations. Of course, not all cases are so straightforward. The case of Hedley, Byrne & Co. Ltd v. Heller & Partners Ltd [1964] AC 465 provides a more complex example.

Vocabulary

a. Find words which have similar meanings to those listed below:
   a responsible
   b careless
   c clearly stated
   d wrong reports.

Language and information check

b. In order to revise some prepositions, form six sentences, choosing one item from each column below:

a The bankers inquired with his advice.
b He had dealings for a large company.
c They relied to the loss.
d She sued him on its readers.
e A newspaper is not financially accountable for his negligence
f The bank was not responsible into the financial situation.

The distinguishing facts in Hedley Byrne v. Heller were:

i. the case involved negligent words or statements as opposed to negligent actions, and
ii. the plaintiffs had suffered financial loss rather than physical injury.

You will see from the extract that these distinguishing facts led the House of Lords to restrict the neighbour principle which is based on foreseeability of harm. They added the further requirement of a ‘special relationship’ between the plaintiffs and the defendants. This has become the ratio decidendi of the case. As with the neighbour principle the nature of a ‘special relationship’ has been determined by subsequent cases involving financial loss suffered as a result of negligent words - and so the case law develops.

Legal exercises

40. Distinguish between ratio decidendi and obiter dicta. What is the significance of the distinction?

41. What is the difference between reversing and overruling?

42. Why do you think it was necessary for the House of Lords to distinguish between negligent words and negligent acts in Hedley Byrne v. Heller?

43. As a lawyer, you are consult by your client, Mrs Gamble, over the following problem. On which case precedent would you base your advice and why?

Mrs Gamble had inherited £10,000 when her rich uncle died. She consulted her bank manager, Miss Nugget, on the best way to invest the money. On the basis of her advice Mrs
Gamble bought £5,000 worth of shares in Intoil pic. She invested the remaining £5,000 in a construction company called Kwikbuild pic after reading an article about the company in a national newspaper. Both companies were financially unsound at the times Mrs Gamble invested in them and six months later both Intoil pic and Kwikbuild pic have ceased trading and Mrs Gamble has lost all her money.

This last type of question is very common in legal study; it is called a 'problem' question. There is a special technique for answering these questions which is different from the usual essay technique. It can be quite simply stated although in practice it is more difficult:

a. Identify the area(s) of law involved - often there will be more than one.

b. State what the law is in the relevant area(s) by an analysis of cases.

c. Apply the law to the facts of the problem, particularly analysing any facts which distinguish the problem from the relevant case law.

Although you are in a way being asked to act as a judge in problem questions it is not important that you reach a decision - often the case law will be uncertain so that it will not be possible to do so. The questions are a test of your ability to recognise the legal issues involved and to analyse the law.

22 Identify the advantages and disadvantages of judicial precedent and complete the table below.

<table>
<thead>
<tr>
<th>Disadvantages</th>
<th>Advantages</th>
</tr>
</thead>
<tbody>
<tr>
<td>a Certainty:</td>
<td>44. may prevent mistakes by judge;</td>
</tr>
<tr>
<td>45.</td>
<td>b etc.</td>
</tr>
<tr>
<td>a</td>
<td>b etc.</td>
</tr>
</tbody>
</table>

Finally in this section we should consider, in outline, some comparisons with other legal?

Bibliographical references

*see Cross, Precedent in English Law, 3rd ed., 1977, pp. 17-19*).


(Cross, op. cit., pp. 12-17;


Here are three bibliographical references (or citations) which may need some explanation:
As with cases there is a standard way of referring to articles in legal journals. You will see that it is very similar to the way that cases are cited. There are a large number of law journals with most countries publishing their own. Full details of these journals and their abbreviated references can be found in most good law dictionaries.

1.2.7 Author's surname.
1.2.8 Title. Italic letters indicate that this is a book not an article.
1.2.9 3rd edition. It is important to find the right edition because new information is included in later editions and, of course, page numbers may change.
1.2.10 Year of publication.
1.2.11 From page 17 to page 19.

Cross, op.cit., pp. 12-17.

1 opere citato (Latin) means ‘in the work cited’, i.e. the book by 58 English Law and Language

23 Decide if the preceding statements are true (T) or false (F).
   a The USA has a centralised legal system, b The decisions in US Federal and District courts are binding in later cases.
   c The legal code is important in Continental legal systems, d Continental systems of law have been greatly influenced by the writing of jurists, e In England, textbooks have greater authority than judicial decisions.

3.2 Statute law

Statute law is the law enacted by Parliament. In section 2.3.1 on parliamentary sovereignty we examined the supreme legislative powers of Parliament and emphasised the constitutional fact that the judiciary have no authority to question the validity of an Act of Parliament. Nevertheless judges do have an important role in relation to legislation: Parliament passes the laws, and the courts apply them to individual cases. But before the law can be applied the judges must decide on its meaning. This process is called statutory interpretation.

Before examining this process in more detail you should study Figure 3.2 which shows the normal procedure of a Bill through Parliament. An individual piece of legislation is known as a Bill during its legislative process and called an Act after receiving the Royal Assent. Unless otherwise specified, an Act comes into force on the day it receives the Royal Assent. Figure 3.3. on pp. 61-3 shows a copy of an Act of Parliament. Look at the explanatory notes carefully as these indicate the different parts of the Act.
3.2.1. The purpose of statutory interpretation

48. When interpreting statutes the courts are said to be seeking the 'intention of Parliament'. This search is as difficult as that for the ratio decidendi of a case. Parliament comprises many individual members of Parliament who may have different views on any one subject. Seeking the common intention of such a disparate group would be a speculative and impossible task. In this sense the 'intention of Parliament' is a phrase with little meaning.

The purpose of statutory interpretation therefore is to find the meaning of the words used in the statute. As people studying in a foreign language you will be particularly aware that words are often complex and ambiguous and finding their meaning is not an easy task. The following passage outlines some of the inherent difficulties:

Language note

'So' often replaces a word or clause which has already been used in the same or previous sentence. It can be used formally in writing or informally in conversation.

**Example:** A: 'John saw the Prime Minister yesterday.'
B: 'Did he say so?' (so = that he saw the PM yesterday)

**Example:** Many people feel that a Bill of Rights would increase the protection of personal liberties.
The Labour party thinks so but the Conservative party does not. (so = that a Bill . . .)

**Sources of**

**Figure 3.3** Example of an Act of Parliament. (Courtesy HMSO.) (See section 3.2 Statute Law on page 58.)

**Congenital Disabilities (Civil Liability) Act 1976**

1976 CHAPTER 28

**Short title** -

**Official citation**

An Act to make provision as to civil liability in the case of children born disabled in consequence of some person's fault; and to extend the Nuclear Installations Act 1965, so that children so born in consequence of a breach of duty under that Act may claim compensation.

[22nd July 1976]
long title

Date of Royal Assent -

Enacting formula -

Date of Royal Assent -

Enacting formula -

Section 1

1. —(1) If a child is born disabled as the result of such an occurrence before its birth as is mentioned in subsection (2) below, and a person (other than the child's own mother) is under this section answerable to the child in respect of the occurrence, the child's disabilities are to be regarded as damage resulting from the wrongful act of that person and actionable accordingly at the suit of the child.

Sub-section - (2) An occurrence to which this section applies is one which—

49. affected either parent of the child in his or her ability to have a normal, healthy child; or

50. affected the mother during her pregnancy, or affected her or the child in the course of its birth, so that the child is born with disabilities which would not otherwise have been present.

a. Subject to the following subsections, a person (here referred to as "the defendant") is answerable to the child if he was liable in tort to the parent or would, if sued in due time, have been so; and it is no answer that there could not have been such liability because the parent suffered no actionable injury, if there was a breach of legal duty which, accompanied by injury, would have given rise to the liability.

b. In the case of an occurrence preceding the time of conception, the defendant is not answerable to the child if at that time either or both of the parents knew the risk of their child being born disabled (that is to say, the particular risk created by the occurrence); but should it be the child's father who is the defendant, this subsection does not apply if he knew of the risk and the mother did not.

c. The defendant is not answerable to the child, for anything he did or omitted to do when responsible in a professional capacity for treating or advising the parent, if he took reasonable care having due regard to then received professional opinion applicable to the particular class of case; but this does not mean that he is answerable only because he departed from received opinion.

d. Liability to the child under this section may be treated as having been excluded or limited by contract made with the parent affected, to the same extent and subject to the same restrictions as liability in the parent's own case; and a contract term which could have been set up by the defendant in an action

Figure 3.3 contd.

c. 28 Congenital Disabilities (Civil Liability) Act 1976

by the parent, so as to exclude or limit his liability to him or her, operates in the defendant's favour to the same, but no greater, extent in an action under this section by the child.

(?) If in the child's action under this section it is shown that the parent affected shared the responsibility for the child being born disabled, the damages are to be reduced to such extent as the court thinks just and equitable having regard to the extent of the parent's responsibility. Marginal 2. A woman driving a motor vehicle when she knows (or note ought reasonably to know) herself to be pregnant is to be regarded as being under the same duty to take care for the safety of her unborn child as the law imposes on her with respect to the safety of other people; and if in consequence of her breach of that duty her child is born with disabilities which would not otherwise have been present, those disabilities are to be regarded as damage resulting from her wrongful act and actionable accordingly at the suit of the child.

51. —(1) Section 1 of this Act does not affect the operation of the Nuclear Installations Act 1965 as to liability for, and compensation in respect of, injury or damage caused by occurrences involving nuclear matter or the emission of ionising radiations.

a. For the avoidance of doubt anything which—

(i) affects a man in his ability to have a normal, healthy child; or

(£>) affects a woman in that ability, or so affects her when she is pregnant that her child is born with disabilities which would not otherwise have been present,

is an injury for the purposes of that Act.

b. If a child is born disabled as the result of an injury to either of its parents caused in breach of a duty imposed by any of sections 7 to 11 of that Act (nuclear site licensees and others to secure that nuclear incidents do not cause injury to persons, etc.), the child's disabilities are to be regarded under the subsequent provisions of that Act (compensation and other matters) as injuries caused on the same occasion, and by the same breach of duty, as was the injury to the parent.

c. As respects compensation to the child, section 13 (6) of that Act (contributory fault of person injured by radiation) is to be applied as if the reference there to fault were to the fault of the parent.

d. Compensation is not payable in the child's case if the injury to the parent preceded the time of the child's conception and at that time either or both of the parents knew the risk of their child being born disabled (that is to say, the particular risk created by the injury).

52. —(1) References in this Act to a child being born disabled or with disabilities are to its being born with any deformity, disease or abnormality, including predisposition (whether or not susceptible of immediate prognosis) to physical or mental defect in the future.

a. In this Act(6) "born" means born alive (the moment of a child's
birth being when it first has a life separate from its mother), and "birth" has a corresponding meaning; and

1.2.12 "motor vehicle" means a mechanically propelled vehicle intended or adapted for use on roads.

1.2.12 Liability to a child under section 1 or 2 of this Act is to be regarded—

(a) as respects all its incidents and any matters arising or to arise out of it; and

Disabled birth due to radiation. 1965 c. 57.

Interpretation and other supplementary provisions.

Figure 3.3 contd.

Congenital Disabilities (Civil Liability) Act 1976 c. 28

(b) subject to any contrary context or intention, for the purpose of construing references in enactments and documents to personal or bodily injuries and cognate matters,
as liability for personal injuries sustained by the child immediately after its birth.

53. No damages shall be recoverable under either of those sections in respect of any loss of expectation of life, nor shall any such loss be taken into account in the compensation payable in respect of a child under the Nuclear Installations Act 1965 as amended; and for the purposes of section 28 of that Act (power by Order in Council to extend the Act to territories outside the United Kingdom) section 3 of this Act is to be treated as if it were a provision of that Act.

a. This Act binds the Crown.

b. —(1) This Act may be cited as the Congenital Disabilities (Civil Liability) Act 1976.
     (2) This Act extends to Northern Ireland but not to Scotland.

Legal exercises

i. There are four possible interpretations of the following simple sentence. What are they?
   'John met Peter and he raised his hat.'

   ii. Which of the following would you consider to be a 'vehicle'?

   a  a car  
   b  a pram  
   c  a bicycle  
   d  an aeroplane.

   iii. Which of the following would you consider to be a 'building'?

   a  a tent  
   b  a house  
   c  a garden shed  
   d  a caravan.

3.2.2 Aids to interpretation

Given that words are an imperfect means of communication a number of aids have evolved to assist judges in the interpretation of statutes. The next extract provides an outline of some of these aids but be aware that statutory interpretation is not a scientific process and these 'rules' of interpretation are general principles rather than strict rules.
The statute in this case imposed a duty on railway companies to provide an adequate warning system whenever railway workers were 'repairing or relaying' the railway line. The plaintiffs husband was killed whilst oiling and cleaning the railway points. No warning system had been provided. The House of Lords, by a three to two majority, held that Mr Berriman had been engaged in maintaining the railway line at the time of his death and this was not the same as 'repairing and relaying' it.

It is interesting to note in this case that the Law Lords in seeking the 'literal and usual' meaning of the words 'repairing and relaying' reached different conclusions; that is the minority considered that Mr Berriman's actions did come within the meaning of 'repairing and relaying'.

This gives a clear illustration of the difficulty in determining the meaning of what might appear to be very simple words.

Paras. 2-5: 2

The defendant was charged under section 3 of the Official Secrets Act 1920 which provides that no person shall 'in the vicinity of a prohibited place' obstruct any member of Her Majesty's forces. George was charged under section 3 after entering a Ministry of Defence airfield. He argued that he was not in the vicinity of, but actually in a prohibited place and had therefore not committed the offence according to the words of the statute. His argument was rejected - such an interpretation of the Act would lead to absurdity and nullify its purpose. The court interpreted the offence as 'in or in the vicinity of.'

Section 1(1) of the Street Offences Act 1959 made it a criminal offence 'for a common prostitute to loiter or solicit in a street or public place for the purpose of prostitution'. The defendant was charged after soliciting from the balcony of her own home. She appealed against her conviction under the Act, claiming that she was not soliciting 'in the street or public place'. Lord Parker CJ approached the case by 'considering the mischief aimed at in the Act'. This was to 'enable people to walk the street without being molested or solicited by common prostitutes'. It did not matter that she had been standing on the balcony or in the street. Her appeal was rejected.

Text notes:
56. replacing, i.e. laying again
57. to stand around
58. to make a sexual offer for payment
Legal exercises

a. What is the constitutional reason for judges seeking to find the intention of Parliament when interpreting statutes?

b. Why does the need for statutory interpretation arise?

c. Distinguish between internal and external aids. Give examples of both.

d. Why do you think Parliament enacted the statute which was at issue in the Berriman case? Do you think the decision of the majority of the House of Lords in that case reflected the intention of Parliament?

There is a particular technique to use in answering questions which require you to apply legislation to a given situation:

i. Decide on the words which will require interpretation.

ii. Analyse the words on the basis of your knowledge of the rules of statutory interpretation.

iii. Apply your analysis to the situation.

Apply this technique to the following question.

e. Consider the following situations in the light of the relevant statutory provisions:

a. Section 4 of the Offensive Weapons Act 1994 provides: ‘Any person found carrying a gun, pistol, knife or any other offensive weapon shall be guilty of a criminal offence.’ Jaimes is charged under the Act after being found carrying a piece of broken glass which he had picked up off the street.

b. The Employers’ Liability (Defective Equipment) Act 1969 section 1(1) reads: ‘Where, after the commencement of this Act - (a) an employee suffers a personal injury in the course of his employment in consequence of a defect in equipment provided by his employer for the purpose of his employer’s business; and (b) the defect is attributable wholly or partly to the fault of a third person (whether identified or not), the injury shall be deemed to be attributable to negligence on the part of the employer . . .’

Section 1(3) reads: ‘In this section - “equipment” includes any plant or machinery, vehicle, aircraft and clothing . . . “personal injury” includes loss of life . . .’

Bert is a sailor on board the Morning Star (a supertanker). He was employed by Transpico who owned the vessel. The ship sinks on its first voyage as a result of a defect in its construction. Bert suffers serious injuries in the incident. Rose, who is also employed by Transpico, is on the ship for a free ride as a reward for thirty years’ service to the company. Rose dies in the accident.

Sources of law 67

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Text notes:

59. faulty
60. ‘to attribute’ means to consider to result from
61. considered
62. on (for ships)
3.2.3 Reform

The case of London & North Eastern Railway Co. v. Berriman is an illustration of the way in which a strict adherence to the literal approach to statutory interpretation may fail to achieve the purpose of a statute - or the intention of Parliament. The argument in favour of such an approach is based on the doctrine of parliamentary sovereignty: the courts must accept the words used by Parliament and not seek to guess its intention or purpose if this cannot be readily supported by the words used. If this leads to injustice it is for Parliament to change the statute.

The most vocal critic of this approach was Lord Denning. He enthusiastically adopted what has become known as the 'purposive approach' to statutory interpretation. This is an extension of the Mischief Rule which looked beyond the words of the statute to its purpose. This approach received little judicial support. The conflicting statements of Lord Denning and Lord Simmonds in Magor & St Mellors Rural District Council v. Newport Corporation [1951] 2 All ER 839 highlight the judicial conflict.

Lord Denning:

We do not sit here to pull the language of Parliament and of Ministers to pieces and make nonsense of it. That is an easy thing to do, and it is a thing to which lawyers are too often prone.62 We sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis.

Lord Simmonds:

. . . The court, having discovered the intention of Parliament and of Ministers too, must proceed to fill in the gaps. What the legislature has not written, the court must write. This proposition, which restates in a new form the view expressed by the Lord Justice in the earlier case of Seaford Court 5 Estates Ltd v. Asher (to which the Lord Justice himself refers), cannot be supported. It appears to me to be a naked usurpation64 of the legislative function under the thin disguise of interpretation. And it is the less justifiable65 when it is guess-work with what material the legislature would, if it had discovered the gap, have filled it in.66 If a gap is disclosed, the remedy10 lies in an amending Act.

Text notes:
63. 'to be prone to' means to have a tendency to
64. 'to usurp' means to take wrongly
65. even less justifiable
66. notice this is an 'unreal' conditional - see text for more information

Comprehension check

Unreal conditionals (in the past) are formed as follows:
If + had + past participle, would/could/might have + past participle.

For example: 'If the legislature had discovered the gap, it would have filled it in.'

These conditionals are called 'unreal' because in fact both actions did not happen.

37 The second extract above is quite difficult. It may help you to understand it if you try and decide whether the following statements are true or false:

a Lord Simmonds agrees with Lord Denning, b Lord Simmonds thinks that 'filling in the gaps' in an Act is part of the judges' role of interpretation, c Lord Simmonds thinks that 'filling in the gaps' is the job of the legislature.
d Lord Simmonds thinks that judges should not try and guess how the legislature might fill a gap.

Apart from the constitutional implications of Lord Denning's approach it is argued that an excess of judicial creativity would lead to individual judges determining what is 'right and just'. This
could result in accusations of bias and prejudice. Nevertheless there has been a general criticism of a strict adherence to the Literal Rule. The Law Commission report *The Interpretation of Statutes* (Law Comm. No. 21) approved the use of the Mischief Rule, preferring 'a construction which would promote the general legislative purpose over one which would not'. Lord Denning's campaign has undoubtedly led to a more flexible judicial approach to statutory interpretation.

**Vocabulary**

Adjectives can usually be recognised by their suffixes (endings) and this can help your understanding of a text.

38 Using the nouns and verbs below, choose appropriate suffixes to form adjectives. The following suffixes will be needed: -ive, -able, -al, -ory, -ary, -ing, -ent. (All the adjectives have already been used in the book.)

<table>
<thead>
<tr>
<th>Noun</th>
<th>Adjective</th>
</tr>
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<tbody>
<tr>
<td>defect</td>
<td>-ive</td>
</tr>
<tr>
<td>reason</td>
<td>-ive</td>
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<tr>
<td>law</td>
<td>-ary</td>
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<td>description</td>
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<td>continent</td>
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<td>statute</td>
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<td>hierarchy</td>
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<td>discretion</td>
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<th>Verb</th>
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<td>speculate</td>
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<td>reconcile</td>
<td>-able</td>
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<td>distinguish</td>
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</table>

39 Write an essay of 500 words on the following statement:

Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use good sense to remedy it - by reading words in, if necessary - so as to do what Parliament would have done, had they had the situation in mind.


Essay questions in the form of a quotation are very common. Before writing your essay think carefully about the meaning of the quotation and its particular emphasis in relation to the topic. You will rarely be asked to provide only factual information; you must also be prepared to comment critically on the subject and to analyse the relevant areas of debate or controversy. Read the following essay plan to help you structure your essay properly.
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67. What is the aim of the judges when they are interpreting statutes? What is the constitutional reason for this aim?
68. What difficulties are involved in achieving this aim?
69. Why is statutory interpretation necessary? What aids are available to assist judges in the interpretation of statutes?
70. What is strict interpretation and how does it lead to absurd and unjust situations?
71. What approach to interpretation is Lord Denning advocating? Why is it controversial?
4 The courts

Summary
Legal content

72. Classification of the courts
73. The civil courts
   1.2.13 Small claims
   1.2.14 Reform
74. The criminal courts
   1.3.3 The decision to prosecute
   1.3.4 The classification of offences and the criminal courts
   1.3.5 Review
75. Tribunals and arbitration Additional reading

Aim
To provide a factual account of the structure of the English courts based on the distinction between civil and criminal courts, and courts of first instance and appellate courts. A critical assessment of the functions and purpose of the system will be included together with an analysis of proposals for reform.

Language content
Grammar: long noun phrases
Vocabulary: dictionary use - using guidewords; verb + noun collocations; negative affixes (-less, dis-, mis-)

4.1 Classification of the courts
You will now be familiar with the distinction between civil and criminal law; this distinction is reflected to some extent in the structure of the courts. Before you read the following extract you should also be aware of the difference between courts of first instance and appellate courts. The court in which a case is first heard is called the court of first instance. In almost all cases it is possible to appeal to a higher court for reconsideration of the decision of the original court. These courts are called appellate courts. It may be helpful to refer back to the diagrammatical representation of the courts in Chapter 3 (see Figure 3.1) before reading the following extract.

Although there is no clear distinction between the civil and criminal courts or courts of first instance and appellate courts, it is usual to deal with the individual courts under those headings.

4.2 The civil courts
Before examining these courts in more detail let us consider their purpose. Civil actions take place between two or more individuals in dispute. These disputes can take many forms, for example between neighbours, families, companies, consumers and manufacturers. It is the function of the civil courts to adjudicate on these disputes. Different types of disputes will require different forms of adjudication; some disputes will be more serious and complex than others. These differences are reflected in the court system; the jurisdiction of the courts is limited by the type of case and, with the lower courts, by the geography and the amount of the claim. For example, the county courts are limited in tort and contract cases to incidents which occurred...
within their locality and to claims which do not exceed £5,000. Look for the differences as you read the extract below then answer the questions.

Text notes:
I. who disagree strongly with each other
2. to give judgment

76. Let us look more closely at the trial of civil cases. The courts with original civil jurisdiction are

Comprehension check

4. Below is a diagrammatic representation of some of the information in paragraph two of the extract from Williams above. Use the following items to complete it.

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Family Division, 'wives', Queen's Bench, 'wrecks', equity, admiralty affairs, divorce, 'wills', common law, Chancery Division.

![Diagram]

- a
- e
- h

deals mainly with
a What are the civil courts of first instance? b Who will hear a case in the High Court? c What is the term used for the party who appeals to a higher court? 
d What is the most important civil court of first instance? e From which courts will an appeal lie to the Court of Appeal? f To which court will an appeal lie from the magistrates’ court? g What is the highest appellate court? 
h What appeal procedure was introduced by the Administration of Justice Act 1969?

**Dictionary use**

Which page will the word be on? When looking for a word it is useful to look at the top of the page where the first and last entries on that page are printed. For example, if you are looking for *appellate* you will

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find it (in *The Cassell Concise English Dictionary*) on the page which begins with *apothecium* and ends with *appellate*. (NB. Other dictionaries will have alternative layouts.)

6 Match the words below with the correct pairs of entries. (NB: You will not need to use some pairs.) Do this as quickly as you can.

a jurisdiction, b original, c dispute, d consumer, e adjudication, f wreck, g will, h illegitimate, i matrimonial, j stipendiary.

A consummate - contend  
B Stilton - stoccade  
C wildebeest - wimple  
D adherence - *ad libitum*  
E adaxial - adhere  
F stickle - stilt  
G wicker-wild  
H illegible - imagine  
I dispossess - disseminate  
J orgasm - ormolu  
K junket - justify  
L ignorant - -illegal  
M materia medica - matting  
N wrap - wring  
O constitution - consummate

---

4.2.1 Small claims

We have accepted that cases will differ in seriousness and complexity and that the court system should take account of that fact - a straightforward action for the recovery of a £200 debt will require different practice and procedure from a dispute over a commercial contract involving a
complex point of law and a claim for £500,000 damages. This is not to say that all cases involving small sums of money will be simple as regards the law and the definition of a small claim based on financial limits is necessarily arbitrary. Nevertheless, the majority of cases are not complex and it is important that the system provides an efficient means of resolving these disputes. Within the formal court system this is done through the county court arbitration service. The following paragraphs provide an outline of this procedure.

The present county courts were set up in 1846 to provide a locally based service which was easily accessible to ordinary people. Figures provided by the Consumer Council in its 1970 report, *Justice out of Reach*, showed that the county courts had become primarily a debt-collection agency in which the majority of actions were taken out against the ordinary person: 'far from being the court of the ordinary person as plaintiff, it was the court in which the ordinary person was sued for debt' (White, *The Administration of Justice*, Blackwells, at p. 145). Equally, county court procedure had become too formal and expensive to fulfill its original purpose. In response the arbitration scheme was introduced in 1973.

The original jurisdiction of the arbitration scheme was to hear claims involving less than £75. It is now mandatory for all claims of less than £500, and may be used, if both parties agree, in disputes involving larger sums. (There is a provision for certain cases involving complex legal issues to be referred to a higher court.) The case is heard by the Registrar of the county court (an 'assistant' judge who is employed by the court and whose role is administrative and judicial).

The first stage is the preliminary consideration; the Registrar will discuss the dispute with the parties and decide how the case is to be conducted. In very simple cases it may be possible to resolve the dispute at this stage. If the case goes to full arbitration the procedure is less formal than in the county court.

It is important to realise that 'arbitration' in the legal system does not have the lay meaning of conciliation and compromise, as, for example, in an industrial dispute. The county court arbitration scheme is adversarial in which one party 'wins' and the other 'loses'.

During the hearing the Registrar will hear both sides to the dispute and may call expert witnesses. Legal representation is permitted but no costs for this are awarded. This is to discourage the use of lawyers who have a tendency to complicate and formalise even a simple case! After considering the evidence the Registrar will give judgment. There is no right of appeal against the decision of the Registrar although the decision may be challenged on very limited grounds, e.g. evidence of misconduct by the Registrar.

The arbitration scheme has been relatively successful in increasing access to the courts for the ordinary people who make up 38 per cent of the plaintiffs. However, it has been criticised for still being too complex: in particular the adversarial style of enquiry, although modified, continues to disadvantage and intimidate many ordinary people. There is general agreement that an
inquisitorial form of hearing would be more appropriate in small claims actions, allowing the Registrar to play a more active role. Recent legislative reforms in this area will be considered in the next section.

Text notes:
77. based on random choice
78. settlement of a dispute
79. contrasted with 'may be used' later in the sentence so means 'obligatory'
80. frighten (cf. 'timid')

Comprehension check

7 Check your comprehension of the passage above by completing the summary below with words from the list which follows; you may use a word more than once.

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in addition, because, excess, formal, nevertheless, agree, informal, informality, access, although, more, less, permitted, may, formality, must, discouraged, disagree, should. The arbitration scheme was set up (a) ................................county courts were no longer fulfilling their purpose of providing (b) .........................to ordinary people in a fairly (c) .........................situation and without excessive (d) .....................or cost. Small claims of up to £500 (e) ......................be heard by the scheme; larger claims (f) ................................also be heard if both sides (g) .........................Parties (h) .........................be represented by lawyers but this is (i) .........................Although rules are followed, the atmosphere is (j) .........................formal than in the county courts; (k) .........................the procedure is said still to be very complex and to frighten many people.

Research

81. Find out the names of the civil courts in your country. Set them out in a diagram, noting which courts are courts of first instance and which are appellate courts.

Legal exercises

82. George had agreed to sell his car to Nigel for £200. George has delivered the car but Nigel refuses to pay the money. George wishes to take legal action to enforce the contract. He seeks your advice on the following:

a To which courts may he apply to enforce the payment? b If he is dissatisfied with the result to which court(s) may he appeal?
83. Angela is seriously injured in a road accident caused by Percy's negligence. She estimates her damages to be £50,000.

a In which court would the legal action take place? b If her action is unsuccessful, to which courts may she appeal?

4.2.2 Reform

Whilst it is the function of the civil court system to adjudicate on disputes, its aim should be to do so efficiently and fairly. The correct balance between these two requirements is not easy to assess or achieve. An efficient system which is quick and cheap may not provide an adequate opportunity for the litigants to prepare and present their case. Equally, delay and expense can lead to injustice. There was increasing criticism throughout the 1980s that existing civil procedure was neither efficient nor fair. Statistics seemed to support these criticisms. In personal injury cases the average period of time from accident to settlement in the High Court was five years; in 40 per cent of cases the costs involved in bringing the action were higher than the amount of damages awarded (Zander, Cases and Materials on the English Legal System, Weidenfeld & Nicholson, 1988). Costs and delays are less in the county courts but they leave no room for complacency. The government responded to these criticisms by undertaking a major review of the civil justice system.

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Text note:
18 one should not be satisfied with the situation

In 1985, Lord Hailsham of St Marylebone, the then Lord Chancellor, announced the setting up of a civil justice review. The purpose of the review was to improve the machinery of civil justice in England and Wales by means of reforms in jurisdiction, procedure and court administration, and in particular to reduce delay, cost and complexity. Each of the five main classes of civil business, personal injury, small claims, housing, commercial and debt would be examined in three stages each. First research, secondly a consultation paper and thirdly, implementation by legislation. The Lord Chancellor would be assisted by an advisory committee which, besides 10 lawyers, academics and consumer representatives, included a significant business element.

The research on each of the main areas has been imaginative. The civil justice process has been seen as a management system in which the efficiency of the system and the productivity of those within it was sorely in need of improvement. The final consultation paper . . . was issued in March 1987 and it includes a number of radical proposals:

84. Either an amalgamation of the County Court and the High Court into a single civil court, or a much closer integration of the two. The closer integration of the two could be achieved by a 'one court entry' system. All civil cases would start in the same way and be allocated to a particular court on the basis of their complexity.

The Law Society has said that it prefers a unified court system though the Bar and the judiciary are against it. The 'one court entry' system looks a likely compromise.

85. Full pre-trial disclosure of evidence including witness statements.
A new case flow management system giving a timetable for the progress of cases. This would reduce cost and delay.

a. Increased judicial productivity. This would entail reducing leave entitlements and an extra hour's sitting per day. High Court judges would also go on circuit. This proposal - which would effectively give 25 per cent more judging time - has not been popular with the judiciary!

b. A new in-court arbitration system for cases involving claims between £1,000 and £5,000. The new small claims arbitration limit would be £1,000.

c. A unified cost system.

d. Greater incentives and competition in the remuneration of court-related work. Flat-rate fees should be available for simpler forms of litigation and there could perhaps be incentives and penalties for speedy resolution or delay. It works with builders why not lawyers?!


**Text notes:**

i. used as an adjective: 'at that time'

ii. greatly

iii. society of solicitors

iv. barristers

v. judges

vi. involve

vii. i.e. sitting as judges in court

viii. travel to provincial courts

ix. fixed

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**Comprehension check**

11 In point (g) of the extract above, can you work out from the context what are meant by 'incentives' and 'penalties'?

**Language point - compound nouns**

In formal and academic English you often find quite long phrases composed of several nouns. There are several in the extract above

a. Line 19: 'a one court entry system'

b. Line 25: 'a new case flow management system'

c. Lines 27-8: 'leave entitlements'

d. Line 31: 'a new in-court arbitration system'
As a result of the civil justice review the Lord Chancellor, Lord McK introduced reforming legislation to Parliament - the Courts and Li Services Bill. The Bill received the Royal Assent in late 1990. Most of provisions relate to the deregularisation of the legal profession; these be examined in Chapter 6. The Act gives the Lord Chancellor the power to redistribute business between the High Court and the county courts on basis of the complexity of individual cases. The financial limit of £5,000 cases heard by the county courts is therefore removed. The proposal has been generally welcomed in theory but fears have been expressed over how the system will work in practice. The county courts already overburdened and delay is a growing problem. Any increase in workload of the county courts without compensating administrative refo will defeat the purpose of the proposed changes. The Courts and Legal Services Act also enacts the proposal in the justice review that the role of the Registrar in small claims actions should be more inquisitorial. It also gives a statutory right to litigants to be represented by a lay28 person. This is part of the policy of the L Chancellor to break the legal profession's monopoly on rights of audience. This is discussed more fully in Chapter 6.

Text note:
28 here means without legal qualifications

4.3 The criminal courts

Whilst the purpose of the civil courts is to adjudicate on disputes between individuals and to provide a remedy for the wronged party, the purpose of the criminal courts is to determine whether the accused person has committed a crime and to punish the wrongdoer. The balance required is between the need to protect society and the need to ensure, as far as possible, that only the guilty are punished. Given the serious consequences which can result from being convicted of a criminal offence, it is necessary to provide safeguards against wrongful conviction. One way is that the burden of proof29 is on the prosecution to prove 'beyond
reasonable doubt' that the accused committed the offence charged. This can be compared with the burden of proof in civil actions where it is for the plaintiff to show that the defendant is liable 'on the balance of probabilities', that is the defendant is more likely to be liable than not. Also criminal court procedure seeks to ensure a fair hearing by imposing very strict and formal rules of evidence (compare the flexible procedures in the county court arbitration scheme). Many other safeguards relate to the powers of the police. Details of these will not be included in this book but references to relevant additional reading can be found at the end of this chapter.

Text note:
29 the obligation of proving

4.3.1. The decision to prosecute

Who can start criminal proceedings?

The general rule is that any private individual can bring a prosecution even if the individual has no particular interest in the case. This is usually referred to as a 'private prosecution'.

Vocabulary

In the preceding extract there are several verb + noun groups (e.g. to investigate a case). These expressions are commonly used in legal texts and it is useful to learn each verb and noun as a pair. To help you to do this, try the following exercise.

15 Match the following verbs with appropriate nouns from the list which follows:

a to bring ...................

b to instigate ..................

c to institute .................

d to give .....................

e to conduct..................

f to prefer ....................

g to remedy ...................

h to punish ...................

i to commit ...................

proceedings, the prosecution, a prosecution, a wrong, action, an offence, a criminal, charges, evidence.

Not all criminal offences are automatically followed by a prosecution. The CPS has discretion to prosecute; in some cases, for example, it may be considered more appropriate to administer an informal caution to the offender. Prior to the creation of the CPS this discretion rested with the local police force. This led to a lack of uniformity. Whether a criminal offence was followed by a prosecution could depend on where the offence was committed. This was a further criticism of the existing system.

The CPS was established as a national prosecution service in an attempt to ensure greater uniformity. The decision to prosecute should now be exercised according to the Code of Practice to Crown Prosecutors issued by the Director of Public Prosecutions. In deciding whether to start a prosecution the following factors should be considered:

86. Is there a realistic prospect of conviction? (This is known as the 51 per cent rule.)
87. Will the public interest be served by bringing a prosecution? Relevant considerations would be the age and physical or mental condition of the offender and the 'staleness' of the offence.
88. Would it be more appropriate to issue a formal warning?

4.3.2 The classification of offences and the criminal courts

After the decision to prosecute has been taken the case will eventually be heard in court. As with civil actions, criminal offences vary in seriousness and complexity. These differences are again reflected in the criminal court system. The following text outlines the way in which offences are classified and the courts of first instance and appeal.
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Text notes:
89. opposite to 'fresh', e.g. stale bread = old bread
90. finally

Pre-reading exercise
16 Without reading the whole passage try scanning it quickly and answer briefly the following questions.

a What is a summary offence? b Give an example, c
What is an indictable offence? d Give an example.

e What are offences triable either way? f Give examples.

There are three types of criminal offence: summary, indictable and triable either way. The nature of the offence will determine the mode of trial.

Summary offences are the less serious offences such as minor motoring offences. These offences are tried in the magistrates' court, without a jury, before a bench of three lay magistrates or one stipendiary magistrate. The magistrates will hear the evidence and reach a verdict. If the verdict is 'not guilty' the defendant will be acquitted; if 'guilty' the magistrates will pass sentence. The sentencing jurisdiction of the magistrates' courts is limited to imposing a fine of up to £1,000 or a maximum prison sentence of six months. A case requiring a heavier punishment must be referred to the Crown Court for sentencing. The defendant may appeal to the Crown Court for a retrial or to the Divisional Court of the Queen's Bench Division of the High Court 'by way of case stated'. This is on the basis that the magistrates were wrong in law or in excess of jurisdiction. The magistrates are required to 'state the case' (give reasons) for their verdict. This form of appeal is, unusually, available to the prosecution as well as the defence. A further appeal to the House of Lords is available in cases involving important questions of law.

Indictable offences are the most serious offences; examples are murder, manslaughter, rape and arson. The procedure for trying these offences begins in the magistrates' court with 'committal proceedings'. Here it is the role of the magistrates to conduct a preliminary enquiry into the prosecution's evidence and to decide whether it forms a prima facie case against the accused. If not, the case will be discharged. This is not the same as an acquittal as the prosecuting authorities can bring the case before the court again if further evidence becomes available; a person who has been acquitted of a charge cannot be tried for the same offence again. If a prima facie case is established, a full trial will take place in the Crown Court before a judge and a jury of twelve ordinary people. It is the role of the judge in this full trial to rule on points of law and, if the defendant is found guilty, to pass sentence. The jury assesses the facts and reaches a verdict. The defendant may appeal against conviction or sentence to the Criminal Division of the Court of Appeal. Under the Criminal Justice Act 1988, the
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prosecution may also appeal to the Court of Appeal for the sentence to be increased. A further appeal to the House of Lords may be allowed on an important point of law.

Offences triable either way are offences which can be committed in a serious or minor way. Burglary and theft are examples of these offences. They may be tried summarily in the magistrates’ court or on indictment in the Crown Court. The magistrates will determine the mode of trial taking into account such factors as the seriousness of the offence and the possible appropriate sentence. The accused can insist on trial by jury in the Crown Court but not on summary trial, if the magistrates decide that the case should be tried on indictment. The trial procedure will then follow the summary or indictable form as discussed previously.

Text notes:

91. to indict = to charge with an offence
92. able to be tried
93. without legal qualifications
94. legally qualified, paid and full-time
95. unlawful killing without malice
96. burning of another person’s property
97. a case supported by some evidence
98. ‘sent away’ (NB: ‘dis’ is a negative prefix, e.g. d/honest), or, as here, ‘removed’ (cf. dismiss, meaning to send away)
99. entering a building and stealing, causing damage, grievous bodily harm or rape
100. taking property from another person

Vocabulary

17 As in the last vocabulary exercise, match the following verbs with the appropriate nouns from the list below:

<table>
<thead>
<tr>
<th>a</th>
<th>b</th>
<th>c</th>
<th>d</th>
<th>e</th>
<th>f</th>
<th>g</th>
</tr>
</thead>
<tbody>
<tr>
<td>to try</td>
<td>to hear</td>
<td>to reach</td>
<td>to pass</td>
<td>to impose</td>
<td>to conduct</td>
<td>to assess</td>
</tr>
</tbody>
</table>

a verdict, an enquiry, an offence, the facts, the evidence, a fine, sentence.
Research

Find out the names of the criminal courts in your country and make a diagram of them, noting which courts are courts of first instance and which ones are appellate courts. Is there an independent body like the CPS in your country which is responsible for deciding which cases come to trial? If not, who is responsible for these decisions?

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Legal exercises

101. Distinguish between the three types of criminal offence.
102. What is the role of the magistrates in trying each of these offences?
103. What are the respective roles of the judge and the jury in trying indictable offences in the Crown Court?
104. What are the advantages of the Crown Prosecution Service?
105. Distinguish between 'discharge' and 'acquittal'.
106. Mr Smith is arrested by the police on the suspicion of murdering Mr Jones.
   a What factors will be taken into account when deciding whether to prosecute him?
   b What events will follow if the decision is taken to prosecute him?
   c If he is found guilty, may either Mr Smith or the prosecution appeal from the verdict?
107. Mrs Brown is charged with theft before the magistrates' court.
   a Before which courts may she be tried?
   b If she is found guilty, to which courts may she appeal?

Text note:
51 of each in turn

4.3.3 Review

In 1974 the Irish Republican Army (IRA) waged a bombing campaign on the mainland of Britain in which twenty-eight people were killed. A number of people were subsequently tried and found guilty of the offences. These people became known as the 'Guildford Four' and 'Birmingham Six' (after the names of the cities in which it was alleged they had planted the bombs). In addition, the seven members of a family named Maguire, the 'Maguire Seven', were gaoled for illegal possession of explosives. The 'Guildford Four' and the 'Birmingham Six' claimed that they had been beaten whilst in police custody in order to obtain confessions from
them. The Maguire family questioned the validity of the forensic\textsuperscript{52} evidence on which their conviction was based. All those convicted appealed through the formal appeal procedures; these were dismissed.

In 1989, as a result of receiving fresh evidence, the Home Secretary referred the case of the 'Guildford Four' back to the Court of Appeal. The Court of Appeal freed the men and the Home Secretary set up an enquiry into their case and that of the Maguire family, headed by Sir John May. The latter case has been referred to the Court of Appeal by the Home Secretary who has stated that their convictions are unsafe and can no longer stand. The case of the 'Birmingham Six' has also been referred back to the Court of Appeal.

The May enquiry revealed serious weaknesses in the system of criminal justice which has led to calls for the establishment of an independent tribunal to prepare evidence and to investigate appeals. Many of the weaknesses highlighted by the enquiry have to some extent been removed by changes which have taken place since the time of the original convictions; the CPS has taken over prosecutions from the police and the Criminal Evidence Act 1984 has placed stricter controls on detention and interrogation procedures, but most of these reforms are not applicable to suspected terrorists. Many people believe that the judges are too willing to accept prosecution evidence and the whole adversarial system of justice has been questioned. A change to an inquisitorial system would have an enormous impact on the whole system of justice; it is not something which can be undertaken lightly or speedily but the results of the May enquiry indicate that much could be done to improve the existing system without undertaking such a radical reform of trial procedure.

\textbf{Text note:}
52 medical evidence used in court

\section*{4.4 Tribunals and arbitration}

The formal courts are not the only means of solving disputes; adjudication increasingly takes place outside the court system. This is a further reflection of the need to suit the form of dispute resolution to the nature of the dispute involved. The two main forms of extra\textsuperscript{53}-court adjudication are tribunals and arbitration. Let us look first at tribunals.

\textbf{Text note:}
53 outside (Latin) - see also 2 lines above
You will see from the extract that 'administrative' tribunals are created by statute to resolve disputes arising from the relevant social legislation. In contrast, arbitration is a private means of adjudication, arranged and agreed between the parties involved. It is used in many different situations from the resolution of complex commercial disputes to those involving comparatively minor disagreements between the suppliers of goods and services and the consumer.

The advantages of arbitration are similar to those of tribunals: speed, lower costs, flexibility, informality and adjudication by an expert. These advantages must of course be balanced against the disadvantages. There is the argument that cheaper, quicker and less formal hearings result in a poor quality service and a two-tier\(^{62}\) system of adjudication, and that the legal training of judges and the formal rules of court procedure have been developed to ensure a fair trial. Nevertheless the increasing use of tribunals and arbitration seems to indicate that they are a popular way of resolving disputes. On a wider point, they also increase the points of access to justice for the ordinary person. This topic will be considered in more detail in Chapter 6.

Text note:
\(^{62}\) two levels, i.e. one higher and the other lower In quality

Vocabulary review

Below are three different exercises to help you remember some of the vocabulary in this chapter.

109. Complete the table below:

<table>
<thead>
<tr>
<th>Verb</th>
<th>Noun</th>
<th>Adjective</th>
</tr>
</thead>
<tbody>
<tr>
<td>arbitrate</td>
<td>a ...........</td>
<td>x</td>
</tr>
<tr>
<td></td>
<td>b</td>
<td></td>
</tr>
<tr>
<td></td>
<td>c ...........</td>
<td>claimant</td>
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<td>e ...........</td>
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<td>g ...........</td>
<td>administrator</td>
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<td>j</td>
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<td>l</td>
</tr>
<tr>
<td></td>
<td></td>
<td>intimidated</td>
</tr>
</tbody>
</table>

110. In Chapter 3 four common 'negative' prefixes were practised (un-, in-, j1-, im-). Three other negative affixes are -less, e.g. hopeless, dis-, e.g. dissatisfied, and mis-, e.g. misread (= read inaccurately). Try and use the correct affix to form opposites of the words below. In some cases you will have to make other changes.

<table>
<thead>
<tr>
<th>a useul</th>
<th>d agree</th>
</tr>
</thead>
<tbody>
<tr>
<td>b conduct</td>
<td>e colourful</td>
</tr>
<tr>
<td>c encourage</td>
<td>f persuade</td>
</tr>
</tbody>
</table>

111. Complete the sentences below using one or two words:

a The claim _____________ £5,000 (i.e. was for more than £5,000).

b A person who appeals is called ________________

c Money which is owed is called ________________

d __ __ __ has a similar meaning to compulsory.

e A _____________ is a person involved in a civil case.

f A _____________ magistrate is paid, whereas a ______________ magistrate is not.
Minor motoring offences are ____________ offences but murder is ____________ offence.

Research

32 What facilities for the adjudication of disputes outside the formal court system are available in your country?

The courts 95

Legal exercises

33 Choose two teams from your group to debate the following proposition: The civil courts in the English legal system do not provide an adequate means of adjudication in the majority of disputes.’

Follow the instructions for the preparation and performance of the debate which are provided at the end of Chapter 2. You will need to reread carefully the sections in this chapter on the civil courts, tribunals and arbitration. The relevant issues are:

a The aims of the civil justice system, b The existing machinery of the system, c How adequate is it for the majority of disputes? d Will the reforms contained in the Courts and Legal Services Act improve the system?

If you are working on your own, prepare a written argument for each side of the debate taking into account the preceding points.