second edition

business law

David Kelly, Ruby Hammer and John Hendy

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business law

Business Law offers comprehensive coverage of the key aspects of business law that is easy to understand for both law and non-law students.

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Key learning features include:

- new Law in Context boxes that contextualise each chapter's topic within the Business environment;
- diagrams and tables to illustrate key principles;
- newly updated key cases boxes that highlight landmark cases for easy reference;
- revision summaries at the end of each chapter to help clarify the key points for each topic;
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- an up-to-date and easy-to-use companion website with additional features to further your learning and track your progress.

Business Law offers a topical overview of this subject in an accessible style suited to both law and business studies undergraduates.

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David Kelly, Ruby Hammer
and John Hendy

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Outline Contents

Detailed Contents

Preface

One of the problems facing the person studying business activity, and one that is specifically addressed in this book, is the fact that business enterprise takes place within a general and wide-ranging legal environment, but the student is required to have more than a passing knowledge of the legal rules and procedures which impact on business activity. The difficulty lies in acquiring an *adequate* knowledge of the many areas that govern such business activity. Law students may legitimately be expected to focus their attention on the minutiae of the law, but those studying law within, and as merely a component part of, a wider sphere of study cannot be expected to have the same detailed level of knowledge as law students. Nonetheless, they are expected to have a more than superficial knowledge of various legal topics.

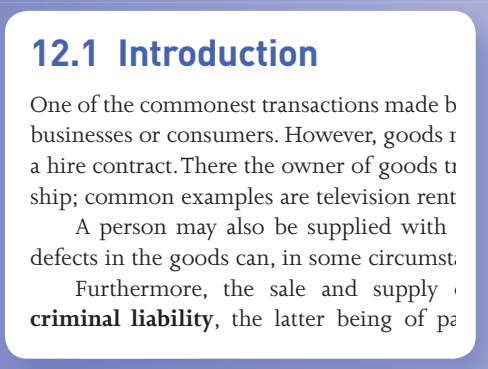
For the author of a business law textbook, the difficulty lies in pitching the material considered at the appropriate level so that those studying the subject acquire a sufficient grasp to understand law as it relates *generally* to business enterprise, and of course to equip the student to pass the requisite exams. To achieve this goal, the text must not be too specialised and focus on too small a part of what is contained in most business law syllabuses. For example, although contract law is central to any business law course, to study it on its own, or with a few ancillary topics, is not sufficient. (With three subject specialists involved, each with a favouritism to advance, not to say an axe to grind, it can be well imagined that the final text was a matter of some serious debate.) Nor, however, should the text be so wide-ranging as to provide the student with no more than a superficial general knowledge of most of the possible interfaces between law and business enterprise. A selection has to be made and it is hoped that this text has made the correct one. No attempt has been made to cover all the areas within the potential scope of business law, but it is hoped that attention has been focused on the most important of these, without excluding any area of major importance. Additionally, it is hoped that the material provided deals with the topics selected in as thorough a way as is necessary.

We have taken the decision that anyone conducting a business today can no longer deny, or ignore, the impact of their activity on the physical environment and the legal rules that constrain such activity. Consequently, we have included a section on environmental law and its impact on business. Perhaps this may seem an unusual topic for the moment, but we are sure that we are merely beating a path that others will follow in the future. As is only to be expected, we have made every effort to ensure that the text is as up to date as we can make it.

David Kelly
Ruby Hammer
John Hendy
February 2014

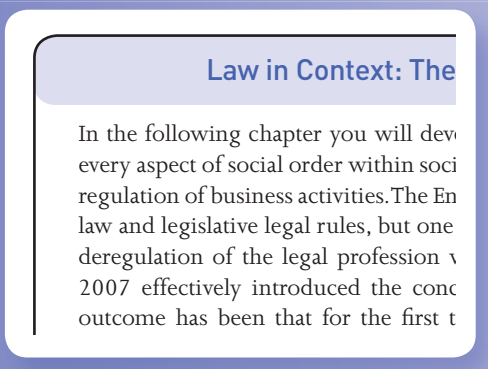
Guide to Using the Book

Business Law is rich with features designed to support and reinforce your learning. This Guided Tour shows you how to make the most of your textbook by illustrating each of the features used by the authors.



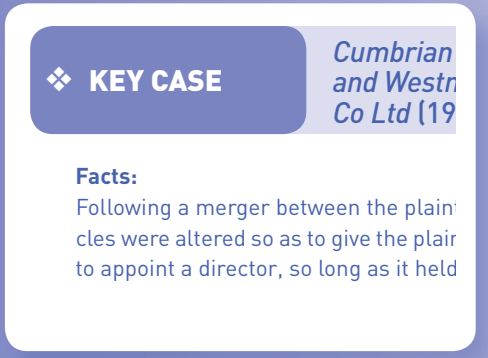
Chapter Overviews

These overviews are a brief introduction to the core themes and issues you will encounter in each chapter.



Law in Context

A new feature at the start of each chapter to contextualise the aspects of law under discussion in order to enhance your understanding of the relationship between the law and the business world.



Key Cases

A variety of landmark cases are highlighted in text boxes for ease of reference. The facts and decisions are presented to help you reach an understanding of how and why the court reached the conclusion it did.

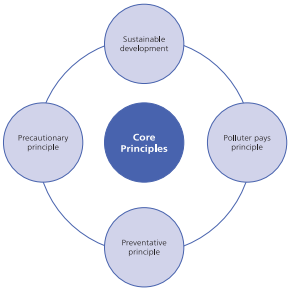


Figure 15.1 Key Principles of Environmental Law

Diagrams and Flowcharts

Diagrams, tables and flowcharts provide a clear visual representation of important or complex points.

will reasonably and promptly afford a
of any grievance they may have.

There is generally no requireme
former employee. However, in certai

See Chapter 15 →

employer open to a claim c
discrimination legislation –
Yorkshire Police v Khan (2001).
tion.) Also, if a reference is provide
accurate reflection of the employee'
Assurance plc (1995), the employer ma

Cross-References

Related material is linked together by a series of clearly marked cross-references.

Summary

Individual Employment Rights

An employee is employed under a contrac
independent contractor is employed unde
because many employment rights only acc

- An express term in a document which
is conflict between them – *Stevedoring &*

Chapter Summaries

The essential points and concepts covered in each chapter are distilled into bulleted summaries at the end of each chapter in order to provide you with an at-a-glance reference point for each topic.

Further Reading

There are a number of further reading mate
the general nature of Tort Law. The classic

Jones, MA and Dugdale, AM (eds), *Clerk &*
Maxwell

For general textbooks on Tort Law the follc

Harpwood, VH, *Modern Tort Law*, 7th edn, 2

Further Reading

Selected further reading is included at the end of each chapter to provide a pathway for further study.

Guide to the Companion Website

www.routledge.com/textbooks/kelly

Visit *Business Law*'s Companion Website to discover a comprehensive range of resources designed to enhance the learning and teaching experience for both students and lecturers.

On this accompanying website, you'll find the following resources with which you can engage with *Business Law*:

Chapter Questions and Suggested Answers

Questions around the key topics discussed in the book are provided, with sample and suggested discussion points also shown to demonstrate full and accurate answers.

Multiple Choice Questions

Ordered by chapter, these MCQs have been written to test your knowledge and understanding of each subject in the book.

Diagrams

A full set of PowerPoints of the diagrams contained within the text should be of use for lecturers and students alike.

Weblinks

Make use of a series of website links, ordered by Part, to related websites.

Case Studies

Scenarios presenting business law in practice are posed, relating to the key topics discussed in the chapters. Sample answers and points of discussion are then provided for your consideration.

Table of Cases

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Table of Statutory Instruments

Table of Conventions, Treaties and EC Legislation

European Treaties and Conventions

Directives

Regulations

List of Abbreviations

ACAS	Advisory, Conciliation and Arbitration Service
ADR	Alternative Dispute Resolution
BNA	Business Names Act 1985
CA	Companies Act 1862/1985/1989
CAA	Criminal Appeal Act 1968/1995
C(AICE)A	Companies (Audit, Investigations and Community Enterprise) Act 2004
CDDA	Company Directors Disqualification Act 1986
CFREU	Charter of Fundamental Rights of the European Union
CIB	Companies Investigations Branch (of the Department of Trade and Industry)
CIC	Community Interest Company
CJA	Criminal Justice Act 1972/1988/1993
CPA	Consumer Protection Act 1987
CPIA	Criminal Procedure and Investigations Act 1996
CPR	Civil Procedure Rules
CPS	Crown Prosecution Service
DCOA	Deregulation and Contracting Out Act 1994
DDA	Disability Discrimination Act 1995/2004
EAT	Employment Appeal Tribunal
EC	European Community
ECJ	European Court of Justice
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEC	European Economic Community
EOC	Equal Opportunities Commission
EPA	Equal Pay Act 1970
ERA	Employment Rights Act 1996
EU	European Union
FRC	Finance Reporting Council
FRRP	Financial Reporting Review Panel
GPSR	General Product Safety Regulations 1994/2005
HRA	Human Rights Act 1998
IA	Insolvency Act 1986
LLP	Limited Liability Partnership
LLPA	Limited Liability Partnership Act 2000
LLPR	Limited Liability Partnership Regulations 2001
MA	Misrepresentation Act 1967
NICA	Northern Ireland Court of Appeal
NMWA	National Minimum Wage Act 1998
PA	Partnership Act 1890
RRA	Race Relations Act 1976
SDA	Sex Discrimination Act 1975/1986

SEA	Single European Act 1986
SGSA	Supply of Goods and Services Act 1982
SoGA	Sale of Goods Act 1979
TDA	Trade Descriptions Act 1968
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TULR(C)A	Trade Union and Labour Relations (Consolidation) Act 1992
TURERA	Trade Union Reform and Employment Rights Act 1993
UCTA	Unfair Contract Terms Act 1977
YJCEA	Youth Justice and Criminal Evidence Act 1999

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Part 1

Law, Legal Sources and Dispute Resolution

Business activity takes place in the context of a legal environment that structures, regulates and controls its operation. The greater part of this book will focus on the substantive legal rules and procedures that apply to such business activity. However, in order to understand the content of 'business' law as such, it is necessary to have a general understanding of the legal context. It is the purpose of the first part of this book to supply this necessary general introduction to the level required to allow the business student to understand and deal with specific legal rules. It has to be emphasised that no business related modules, courses or indeed text books look to make lawyers of those who study them, but they do look to make their students aware of the inescapable interface between law and business activity.

This part of our book introduces the reader to the study of law and provides the basis for the later study of more detailed specific areas of business law. The first chapter addresses what law is and where it comes from. In doing so it looks to explain different types of law, particularly legislation and the judge-made common law. The chapter also introduces two further aspects of law that must constantly be borne in mind by businesses: the first of these is the Human Rights Act 1998, the provisions and principles of which apply pervasively throughout all aspects of business. The second specific area of attention is the impact of the UK's membership of the European Union – which is now the source of many of the legal regulations that apply to business activity.

Where legal problems arise they are usually dealt with in the courts and chapter 2 introduces the reader to the courts, both criminal and civil, and explains the relationship between them.

However, it is not always in the parties' interest to take disputes to court and chapter 3 looks at the alternatives to taking court action and the reasons why such alternative dispute resolution procedures are sometimes preferred.

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Chapter 1

Law and Legal Sources

Chapter Contents

Law in Context: The Provision of Legal Services

In the following chapter you will develop an understanding of how law regulates nearly every aspect of social order within society, and the impact it has upon the organisation and regulation of business activities. The English legal system is a rich tapestry of both common law and legislative legal rules but one of the biggest changes in recent times has been the deregulation of the legal profession which interprets such rules. The Legal Services Act 2007 effectively introduced the concept of 'alternative business structures' (ABS). The outcome has been that for the first time in history law firms can operate with capital investment from non-legal investors. Many law firms are already inviting investment from non-lawyers and several brand names have entered the legal service marketplace. This has revolutionised the availability of legal advice to both the private and business sectors, but not without criticism. Many argue that the quality of service and integrity of the legal profession will suffer. Students embarking on a study of business law should remain alert to how the changes work out, as they will have considerable implications for business and commerce.

1.1 The Nature of Law

To a great extent, business activity across the world is carried on within a capitalist, market-based system. With regard to such a system, law provides and maintains an essential framework within which such business activity can take place, and without which it could not operate. In maintaining this framework, law establishes the rules and procedures for what is to be considered legitimate business activity and, as a corollary, what is not legitimate. It is essential, therefore, for the businessperson to be aware of the nature of the legal framework within which they have to operate. Even if they employ legal experts to deal with their legal problems, they will still need to be sufficiently knowledgeable to be able to recognise when to refer matters to those experts. It is the intention of this textbook to provide business students with an understanding of the most important aspects of law as they impinge on various aspects of business activity.

One of the most obvious and most central characteristics of all societies is that they must possess some degree of order, in order to permit their members to interact over a sustained period of time. Different societies, however, have different forms of order. Some societies are highly regimented with strictly enforced social rules, whereas others continue to function in what outsiders might consider a very unstructured manner, with apparently few strict rules being enforced.

Order is, therefore, necessary, but the form through which order is maintained is certainly not universal, as many anthropological studies have shown (see Mansell and Meteyard, *A Critical Introduction to Law*, 1999).

In our society, law plays an important part in the creation and maintenance of social order. We must be aware, however, that law as we know it is not the only means of creating order. Even in our society, order is not solely dependent on law, but also involves questions of a more general moral and political character. This book is not concerned with providing a general explanation of the form of order. It is concerned, more particularly, with describing and explaining the key institutional aspects of that particular form of order that is legal order.

The most obvious way in which law contributes to the maintenance of social order is the way in which it deals with disorder or conflict. This book, therefore, is particularly concerned with the institutions and procedures, both civil and criminal, through which law operates to ensure a particular form of social order by dealing with various conflicts when they arise.

Law is a formal mechanism of social control and, as such, it is essential that the student of law is fully aware of the nature of that formal structure. There are, however, other aspects to law that are less immediately apparent but of no less importance, such as the inescapably political nature of law. Some textbooks focus more on this particular aspect of law than others and these differences become evident in the particular approach adopted by the authors. The approach favoured by the authors of this book is to recognise that studying English law is not just about learning legal rules; it is also about considering a social institution of fundamental importance.

There is an ongoing debate about the relationship between law and morality and as to what exactly that relationship is or should be. Should all laws accord with a moral code, and, if so, which one? Can laws be detached from moral arguments? Many of the issues in this debate are implicit in much of what follows in the text, but the authors believe that, in spite of claims to the contrary, there is no simple causal relationship of dependency or determination, either way, between morality and law. We would rather approach both morality and law as ideological, in that they are manifestations of, and seek to explain and justify, particular social and economic relationships. This essentially materialist approach to a degree explains the tensions between the competing ideologies of law and morality and explains why they sometimes conflict and why they change, albeit asynchronously, as underlying social relations change.

1.2 Categories of Law

There are various ways of categorising law, which initially tends to confuse the non-lawyer and the new student of law. What follows will set out these categorisations in their usual dual form whilst, at the same time, trying to overcome the confusion inherent in such duality. It is impossible to avoid the confusing repetition of the same terms to mean different things and, indeed, the purpose of this section is to make sure that students are aware of the fact that the same words can have different meanings, depending upon the context in which they are used.

1.2.1 Common law and civil law

In this particular juxtaposition, these terms are used to distinguish two distinct legal systems and approaches to law. The use of the term 'common law' in this context refers to all those legal systems which have adopted the historic English legal system. Foremost amongst these is, of course, the US, but many other Commonwealth and former Commonwealth countries retain a common law system. The term 'civil law' refers to those other jurisdictions which have adopted the European continental system of law, which is derived essentially from ancient Roman law but owes much to the Germanic tradition.

The usual distinction to be made between the two systems is that the former, the common law system, tends to be case centred and, hence, judge centred, allowing scope for a discretionary, *ad hoc*, pragmatic approach to the particular problems that appear before the courts, whereas the latter, the civil law system, tends to be a codified body of general abstract principles which control the exercise of judicial discretion. In reality, both of these views are extremes, with the former overemphasising the extent to which the common law judge can impose his discretion and the latter underestimating the extent to which continental judges have the power to exercise judicial discretion. It is perhaps worth mentioning at this point that the Court of Justice of the European Union (CJEU), which was established, in theory, on civil law principles, is in practice increasingly recognising the benefits of establishing a body of case law.

It has to be recognised, and indeed the English courts do so, that although the CJEU is not bound by the operation of the doctrine of *stare decisis* (see 1.6 below), it still does not decide individual cases on an *ad hoc* basis and, therefore, in the light of a perfectly clear decision of the CJEU,

national courts will be reluctant to refer similar cases to its jurisdiction. Thus, after the CJEU decided in *Grant v South West Trains Ltd* (1998) that Community law did not cover discrimination on grounds of sexual orientation, the High Court withdrew a similar reference in *R v Secretary of State for Defence ex p Perkins (No 2)* (1998) (see 1.4.3 below, for a detailed consideration of the CJEU).

1.2.2 Common law and equity

In this particular juxtaposition, these terms refer to a particular division within the English legal system.

The common law has been romantically and inaccurately described as 'the law of the common people of England'. In fact, the common law emerged as the product of a particular struggle for political power. Prior to the Norman Conquest of England in 1066, there was no unitary, national legal system. The emergence of the common law represented the imposition of such a unitary system under the auspices and control of a centralised power in the form of a sovereign king; in that respect, it represented the assertion and affirmation of that central sovereign power.

Traditionally, much play is made about the circuit of judges who travelled around the country establishing the King's peace and, in so doing, selected the best local customs and making them the basis of the law of England by means of a piecemeal but totally altruistic procedure. The reality of this process was that the judges were asserting the authority of the central State and its legal forms and institutions over the disparate and fragmented State and legal forms of the earlier feudal period. Hence, the common law was common *to* all in application, but certainly was not common *from* all. By the end of the 13th century, the central authority had established its precedence at least partly through the establishment of the common law. Originally, courts had been no more than an adjunct of the King's Council, the *Curia Regis*, but, gradually, the common law courts began to take on a distinct institutional existence in the form of the Courts of Exchequer, Common Pleas and King's Bench. With this institutional autonomy, however, there developed an institutional sclerosis, typified by a reluctance to deal with matters that were not, or could not be, processed in the proper form of action. Such a refusal to deal with substantive injustices, because they did not fall within the particular parameters of procedural and formal constraints, by necessity led to injustice and the need to remedy the perceived weaknesses in the common law system. The response was the development of equity.

Plaintiffs who were unable to gain access to the three common law courts might appeal directly to the Sovereign, and such pleas would be passed for consideration and decision to the Lord Chancellor, who acted as the 'King's conscience'. As the common law courts became more formalistic and more inaccessible, pleas to the Chancellor correspondingly increased and, eventually, this resulted in the emergence of a specific court which was constituted to deliver equitable or fair decisions in cases with which the common law courts declined to deal. As had happened with the common law, the decisions of the courts of equity established principles which were used to decide later cases, so it should not be thought that the use of equity meant that judges had discretion to decide cases on the basis of their personal ideas of what was just in each case.

The division between the common law courts and the courts of equity continued until they were eventually combined by the Judicature Acts 1873–75. Prior to this legislation, it was essential for a party to raise their action in the appropriate court; for example, the courts of law would not implement equitable principles. The Judicature Acts, however, provided that every court had the power and the duty to decide cases in line with common law and equity, with the latter being paramount in the final analysis.

Some would say that as equity was never anything other than a gloss on common law, it is perhaps appropriate, if not ironic, that both systems have now effectively been subsumed under the one term: common law.

Common law remedies

Common law remedies are available as of right. The classic common law remedy of damages can be subdivided into the following types:

- *Compensatory damages*: these are the standard awards, intended to achieve no more than to recompense the injured party to the extent of the injury suffered. Damages in contract can only be compensatory.
- *Aggravated damages*: these are compensatory in nature but are additional to ordinary compensatory awards and are awarded in relation to damage suffered to the injured party's dignity and pride. They are, therefore, akin to damages being paid in relation to mental distress. In *Khodaparast v Shad* (2000), the claimant was awarded aggravated damages after the defendant had been found liable for the malicious falsehood of distributing fake pictures of her in a state of undress, which resulted in her losing her job.
- *Exemplary damages*: these are awarded in tort in addition to compensatory damages. They may be awarded where the person who committed the tort intended to make a profit from their tortious action. The most obvious area in which such awards might be awarded is in libel cases where the publisher issues the libel to increase sales. An example of exemplary awards can be seen in the award of £50,000 (originally £275,000) to Elton John as a result of his action against *The* Mirror newspaper (*John v MGN Ltd* (1996)).
- *Nominal damages*: these are awarded in the few cases which really do involve 'a matter of principle' but where no loss or injury to reputation is involved. There is no set figure in relation to nominal damages; it is merely a very small amount.
- *Contemptuous damages*: these are extremely small awards made where the claimant wins their case, but has suffered no loss and has failed to impress the court with the standard of their own behaviour or character. In *Reynolds v Times Newspapers Ltd* (1998), the former Prime Minister of Ireland was awarded one penny in his libel action against *The Times* newspaper; this award was actually made by the judge after the jury had awarded him no damages at all. Such an award can be considered nothing if not contemptuous.

The whole point of damages is compensatory, to recompense someone for the wrong they have suffered. There are, however, different ways in which someone can be compensated. For example, in contract law the object of awarding damages is to put the wronged person in the situation they would have been in had the contract been completed as agreed: that is, it places them in the position in which they would have been *after the event*. In tort, however, the object is to compensate the wronged person, to the extent that a monetary award can do so, for injury sustained; in other words to return them to the situation they were in *before the event*.

Equitable remedies

Remedies in equity are discretionary; in other words, they are awarded at the will of the court and depend on the behaviour and situation of the party claiming such remedies. This means that, in effect, the court does not have to award an equitable remedy where it considers that the conduct of the party seeking such an award does not deserve such an award (*D & C Builders Ltd v Rees* (1965)). The usual equitable remedies are as follows:

- *Injunction* – this is a court order requiring someone to do something or, alternatively, to stop doing something (*Warner Bros v Nelson* (1937)).
- *Specific performance* – this is a court order requiring one of the parties to a contractual agreement to complete their part of the contract. It is usually only awarded in respect of contracts relating to specific individual articles, such as land, and will not be awarded where the court cannot supervise the operation of its order (*Ryan v Mutual Tontine Westminster Chambers Association* (1893)).

- *Rectification* – this order relates to the alteration, under extremely limited circumstances, of contractual documents (*Joscelyne v Nissen* (1970)).
- *Rescission* – this order returns parties to a contractual agreement to the position they were in before the agreement was entered into. It is essential to distinguish this award from the common law award of damages, which is intended to place the parties in the position they would have been in had the contract been completed.

1.2.3 Common law and statute law

This particular conjunction follows on from the immediately preceding section, in that 'common law' here refers to the substantive law and procedural rules that have been created by the judiciary, through their decisions in the cases they have heard. Statute law, on the other hand, refers to law that has been created by Parliament in the form of legislation. Although there was a significant increase in statute law in the 20th century, the courts still have an important role to play in creating and operating law generally, and in determining the operation of legislation in particular. The relationship of this pair of concepts is of central importance and is considered in more detail below, at 1.5 and 1.6.

1.2.4 Private law and public law

There are two different ways of understanding the division between private and public law.

At one level, the division relates specifically to actions of the State and its functionaries vis à vis the individual citizen, and the legal manner in which, and form of law through which, such relationships are regulated; that is, public law. In the 19th century, it was at least possible to claim, as Dicey did, that there was no such thing as public law in this distinct administrative sense, and that the power of the State with regard to individuals was governed by the ordinary law of the land, operating through the normal courts. Whether such a claim was accurate when it was made, which is unlikely, there certainly can be no doubt now that public law constitutes a distinct and growing area of law in its own right. The growth of public law, in this sense, has mirrored the growth and increased activity of the contemporary State, and has seen its role as seeking to regulate such activity. The crucial role of judicial review in relation to public law will be considered below, at 1.5.6.

There is, however, a second aspect to the division between private and public law. One corollary of the divide is that matters located within the private sphere are seen as purely a matter for individuals themselves to regulate, without the interference of the State, whose role is limited to the provision of the forum for deciding contentious issues and mechanisms for the enforcement of such decisions. Matters within the public sphere, however, are seen as issues relating to the interest of the State and general public and are, as such, to be protected and prosecuted by the State. It can be seen, therefore, that the category to which any dispute is allocated is of crucial importance to how it is dealt with. Contract may be thought of as the classic example of private law, but the extent to which this purely private legal area has been subjected to the regulation of public law in such areas as consumer protection should not be underestimated. Equally, the most obvious example of public law in this context would be criminal law. Feminists have argued, however, that the allocation of domestic matters to the sphere of private law has led to a denial of a general interest in the treatment and protection of women. By defining domestic matters as private, the State and its functionaries have denied women access to its power to protect themselves from abuse. In doing so, it is suggested that, in fact, such categorisation has reflected and maintained the social domination of men over women.

1.2.5 Civil law and criminal law

Civil law is a form of private law and involves the relationships between individual citizens. It is the legal mechanism through which individuals can assert claims against others and have those rights

adjudicated and enforced. The purpose of civil law is to settle disputes between individuals and to provide remedies; it is not concerned with punishment as such. The role of the State in relation to civil law is to establish the general framework of legal rules and to provide the legal institutions for operating those rights, but the activation of the civil law is strictly a matter for the individuals concerned. Contract, tort and property law are generally aspects of civil law.

Criminal law, on the other hand, is an aspect of public law and relates to conduct which the State considers with disapproval and which it seeks to control and/or eradicate. Criminal law involves the enforcement of particular forms of behaviour, and the State, as the representative of society, acts positively to ensure compliance. Thus, criminal cases are brought by the State in the name of the Crown and cases are reported in the form of *Regina v* . . . (*Regina* is simply Latin for 'Queen' and case references are usually abbreviated to *R v* . . .), whereas civil cases are referred to by the names of the parties involved in the dispute, for example, *Smith v Jones*.

Decisions to prosecute in relation to criminal cases are taken by the Crown Prosecution Service (CPS), which is a legal agency operating independently of the police force.

In distinguishing between criminal and civil actions, it has to be remembered that the same event may give rise to both. For example, where the driver of a car injures someone through their reckless driving they will be liable to be prosecuted under the road traffic legislation but, at the same time, they will also be responsible to the injured party in the civil law relating to the tort of negligence.

In June 2009 relatives of the victims of the Omagh bombing in Northern Ireland, which killed 29 people in 1998, won the right to take a civil case against members of the Real IRA, following the failure of a criminal prosecution to secure any convictions. Damages of £1.6 million were awarded against four men. Subsequently, in 2013 a retrial of two of the men was held after they had succeeded on appeal in challenging the original decision. At the retrial they were once again found liable with the other two men, whose original appeal had failed.

A crucial distinction between criminal and civil law is the level of proof required in the different types of cases. In a criminal case, the prosecution is required to prove that the defendant is guilty beyond reasonable doubt, whereas in a civil case the degree of proof is much lower and has only to be on the balance of probabilities. This difference in the level of proof raises the possibility of someone being able to succeed in a civil case although there may not be sufficient evidence for a criminal prosecution. Indeed, this strategy has been used successfully in a number of cases against the police where the CPS has considered there to be insufficient evidence to support a criminal conviction for assault.

It is essential not to confuse the standard of proof with the burden of proof. The latter refers to the need for the person making an allegation, be it the prosecution in a criminal case or the claimant in a civil case, to prove the facts of the case. In certain circumstances, once the prosecution/claimant has demonstrated certain facts, the burden of proof may shift to the defendant/respondent to provide evidence to prove their lack of culpability. The reverse burden of proof may be either *legal* or *evidential*, which in practice indicates the degree of evidence they have to provide in order to meet the burden they are under.

It should also be noted that the distinction between civil and criminal responsibility is further blurred in cases involving what may be described as hybrid offences. These are situations where a court awards a civil order against an individual, but with the attached sanction that any breach of the order will be subject to punishment as a criminal offence. As examples of this procedure may be cited the Protection from Harassment Act 1997 and the provision for the making of Anti-Social Behaviour Orders originally made available under s 1(1) of the Crime and Disorder Act 1998.

Although prosecution of criminal offences is usually the prerogative of the CPS as the agent of the State, it remains open to the private individual to initiate a private prosecution in relation to a criminal offence. It has to be remembered, however, that, even in the private prosecution, the test of the standard of proof remains the criminal one – requiring the facts to be proved beyond reasonable doubt. An example of the problems inherent in such private actions can be seen in

the case of Stephen Lawrence, the young black man who was gratuitously stabbed to death by a gang of white racists whilst standing at a bus stop in London. Although there was strong suspicion, and indeed evidence, against particular individuals, the CPS declined to press the charges against them on the basis of insufficiency of evidence. When the lawyers of the Lawrence family mounted a private prosecution against the suspects, the action failed for want of sufficient evidence to convict. As a consequence of the failure of the private prosecution, the then rule against double jeopardy meant that the accused could not be re-tried for the same offence at any time in the future, even if the police subsequently acquired sufficient new evidence to support a conviction. The report of the Macpherson Inquiry into the manner in which the Metropolitan Police dealt with the Stephen Lawrence case gained much publicity for its finding of 'institutional racism' within the service, but it also made a clear recommendation that the removal of the rule against double jeopardy be considered. Subsequently, a Law Commission report recommended the removal of the double jeopardy rule and provision to remove it, under particular circumstances and subject to strict regulation, was contained in ss 75–79 of the Criminal Justice Act 2003.

In considering the relationship between civil law and criminal law, it is sometimes thought that criminal law is the more important in maintaining social order, but it is at least arguable that, in reality, the reverse is the case. For the most part, people come into contact with the criminal law infrequently, whereas everyone is continuously involved with civil law, even if it is only the use of contract law to make some purchase. The criminal law of theft, for example, may be seen as simply the cutting edge of the wider and more fundamental rights established by general property law. In any case, there remains the fact that civil and criminal law each has its own distinct legal system.

1.3 The Human Rights Act 1998

The UK was one of the initial signatories to the European Convention on Human Rights (ECHR) in 1950, which was set up in post-War Europe as a means of establishing and enforcing essential human rights. In 1966, it recognised the power of the European Commission on Human Rights to hear complaints from individual UK citizens and, at the same time, recognised the authority of the European Court of Human Rights (ECtHR) to adjudicate on such matters. It did not, however, at that time incorporate the European Convention into UK law.

The consequence of non-incorporation was that the Convention could not be directly enforced in English courts (*R v Secretary of State for the Home Department ex p Brind* (1991)). That situation was remedied, however, by the passing of the Human Rights Act 1998 (HRA), which came into force in England and Wales in October 2000 and was by then already in effect in Scotland. The HRA incorporates the ECHR into UK law. The Articles incorporated into UK law and listed in Sched 1 to the Act cover the following matters:

- The right to life. Article 2 states that 'everyone's right to life shall be protected by law'.
- Prohibition of torture. Article 3 actually provides that 'no one shall be subjected to torture or inhuman or degrading treatment or punishment'.
- Prohibition of slavery and forced labour (Art 4).
- The right to liberty and security. After stating the general right, Art 5 is mainly concerned with the conditions under which individuals can lawfully be deprived of their liberty.
- The right to a fair trial. Article 6 provides that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.
- The general prohibition of the enactment of retrospective criminal offences. Article 7 does, however, recognise the *post hoc* criminalisation of previous behaviour where it is 'criminal according to the general principles of law recognised by civilised nations'.

- The right to respect for private and family life. Article 8 extends this right to cover a person's home and their correspondence.
- Freedom of thought, conscience and religion (Art 9).
- Freedom of expression. Article 10 extends the right to include 'freedom . . . to receive and impart information and ideas without interference by public authority and regardless of frontiers'.
- Freedom of assembly and association. Article 11 specifically includes the right to form and join trade unions.
- The right to marry (Art 12).
- Prohibition of discrimination (Art 14).
- The right to peaceful enjoyment of possessions and protection of property (Art 1 of Protocol 1).
- The right to education (subject to a UK reservation) (Art 2 of Protocol 1).
- The right to free elections (Art 3 of Protocol 1).
- The right not to be subjected to the death penalty (Arts 1 and 2 of Protocol 6).

The rights listed can be relied on by any person, non-governmental organisation, or group of individuals. Importantly, they also apply, where appropriate, to companies, which are incorporated entities and hence legal persons. However, they cannot be relied on by governmental organisations, such as local authorities.

The rights listed above are not all seen in the same way. Some are absolute and inalienable and cannot be interfered with by the State. Others are merely contingent and are subject to derogation, that is, signatory States can opt out of them in particular circumstances. The absolute rights are those provided for in Arts 2, 3, 4, 7 and 14. All of the others are subject to potential limitations; in particular, the rights provided for under Arts 8, 9, 10 and 11 are subject to legal restrictions, such as are:

> . . . necessary in a democratic society in the interests of national security or public safety, for the prevention of crime, for the protection of health or morals or the protection of the rights and freedoms of others. [Art 11(2)]

In deciding the legality of any derogation, courts are required not just to be convinced that there is a need for the derogation, but they must also be sure that the State's action has been proportionate to that need. In other words, the State must not overreact to a perceived problem by removing more rights than is necessary to effect the solution. The UK entered such a derogation in relation to the extended detention of terrorist suspects without charge under the Prevention of Terrorism (Temporary Provisions) Act 1989, subsequently replaced and extended by the Terrorism Act 2000. Those powers had been held to be contrary to Art 5 of the Convention by the ECtHR in *Brogan v United Kingdom* (1989). The UK also entered a derogation with regard to the Anti-Terrorism, Crime and Security Act 2001, which was enacted in response to the attack on the World Trade Center in New York on 11 September that year. The Act allowed for the detention without trial of foreign citizens suspected of being involved in terrorist activity.

With further regard to the possibility of derogation, s 19 of the 1998 Act requires a minister, responsible for the passage of any Bill through Parliament, either to make a written declaration that it is compatible with the Convention or, alternatively, to declare that although it may not be compatible, it is still the Government's wish to proceed with it.

1.3.1 The structure of the Human Rights Act 1998

The HRA has profound implications for the operation of the English legal system. However, to understand the structure of the HRA, it is essential to be aware of the nature of the changes

introduced by the Act, especially in the apparent passing of fundamental powers to the judiciary. Under the doctrine of parliamentary sovereignty, the legislature could pass such laws at it saw fit, even to the extent of removing the rights of its citizens. The 1998 Act reflects a move towards the entrenchment of rights recognised under the ECHR but, given the sensitivity of the relationship between the elected Parliament and the unelected judiciary, it has been thought expedient to minimise the change in the constitutional relationship of Parliament and the judiciary.

Section 2 of the Act requires future courts to take into account any previous decision of the ECtHR. This provision impacts on the operation of the doctrine of precedent within the English legal system, as it effectively sanctions the overruling of any previous English authority that was in conflict with a decision of the ECtHR.

Section 3 requires all legislation to be read, so far as possible, to give effect to the rights provided under the ECHR. As will be seen, this section provides the courts with new and extended powers of interpretation. It also has the potential to invalidate previously accepted interpretations of statutes which were made, by necessity, without recourse to the ECHR (see *Ghaidan v Godin-Mendoza* (2004) below at 1.3.2).

Section 4 empowers the courts to issue a declaration of incompatibility where any piece of primary legislation is found to conflict with the rights provided under the ECHR. This has the effect that the courts cannot invalidate primary legislation, essentially Acts of Parliament but also Orders in Council, which is found to be incompatible; they can only make a declaration of such incompatibility, and leave it to the legislature to remedy the situation through new legislation. Section 10 provides for the provision of remedial legislation through a fast track procedure, which gives a minister of the Crown the power to alter such primary legislation by way of statutory instrument.

Section 5 requires the Crown to be given notice where a court considers issuing a declaration of incompatibility, and the appropriate Government minister is entitled to be made a party to the case.

Section 6 declares it unlawful for any public authority to act in a way that is incompatible with the ECHR, and consequently the Human Rights Act does not *directly* impose duties on private individuals or companies unless they are performing public functions. Whether or not a private company is performing a public function is problematic, there are instances where they clearly would be considered as doing so, such as in regard to the privitised utility companies providing essential services, equally if a private company were to provide prison facilities then clearly it would be operating as a public authority. However, at the other end of an uncertain spectrum, it has been held that, where a local authority fulfils its statutory duty to arrange the provision of care and accommodation for an elderly person through the use of a private care home, the functions performed by the care home are not to be considered as of a public nature. At least that was the decision of the House of Lords by a majority of three to two in *YL v Birmingham City Council* (2007), a rather surprisingly conservative decision, and one that met with no little dismay, given that it was the expectation that the public authority test would be applied generously. Where a public authority is acting under the instructions of some primary legislation which is itself incompatible with the ECHR, the public authority will not be liable under s 6.

Section 6(3), however, *indirectly* introduces the possibility of horizontal effect into private relationships. As s 6(3)(a) specifically states that courts and tribunals are public authorities they must therefore act in accordance with the Convention. The consequence of this is that, although the HRA does not introduce new causes of action between private indivuduals the courts, as public authorities, are required to to recognise and give effect to their Convention rights in any action that can be raised.

Section 7 allows the 'victim of the unlawful act' to bring proceedings against the public authority in breach. However this is interpreted in such a way as to permit relations of the actual victim to initiate proceedings.

Section 8 empowers the court to grant such relief or remedy against the public authority in breach of the Act as it considers just and appropriate.

Section 19 of the Act requires that the minister responsible for the passage of any Bill through Parliament must make a written statement that the provisions of the Bill are compatible with ECHR rights. Alternatively, the minister may make a statement that the Bill does not comply with ECHR rights but that the Government nonetheless intends to proceed with it.

Reactions to the introduction of the HRA have been broadly welcoming, but some important criticisms have been raised. First, the ECHR is a rather old document and does not address some of the issues that contemporary citizens might consider as equally fundamental to those rights actually contained in the document. For example, it is silent on the rights to substantive equality relating to such issues as welfare and access to resources. Also, the actual provisions of the ECHR are uncertain in the extent of their application, or perhaps more crucially in the area where they can be derogated from, and at least to a degree they are contradictory. The most obvious difficulty arises from the need to reconcile Art 8's right to respect for private and family life with Art 10's freedom of expression. Newspaper editors have expressed their concern in relation to this particular issue, and fear the development, at the hands of the court, of an overly limiting law of privacy, which would prevent investigative journalism. This leads to a further difficulty: the potential politicisation, together with a significant enhancement in the power, of the judiciary. Consideration of this issue will be postponed until some cases involving the HRA have been examined.

Perhaps the most serious criticism of the HRA was the fact that the Government did not see fit to establish a Human Rights Commission to publicise and facilitate the operation of its procedures. Many saw the setting up of such a body as a necessary step in raising human rights awareness and assisting individuals, who might otherwise be unable to use the Act, to enforce their rights. However, on 1 October 2007, a new Equality and Human Rights Commission (EHRC) came into operation. The new commission brought together and replaced the former Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission, with the remit of promoting 'an inclusive agenda, underlining the importance of equality for all in society as well as working to combat discrimination affecting specific groups'.

1.3.2 Cases decided under the Human Rights Act 1998

Proportionality

The way in which States can interfere with rights, so long as they do so in a way that is proportionate to the attainment of a legitimate end, can be seen in *Brown v Advocate General for Scotland* (2001).

❖ **KEY CASE** *Brown v Advocate General for Scotland* (2001)

Facts:

Brown had been arrested at a supermarket in relation to the theft of a bottle of gin. When the police officers noticed that she smelled of alcohol, they asked her how she had travelled to the superstore. Brown replied that she had driven and pointed out her car in the supermarket car park. Later, at the police station, the police used their powers under s 172(2)(a) of the Road Traffic Act 1988 to require her to say who had been driving her car at about 2.30 am; that is, at the time when she would have travelled in it to the supermarket. Brown admitted that she had been driving. After a positive breath test, Brown was charged with drunk driving, but appealed to the Scottish High Court of Justiciary for a declaration that the case could not go ahead on the grounds that her admission, as required under s 172, was contrary to the right to a fair trial under Art 6 of the ECHR.

Decision:
The High Court of Justiciary supported her claim on the basis that the right to silence and the right not to incriminate oneself at trial would be worthless if an accused person did not enjoy a right of silence in the course of the criminal investigation leading to the court proceedings. If this were not the case, then the police could require an accused person to provide an incriminating answer which subsequently could be used in evidence against them at their trial. Consequently, the use of evidence obtained under s 172 of the Road Traffic Act 1988 infringed Brown's rights under Art 6(1).

However, on 5 December 2000, the Privy Council reversed the judgment of the Scottish appeal court. The Privy Council reached its decision on the grounds that the rights contained in Art 6 of the ECHR were not themselves absolute and could be restricted in certain limited conditions. Consequently, it was possible for individual States to introduce limited qualification of those rights so long as they were aimed at 'a clear public objective' and were 'proportionate to the situation' under consideration. The ECHR had to be read as balancing community rights with individual rights. With specific regard to the Road Traffic Act 1998, the objective to be attained was the prevention of injury and death from the misuse of cars, and s 172 was not a disproportionate response to that objective.

Subsequently, in a majority decision in *O'Halloran v UK* (2007), the European Court of Human Rights approved the use of s 172 in order to require owners to reveal who had been driving cars caught on speed cameras.

Section 3: duty to interpret legislation in line with the ECHR

It has long been a matter of concern that, in cases where rape has been alleged, the common defence strategy employed by lawyers has been to attempt to attack the credibility of the woman making the accusation. Judges had the discretion to allow questioning of the woman as to her sexual history where this was felt to be relevant, and in all too many cases this discretion was exercised in a way that allowed defence counsel to abuse and humiliate women accusers. Section 41 of the Youth Justice and Criminal Evidence Act 1999 (YJCEA) placed the court under a restriction that seriously limited evidence that could be raised in cross-examination of a sexual relationship between a complainant and an accused. Under s 41(3) of the 1999 Act, such evidence was limited to sexual behaviour 'at or about the same time' as the event giving rise to the charge that was 'so similar' in nature that it could not be explained as a coincidence.

In *R v A* (2001), the defendant in a case of alleged rape claimed that the provisions of the YJCEA were contrary to Art 6 of the ECHR to the extent that they prevented him from putting forward a full and complete defence. In reaching its decision, the House of Lords emphasised the need to protect women from humiliating cross-examination and prejudicial but valueless evidence in respect of their previous sex lives. It nonetheless held that the restrictions in s 41 of the 1999 Act were *prima facie* capable of preventing an accused from putting forward relevant evidence that could be crucial to his defence.

However, rather than make a declaration of incompatibility, the House of Lords preferred to make use of s 3 of the HRA to allow s 41 of the YJCEA to be read as permitting the admission of evidence or questioning relating to a relevant issue in the case where it was considered necessary by the trial judge to make the trial fair. The test of admissibility of evidence of previous sexual relations between an accused and a complainant under s 41(3) of the 1999 Act was whether the evidence was so relevant to the issue of consent that to exclude it would be to endanger the fairness of the trial under Art 6 of the Convention. Where the line is to be drawn is left to the judgment of

trial judges. In reaching its decision, the House of Lords was well aware that its interpretation of s 41 did a violence to its actual meaning, but it nonetheless felt it within its power so to do.

In *Re S* (2002), the Court of Appeal used s 3 of the HRA in such a way as to create new guidelines for the operation of the Children Act 1989, which increased the courts' powers to intervene in the interests of children taken into care under the Act. This extension of the courts' powers in the pursuit of the improved treatment of such children was achieved by reading the Act in such a way as to allow the courts increased discretion to make interim rather than final care orders, and to establish what were referred to as 'starred milestones' within a child's care plan. If such starred milestones were not achieved within a reasonable time, then the courts could be approached to deliver fresh directions. In effect, what the Court of Appeal was doing was setting up a new and more active regime of court supervision in care cases.

The House of Lords, however, although sympathetic to the aims of the Court of Appeal, felt that it had exceeded its powers of interpretation under s 3 of the HRA and, in its exercise of judicial creativity, it had usurped the function of Parliament.

Lord Nicholls explained the operation of s 3:

> The Human Rights Act reserves the amendment of primary legislation to Parliament. By this means the Act seeks to preserve parliamentary sovereignty. The Act maintains the constitutional boundary. Interpretation of statutes is a matter for the courts; the enactment of statutes, are matters for Parliament . . . [but that any interpretation which] departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment.

Unfortunately, the Court of Appeal had overstepped that boundary.

In *Ghaidan v Godin-Mendoza*, the Court of Appeal used s 3 to extend the rights of same-sex partners to inherit a statutory tenancy under the Rent Act 1977. In *Fitzpatrick v Sterling Housing Association Ltd* (1999), the House of Lords had extended the rights of such individuals to inherit the lesser assured tenancy by including them within the deceased person's family. It declined to allow them to inherit statutory tenancies, however, on the grounds that they could not be considered to be the wife or husband of the deceased as the Act required. In *Ghaidan v Godin-Mendoza*, the Court of Appeal held that the Rent Act 1977, as it had been construed by the House of Lords in *Fitzpatrick*, was incompatible with Art 14 of the ECHR on the grounds of its discriminatory treatment of surviving same-sex partners. The court, however, decided that the failing could be remedied by reading the words 'as his or her wife or husband' in the Act as meaning 'as if they were his or her wife or husband'. The Court of Appeal's decision and reasoning were subsequently confirmed by the House in 2004 in *Ghaidan v Godin-Mendoza*. *Mendoza* is of particular interest in the fact that it shows how the HRA can permit lower courts to avoid previous and otherwise binding decisions of the House of Lords. It also clearly shows the extent to which s 3 increases the powers of the judiciary in relation to statutory interpretation. In spite of this potential increased power, the House of Lords found itself unable to use s 3 in *Bellinger v Bellinger* (2003). The case related to the rights of transsexuals and the court found itself unable, or at least unwilling, to interpret s 11(c) of the Matrimonial Causes Act 1973 in such a way as to allow a male to female transsexual to be treated in law as a female. Nonetheless, the court did issue a declaration of incompatibility (see below for explanation).

Declarations of incompatibility

Where a court cannot interpret a piece of primary legislation in such a way as to make it compatible with the ECHR, it cannot declare the legislation invalid, but it can make a declaration that the legislation in question is not compatible with the rights provided by the Convention. The first declaration of incompatibility was issued in *R v (1) Mental Health Review Tribunal, North & East London Region (2) Secretary of State for Health ex p H* in March 2001. In that case, the Court of Appeal held that ss 72 and

73 of the Mental Health Act 1983 were incompatible with Art 5(1) and (4) of the ECHR, inasmuch as they reversed the normal burden of proof by requiring the detained person to show that they should not be detained, rather than placing the burden on the authorities to show that they should be detained.

Wilson v First County Trust (2000) was, however, the first case in which a court indicated its likelihood of its making a declaration of incompatibility under s 4 of the HRA.

❖ KEY CASE *Wilson v First County Trust* (2000)

Facts:

Section 127(3) of Consumer Credit Act (CCA) 1974, proscribed the enforcement of any consumer credit agreement which did not comply with the requirements of the Act. Wilson had borrowed £5,000 from First County Trust (FCT) and had pledged her car as security for the loan. Wilson was to be charged a fee of £250 for drawing up the loan documentation but asked FCT to add it to the loan, which they agreed to do. The effect of this was that the loan document stated that the amount of the loan was £5,250. This, however, was inaccurate, as in reality the extra £250 was not part of the loan as such; rather, it was part of the charge for the loan. The loan document had therefore been drawn up improperly and did not comply with the requirement of s 61 of the CCA 1974. When Wilson subsequently failed to pay the loan at the end of the agreed period, FCT stated their intention of selling the car unless she paid £7,000. Wilson brought proceedings: (a) for a declaration that the agreement was unenforceable by reason of s 127(3) of the 1974 Act because of the misstatement of the amount of the loan; and (b) for the agreement to be reopened on the basis that it was an extortionate credit bargain.

At first instance the judge rejected Wilson's first claim but reopened the agreement and substituted a lower rate of interest, and Wilson subsequently redeemed her car on payment of £6,900. However, she then successfully appealed against the judge's decision as to the enforceability of the agreement, the Court of Appeal holding that s 127(3) clearly and undoubtedly had the effect of preventing the enforcement of the original agreement and Wilson was entitled to the repayment of the money she had paid to redeem her car. Consequently, Wilson not only got her car back but also retrieved the money she paid to FCT, who lost their money completely. In reaching its decision, however, the Court of Appeal expressed the opinion that it was at least arguable that s 127(3) was incompatible with Art 6(1) and/or Protocol 1 of Art 1 of the ECHR. First, the absolute prohibition of enforcement of the agreement appeared to be a disproportionate restriction on the right of the lender to have the enforceability of its loan determined by the court contrary to Art 6(1); and secondly, to deprive FCT of its property – that is, the money which it had lent to Wilson – appeared to be contrary to Protocol 1 of Art 1. The Court of Appeal's final decision to issue a declaration of incompatibility was taken on appeal to the House of Lords.

Decision:

The House of Lords overturned the earlier declaration of incompatibility. In reaching its decision, the House of Lords held that the Court of Appeal had wrongly used its powers retrospectively to cover an agreement that had been entered into before the HRA itself had come into force. This ground in itself was enough to overturn the immediate decision of the Court of Appeal. Nonetheless, the House of Lords went on to consider the

compatibility question, and once again it disagreed with the lower court's decision. In the view of the House of Lords, the provision of the CCA 1974 was extremely severe in its consequences for the lender, to the extent that its provisions might even appear unreasonable on occasion. However, once again the court recognised a powerful social interest in the need to protect unsophisticated borrowers from potentially unscrupulous lenders. In seeking to protect this interest, the legislature could not be said to have acted in a disproportionate manner. Consequently, s 127(3) and (4) of the CCA 1974 was not incompatible with Art 1 of the First Protocol to the ECHR.

1.4 The European Union: Law and Institutions

This section examines the various ways in which law comes into existence. Although it is possible to distinguish domestic and European sources of law, it is necessary to locate the former firmly within its wider European context; in line with that requirement, this section begins with an outline of that context.

1.4.1 European Union

Ever since the UK joined the European Economic Community (EEC), subsequently the European Community (EC) and now the European Union (EU) it has progressively, but effectively, passed the power to create laws which have effect in this country to the wider European institutions. In effect, the UK's legislative, executive and judicial powers are now controlled by, and can only be operated within, the framework of EU law. It is essential, therefore, that the contemporary student of business law is aware of the operation of the legislative and judicial powers of the EU.

Before the UK joined the EU, its law was just as foreign as law made under any other jurisdiction. On joining the EU, however, the UK and its citizens accepted and became subject to EU law. This subjection to European law remains the case even where the parties to any transaction are themselves both UK subjects. In other words, in areas where it is applicable, EU law supersedes any existing UK law to the contrary.

An example of EU law invalidating the operation of UK legislation can be found in the first *Factortame* case.

❖ **KEY CASE** — *Factortame Ltd v Secretary of State for Transport (No 1)* (1989)

Facts:

The common fishing policy, established by the EEC, as it then was, had placed limits on the amount of fish that any member country's fishing fleet was permitted to catch. In order to gain access to British fish stocks and quotas, Spanish fishing boat owners formed British companies and re-registered their boats as British. In order to prevent what it saw as an abuse and an encroachment on the rights of indigenous fishermen, the UK Government introduced the Merchant Shipping Act 1988, which provided that any fishing company seeking to register as British must have its principal place of business in the UK and at least 75% of its shareholders must be British nationals. This effectively debarred the Spanish boats from taking up any of the British fishing quota. Some 95 Spanish boat owners applied to the British courts for judicial review of the Merchant Shipping Act 1988 on the basis that it was contrary to EU law.

The High Court decided to refer the question of the legality of the legislation to the European Court of Justice (ECJ) under what is currently Art 267 of the Treaty on the Functioning of the European Union (TFEU) (formerly Art 234 and Art 177 of previous versions of the treaty), but in the meantime granted interim relief, in the form of an injunction disapplying the operation of the legislation, to the fishermen. On appeal, the Court of Appeal removed the injunction, a decision confirmed by the House of Lords. However, the House of Lords referred the question of the relationship of Community law and contrary domestic law to the ECJ. Effectively, they were asking whether the domestic courts should follow the domestic law or Community law.

Decision:
The ECJ ruled that the Treaty of Rome, the TFEU as it now is, requires domestic courts to give effect to the directly enforceable provisions of EU law and, in doing so, such courts are required to ignore any national law that runs counter to EU law.

The House of Lords then renewed the interim injunction. The ECJ later ruled that, in relation to the original referral from the High Court, the Merchant Shipping Act 1988 was contrary to EU law and therefore the Spanish fishing companies should be able to sue for compensation in the UK courts. The subsequent claims also went all the way to the House of Lords before it was finally settled in October 2000 that the UK was liable to pay compensation, which has been estimated at between £50 million and £100 million.

The long-term process leading to the, as yet still to be attained, establishment of an integrated European Union was a response to two factors: the disasters of the Second World War; and the emergence of the Soviet Bloc in Eastern Europe. The aim was to link the separate European countries, particularly France and Germany, together in such a manner as to prevent the outbreak of future armed hostilities. The first step in this process was the establishment of a European Coal and Steel Community. The next step towards integration was the formation of the European Economic Community (EEC) under the Treaty of Rome in 1957. The UK joined the EEC in 1973. The Treaty of Rome has subsequently been amended in the further pursuit of integration as the Community has expanded. Thus, the Single European Act (SEA) 1986 established a single economic market within the EC and widened the use of majority voting in the Council of Ministers. The Maastricht Treaty further accelerated the move towards a federal European supranational State, in the extent to which it recognised Europe as a social and political – as well as an economic – community. Previous Conservative Governments of the UK resisted the emergence of the EU as anything other than an economic market and objected to, and resiled from, various provisions aimed at social, as opposed to economic, affairs. Thus, the UK was able to opt out of the Social Chapter of the Treaty of Maastricht. The new Labour administration in the UK had no such reservations and, as a consequence, the Treaty of Amsterdam 1997 incorporated the European Social Charter into the EC Treaty which, of course, applies to the UK.

As the establishment of the single market within the European Community progressed, it was suggested that its operation would be greatly facilitated by the adoption of a common currency, or at least a more closely integrated monetary system. Thus, in 1979, the European Monetary System (EMS) was established, under which individual national currencies were valued against a nominal currency called the ECU and allocated a fixed rate within which they were allowed to fluctuate to a limited extent. Britain was a member of the EMS until 1992, when financial speculation against the pound forced its withdrawal. Nonetheless, other members of the EC continued to pursue the policy of monetary union, now entitled European Monetary Union (EMU), and January 1999 saw the installation of the new european currency, the euro, which has now replaced national currencies within what is now known as the Eurozone. The UK did not join the EMU at its inception and there is little chance that membership will appear on the political agenda for the foreseeable future.

The general aim of the EU was set out in Art 2 of the Treaty of Rome, the founding treaty of the EEC.

Among the policies originally detailed in Art 3 were included:

- the elimination between Member States of customs duties and of quantitative restrictions on the import and export of goods;
- the establishment of a common customs tariff and a common commercial policy towards third countries;
- the abolition between Member States of obstacles to the freedom of movement for persons, services and capital;
- the adoption of a common agricultural policy;
- the adoption of a common transport policy;
- the harmonisation of laws of Member States to the extent required to facilitate the proper functioning of the single market;
- the creation of a European Social Fund in order to improve the employment opportunities of workers in the Community and to improve their standard of living.

These essentially economic imperatives were subsequently extended to cover more social, as opposed to purely economic, matters and now incorporate policies relating to education, health, consumer protection, the environment and culture generally.

1.4.2 Sources of EU law

EU law, depending on its nature and source, may have direct effect on the domestic laws of its various members; that is, it may be open to individuals to rely on it, without the need for their particular State to have enacted the law within its own legal system (see *Factortame (No 1)* (1989)).

There are two types of direct effect. Vertical direct effect means that the individual can rely on EU law in any action in relation to their government, but cannot use it against other individuals. Horizontal direct effect allows the individual to use an EU provision in an action against other individuals. Other EU provisions take effect only when they have been specifically enacted within the various legal systems within the EU.

The sources of EU law are fourfold:

- internal treaties and protocols;
- international agreements;
- secondary legislation; and
- decisions of the CJEU.

Internal treaties

Internal treaties govern the Member States of the EU and, as has been seen, anything contained therein supersedes domestic legal provisions.

As long as Treaties are of a mandatory nature and are stated with sufficient clarity and precision, they have both vertical and horizontal effect (*Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963)).

As has previously been mentioned, the originating treaty of the EU was the Treaty of Rome, which was subsequently altered and supplemented by a number of subsequent treaties. The most recent of these treaties is the Lisbon Treaty, which led to significant changes in the constitution and operation of the EU. The origin of the Lisbon Treaty lay in *The Convention on the Future of Europe*, which was established in February 2002 by the then members to consider the establishment of a European

Constitution. The Convention produced a draft constitution, which it was hoped would provide a more simple, streamlined and transparent procedure for internal decision-making within the Union and to enhance its profile on the world stage. Among the proposals for the new constitution were the following:

- the establishment of a new office of President of the European Union. This is currently Herman Van Rompuy of Belgium;
- the appointment of High Representative for Foreign Affairs. This position, effectively that of EU foreign minister, is currently held by Baroness Catherine Ashton from the UK;
- the shift to a two-tier Commission;
- fewer national vetoes;
- increased power for the European Parliament;
- simplified voting power;
- the establishment of an EU defence force by 'core members';
- the establishment of a charter of fundamental rights.

In the months of May and June 2005 the move towards the European Constitution came to a juddering halt when first the French and then the Dutch electorates voted against its implementation. However, as with most EU initiatives, the new constitution did not disappear and re-emerged as the Treaty of Lisbon, signed by all the members in December 2007. In legal form, the Lisbon Treaty merely amended the existing treaties, rather than replacing them as the previous constitution had proposed. In practical terms, however, all the essential changes that would have been delivered by the constitution were contained in the treaty.

The necessary alterations to the fundamental treaties governing the EU, brought about by the Lisbon Treaty, were published at the end of March 2010. As a result there are three newly consolidated treaties:

- *The Treaty on European Union* (TEU)
  Article 1 of this treaty makes it clear that 'The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties'). Those two Treaties shall have the same legal value. *The Union shall replace and succeed the European Community*.'
- *The Treaty on the Functioning of the European Union* (TFEU)
  Article 2 of this treaty provides that:

  'When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.'

  Article 3 specifies that the Union shall have exclusive competence in the following areas:

  (a) customs union;
  (b) the establishing of the competition rules necessary for the functioning of the internal market;
  (c) monetary policy for the Member States whose currency is the euro;
  (d) the conservation of marine biological resources under the common fisheries policy;
  (e) common commercial policy.

  Additionally Art 3 provides that the Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

- *The Charter of Fundamental Rights of the European Union* (CFREU)
  Many Member States, including the UK, have negotiated opt outs from some of the provisions of the charter.

Upon the UK joining the EU, the Treaty of Rome was incorporated into UK law by the European Communities Act 1972 and it remains bound by all the subsequent provisions it has not opted out of.

International treaties

International treaties are negotiated with other nations by the European Commission on behalf of the EU as a whole and are binding on the individual members of the EU.

Secondary legislation

Three types of legislation may be introduced by the European Council and Commission. These are as follows:

- *Regulations* apply to, and within, Member States generally, without the need for those States to pass their own legislation. They are binding and enforceable from the time of their creation, and individual States do not have to pass any legislation to give effect to regulations. Thus, in *Macarthys Ltd v Smith* (1979), on a referral from the Court of Appeal to the ECJ, it was held that Art 141 (formerly Art 119) entitled the claimant to assert rights that were not available to her under national legislation (the Equal Pay Act 1970) which had been enacted before the UK had joined the EEC. Whereas the national legislation clearly did not include a comparison between former and present employees, Art 141's reference to 'equal pay for equal work' did encompass such a situation. Smith was consequently entitled to receive a similar level of remuneration to that of the former male employee who had done her job previously.

  Regulations must be published in the Official Journal of the EU. The decision as to whether or not a law should be enacted in the form of a regulation is usually left to the Commission, but there are areas where the TFEU requires that the regulation form must be used. These areas relate to: the rights of workers to remain in Member States of which they are not nationals; the provision of State aid to particular indigenous undertakings or industries; the regulation of EU accounts; and budgetary procedures.
- *Directives*, on the other hand, state general goals and leave the precise implementation in the appropriate form to the individual Member States. Directives, however, tend to state the means as well as the ends to which they are aimed and the ECJ will give direct effect to directives which are sufficiently clear and complete (see *Van Duyn v Home Office* (1974)). Directives usually provide Member States with a time limit within which they are required to implement the provision within their own national laws. If they fail to do so, or implement the directive incompletely, then individuals may be able to cite and rely on the directive in their dealings with the State in question. Further, *Francovich v Italy* (1991) established that individuals who have suffered as a consequence of a Member State's failure to implement EU law may seek damages against that State.

  In contract law, the provisions in the Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994/3159), repealed and replaced by the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083), are an example of UK law being introduced in response to EU directives, and company law is continuously subject to the process of European harmonisation through directives.
- *Decisions* on the operation of European laws and policies are not intended to have general effect but are aimed at particular States or individuals. They have the force of law under TFEU Art 288 (formerly Art 249). On the other hand, neither recommendations nor opinions in relation to the operation of Union law have any binding force (Art 288), although they may be taken into account in trying to clarify any ambiguities in domestic law.

Judgments of the CJEU

The Court of Justice of the European Union (CJEU, formerly ECJ) is the judicial arm of the EU and, in the field of EU law its judgments overrule those of national courts. Under Art 267 (formerly Art 234) of the TFEU, national courts have the right to apply to the CJEU for a preliminary ruling on a point of Union law before deciding a case.

The mechanism through which EU law becomes immediately and directly effective in the UK is provided by s 2(1) of the European Communities Act 1972. Section 2(2) gives power to designated ministers or departments to introduce Orders in Council to give effect to other non-directly effective Union law.

1.4.3 The institutions of the EU

The major institutions of the EU are: the Council of Ministers; the European Parliament; the European Commission; and the European Court of Justice.

The Council of Ministers

The Council is made up of ministerial representatives of each of the 27 Member States of the EU. The actual composition of the Council varies, depending on the nature of the matter to be considered: when considering economic matters, the various States will be represented by their finance ministers; if the matter before the Council relates to agriculture, the various agriculture ministers will attend. The Council of Ministers is the supreme decision-making body of the EU and, as such, has the final say in deciding upon EU legislation. Although it acts on recommendations and proposals made to it by the Commission, it does have the power to instruct the Commission to undertake particular investigations and to submit detailed proposals for its consideration.

At present Council decisions are taken on a mixture of voting procedures. Some measures only require a simple majority; in others, a procedure of qualified majority voting is used; in yet others, unanimity is required. Qualified majority voting is the procedure in which the votes of the 27 Member countries are weighted in proportion to their population from 29 down to three votes each and a specific number of votes is required to pass any specific proposal.

However, the Lisbon Treaty introduces changes to this procedure. As a consequence, although the present system will continue until November 2014, after that date the qualified majority voting procedure will be fundamentally changed, with the Council, from then on, adopting a 'double majority' system under which a proposal must be supported by both 55% of the EU Member States, i.e. 15 of the current 27 members, and at least 65% of the population of the EU. In addition for a blocking minority to prevent the adoption of a proposal, that majority must include the votes of at least four Member States. However, between November 2014 and March 2017 any Member State may request that the current voting system be applied instead of the new double majority system.

The European Parliament

The European Parliament is the directly elected European institution and, to that extent, it can be seen as the body which exercises democratic control over the operation of the EU. As in national Parliaments, members are elected to represent constituencies, the elections being held every five years. Following the Lisbon Treaty there is a maximum total of 751 members, divided amongst the 27 Member States in approximate proportion to the size of their various populations. The Treaty also provides that that no Member State can have fewer than 6 or more than 86 seats (from 2014). Members of the European Parliament do not sit in national groups but operate within political groupings.

The European Parliament's General Secretariat is based in Luxembourg and, although the Parliament sits in plenary session in Strasbourg for one week in each month, its detailed and preparatory work is carried out through 18 permanent committees, which usually meet in Brussels.

These permanent committees consider proposals from the Commission and provide the full Parliament with reports of such proposals for discussion.

Originally, the powers of the Parliament were merely advisory and supervisory, but its role and functions have increased over time and as a consequence of the changes introduced by the Lisbon Treaty, the previous 'co-decision procedure' under which proposals required to be approved by both the Parliament and the Council have been extended to a further 40 areas, to greatly enhance the power and prestige of the Parliament. In its supervisory role, the Parliament scrutinises the activities of the Commission and has the power to remove the Commission by passing a motion of censure against it by a two-thirds majority.

The Parliament, together with the Council of Ministers, is the budgetary authority of the EU. The budget is drawn up by the Commission and is presented to both the Council and the Parliament. As regards what is known as obligatory expenditure, the Council has the final say but, in relation to non-obligatory expenditure, the Parliament has the final decision as to whether to approve the budget or not.

The European Commission

The European Commission is the executive of the EU and, in that role, is responsible for the administration of EU policies. There are 27 Commissioners, chosen from the various Member States to serve for renewable terms of four years. Commissioners are appointed to head departments with specific responsibility for furthering particular areas of EU policy. Once appointed, Commissioners are expected to act in the general interest of the EU as a whole, rather than in the partial interest of their own home country.

In pursuit of EU policy, the Commission is responsible for ensuring that Treaty obligations between the Member States are met and that EU laws relating to individuals are enforced. In order to fulfil these functions, the Commission has been provided with extensive powers in relation to both the investigation of potential breaches of EU law and the subsequent punishment of offenders. The classic area in which these powers can be seen in operation is in the area of competition law. Under Arts 101 and 102 (formerly Arts 81 and 82) of the TFEU, the Commission has substantial powers to investigate and control potential monopolies and anti-competitive behaviour. It has used these powers to levy what, in the case of private individuals, would amount to huge fines where breaches of EU competition law have been discovered. In November 2001, the Commission imposed a then record fine of £534 million on a cartel of 13 pharmaceutical companies that had operated a price-fixing scheme within the EU in relation to the market for vitamins. The highest individual fine was against the Swiss company Roche, which had to pay £288 million, while the German company BASF was fined £185 million. The lowest penalty levelled was against Aventis, which was only fined £3 million due to its agreement to provide the Commission with evidence as to the operation of the cartel. Otherwise its fine would have been £70 million. The Commission took two years to investigate the operation of what it classified as a highly organised cartel, holding regular meetings to collude on prices, exchange sales figures and co-ordinate price increases.

In the following month, December 2001, Roche was again fined a further £39 million for engaging in another cartel, this time in the citric acid market. The total fines imposed in this instance amounted to £140 million.

In 2004 the then EU Competition Commissioner, Mario Monti, levied an individual record fine of €497 million (£340 million) on Microsoft for abusing its dominant position in the PC operating systems market. In addition, the Commissioner required Microsoft to disclose 'complete and accurate' interface documents to allow rival servers to operate with the Microsoft windows system, or face penalties of €2 million (£1.4 million) for each day of non-compliance. In January 2006 Microsoft offered to make available part of its source code – the basic instructions for the Windows operating system. In an assertion of its complete compliance with Mario Monti's

decision, Microsoft insisted it had actually gone beyond the Commission's remedy by opening up part of the source code behind Windows to rivals willing to pay a licence fee.

The offer, however, was dismissed by many as a public relations exercise. As a lawyer for Microsoft's rivals explained, 'Microsoft is offering to dump a huge load of source code on companies that have not asked for source code and cannot use it. Without a road map that says how to use the code, a software engineer will not be able to design inter-operable products.'

In February 2006 Microsoft repeated its claim that it had fully complied with the Commission's requirements. It also announced that it wanted an oral hearing on the allegations before national competition authorities and senior EU officials, a proposal that many saw as merely a delaying tactic postponing the imposition of the threatened penalties until the court of first instance has heard the company's appeal against the original allegation of abuse of its dominant position and, of course, the related €497 million fine. In July 2006, the Commission fined Microsoft an additional €280.5 million, €1.5 million per day from 16 December 2005 to 20 June 2006. On 17 September 2007, Microsoft lost their appeal and in October 2007, it announced that it would comply with the rulings.

In May 2009 the Commission levied a new record individual fine against the American computer chip manufacturer Intel for abusing its dominance of the microchip market. Intel was accused of using discounts to squeeze its nearest rival, Advanced Micro Devices, (AMD), out of the market. The amount of the fine was €1.06 billion, equivalent to £950 million, or $1.45 billion. Intel appealed against the finding and the fine in September 2009. As yet, the appeal has not been decided.

In addition to these executive functions, the Commission also has a vital part to play in the EU's legislative process. The Council can only act on proposals put before it by the Commission. The Commission, therefore, has a duty to propose to the Council measures that will advance the achievement of the EU's general policies.

The Court of Justice of the European Union (CJEU)

The CJEU is the judicial arm of the EU and, in the field of Union law, its judgments overrule those of national courts. It consists of 27 judges, assisted by 8 Advocates General, and sits in Luxembourg. The role of the Advocate General is to investigate the matter submitted to the CJEU and to produce a report, together with a recommendation for the consideration of the Court. The CJEU is free to accept the report or not, as it sees fit. A Court of First Instance, separate from the CJEU, was introduced by the Single European Act 1986. Under the Treaty of Lisbon it was renamed the General Court. It has jurisdiction in first instance cases, with appeals going to the CJEU on points of law. The former jurisdiction of the Court of First Instance, in relation to internal claims by EU employees was transferred to a newly created European Union Civil Service Tribunal in 2004. Together the three distinct courts constitute *the Court of Justice of the European Union*. The aim of introducing the two latter courts was to reduce the burden of work on the CJEU, but there is a right of appeal, on points of law only, to the full CJEU. In July 2000, an appeal against a fine imposed by the Commission in 1998 against Europe's biggest car producer, Volkswagen (VW), was successful to the extent that the CJEU reduced the amount of the fine by £7.5 million. Unfortunately for VW, it upheld the essential finding of the Commission and imposed a fine of £57 million on it, then a record for any individual company. VW was found guilty of 'an infringement which was particularly serious, the seriousness being magnified by the size of the Volkswagen group'. What the company had done was to prevent customers, essentially those in Germany and Austria, from benefiting from the weakness of the Italian lire between 1993 and 1996 by instructing the Italian dealers not to sell to foreign customers on the false basis that different specifications and warranty terms prevented cross-border sales. Not only had VW instructed that this should happen, but it threatened that Italian dealers would lose their franchises if they failed to comply.

The CJEU performs two key functions, as follows:

(a) It decides whether any measures adopted, or rights denied, by the Commission, Council or any national government are compatible with Treaty obligations. In October 2000, the ECJ (as it was then) annulled EC Directive 98/43, which required Member States to impose a ban on advertising and sponsorship relating to tobacco products, because it had been adopted on the basis of the wrong provisions of the EC Treaty. The Directive had been adopted on the basis of the provisions relating to the elimination of obstacles to the completion of the internal market, but the Court decided that, under the circumstances, it was difficult to see how a ban on tobacco advertising or sponsorship could facilitate the trade in tobacco products.

Although a partial prohibition on particular types of advertising or sponsorship might legitimately come within the internal market provisions of the Treaty, the Directive was clearly aimed at protecting public health, and it was therefore improper to base its adoption on freedom to provide services (*Germany v European Parliament and EU Council* (Case C-376/98)).

A Member State may fail to comply with its Treaty obligations in a number of ways. It might fail, or indeed, refuse, to comply with a provision of the Treaty or a regulation; alternatively, it might refuse to implement a directive within the allotted time provided for. Under such circumstances, the State in question will be brought before the CJEU, either by the Commission or by another Member State or, indeed, by individuals within the State concerned.

In 1996, following the outbreak of 'mad cow disease' (BSE) in the UK, the European Commission imposed a ban on the export of UK beef. The ban was partially lifted in 1998 and, subject to conditions relating to the documentation of an animal's history prior to slaughter, from 1 August 1999 exports satisfying those conditions were authorised for despatch within the Community. When the French Food Standards Agency continued to raise concerns about the safety of British beef, the Commission issued a protocol agreement, which declared that all meat and meat products from the UK would be distinctively marked as such. However, France continued in its refusal to lift the ban. Subsequently, the Commission applied to the CJEU for a declaration that France was in breach of Community law for failing to lift the prohibition on the sale of correctly labelled British beef in French territory. In December 2001, in *Commission of the European Communities v France*, the CJEU held that the French Government had failed to put forward a ground of defence capable of justifying the failure to implement the relevant decisions and was therefore in breach of Community law.

France was also fined in July 2005 for breaching EU fishing rules. On that occasion the CJEU imposed the first ever 'combination' penalty, under which a lump-sum fine was payable, but in addition France is liable to a periodic penalty for every six months until it has shown it is fully complying with EU fisheries laws. The CJEU set the lump sum fine at €20 million and the periodic penalty at €57.8 million.

The Court held that it is was possible and appropriate to impose both types of penalty at the same time, in circumstances where the breach of obligations has both continued for a long period and is inclined to persist.

(b) It provides authoritative rulings at the request of national courts under Art 267 (formerly Art 234) of the EC Treaty on the interpretation of points of Community law. When an application is made under Art 234, the national proceedings are suspended until such time as the determination of the point in question is delivered by the CJEU. Whilst the case is being decided by the CJEU, the national court is expected to provide appropriate interim relief, even if this involves going against a domestic legal provision (as in the *Factortame* case).

The question of the extent of the CJEU's authority arose in *Arsenal Football Club plc v Reed* (2003), which dealt with the sale of football souvenirs and memorabilia bearing the name of the football club and consequently infringing its registered trademarks. On first hearing, the Chancery Division of the High Court referred the question of the interpretation of the Trade Marks Directive (89/104) in relation to the issue of trademark infringement

to the CJEU. After the CJEU had made its decision, the case came before Laddie J for application, who declined to follow its decision. The ground for so doing was that the ambit of the CJEU's powers was clearly set out in Art 234. Consequently, where, as in this case, the ECJ makes a finding of fact which reverses the finding of a national court on those facts, it exceeds its jurisdiction, and it follows that its decisions are not binding on the national court.

The Court of Appeal later reversed Laddie J's decision on the ground that the ECJ had not disregarded the conclusions of fact made at the original trial and, therefore, he should have followed its ruling and decided the case in the favour of Arsenal. Nonetheless, Laddie J's general point as to the ECJ's authority remains valid.

1.5 Domestic Legislation

If the institutions of the EU are sovereign within its boundaries then, within the more limited boundaries of the UK, the sovereign power to make law lies with Parliament. Under UK constitutional law, it is recognised that Parliament has the power to enact, revoke or alter such, and any, law as it sees fit. Coupled to this wide power is the convention that no one Parliament can bind its successors in such a way as to limit their absolute legislative powers. Although we still refer to our legal system as a common law system, and although the courts still have an important role to play in the interpretation of statutes, it has to be recognised that legislation is the predominant method of law making in contemporary society. It is necessary, therefore, to have a knowledge of the workings of the legislative procedure through which law is made.

1.5.1 The legislative process

As an outcome of various historical political struggles, Parliament, and in particular the House of Commons, has asserted its authority as the ultimate source of law making in the UK. Parliament's prerogative to make law is encapsulated in the notion of the supremacy of Parliament.

Parliament consists of three distinct elements: the House of Commons, the House of Lords and the Monarch. Before any legislative proposal, known at that stage as a Bill, can become an Act of Parliament, it must proceed through and be approved by both Houses of Parliament and must receive the royal assent.

Before the formal law making procedure is started, the Government of the day, which in practice decides and controls what actually becomes law, may enter into a process of consultation with concerned individuals or organisations.

Green Papers are consultation documents issued by the Government which set out and invite comments from interested parties on particular proposals for legislation.

After considering any response, the Government may publish a second document in the form of a White Paper, in which it sets out its firm proposals for legislation.

A Bill must be given three readings in both the House of Commons and the House of Lords before it can be presented for the royal assent. It is possible to commence the procedure in either House, although money Bills must be placed before the Commons in the first instance.

Before it can become law, any Bill introduced in the Commons must go through five distinct procedures:

- *First reading*
  This is a purely formal procedure, in which the Bill's title is read and a date is set for its second reading.

- *Second reading*
  At this stage, the general principles of the Bill are subject to extensive debate. The second reading is the critical point in the process of a Bill. At the end, a vote may be taken on its merits and, if it is approved, it is likely that it will eventually find a place in the statute book.
- *Committee stage*
  After its second reading, the Bill is passed to a standing committee, whose job is to consider the provisions of the Bill in detail, clause by clause. The committee has the power to amend it in such a way as to ensure that it conforms with the general approval given by the House at its second reading.
- *Report stage*
  At this point, the standing committee reports the Bill back to the House for consideration of any amendments made during the committee stage.
- *Third reading*
  Further debate may take place during this stage, but it is restricted solely to matters relating to the content of the Bill; questions relating to the general principles of the Bill cannot be raised.

When a Bill has passed all of these stages, it is passed to the House of Lords for consideration. After this, the Bill is passed back to the Commons, which must then consider any amendments to the Bill that might have been introduced by the Lords. Where one House refuses to agree to the amendments made by the other, Bills can be repeatedly passed between them; since Bills must complete their process within the life of a particular parliamentary session, however a failure to reach agreement within that period might lead to the total failure of the Bill.

Since the Parliament Acts of 1911 and 1949, the blocking power of the House of Lords has been restricted as follows:

- a 'Money Bill', that is, one containing only financial provisions, can be enacted without the approval of the House of Lords after a delay of one month;
- any other Bill can be delayed by one year by the House of Lords.

The royal assent is required before any Bill can become law. The procedural nature of the royal assent was highlighted by the Royal Assent Act 1967, which reduced the process of acquiring royal assent to a formal reading out of the short titles of any Act in both Houses of Parliament.

An Act of Parliament comes into effect on the date that royal assent is given, unless there is any provision to the contrary in the Act itself.

1.5.2 Types of legislation

Legislation can be categorised in a number of ways. For example, distinctions can be drawn between:

- *public Acts*, which relate to matters affecting the general public. These can be further subdivided into either Government Bills or Private Members' Bills;
- *private Acts*, which relate to the powers and interests of particular individuals or institutions, although the provision of statutory powers to particular institutions can have a major effect on the general public. For example, companies may be given the power to appropriate private property through compulsory purchase orders; and
- *enabling legislation*, which gives power to a particular person or body to oversee the production of the specific details required for the implementation of the general purposes stated in the parent Act. These specifics are achieved through the enactment of statutory instruments. (See 1.5.3 below, for a consideration of delegated legislation.)

Acts of Parliament can also be distinguished on the basis of the function that they are designed to carry out. Some are unprecedented and cover new areas of activity previously not governed by legal rules, but other Acts are aimed at rationalising or amending existing legislative provisions:

- *Consolidating legislation* is designed to bring together provisions previously contained in a number of different Acts, without actually altering them. The Companies Act 1985 is an example of a consolidation Act. It brought together provisions contained in numerous amending Acts which had been introduced since the previous Consolidation Act 1948.
- *Codifying legislation* seeks not just to bring existing statutory provisions under one Act, but also looks to give statutory expression to common law rules. The classic examples of such legislation are the Partnership Act 1890 and the Sale of Goods Act 1893, now 1979.
- *Amending legislation* is designed to alter some existing legal provision. Amendment of an existing legislative provision can take one of two forms:
    - *textual amendments*, where the new provision substitutes new words for existing ones in a legislative text or introduces completely new words into that text. Altering legislation by means of textual amendment has one major drawback, in that the new provisions make very little sense on their own without the contextual reference of the original provision that it is designed to alter; or
    - *non-textual amendments* do not alter the actual wording of the existing text, but alter the operation or effect of those words. Non-textual amendments may have more immediate meaning than textual alterations, but they too suffer from the problem that, because they do not alter the original provisions, the two provisions have to be read together to establish the legislative intention.

  Neither method of amendment is completely satisfactory, but the Renton Committee on the Preparation of Legislation (1975, Cmnd 6053) favoured textual amendments over non-textual amendments.

1.5.3 Delegated legislation

In contemporary practice, the full scale procedure detailed above is usually only undergone in relation to enabling Acts. These Acts set out general principles and establish a framework within which certain individuals or organisations are given power to make particular rules designed to give practical effect to the enabling Act. The law produced through this procedure is referred to as 'delegated legislation'.

As has been stated, delegated legislation is law made by some person or body to whom Parliament has delegated its general law-making power. A validly enacted piece of delegated legislation has the same legal force and effect as the Act of Parliament under which it is enacted; equally, however, it only has effect to the extent that its enabling Act authorises it. Any action taken in excess of the powers granted is said to be *ultra vires* and the legality of such legislation can be challenged in the courts, as considered below.

In previous editions of this book the authors have, to a greater or lesser degree, focused on the increase in the power of Ministers of State to alter Acts of Parliament by means of statutory instruments in the pursuit of economic, business and regulatory efficiency.

The first of these (dis)empowering Acts of Parliament that brought this situation about was the Deregulation and Contracting Out Act (DCOA) 1994, introduced by the last Conservative Government. It was a classic example of the wide-ranging power that enabling legislation can extend to ministers in the attack on such primary legislation as was seen to impose unnecessary burdens on any trade, business or profession. Although the DCOA 1994 imposed the requirement

that ministers should consult with interested parties to any proposed alteration, it nonetheless gave them extremely wide powers to alter primary legislation without the necessity of having to follow the same procedure as was required to enact that legislation in the first place. For that reason, deregulation orders were subject to a far more rigorous procedure (sometimes referred to as 'super-affirmative') than ordinary statutory instruments. The powers were extended in its first term in office by the former Labour Government under the Regulatory Reform Act (RRA) 2001.

It was, however, only with the proposed Legislative and Regulatory Reform Bill 2006 that alarm bells started to ring generally. This critical reaction was based on the proposed power contained in the Act for ministers to create new criminal offences, punishable with less than two years imprisonment, without the need for a debate in Parliament. However as a result of much opposition, the Government amended the legislation to ensure that its powers could only be used in relation to business and regulatory efficiency.

It should also be remembered that s 10 of the HRA allows ministers to amend primary legislation by way of statutory instrument where a court has issued a declaration of incompatibility (see 1.3 above).

The output of delegated legislation in any year greatly exceeds the output of Acts of Parliament. For example, in 2011, Parliament passed just 25 general public Acts, in comparison to over 3,000 statutory instruments. In statistical terms, therefore, it is at least arguable that delegated legislation is actually more significant than primary Acts of Parliament.

There are various types of delegated legislation, as follows:

- *Orders in Council* permit the Government, through the Privy Council, to make law. The Privy Council is nominally a non-party political body of eminent parliamentarians, but in effect it is simply a means through which the Government, in the form of a committee of ministers, can introduce legislation without the need to go through the full parliamentary process. Although it is usual to cite situations of State emergency as exemplifying occasions when the Government will resort to the use of Orders in Council, in actual fact a great number of Acts are brought into operation through Orders in Council. Perhaps the widest scope for Orders in Council is to be found in relation to EU law, for, under s 2(2) of the European Communities Act 1972, ministers can give effect to provisions of Community law which do not have direct effect.
- *Statutory instruments* are the means through which government ministers introduce particular regulations under powers delegated to them by Parliament in enabling legislation. Examples have already been considered in relation to the DCOA 1994.
- *Bylaws* are the means through which local authorities and other public bodies can make legally binding rules. Bylaws may be made by local authorities under such enabling legislation as the Local Government Act 1972, and public corporations are empowered to make regulations relating to their specific sphere of operation. *Court rule committees* are empowered to make the rules which govern procedure in the particular courts over which they have delegated authority under such acts as the Supreme Court Act 1981, the County Courts Act 1984 and the Magistrates' Courts Act 1980.
- *Professional regulations* governing particular occupations may be given the force of law under provisions delegating legislative authority to certain professional bodies which are empowered to regulate the conduct of their members. An example is the power given to The Law Society, under the Solicitors Act 1974, to control the conduct of practising solicitors.

1.5.4 Advantages of the use of delegated legislation

The advantages of using delegated legislation are as follows:

- *Timesaving*
  Delegated legislation can be introduced quickly where necessary in particular cases and permits rules to be changed in response to emergencies or unforeseen problems.
  The use of delegated legislation, however, also saves parliamentary time generally. Given the pressure on debating time in Parliament and the highly detailed nature of typical delegated legislation, not to mention its sheer volume, Parliament would not have time to consider each individual piece of law that is enacted in the form of delegated legislation.
- *Access to particular expertise*
  Related to the first advantage is the fact that the majority of Members of Parliament (MPs) simply do not have sufficient expertise to consider such provisions effectively. Given the highly specialised and extremely technical nature of many of the regulations that are introduced through delegated legislation, it is necessary that those who are authorised to introduce the legislation should have access to the external expertise required to formulate such regulations. With regard to bylaws, it practically goes without saying that local and specialist knowledge should give rise to more appropriate rules than reliance on the general enactments of Parliament.
- *Flexibility*
  The use of delegated legislation permits ministers to respond on an *ad hoc* basis to particular problems as and when they arise, and provides greater flexibility in the regulation of activity which is subject to the ministers' overview.

1.5.5 Disadvantages in the prevalence of delegated legislation

Disadvantages in the prevalence of delegated legislation are as follows:

- *Accountability*
  A key issue in the use of delegated legislation concerns the question of accountability and the erosion of the constitutional role of Parliament. Parliament is presumed to be the source of legislation but, with respect to delegated legislation, individual MPs are not the source of the law. Certain people, notably government ministers and the civil servants who work under them to produce the detailed provisions of delegated legislation, are the real source of such - regulations. Even allowing for the fact that they are in effect operating on powers delegated to them from Parliament, it is not beyond questioning whether this procedure does not give them more power than might be thought appropriate or, indeed, constitutionally correct.
- *Scrutiny*
  The question of general accountability raises the need for effective scrutiny, but the very form of delegated legislation makes it extremely difficult for ordinary MPs to fully understand what is being enacted and, therefore, to effectively monitor it. This difficulty arises in part from the tendency for such regulations to be highly specific, detailed and technical. This problem of comprehension and control is compounded by the fact that regulations appear outside the context of their enabling legislation but only have any real meaning in that context.
- *Bulk*
  The problems faced by ordinary MPs in effectively keeping abreast of delegated legislation are further increased by the sheer mass of such legislation, and if parliamentarians cannot keep up with the flow of delegated legislation, the question has to be asked as to how the general public can be expected to do so.

1.5.6 Control over delegated legislation

The foregoing difficulties and potential shortcomings in the use of delegated legislation are, at least to a degree, mitigated by the fact that specific controls have been established to oversee the use of delegated legislation. These controls take two forms:

- *Parliamentary control over delegated legislation*
  Power to make delegated legislation is ultimately dependent upon the authority of Parliament, and Parliament retains general control over the procedure for enacting such law. New regulations, in the form of delegated legislation, are required to be laid before Parliament. This procedure takes one of two forms, depending on the provision of the enabling legislation. Some regulations require a positive resolution of one or both of the Houses of Parliament before they become law. Most Acts, however, simply require that regulations made under their auspices be placed before Parliament. They automatically become law after a period of 40 days, unless a resolution to annul them is passed. The problem with the negative resolution procedure is that it relies on Members of Parliament being sufficiently aware of the content, meaning and effect of the detailed provisions laid before them. Given the nature of such statutory legislation, such reliance is unlikely to prove secure.

  Since 1973, there has been a Joint Select Committee on Statutory Instruments, whose function it is to consider statutory instruments. This committee scrutinises statutory instruments from a technical point of view as regards drafting and has no power to question the substantive content or the policy implications of the regulation. Its effectiveness as a general control is, therefore, limited.

  The House of Commons has its own *Select Committee on Statutory Instruments*, which is appointed to consider all statutory instruments laid *only* before the House of Commons.

  EU legislation is overseen by a specific committee, as are local authority bylaws.
- *Judicial control of delegated legislation*
  It is possible for delegated legislation to be challenged through the procedure of judicial review, on the basis that the person or body to whom Parliament has delegated its authority has acted in a way that exceeds the limited powers delegated to them. Any provision which does not have this authority is *ultra vires* and void. Additionally, there is a presumption that any power delegated by Parliament is to be used in a reasonable manner and the courts may, on occasion, hold particular delegated legislation to be void on the basis that it is unreasonable. The power of the courts to scrutinise and control delegated legislation has been greatly increased by the introduction of the HRA. As has been noted previously, that Act does not give courts the power to strike down primary legislation as being incompatible with the rights contained in the ECHR. However, as – by definition – delegated legislation is not primary legislation, it follows that the courts now do have the power to declare invalid any such legislation which conflicts with the ECHR.

1.6 Case Law

The foregoing has highlighted the increased importance of legislation in today's society but, even allowing for this and the fact that case law can be overturned by legislation, the UK is still a common law system, and the importance and effectiveness of judicial creativity and common law principles and practices cannot be discounted. 'Case law' is the name given to the creation and refinement of law in the course of judicial decisions.

1.6.1 The meaning of precedent

The doctrine of binding precedent, or *stare decisis*, lies at the heart of the English common law system. It refers to the fact that, within the hierarchical structure of the English courts, a decision of a higher court will be binding on any court which is lower than it in that hierarchy. In general terms, this means that, when judges try cases, they will check to see whether a similar situation has already come before a court. If the precedent was set by a court of equal or higher status to the

court deciding the new case, then the judge in that case should follow the rule of law established in the earlier case. Where the precedent is set by a court lower in the hierarchy, the judge in the new case does not have to follow it, but he will certainly consider it and will not overrule it without due consideration.

The operation of the doctrine of binding precedent depends on the existence of an extensive reporting service to provide access to previous judicial decisions. The earliest summaries of cases appeared in the Year Books but, since 1865, cases have been reported by the Council of Law Reporting, which produces the authoritative reports of cases. Modern technology has resulted in the establishment of Lexis, a computer-based store of cases.

For reference purposes, the most commonly referenced law reports are cited as follows:

- *Law reports*
  Appeal Cases (AC)
  Chancery Division (Ch D)
  Family Division (Fam)
  King's/Queen's Bench (KB/QB)
- *Other general series of reports*
  All England Law Reports (All ER)
  Weekly Law Reports (WLR)
  Solicitors Journal (SJ)
  European Court Reports (ECR)
- *CD-ROMs and Internet facilities*
  As in most other fields, the growth of information technology has revolutionised law reporting and law finding. Many of the law reports mentioned above are both available on CD-ROM and on the Internet. See, for example, Justis, Lawtel, Lexis-Nexis and Westlaw UK, amongst others. Indeed, members of the public can now access law reports directly from their sources in the courts, both domestically and in Europe. The first major electronic cases database was the Lexis system, which gave immediate access to a huge range of case authorities, some unreported elsewhere. The problem for the courts was that lawyers with access to the system could simply cite lists of cases from the database without the courts having access to paper copies of the decisions. The courts soon expressed their displeasure at this indiscriminate citation of unreported cases trawled from the Lexis database (see *Stanley v International Harvester Co of Great Britain Ltd* (1983)).

In line with the ongoing modernisation of the whole legal system, the way in which cases are to be cited has been changed. Thus, from January 2001, following *Practice Direction (Judgments: Form and Citation)* [2001] 1 WLR 194, a neutral system was introduced; it was extended in a further Practice Direction in April 2002. Cases in the various courts are now cited as follows:

Supreme Court	[year]	UKSC case no
House of Lords	[year]	UKHL case no
Court of Appeal (Civil Division)	[year]	EWCA Civ case no
Court of Appeal (Criminal Division)	[year]	EWCA Crim case no
High Court		
Queen's Bench Division	[year]	EWHC case no (QB)
Chancery Division	[year]	EWHC case no (Ch)
Patents Court	[year]	EWHC case no (Pat)
Administrative Court	[year]	EWHC case no (Admin)
Commercial Court	[year]	EWHC case no (Comm)

Admiralty Court	[year]	EWHC case no (Admlty)
Technology & Construction Court	[year]	EWHC case no (TCC)
Family Division	[year]	EWHC case no (Fam)

Within the individual case, the paragraphs of each judgment are numbered consecutively and, where there is more than one judgment, the numbering of the paragraphs carries on sequentially.

1.6.2 The hierarchy of the courts and the setting of precedent

Supreme Court

Perhaps the most significant change to have taken place in the English legal system since the previous edition of this book is the replacement of the Judicial Committee of the House of Lords

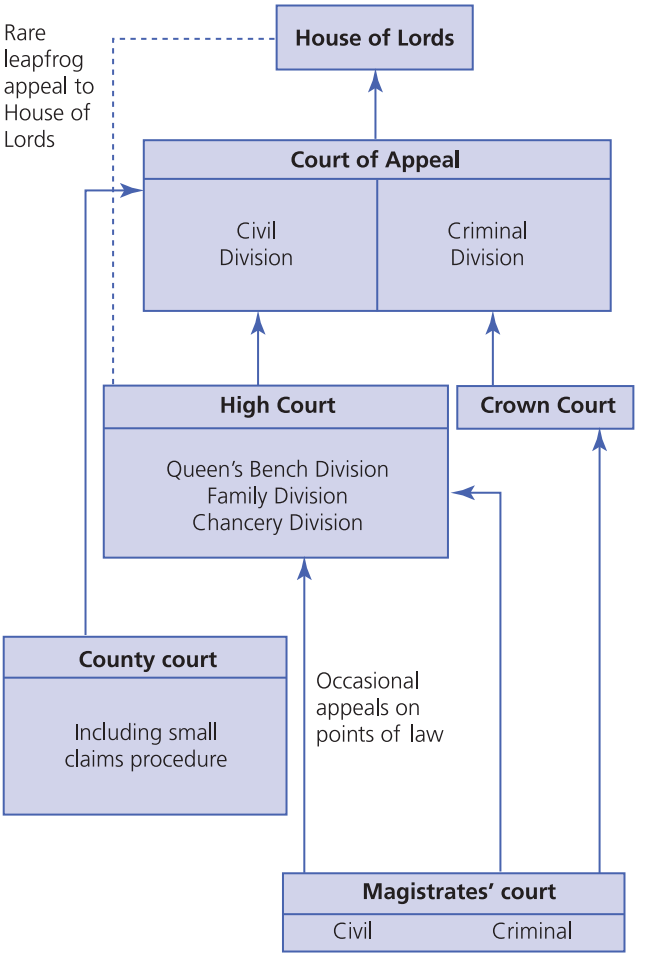

Figure 1.1 The hierarchy of the courts

by the Supreme Court. The Supreme Court began its work on 1 October 2009 and was officially opened by the Queen on 16 October of that year. The Court will be considered in more detail in later chapters, but as the replacement for the House of Lords it now clearly sits at the pinnacle of the English court hierarchy and as such its future decisions will have the same effect and binding power as those of its predecessor. Given the relative novelty of the Supreme Court, with the related lack of actual judgments, the decision has been taken that it would be wrong simply to delete references to the House of Lords and tedious to continually refer to the House of Lords as the House of Lords/Supreme Court. Consequently all future reference to the House of Lords and its powers will be assumed to apply to the Supreme Court. It should also be mentioned that the Supreme Court carries on the previous double existence of the House of Lords and the Privy Council as a distinct institution.

Supreme Court/House of Lords

Until its replacement by the Supreme Court, the House of Lords stood at the summit of the English court structure and its decisions were and still are binding on all courts below it in the hierarchy. It must be recalled, however, that the CJEU is superior to the House of Lords in matters relating to EU law. As regards its own previous decisions, until 1966, the House of Lords regarded itself as bound by such decisions. In a *Practice Statement* (1966), Lord Gardiner indicated that the House of Lords would in future regard itself as being free to depart from its previous decisions where it appeared to be right to do so. Given the potentially destabilising effect on existing legal practice based on previous decisions of the House of Lords, this is not a discretion that the court exercises lightly. There have, however, been a number of cases in which the House of Lords has overruled or amended its own earlier decisions, for example: *Conway v Rimmer* (1968); *Herrington v BRB* (1972); *Miliangos v George Frank (Textiles) Ltd* (1976); and *R v Shivpuri* (1986). In *Herrington v BRB*, the House of Lords overturned the previous rule, established in *Addie v Dumbreck* (1929), that an occupier was only responsible for injury sustained to a trespassing child if the injury was caused either intentionally or recklessly by the occupier. In the modern context, the court preferred to establish responsibility on the basis of whether the occupier had done everything that a humane person should have done to protect the trespasser. Further, in *Miliangos v George Frank (Textiles) Ltd*, the House of Lords decided that, in the light of changed foreign exchange conditions, the previous rule that damages in English courts could only be paid in sterling no longer applied. They allowed payment in the foreign currency as specified in the contract and, in so doing, overruled *Re United Railways of the Havana & Regla Warehouses Ltd* (1961).

Court of Appeal

In civil cases, the Court of Appeal is generally bound by previous decisions of the House of Lords.

The Court of Appeal is also bound by its own previous decisions in civil cases. There are, however, a number of exceptions to this general rule. Lord Greene MR listed these exceptions in *Young v Bristol Aeroplane Co Ltd* (1944). They arise where:

- there is a conflict between two previous decisions of the Court of Appeal. In this situation, the later court must decide which decision to follow and, as a corollary, which decision to overrule (*Tiverton Estates Ltd v Wearwell Ltd* (1974));
- a previous decision of the Court of Appeal has been overruled, either expressly or impliedly, by the House of Lords. In this situation, the Court of Appeal is required to follow the decision of the House of Lords (*Family Housing Association v Jones* (1990)); or
- the previous decision was given *per incuriam*, in other words, that previous decision was taken in ignorance of some authority, either statutory or judge made, that would have led to a different conclusion. In this situation, the later court can ignore the previous decision in question (*Williams v Fawcett* (1985)).

There is also the possibility that, as a consequence of s 3 of the European Communities Act 1972, the Court of Appeal can ignore a previous decision of its own which is inconsistent with EU law or with a later decision of the ECJ.

The Court of Appeal may also make use of ss 2 and 3 of the HRA to overrule precedents no longer compatible with the rights provided under that Act (see 1.3 above). As has been seen in *Ghaidan v Godin-Mendoza* (2004), it extended the rights of same-sex partners to inherit tenancies under the Rent Act 1977 in a way that the House of Lords had not felt able to do in *Fitzpatrick v Sterling Housing Association Ltd* (1999), a case decided before the HRA had come into force. Doubtless the Court of Appeal would use the same powers to overrule its own previous decisions made without regard to rights provided by the 1998 Act.

Although, on the basis of *R v Spencer* (1985), it would appear that there is no difference, in principle, in the operation of the doctrine of *stare decisis* between the Criminal and Civil Divisions of the Court of Appeal, it is generally accepted that, in practice, precedent is not followed as strictly in the former as it is in the latter. Courts in the Criminal Division are not bound to follow their own previous decisions which they subsequently consider to have been based on either a misunderstanding or a misapplication of the law. The reason for this is that the criminal courts deal with matters which involve individual liberty and which, therefore, require greater discretion to prevent injustice.

High Court

The Divisional Courts, each located within the three divisions of the High Court, hear appeals from courts and tribunals below them in the hierarchy. They are bound by the doctrine of *stare decisis* in the normal way and must follow decisions of the House of Lords and the Court of Appeal. Each Divisional Court is usually also bound by its own previous decisions, although in civil cases it may make use of the exceptions open to the Court of Appeal in *Young v Bristol Aeroplane Co Ltd* (1944) and, in criminal appeal cases, the Queen's Bench Divisional Court may refuse to follow its own earlier decisions where it considers the earlier decision to have been made wrongly.

The High Court is also bound by the decisions of superior courts. Decisions by individual High Court judges are binding on courts which are inferior in the hierarchy, but such decisions are not binding on other High Court judges, although they are of strong persuasive authority and tend to be followed in practice.

Crown Courts cannot create precedent and their decisions can never amount to more than persuasive authority.

County courts and magistrates' courts do not create precedents.

1.6.3 The nature of precedent

Previous cases establish legal precedents which later courts must either follow or, if the decision was made by a court lower in the hierarchy, at least consider. It is essential to realise, however, that not every part of the case as reported in the law reports is part of the precedent. In theory, it is possible to divide cases into two parts: the *ratio decidendi* and *obiter dicta*:

- *Ratio decidendi*
  The *ratio decidendi* of a case may be understood as the statement of the law applied in deciding the legal problem raised by the concrete facts of the case. It is essential to establish that it is not the actual decision in a case that sets the precedent – it is the *rule of law on which that decision* is founded that does this. This rule, which is an abstraction from the facts of the case, is known as the *ratio decidendi* of the case.
- *Obiter dicta*
  Any statement of law that is not an essential part of the *ratio decidendi* is, strictly speaking, superfluous, and any such statement is referred to as *obiter dictum* (*obiter dicta* in the plural), that is, 'said

by the way'. Although *obiter dicta statements* do not form part of the binding precedent, they are of persuasive authority and can be taken into consideration in later cases.

The division of cases into these two distinct parts is a theoretical procedure. It is the general misfortune of all those who study law that judges do not actually separate their judgments into the two clearly defined categories. It is the particular misfortune of a student of business law, however, that they tend to be led to believe that case reports are divided into two distinct parts: the *ratio*, in which the judge states what he takes to be the law; and *obiter* statements, in which the judge muses on alternative possibilities. Such is not the case: there is no such clear division and, in reality, it is actually later courts which effectively determine the *ratio* in any particular case. Indeed, later courts may declare *obiter* what was previously felt to be part of the *ratio*. One should never overestimate the objective, scientific nature of the legal process.

Students should always read cases fully; although it is tempting to rely on the headnote at the start of the case report, it should be remembered that this is a summary provided by the case reporter and merely reflects what he or she thinks the *ratio* is. It is not unknown for headnotes to miss an essential point in a case.

1.6.4 Evaluation

The foregoing has set out the doctrine of binding precedent as it operates, in theory, to control the ambit of judicial discretion. It has to be recognised, however, that the doctrine does not operate as stringently as it appears to at first sight, and there are particular shortcomings in the system that must be addressed in weighing up the undoubted advantages with the equally undoubted disadvantages.

1.6.5 Advantages of case law

There are numerous perceived advantages of the doctrine of *stare decisis*, amongst which are the following:

- *Consistency*
  This refers to the fact that like cases are decided on a like basis and are not apparently subject to the whim of the individual judge deciding the case in question. This aspect of formal justice is important in justifying the decisions taken in particular cases.
- *Certainty*
  This follows from, and indeed is presupposed by, the previous item. Lawyers and their clients are able to predict the likely outcome of a particular legal question in the light of previous judicial decisions. Also, once the legal rule has been established in one case, individuals can orient their behaviour with regard to that rule relatively secure in the knowledge that it will not be changed by some later court.
- *Efficiency*
  This particular advantage follows from the preceding one. As the judiciary are bound by precedent, lawyers and their clients can be reasonably certain as to the likely outcome of any particular case on the basis of established precedent. As a consequence, most disputes do not have to be re-argued before the courts. With regard to potential litigants, it saves them money in court expenses because they can apply to their solicitor/barrister for guidance as to how their particular case is likely to be decided in the light of previous cases on the same or similar points.
- *Flexibility*
  This refers to the fact that various mechanisms enable the judges to manipulate the common law in such a way as to provide them with an opportunity to develop law in particular areas

without waiting for Parliament to enact legislation. It should be recognised that judges do have a considerable degree of discretion in electing whether or not to be bound by a particular authority.

Flexibility is achieved through the possibility of previous decisions being either overruled or distinguished, or the possibility of a later court extending or modifying the effective ambit of a precedent. The main mechanisms through which judges alter or avoid precedents are overruling and distinguishing:

- *Overruling*
  This is the procedure whereby a court which is higher in the hierarchy sets aside a legal ruling established in a previous case. It is somewhat anomalous that, within the system of *stare decisis*, precedents gain increased authority with the passage of time. As a consequence, courts tend to be reluctant to overrule long-standing authorities, even though they may no longer accurately reflect contemporary practices. In addition to the wish to maintain a high degree of certainty in the law, the main reason for the judicial reluctance to overrule old decisions would appear to be the fact that overruling operates retrospectively and the principle of law being overruled is held never to have been law. Overruling a precedent, therefore, might have the consequence of disturbing important financial arrangements made in line with what were thought to be settled rules of law. It might even, in certain circumstances, lead to the imposition of criminal liability on previously lawful behaviour. It has to be emphasised, however, that the courts will not shrink from overruling authorities where they see them as no longer representing an appropriate statement of law. The decision in *R v R* (1992) to recognise the possibility of rape within marriage may be seen as an example of this, although, even here, the House of Lords felt constrained to state that it was not actually altering the law but was merely removing a misconception as to the true meaning and effect of the law. As this demonstrates, the courts are rarely ready to challenge the legislative prerogative of Parliament in an overt way.

  Overruling should not be confused with reversing, which is the procedure whereby a court higher in the hierarchy reverses the decision of a lower court in the same case.
- *Distinguishing*
  The main device for avoiding binding precedents is distinguishing. As has been previously stated, the *ratio decidendi* of any case is an abstraction from the material facts of the case. This opens up the possibility that a court may regard the facts of the case before it as significantly different from the facts of a cited precedent and, consequentially, it will not find itself bound to follow that precedent. Judges use the device of distinguishing where, for some reason, they are unwilling to follow a particular precedent, and the law reports provide many examples of strained distinctions where a court has quite evidently not wanted to follow an authority that it would otherwise have been bound by.

1.6.6 Disadvantages of case law

It should be noted that the advantage of flexibility at least potentially contradicts the alternative advantage of certainty, but there are other disadvantages in the doctrine which have to be considered. Amongst these are the following:

- *Uncertainty*
  This refers to the fact that the degree of certainty provided by the doctrine of *stare decisis* is undermined by the absolute number of cases that have been reported and can be cited as authorities. This uncertainty is compounded by the ability of the judiciary to select

which authority to follow, through use of the mechanism of distinguishing cases on their facts.

- *Fixity*
  This refers to the possibility that the law, in relation to any particular area, may become ossified on the basis of an unjust precedent, with the consequence that previous injustices are perpetuated. An example of this was the long delay in the recognition of the possibility of rape within marriage, which was only recognised some twenty years ago (R v R (1992)).
- *Unconstitutionality*
  This is a fundamental question that refers to the fact that the judiciary are in fact overstepping their theoretical constitutional role by actually making law, rather than restricting themselves to the role of simply applying it. It is now probably a commonplace of legal theory that judges do make law. Due to their position in the constitution, however, judges have to be circumspect in the way in which, and the extent to which, they use their powers to create law and impose values. To overtly assert or exercise the power would be to challenge the power of the legislature. For an unelected body to challenge a politically supreme Parliament would be unwise, to say the least.

1.6.7 Case study

Carlill v Carbolic Smoke Ball Co Ltd (1892) is one of the most famous examples of the case law in this area. A summary of the case is set out below.

❖ KEY CASE *Carlill v Carbolic Smoke Ball Co Ltd* (1892)

Facts:

Mrs Carlill made a retail purchase of one of the defendant's medicinal products: the Carbolic Smoke Ball. It was supposed to prevent people who used it in a specified way (three times a day for at least two weeks) from catching influenza. The company was very confident about its product and placed an advertisement in a newspaper, the *Pall Mall Gazette*, which praised the effectiveness of the smoke ball and promised to pay £100 (a huge sum of money at that time) to:

> . . . any person who contracts the increasing epidemic influenza, colds, or any disease caused by taking cold, having used the ball three times daily for two weeks according to the printed directions supplied with each ball.

The advertisement went on to explain that the company had deposited £1,000 with the Alliance Bank (on Regent Street in London) as a sign of its sincerity in the matter. Any proper claimants could get their payment from that sum. On the faith of the advertisement, Mrs Carlill bought one of the balls at a chemist and used it as directed, but she caught influenza. She claimed £100 from the company but was refused it, so she sued for breach of contract. The company said that, for several reasons, there was no contract, the main reasons being that:

- the advert was too vague to amount to the basis of a contract;
- there was no time limit and no way of checking the way in which the customer used the ball;
- Mrs Carlill did not give any legally recognised value to the company; one cannot legally make an offer to the whole world, so the advert was not a proper offer;

- even if the advert could be seen as an offer, Mrs Carlill had not given a legal acceptance of that offer because she had not notified the company that she was accepting; and
- the advert was a mere puff, that is, a piece of insincere rhetoric.

Decision:
The Court of Appeal found that there was a legally enforceable agreement – a contract – between Mrs Carlill and the company. The company would have to pay damages to Mrs Carlill.

Ratio decidendi: The three Lords Justice of Appeal who gave judgments in this case all decided in favour of Mrs Carlill. Each, however, used slightly different reasoning, arguments and examples. The process, therefore, of distilling the reason for the decision of the court is quite a delicate art. The *ratio* of the case can be put as follows.

Offers must be sufficiently clear in order to allow the courts to enforce agreements that follow from them. The offer here was a distinct promise, expressed in language which was perfectly unmistakable. It could not be a mere puff in view of the £1,000 deposited specially to show good faith. An offer *may* be made to the world at large, and the advert was such an offer. It was accepted by any person, like Mrs Carlill, who bought the product and used it in the prescribed manner. Mrs Carlill had accepted the offer by her conduct when she did as she was invited to do and started to use the smoke ball. She had not been asked to let the company know that she was using it.

Obiter dicta: In the course of his reasoning, Bowen LJ gave the legal answer to a set of facts which were not in issue in this case. They are thus *obiter dicta*. He did this because it assisted him in clarifying the answer to Mrs Carlill's case. He said:

> If I advertise to the world that my dog is lost, and that anybody who brings the dog to a particular place will be paid some money, are all the police or other persons whose business it is to find lost dogs to be expected to sit down and write me a note saying that they have accepted my proposal? Why, of course, they at once look [for] the dog, and as soon as they find the dog they have performed the condition.

If such facts were ever subsequently in issue in a court case, the words of Bowen LJ could be used by counsel as persuasive precedent.

Carlill was applied in *Peck v Lateu* (1973) but was distinguished in *AM Satterthwaite & Co v New Zealand Shipping Co* (1972).

1.7 Statutory Interpretation

The two previous sections have tended to present legislation and case law in terms of opposition: legislation being the product of Parliament and case law the product of the judiciary in the courts. Such stark opposition is, of course, misleading, for the two processes come together when consideration is given to the necessity for judges to interpret statute law in order to apply it.

1.7.1 Problems in interpreting legislation

In order to apply legislation, judges must ascertain its meaning and, in order to ascertain that meaning, they are faced with the difficulty of interpreting the legislation. Legislation, however, shares the general problem of uncertainty, which is inherent in any mode of verbal communication. Words can have more than one meaning and the meaning of a word can change, depending on its context.

One of the essential requirements of legislation is generality of application – the need for it to be written in such a way as to ensure that it can be effectively applied in various circumstances without the need to detail those situations individually. This requirement, however, can give rise to particular problems of interpretation; the need for generality can only really be achieved at the expense of clarity and precision of language.

Legislation, therefore, involves an inescapable measure of uncertainty, which can only be made certain through judicial interpretation. However, to the extent that the interpretation of legislative provisions is an active process, it is equally a creative process, and it inevitably involves the judiciary in creating law through determining the meaning and effect being given to any particular piece of legislation.

There are, essentially, two contrasting views as to how judges should go about determining the meaning of a statute – the restrictive, literal approach and the more permissive, purposive approach:

1 *The literal approach*
The literal approach is dominant in the English legal system, although it is not without critics, and devices do exist for circumventing it when it is seen as too restrictive. This view of judicial interpretation holds that the judge should look primarily to the words of the legislation in order to construe its meaning and, except in the very limited circumstances considered below, should not look outside of, or behind, the legislation in an attempt to find its meaning.

2 *The purposive approach*
The purposive approach rejects the limitation of the judges' search for meaning to a literal construction of the words of legislation itself. It suggests that the interpretative role of the judge should include, where necessary, the power to look beyond the words of statute in pursuit of the reason for its enactment, and that meaning should be construed in the light of that purpose and so as to give it effect. This purposive approach is typical of civil law systems found on the European mainland. In these jurisdictions, legislation tends to set out general principles and leaves the fine details to be filled in later by the judges who are expected to make decisions in the furtherance of those general principles.

European Union (EU) legislation tends to be drafted in the continental, civil law, manner. Its detailed effect, therefore, can only be determined on the basis of a purposive approach to its interpretation. This requirement, however, runs counter to the literal approach that was the dominant approach in the English system. The need to interpret such legislation, however, has forced a change in that approach in relation to EU legislation and even with respect to domestic legislation designed to implement EU legislation. Thus, in *Pickstone v Freemans plc* (1988), the House of Lords held that it was permissible, and indeed necessary, for the court to read words into inadequate domestic legislation in order to give effect to EU law in relation to provisions relating to equal pay for work of equal value.

As a consequence of the foregoing there has been, even in the English legal system, a move away from the over-reliance on the literal approach to statutory interpretation to a more purposive approach. As Lord Griffiths put it in *Pepper v Hart* (1993):

> The days have long passed when the court adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears on the background against which the legislation was enacted.

However, it is still necessary to consider the traditional and essentially literally based approaches to statutory interpretation. Additionally, what follows should be read within the context of the Human Rights Act (HRA) 1998, which requires all legislation to be construed in such a way as, if at all possible, to bring it within the ambit of the European Convention on Human Rights (ECHR). The effect of this requirement is to provide the judiciary with powers of interpretation much wider than those afforded to them by the more traditional rules of interpretation, as can be seen from *R v A* (2001), considered above at 1.3.2.

1.7.2 Rules of interpretation

In attempting to decide upon the precise meaning of any statute, judges use well established rules of interpretation, of which there are three primary ones, together with a variety of other secondary aids to construction.

The rules of statutory interpretation are as follows:

- *Literal rule*

  Under this rule, the judge is required to consider what the legislation actually says, rather than considering what it might mean. In order to achieve this end, the judge should give words in legislation their literal meaning; that is, their plain, ordinary, everyday meaning, even if the effect of this is to produce what might be considered an otherwise unjust or undesirable outcome. *Inland Revenue Commissioners v Hinchy* (1960) concerned s 25(3) of the Income Tax Act 1952, which stated that any taxpayer who did not complete their tax return was subject to a fixed penalty of £20 plus *treble the tax which he ought to be charged under the Act*. The question that had to be decided was whether the additional element of the penalty should be based on the total amount that should have been paid, or merely the unpaid portion of that total. The House of Lords adopted a literal interpretation of the statute and held that any taxpayer in default should have to pay triple their original tax bill.

  In *Fisher v Bell* (1961), the court, in line with general contract principles, decided that the placing of an article in a window did not amount to offering but was merely an invitation to treat, and thus the shopkeeper could not be charged with 'offering the goods for sale'. In this case, the court chose to follow the contract law literal interpretation of the meaning of 'offer' in the Act in question, and declined to consider the usual non-legal literal interpretation of the word. (The executive's attitude to the courts' legal-literal interpretation in *Fisher v Bell*, and the related case of *Partridge v Crittenden* (1968), can be surmised from the fact that later legislation, such as the Trade Descriptions Act 1968, has effectively legislated that invitations to treat are to be treated in the same way as offers for sale.)

  A problem in relation to the literal rule arises from the difficulty that judges face in determining the literal meaning of even the commonest of terms. In *R v Maginnis* (1987), the judges differed amongst themselves as to the literal meaning of the common word 'supply' in relation to a charge of supplying drugs. *Attorney General's Reference (No 1 of 1988)* (1989) concerned the meaning of 'obtained' in s 1(3) of the Company Securities (Insider Dealing) Act 1985, since replaced by the Criminal Justice Act 1993, and led to similar disagreement as to the precise meaning of an everyday word.

- *Golden rule*

  This rule is generally considered to be an extension of the literal rule. It is applied in circumstances where the application of the literal rule is likely to result in an obviously absurd result. An example of the application of the golden rule is *Adler v George* (1964). In this case, the court held that the literal wording of the statute ('in the vicinity of') covered the action committed by the defendant who carried out her action within the area concerned.

  Another example of this approach is to be found in *Re Sigsworth* (1935), in which the court introduced common law rules into legislative provisions, which were silent on the matter, to

prevent the estate of a murderer from benefiting from the property of the party he had murdered.

- *Mischief rule*
  This rule, sometimes known as the rule in *Heydon's Case* (1584), operates to enable judges to interpret a statute in such a way as to provide a remedy for the mischief that the statute was enacted to prevent. Contemporary practice is to go beyond the actual body of the legislation to determine what mischief a particular Act was aimed at redressing. The example usually cited of the use of the mischief rule is *Corkery v Carpenter* (1951), in which a man was found guilty of being drunk in charge of a 'carriage', although he was in fact only in charge of a bicycle. A much more controversial application of the rule is to be found in *Royal College of Nursing v DHSS* (1981), where the courts had to decide whether the medical induction of premature labour to effect abortion, under the supervision of nursing staff, was lawful.

1.7.3 Aids to construction

In addition to the three main rules of interpretation, there are a number of secondary aids to construction. These can be categorised as either intrinsic or extrinsic in nature:

- *Intrinsic assistance*
  This is help which is actually derived from the statute which is the object of interpretation. The judge uses the full statute to understand the meaning of a particular part of it. Assistance may be found from various parts of the statute, such as: the title, long or short; any preamble, which is a statement preceding the actual provisions of the Act; and schedules, which appear as detailed additions at the end of the Act. Section headings or marginal notes may also be considered, where they exist.
- *Extrinsic assistance*
  Sources outside of the Act itself may, on occasion, be resorted to in determining the meaning of legislation. For example, judges have always been entitled to refer to dictionaries in order to find the meaning of non-legal words. The Interpretation Act 1978 is also available for consultation with regard to the meaning of particular words generally used in statutes.

  Judges are also allowed to use extrinsic sources to determine the mischief at which particular legislation is aimed. For example, they are able to examine earlier statutes and they have been entitled for some time to look at Law Commission reports, Royal Commission reports and the reports of other official commissions.

Until fairly recently, *Hansard*, the verbatim report of parliamentary debate, literally remained a closed book to the courts. In *Pepper v Hart* (1993), however, the House of Lords decided to overturn the previous rule. In a majority decision it was held that, where the precise meaning of legislation was uncertain or ambiguous, or where the literal meaning of an Act would lead to a manifest absurdity, the courts could refer to *Hansard*'s *Reports of Parliamentary Debates and Proceedings* as an aid to construing the meaning of the legislation.

The operation of the principle in *Pepper v Hart* was extended in *Three Rivers DC v Bank of England (No 2)* (1996) to cover situations where the legislation under question was not in itself ambiguous but might be ineffective in its intention to give effect to some particular EC directive. Applying the wider powers of interpretation open to it in such circumstances, the court held that it was permissible to refer to *Hansard* in order to determine the actual purpose of the statute.

The *Pepper v Hart* principle only applies to statements made by ministers at the time of the passage of legislation, and the courts have declined to extend it to cover situations where ministers

subsequently make some statement as to what they consider the effect of a particular Act to be (*Melluish (Inspector of Taxes) v BMI (No 3) Ltd* (1995)).

1.7.4 Presumptions

In addition to the rules of interpretation, the courts may also make use of certain presumptions. As with all presumptions, they are rebuttable, which means that the presumption is subject to being overturned in argument in any particular case. The presumptions operate in the following ways:

- *Against the alteration of the common law*
  Parliament can alter the common law whenever it decides to do so. In order to do this, however, it must expressly enact legislation to that end. If there is no express intention to that effect, it is assumed that statute does not make any fundamental change to the common law. With regard to particular provisions, if there are alternative interpretations, one of which will maintain the existing common law situation, then that interpretation will be preferred.
- *Against retrospective application*
  As the War Crimes Act 1990 shows, Parliament can impose criminal responsibility *retrospectively, where particular* and extremely unusual circumstances dictate the need to do so, but such effect must be clearly expressed.
- *Against the deprivation of an individual's liberty, property or rights*
  Once again, the presumption can be rebutted by express provision and it is not uncommon for legislation to deprive people of their rights to enjoy particular benefits. Nor is it unusual for individuals to be deprived of their liberty under the Mental Health Act 1983.
- *Against application to the Crown*
  Unless the legislation contains a clear statement to the contrary, it is presumed not to apply to the Crown.
- *Against breaking international law*
  Where possible, legislation should be interpreted in such a way as to give effect to existing international legal obligations.
- *In favour of the requirement that* mens rea *(a guilty mind) be a requirement in any criminal offence*
  The classic example of this presumption is *Sweet v Parsley* (1969), in which a landlord was eventually found not guilty of allowing her premises to be used for the purpose of taking drugs, as she had absolutely no knowledge of what was going on in her house. Offences which do not require the presence of *mens rea* are referred to as strict liability offences.
- *In favour of words taking their meaning from the context in which they are used*
  This final presumption refers back to, and operates in conjunction with, the major rules for interpreting legislation considered previously. The general presumption appears as three distinct sub-rules, each of which carries a Latin tag:
  - the *noscitur a sociis* rule is applied where statutory provisions include a list of examples of what is covered by the legislation. It is presumed that the words used have a related meaning and are to be interpreted in relation to each other (see *IRC v Frere* (1965));
  - the *eiusdem generis* rule applies in situations where general words are appended to the end of a list of specific examples. The presumption is that the general words have to be interpreted in line with the prior restrictive examples. Thus, a provision which referred to a list that included horses, cattle, sheep and other animals would be unlikely to apply to domestic animals such as cats and dogs (see *Powell v Kempton Park Racecourse* (1899)); and
  - the *expressio unius exclusio alterius* rule simply means that, where a statute seeks to establish a list of what is covered by its provisions, then anything not expressly included in that list is specifically excluded (see *R v Inhabitants of Sedgley* (1831)).

1.8 Custom

The traditional view of the development of the common law tends to adopt an overly romantic view as regards its emergence. This view suggests that the common law is no more than the crystallisation of ancient common customs, this distillation being accomplished by the judiciary in the course of their historic travels around the land in the middle ages. This view, however, tends to ignore the political process that gave rise to this procedure. The imposition of a common system of law represented the political victory of a State that had fought to establish and assert its central authority. Viewed in that light, the emergence of the common law can perhaps better be seen as the invention of the judges as representatives of the State and as representing what they wanted the law to be, rather than what people generally thought it was.

One source of customary practice that undoubtedly did find expression in the form of law was business and commercial practice. These customs and practices were originally constituted in the distinct form of the Law Merchant but, gradually, this became subsumed under the control of the common law courts and ceased to exist apart from the common law.

Notwithstanding the foregoing, it is still possible for specific local customs to operate as a source of law. In certain circumstances, parties may assert the existence of customary practices in order to support their case. Such local custom may run counter to the strict application of the common law and, where they are found to be legitimate, they will effectively replace the common law. Even in this respect, however, reliance on customary law as opposed to common law, although not impossible, is made unlikely by the stringent tests that have to be satisfied (see *Egerton v Harding* (1974)). The requirements that a local custom must satisfy in order to be recognised are as follows:

- it must have existed from time immemorial, that is, 1189;
- it must have been exercised continuously within that period;
- it must have been exercised peacefully and without opposition;
- it must also have been felt to be obligatory;
- it must be capable of precise definition;
- it must have been consistent with other customs; and
- it must be reasonable.

Given this list of requirements, it can be seen why local custom is not an important source of law.

1.8.1 Books of authority

In the very unusual situation of a court being unable to locate a precise or analogous precedent, it may refer to legal textbooks for guidance. Such books are subdivided, depending on when they were written. In strict terms, only certain works are actually treated as authoritative sources of law. Legal works produced after *Blackstone's Commentaries* of 1765 are considered to be of recent origin and, although they cannot be treated as authoritative sources, the courts may consider what the most eminent works by accepted experts in particular fields have said in order to help determine what the law is or should be.

1.9 Law Reform

At one level, law reform is a product of either parliamentary or judicial activity, as has been considered previously. Parliament tends, however, to be concerned with particularities of law reform and the judiciary are constitutionally and practically disbarred from reforming the law on anything other than an opportunistic and piecemeal basis. Therefore, there remains a need for the question

of law reform to be considered generally and a requirement that such consideration be conducted in an informed but disinterested manner.

Reference has already been made to the use of consultative Green Papers by the Government as a mechanism for gauging the opinions of interested parties to particular reforms. More formal advice may be provided through various advisory standing committees. Amongst these is the Law Reform Committee. The function of this Committee is to consider the desirability of changes to the civil law which the Lord Chancellor may refer to it. The Criminal Law Revision Committee performs similar functions in relation to criminal law.

Royal Commissions may be constituted to consider the need for law reform in specific areas. For example, the Commission on Criminal Procedure (1980) led to the enactment of the Police and Criminal Evidence Act (PACE) 1984.

Committees may be set up in order to review the operation of particular areas of law, the most significant recent example being the Woolf review of the operation of the civil justice system. (Detailed analysis of the consequences flowing from the implementation of the recommendations of the Woolf Report will be considered subsequently.) Similarly, Sir Robin Auld conducted a review of the whole criminal justice system and Sir Andrew Leggatt carried out a similar task in relation to the tribunal system.

If a criticism is to be levelled at these committees and commissions, it is that they are all *ad hoc* bodies. Their remit is limited and they do not have the power either to widen the ambit of their investigation or initiate reform proposals.

The Law Commission fulfils the need for some institution to concern itself more generally with the question of law reform. Its general function is to keep the law as a whole under review and to make recommendations for its systematic reform.

Although the scope of the Commission is limited to those areas set out in its programme of law reform, its ambit is not unduly restricted, as may be seen from the range of matters covered in its eleventh programme set out in July 2011, which includes reviews of charity law, contempt of court, electoral law, European contract law, misconduct in a public office, and the modernisation of the law on wildlife management (www.justice.gov.uk/lawcommission/docs/lc330_eleventh_programme.pdf). In addition, ministers may refer matters of particular importance to the Commission for its consideration. As was noted above at 1.2.5, it was just such a referral by the Home Secretary, after the Macpherson Inquiry into the Stephen Lawrence case, that gave rise to the Law Commission's recommendation that the rule against double jeopardy be removed in particular circumstances. An extended version of that recommendation was included in the Criminal Justice Act 2003.

Summary

Law and Legal Sources

The nature of law

Legal systems are particular ways of establishing and maintaining social order. Law is a formal mechanism of social control.

Categories of law

Law can be categorised in a number of ways, although the various categories are not mutually exclusive, as follows:

- Common law and civil law relate to distinct legal systems. The English legal system is a common law one.
- Common law and equity distinguish the two historical sources and systems of English law.
- Common law is judge made; statute law is produced by Parliament.

- Private law relates to individual citizens; public law relates to institutions of government.
- Civil law facilitates the interaction of individuals; criminal law enforces particular standards of behaviour.

The Human Rights Act 1998

The Human Rights Act 1998 incorporates the European Convention on Human Rights into UK law. The Articles of the Convention cover:

- the right to life (Art 2);
- the prohibition of torture (Art 3);
- the prohibition of slavery and forced labour (Art 4);
- the right to liberty and security (Art 5);
- the right to a fair trial (Art 6);
- the general prohibition of the enactment of retrospective criminal offences (Art 7);
- the right to respect for private and family life (Art 8);
- freedom of thought, conscience and religion (Art 9);
- freedom of expression (Art 10);
- freedom of assembly and association (Art 11);
- the right to marry (Art 12);
- the prohibition of discrimination (Art 14); and
- the political activity of aliens may be restricted (Art 16).

The incorporation of the Convention into UK law means that UK courts can decide cases in line with the above Articles. This has the potential to create friction between the judiciary and the executive/legislature.

European Union Law

Sources:

- internal treaties and protocols;
- international agreements;
- secondary legislation; and
- decisions of the CJEU.

Institutions:

- Council of Ministers
- European Parliament
- Commission
- Court of Justice of the European Union.

Domestic sources of law

- Legislation is the law produced through the parliamentary system; then it is given royal assent. The House of Lords has only limited scope to delay legislation.
- Delegated legislation is a sub-classification of legislation. It appears in the form of: Orders in Council; statutory instruments; bylaws; and professional regulations.
  Advantages of delegated legislation:
  - speed of implementation;
  - the saving of parliamentary time;

- access to expertise; and
- flexibility.

The disadvantages relate to:

- the lack of accountability;
- the lack of scrutiny of proposals for such legislation; and
- the sheer amount of delegated legislation.

Controls over delegated legislation:

- Joint Select Committee on Statutory Instruments;
- *ultra vires* provisions may be challenged in the courts;
- judges may declare secondary legislation invalid if it conflicts with the provisions of the Human Rights Act.

Case law

- Created by judges in the course of deciding cases.
- The doctrine of *stare decisis*, or binding precedent, refers to the fact that courts are bound by previous decisions of courts which are equal or above them in the court hierarchy.
- The *ratio decidendi* is binding. Everything else is *obiter dicta*.
- Precedents may be avoided through either overruling or distinguishing. The advantages of precedent are:
  - saving the time of all parties concerned;
  - certainty; and
  - flexibility.

  The disadvantages are:
  - uncertainty;
  - fixity; and
  - unconstitutionality.

Statutory interpretation

This is the way in which judges give practical meaning to legislative provisions, using the following rules:

- The *literal rule* gives words everyday meaning, even if this leads to an apparent injustice.
- The *golden rule* is used in circumstances where the application of the literal rule is likely to result in an obviously absurd result.
- The *mischief rule* permits the court to go beyond the words of the statute in question to consider the mischief at which it was aimed.

There are rebuttable presumptions against:

- the alteration of the common law;
- retrospective application;
- the deprivation of an individual's liberty, property or rights; and
- application to the Crown.

And in favour of:

- the requirement of *mens rea* in relation to criminal offences; and
- deriving the meaning of words from their contexts.

Judges may seek assistance from:

- intrinsic sources as the title of the Act, any preamble or any schedules to it; and
- extrinsic sources such as: dictionaries; textbooks; reports; other parliamentary papers; and, since *Pepper v Hart* (1993), *Hansard*.

Custom

Custom is of very limited importance as a contemporary source of law, although it was important in the establishment of business and commercial law in the form of the old Law Merchant.

Law reform

The need to reform the law may be assessed by a number of bodies:

- Royal Commissions;
- standing committees;
- *ad hoc* committees; and
- the Law Commission.

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