1

Understanding the Law

1.1 Introduction

This first chapter sets out to introduce some fundamentals that will underpin your understanding of Legal Method. We do this by introducing you to the main sources of law that you will become familiar with as you work through this book: primarily *legislation* as well as other 'informal' categories of legal rules, and *case law* as it is developed by the courts. We will also look at the institutions responsible for making and shaping our laws—chiefly Parliament and the courts—and consider the impact of Europe on English (and United Kingdom) law. As regards the latter, we will discuss both our membership of the European Union and the more recent incorporation into 'British' law of rights derived from the European Convention on Human Rights. But, first, we will introduce a simple problem to help us focus on some of the issues this chapter will raise.

1.2 A Sample Legal Problem

A friend who is a shopkeeper has recently received a consignment of camping and other knives, including a small number of flick-knives. She is concerned that the police may take action if she were to display and sell these flick-knives to the public, and asks you for advice.

How can you find out if she would be breaking the law?

Obviously you need to know the law relating to flick-knives, displaying them in shop windows, etc. How do you go about this?

It is easy to assume that the 'law' can be found in one book; that somewhere there is a book which will give you the answer to every legal question you might pose. If this were true there would be little need for lawyers! Clearly it is not true. So a fundamental legal skill must be the ability to find the law. It is the purpose of both this and the following chapter to set you on the right road. Before we do that we need to consider a very basic question:

1.3 'What is Law?'

At first glance this seems a very simple, if not a rather strange, question to ask. After all, as the poet W.H. Auden said, 'The law is The Law' and we tend to know it when we see it.

But it is also a question that philosophers and legal theorists have expended many pages in trying to answer. Why do you think that is? And what answers do you think they might have come up with?

Some of the philosophers' answers, reduced to their most basic form, are:

- Law is a system of rules laid down by a body or person with the power and authority to make law;
- Law is what legislators, judges, and lawyers 'do';
- Law is a tool of oppression used by the ruling class to advance its own interests;
- Law is a system of rules grounded on fundamental principles of morality.

Each of these characterisations has the capacity to tell us something useful about the nature of 'law' and how it operates—at least within 'Western' legal systems; whether each (or any of them) offers 'the truth' about law is a different question, and not one that we intend to dwell on here. We think 'what is law' is a useful question for *our* purposes for at least three reasons.

First, at its simplest, the ability to find the law presupposes that we know how to identify it: this leads us back to that fundamental question: 'what is law?' This chapter answers that question by looking at the 'institutional' sources of law, i.e. the bodies that have the power to make or interpret rules that have the authority of law. This is the easiest way of beginning to define 'law', and the most practical, though it is not the only way.

Secondly, even asking the question obliges us to think about how we conceptualise complex phenomena like 'law'. Being able to conceptualise a phenomenon and describe it in language is a crucial step on the path to understanding that thing and the ideas and beliefs which shape and are shaped by it. Our third reason for asking the question also flows from this: namely, that understanding in turn helps us to determine how we should make sensible or reasoned choices about what constitutes law in any given situation. This too can be a complex issue for philosophy, but it is also of real significance, for example, in assessing the perennial problem of whether and how we can determine if a law is 'good' or 'bad', and if it is bad, what we can (or should) do about it. We will touch on some basic issues of conceptualisation in **Chapters 3** and **4**, on 'Reading the Law' and 'Law, Fact and Language' respectively.

In this chapter, we will take the question 'What is law?' in two stages. First, we shall briefly distinguish law from other (what we call 'social') rules; then we shall explain what we mean by an 'institutional' source, and how that helps us to understand the law.

1.3.1 Legal Rules and Social Rules

Law, in the sense that we are using it, is definable as a system of rules. It guides and directs our activities in much of day-to-day life: the purchases we make in a shop, our conduct at work, and our relationship with the state are all built upon the foundation of legal rules. Of course, any society is governed by a mass of other rules which are not laws in the formal sense, but merely social conventions—perceptions of 'proper' behaviour. In reality, these are also means of controlling social conduct, but the different mechanisms

employed to enforce these rules reflect different social values regarding the behaviour in question. Thus, while most of us would accept that anyone stealing the possessions of another, or possibly someone selling flick-knives, should be liable to a penalty under the criminal law, we might be rightly surprised to see someone in court for eating peas off their knife! Regulating the latter is not really so important to our society as to require the force of law.

Why some rules should be given the force of law and others not is another of those philosophical questions to which we do not have a full answer. Law certainly is not the same everywhere; it will reflect different values in different cultures and different epochs. Take laws governing adultery for example; in modern English law, a person who has a sexual relationship with another's spouse will incur no legal penalty (though he or she may end up being cited in a divorce case). In Islamic law, the *Qur'an* prohibits adultery by making it a crime, and subjects the parties to the *hudud* punishment of flogging or stoning (though the evidential requirements are so stringent that, unless the adultery is confessed, it is unusual for the full punishment to be handed out); in Ancient Greece, to give a historical example, a man who seduced another man's wife could face a claim for compensation, since he had violated the 'property' rights of his lover's husband. In a more deterrent mode, the seducer risked other physical penalties—the most widely used of which involved pushing radishes up his backside, or pulling out his pubic hair!

Thus, the different laws on adultery could be said to exist as a reflection of different religious or moral standpoints taken by the law; perhaps they also reflect diverse views of human sexuality, or the different status of men and women in a society. This cultural dimension of law is important in developing our understanding of why particular legal rules have developed, or why different 'legal traditions' (we will come back to this concept later in the chapter) have evolved in different countries. The cultural dimension has become increasingly important in legal education over the last thirty years or so. It is reflected both in the trend of studying law 'in context', i.e. in the light of the social, political, economic, or moral contexts that both shape and are shaped by the law, and in the development of specific subjects like Legal Anthropology and Comparative Law. One of the functions of this book is to provide a gentle introduction to the art of comparing legal traditions (see in particular **Chapters 4, 10,** and **11**), though we have not developed this dimension sufficiently for this book to constitute even a short introduction to Comparative Law as a subject in its own right.

1.3.2 The Institutional Sources of Law

Generally, laws are identifiable by the fact that they take a form which distinguishes them from social conventions. Their form tells us that they are derived from an 'institutional' source that is socially recognised as having the power to create law. Only laws so created can be said to be legally *binding* upon the individual, or even upon the state itself. Thus our first step in finding the law governing the sale of flick-knives would be to discover whether any of the legal institutions have had anything to say on the matter.

In English law there are three main institutional sources which we shall consider: Parliament, the courts, and the European Community. To these we can add a fourth,

the European Convention on Human Rights, though its impact to date has been more restricted than that of the other three. By taking them as our starting point, we are defining legal material by concentrating on the 'law-makers'. This is, perhaps, a slightly narrow basis. It does, however, emphasise the importance of what are often called the 'primary' sources, and distinguishes them from the 'secondary' or literary sources of law that provide only a commentary on or analysis of the rules (see **Chapter 2**).

1.4 Parliament

Parliament is significant for three reasons. First, it is the originator of what is probably the single most important modern source of law—that is, **statute law**. Secondly, through its legislative powers, Parliament is able to give law-making powers to other bodies, such as local councils and Government departments. This results in a form of law that is referred to as **delegated** or **secondary legislation**. Thirdly, Parliament's delegatory powers are being increasingly used to create sets of **informal rules** which operate within the framework of formal rules created by statute.

1.4.1 Statute Law

A statute is a document which contains laws made by Parliament. Statutes are also referred to as Acts of Parliament. Each statute usually deals with a separate topic such as, e.g., the Theft Act 1968 or the Sale of Goods Act 1979. Statutes are now found in virtually all fields of law and regulate all sorts of activities. Some statutes affect our lives without us even knowing about them. For instance, how is the date of Easter calculated? For the answer to that one has to turn to a strange Act of 1750—The Calendar (New Style) Act. This Act determined many calendar calculations, including leap years and Easter. The strangest provision, however, came with the calendar itself. In 1750 Britain used the old Julian calendar. Many other countries had switched to the more accurate Gregorian calendar. There was a difference of eleven days between these calendars. When it was the end of September here, it was October elsewhere (as the Austrian and Russian armies discovered when they arranged to meet to fight Napoleon at the battle of Ulm and the Austrians turned up on their own eleven days earlier than the Russians). In 1750 Britain, the Julian calendar was wrong and a change had to be made. The question was: how? The Act provided the answer by stating that 2 September 1752 was followed by 14 September 1752. Eleven days were thus simply deemed not to exist! This led to riots in the streets; not least because some people were not getting birthdays in September 1752, and everyone was suddenly eleven days older.

Statutes are created directly by Parliament, following procedures laid down in both the House of Commons and the House of Lords. The details of that process belong more properly within a course on Constitutional Law, but it should be noted that a statute becomes law only after it has been introduced into Parliament as a 'Bill', been approved by Parliament, and has satisfied the formality of obtaining the Royal Assent. Once an Act has been passed it is unimpeachable, so far as English law is concerned. As Lord Campbell put

it in *Edinburgh & Dalkeith Railway* v *Wauchope* (1842) 8 Cl & F 710: 'no Court of Justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction, or what passed in Parliament during its progress.'

Lord Campbell's statement still rings broadly true today. There is no single United Kingdom court with the power equivalent to, say, the American Supreme Court to declare domestic legislation unconstitutional and therefore invalid. This absence of constitutional review reflects a principle called the *Sovereignty of Parliament*, that is, that Parliament is the primary law-maker, and that an Act of Parliament is the supreme form of English law. The supremacy of Parliament is important for Legal Method, since it creates a division between law-making and judicial functions in the state. English judges are consequently wary of exercising their powers in any way that may seem to usurp the legislative role of Parliament. That does not mean that there are no circumstances in which a court can entertain challenges to the legality or general application of primary legislation, and in fact there are at least three possible routes whereby the validity of legislation may be challenged in any court.

First, even Parliament must abide by the law. Consequently, in theory at least, if Parliament itself broke the law, the courts could declare that any resulting 'legislation' was not a valid Act of Parliament. Obviously this is not a likely event, and such claims are seldom successful, but such challenges do occur. A recent example concerns the furore around the Hunting Act 2004, which banned fox-hunting with dogs. The original Hunting Bill had been strongly opposed in the House of Lords and was passed only by the House of Commons invoking a special procedure, created by the Parliament Acts of 1911 and 1949, which allows Bills passed by the House of Commons to become law without the consent of the Lords. Opponents of the Hunting Act challenged its legality by arguing a kind of domino effect. The Hunting Act, they said, was invalid because it was deemed to be passed according to a time limit laid down by the Parliament Act 1949. But the Parliament Act 1949, which amended the time limits contained in the Parliament Act 1911, was, the applicants argued, *itself* invalid because it was only passed as a consequence of the special procedures in the Parliament Act 1911. In short, in the applicants' view, the 1911 Act could not be used to authorise its own amendment in this way. Although the argument failed at every stage, the case went to the highest court in the country, the House of Lords—see *R (Jackson and others)* v *Attorney General* [2005] WLR (D) 129. Here a panel of nine Law Lords finally and unanimously rejected the pro-hunting lobby's claims on the basis that, on a proper interpretation, the 1911 Act did not preclude the use of its own procedures to amend itself, and consequently both the 1949 and 2004 Acts were valid.

Secondly, the United Kingdom's membership of the European Union has also had an impact on the relationship between the courts and Parliament, to the extent that the superior courts may override or 'disapply' an Act of Parliament that conflicts with directly enforceable European law—we discuss this further in section **1.8.3**, below.

Thirdly, under the Human Rights Act 1998, the courts also have the power to declare legislation incompatible with the fundamental rights contained in the European Convention on Human Rights—we also discuss this in more detail in section **1.7** and **Chapter 9**.

Note that a court in these situations is simply making a declaration that an Act or part of an Act should not be applied. It remains up to Parliament ultimately to do something about the illegality, though the courts may also be able, in some circumstances, to grant financial or other remedies to individuals who have suffered loss or interference with their rights as a consequence.

The growth of legislation has been a key feature of the English legal system over the last 100 or so years. It reflects the extent to which government has extended its control over our activities. This is particularly true of the legal developments that followed the emergence of the Welfare State in the 1940s. As a result, many important fields, such as employment, child care, and social security law, owe their modern existence almost exclusively to statute. This has, of course, meant that there has been significant growth in the volume of legislation actually in force. This is not just a matter of accumulation, because Parliament is also active in removing redundant or unwanted legislation from the statute books. Rather, there is clear evidence that the number of Acts being passed is increasing—by 20 per cent in the decade between 1964 and 1974 for example (Miers, 1986). If we take into account the length of legislation, that too suggests that there is an expanding statute book. Miers (1989) has also shown that the volume of legislation by this measure rose steadily from an average of 745 pages per session in the 1950s to 1,525 pages in the 1980s. All the available evidence suggests that this trend has continued unabated into the twenty-first century. Against this background there would therefore seem a fair chance that there is legislation somewhere governing the display and sale of flick knives.

1.4.2 Delegated Legislation

Acts of Parliament are not only a major source of law in their own right; they provide a legitimate means whereby Parliament can pass on, or delegate, its law-making powers to another body or person. Parliament's power of delegation has in fact been widely used for many years, but because its exercise is much less visible than the act of legislating, it is easy to lose sight of the importance of delegated legislation.

Most delegated legislation is published as **statutory instruments**; these are also sometimes referred to as *Regulations*. The volume of statutory instruments is considerable: 27,999 instruments were made between 1987 and 1997 (Page, 2001). Taking the important category of general instruments (that is, those that affect the general law, rather than some local or private interest), as a rough average, they have been passed at a rate of about 2,000 per year, thereby exceeding the number of Public Acts by a ratio approaching 20:1. Statutory instruments are not just quantitatively important. It is worth remembering that, in practice, the operation of whole areas of law, such as social security and immigration, is dependent upon a network of regulations, which will be of greater day-to-day significance than statute. For instance, the important rules governing employees' rights on the sale of a business are covered in the Transfer of Undertakings (Protection of Employment) Regulations 1981, a statutory instrument rather than an Act.

Delegation always requires the express authority of an Act of Parliament, which, in respect of any delegated legislation created under its authority, will be referred to as the

parent Act. The parent Act will not only give authority to the process of delegation, but also will set the parameters of the delegated power. Sometimes these will be extremely wide and generalised, for example, where an Act provides that 'the Secretary of State may make such regulations as he sees fit', but equally they can be highly detailed and specific. For example, the Social Security Administration Act 1992, section 5(1) required eighteen paragraphs and six sub-paragraphs to specify the powers available to regulate claims and payments of benefit. Practically, the ability to delegate carries great advantages, as delegated legislation can take effect more quickly, and deal more easily with technical detail, than statute law; however, Parliament does not maintain the same level of supervision over delegated legislation, so there is concern that those advantages are bought at some cost to the Constitution.

1.4.3 Informal Rules

Informal rules are mostly created by ministerial powers granted under the authority of statute. They go under a wide variety of names, such as Directions, Guidance, Circulars, and Codes of Practice. They are called informal because they can be contrasted with the formalities necessary to create an Act or statutory instrument, and because their structure and operation are also often less formalised. The bulk of this book is concerned with the formal rules, so we shall deal with informal rules in some detail here.

Do not let the term 'informal' lead you into thinking that these rules are unimportant. They play a significant part in the regulation of a wide variety of public bodies. Although it may seem rather odd that we should have such different types of rules, it can be argued that the difference in form is reflective of a genuine difference in function. The chief function of informal rules is to regulate official discretion. By discretion we mean, to quote Professor Galligan (1986:1):

> the extent to which officials . . . make decisions in the absence of previously fixed, relatively clear, and binding legal standards.

Discretion is of considerable importance in legal contexts. As we shall see, it is both difficult and often undesirable to make a legal rule so precise that there is only one way that an official could apply it. Few rules are so clear that they can be used like an on–off switch. The person using the rule cannot always say with certainty 'yes, it applies' or 'it does not apply here'. This means that officials must often resort to their own judgement in deciding whether a rule applies. Informal rules are instrumental in guiding officials in the use of their discretion, and can actually impose significant restraints upon it. At the same time, however, there is concern that the increasing use of such rules reduces the ability of Parliament and the courts to maintain a check on the activities of state bureaucracies.

To an even greater extent than delegated legislation, informal rules are a modern development in the English Legal System. The range of operation of such rules is almost as varied as the names they are called. Social workers, police officers, and social security officials,

amongst others, all operate within a framework of such rules. Baldwin & Houghton (1986:239) have suggested that informal rules will fall into one or other of three categories:

Procedural rules: Many bodies lay down procedures for outsiders to follow—e.g. procedures for making a claim for social security benefit. Informal rules often play an important part in establishing these procedures, although, in practice, they are often the result of an amalgam of statute, statutory instrument, and informal rules.

Interpretative guides: These are 'official statements of departmental policy… expressions of criteria to be followed, standards to be enforced or considerations to be taken into account' (Baldwin & Houghton, 1986:241) which may be made available to citizens to inform them of their rights, etc. An example of such a guide is the guidance issued by the Inland Revenue to taxpayers.

Instructions to officials: Although akin to interpretative guides, these are often intended purely to give guidance to officials, not to citizens. This may mean that they operate as secret codes, though this is not always the case. For example, the *Adjudication Officers' Guide* used by social security officials is published and thus seems to fall between our two categories. It is intended primarily as official guidance, but can also provide useful information to the citizen on how the rules will be applied.

Informal rules do not apply to the public at large (so they would not be of immediate relevance to the problem we posed at the beginning of the chapter). Some are not published, while others are available publicly. Many will not be legally enforceable, but even here there is considerable variation. Consider, for example, the Codes of Practice created by the Home Office under powers in the Police and Criminal Evidence Act 1984. A particularly important one is Code of Practice 'C' governing the detention and questioning of persons held at a police station. It is not directly enforceable in the courts, by virtue of section 67 of the 1984 Act. This means that breaches of the Code are not themselves breaches of law; however, the Act does enable them to be used by a court to justify excluding any item of evidence that has been improperly obtained by the police (see, e.g., *R* v *Samuel* [1988] QB 615; [1988] 2 All ER 135).

In form, such rules will also vary considerably; often their structure is not so very different from the formal rules they support, but equally they may lack the detailed language of Acts and Regulations, and particularly the emphasis on internal definition often found in the latter. A particularly interesting example of the types of informal rule that exist was provided by the *Social Fund Manual*. (As a result of various social security reforms through the 1990s the original *Manual* has been replaced, in part by regulations, but also by new guidance, currently contained in the *Social Fund Guide* and the so-called *Decision Makers' Guide*.) This contained a two-tiered system of informal rules which were provided to officers of the(then) Department of Social Security to assist in determining applications made by social security claimants for grants or loans for special needs. The distinction was made between 'Directions' and 'Guidance' in the scheme. The former, as the name suggests, had to be strictly applied by the officers, while the latter was intended only to be indicative, leaving the officer with some degree of choice in applying it to the claim at hand.

Differences in form, function, and language between rule-types are not merely a matter of esoteric interest, because those differences can affect decisions about the legitimacy of the rules. Thus, to take our example of the *Social Fund Manual*, the Directions, which we

binding on officials, were couched in more detailed, imperative language, and possessed a structure which is hardly distinguishable from conventional secondary legislation. The Guidance was less closely structured, less formal, and less peremptory in its language, reflecting its function of merely *guiding* officials in the exercise of their discretion. It is not surprising that the courts used this difference in function and form to help determine the legality of such rules. When the Secretary of State published Guidance which used the mandatory language of the Directions, he was held to be acting in excess of his statutory powers—see *R* v *Social Fund Inspector and Secretary of State for Social Security ex parte Roberts, The Times*, 23 February 1990. To put it simply, guidance which directs officials to do something is no longer guidance.

Although legislation is extremely important, it cannot operate in isolation. Legislation requires implementation. On a day-to-day basis, that is the function of a wide variety of officials, whose job is either itself to carry out Parliament's commands or else to make sure that other organisations or private individuals are doing so. In this process, questions may be raised about the effect of a particular piece of legislation. Often these will involve technical questions of *interpretation*. On a day-to-day basis officials are constantly engaged in interpreting both primary and secondary legislation, but sometimes we require a more authoritative statement of what the law means. That process of interpretation is usually undertaken by the courts.

1.5 The Courts

The courts are not only important as interpreters of legislation, they are also the second major source of English law in their own right, through the development of the **Common Law**, a term which we first need to define.

1.5.1 The Meaning of 'Common Law'

This term is used in two ways:

To distinguish Common Law from statute: 'Common Law' is used to describe all those rules of law that have evolved through court cases (as opposed to those which have emerged from Parliament) over the past 800 years. Despite the growth of statute, English law is still generally understood in Common Law terms. By this we mean that the way in which we think about law, and categorise laws, is still heavily influenced by the old Common *Law forms of action* which determine what types of problem we now call 'contract', 'tort', etc.

To distinguish Common Law from other systems: Comparative lawyers have long used the term 'legal families' to group together legal systems which share certain common features. More recently, the term 'legal tradition' has become more popular as a way of thinking comparatively about different legal systems and cultures (see, e.g., Glenn, 2004). Tradition in this setting emphasises both the influence of (legal) history—the continuing presence of the past in shaping the law—and the complex, dynamic nature of legal culture. The philosopher Alasdair MacIntyre (1998) summaries this idea of a 'living

tradition' as 'an historically extended, socially embodied argument, and an argument precisely about the goods that constitute that tradition'. In other words, 'tradition' becomes a way of understanding and explaining the norms and values that make up a particular conception of the legal world, and the ways in which that legal world embraces both continuity and change.

In the Western world, there are two dominant 'traditions' which we call Civil and Common Law (the latter being the oldest national law in Europe), though there are a number of legal systems, such as the Scottish, which reflect elements of both traditions. The term 'Common Law' is thus used as a means of defining all those legal systems in the world whose laws are derived from the English system. We use the term 'English' rather than 'British' with good cause. For reasons of history, not only Scotland, but also Northern Ireland, and even the Isle of Man and Channel Islands have evolved as separate legal systems from England and Wales (the Channel Islands, for instance, are part of Great Britain but not part of the UK or the EU). Although much of the legislation passed by the Westminster Parliament now governs the whole United Kingdom, there remain substantial differences in law and the legal processes that apply in the different jurisdictions that make up the British Isles. The process of devolution, which gives greater political and legal autonomy to Wales and Scotland, is likely to increase still further the variations in the law between different parts of the UK, albeit only in those areas of law that are within the competence of the new Welsh and Scottish assemblies.

The Common Law world remains extensive; it includes the Federal laws of the United States of America, and most existing or former members of the British Commonwealth, such as Australia, Canada, India, New Zealand, and Singapore, though in many such systems the English influence may coexist with elements of local customary law or even with other legal traditions, such as Islamic Law or Hindu Law (see, e.g., Glenn, 2004). This does not mean that these countries have all developed uniform responses to particular legal problems. To survive transplanting, the Common Law has had to respond to the different needs and conditions of each jurisdiction. This has often meant departing from the established (English) rules. Such variation is generally seen not so much as a dilution of the Common Law, but rather as a sign of its capacity to adapt (see, e.g., *per* Lord Diplock in *Cassell* v *Broome* [1972] AC 1027 at 1127; [1972] 1 All ER 801 at 871; *per* Lord Lloyd in the New Zealand case of *Invercargill City Council* v *Hamlin* [1996] 1 All ER 756 at 764–5). Courts, legislators, and lawyers in the Common Law world still share a more or less common approach to legal reasoning, and, as Lord Lloyd put it in *Invercargill*, a willingness to learn from each other. For example, it is not that uncommon, particularly in areas where the law is uncertain, for judges to refer to decisions from several Common Law jurisdictions, thereby enabling them to analyse a range of potential solutions to the problem.

1.5.2 The Contrast with 'Civil Law'

The term Civil Law describes those systems which have developed out of the Romano-Germanic legal tradition of continental Europe. It is the Civil Law tradition which dominates within the present European Community. Of the 25 Member states, only two, the Republic of Ireland and the United Kingdom (subject to the *caveat* already noted), belong

to the Common Law world. As large sections of this book will be concerned with comparative issues between English and 'European' Law, it is worth taking a brief excursion at this point to highlight some of the features of these two legal traditions.

Underlying a number of practical variations there is, ultimately, a rather different way of thinking about law within each tradition. In Civilian systems (as they are called) one can conventionally identify a higher level of conceptualisation, reflected in a theoretically complex 'institutional basis' of Civil Law (see, e.g., Stein, 1984). This is sometimes said to create a more 'scientific' or rational legal system than the highly pragmatic tradition of the Common Law (cf. **Chapter 10** of this book). This has a number of practical implications.

First, it can be said that our dependence upon descriptive factual categories (the forms of action) may actually hold back new developments in English law, because we do not have the conceptual apparatus to incorporate change easily. This is sometimes seen as the key difference between the English and Roman traditions (e.g. Samuel, 1990).

Secondly, the modern Civil Law tradition is chiefly based upon principles of *codified* law. The modern process of codification in Europe is one that can be traced back to about the eighteenth century, though the structure of most Western European legal codes owes a major debt to the thinking of the ancient Roman lawyers, and particularly to the *Corpus Iuris Civilis* (meaning literally, 'the body of civil law') of the Emperor Justinian, who ruled from AD 527 to AD 565. The assumption underlying a codified legal system is that it is possible to create a set of texts containing an authoritative statement of the law, usually in the form of Civil and Criminal 'Codes', or sub-divisions thereof. Although English lawyers also talk about 'codifying' legislation, the term is used to mean rather different things in Common as opposed to Civil Law systems.

In the Common Law, a codifying Act is primarily a tidying-up operation. It is a piece of legislation which brings together all the existing law on a topic, both statute and case law, and converts it into a single entity—the codifying Act. An oft-cited example is the original Sale of Goods Act of 1893. The aim of tidying-up is one which codifying Acts share with the continental codes. However, by contrast with the continent, codification in England has been used as a limited means of imposing legislative coherence on a particularly problematic area of law, such as the sale of goods or the law relating to theft. What English codifications have not done is to produce a complete restatement of the whole of, say, Commercial or Criminal Law in a statutory form. Yet it is precisely the latter approach that has been adopted in the majority of Civilian systems. The codification of the English Criminal Law was first proposed by the Law Commission in its Report of 1985. However, its approach (see, e.g., Law Commission, 1992) has been to advance a far more gradual and particularistic codification process than originally envisaged (see generally de Búrca & Gardner, 1990; Gardner, 1992). This seems to suggest that we still have a long way to go before English lawyers are prepared to use codification as anything other than a discrete solution to a specific problem. For the English, codification has never been the key mechanism for organising and conceptualising the rules of law that go to make up a legal system.

Thirdly, it follows that, in theory, codification reduces the role of the Civil Law courts to simply interpreting and applying the law of the Code. Common Law lawyers have

traditionally argued that Civilian judges have not had the dual roles of their Common Law counterparts; that is, being both interpreters of legislation *and* custodians of a distinct body of case law. In truth, that difference has probably been over-emphasised, so that we are in danger of missing the significance of case law in continental Europe. In many European states, the law (or part of it) is not fully codified—German administrative law is one such example—and most countries have their own systems of precedent, some of which are not so far removed from English practice. Paradoxically, perhaps, the way in which the Codes tend to be structured leaves European judges with far more discretion in interpretation than their English counterparts are supposed to have! We shall come back to this point in **Chapters 7** and **8**; but, for now, let us return to considering the details of that English system.

1.5.3 The Court Structure

In looking at the English courts as a source of law, it is important to draw two basic distinctions. One is the distinction between *trial* and *appellate* courts; the other is between *civil* and *criminal* courts.

The function of trial courts, such as the county court, is to hear cases 'at first instance': that is, to make a ruling on the issues of fact and law (this is a distinction that we shall discuss in detail in **Chapters 3** and **4**) that arise in the case. This distinguishes them from appellate courts, whose function it is to reconsider the application of legal principles to a case that has already been heard by a lower court. Some appeal courts also have jurisdiction to reconsider disputed issues of fact—i.e. disputes about the events leading to the legal action. Thus, any one case may well be heard by more than one court before the issues are finally resolved. Rights of appeal can be a complex subject in their own right, governed by a whole set of procedural rules; the detail of these falls outside the scope of this book, and we shall only outline the general principles that apply.

Trial and appellate functions are often combined within one court; the system is not simple enough for us to say that court X is solely a trial court, while court Y is purely appellate.

Civil and criminal law are significantly different in their aims, and employ different legal procedures. This latter point is particularly true of rules of evidence, for example. 'Evidence' describes the legal rules which control what facts may be proved, and the manner of their proving, before the courts. If you were to study the Law of Evidence, you would soon be struck by the greater evidential restrictions governing criminal as opposed to civil cases.

The term civil law (as opposed to 'Civil Law' as already considered) is used to describe all those areas of law which govern the relationship between legal persons—i.e. individuals and corporations—such as contract, employment, or tort (itself an umbrella term used to describe a whole variety of specific wrongs such as negligence, libel, and trespass).

Criminal law, by contrast, describes those wrongs which are sufficiently important for society, usually through the intervention of the state, to outlaw as crimes, and to impose special penalties on the wrongdoer (such as a fine or term of imprisonment). By and large there is a fairly clear distinction between those courts having civil and those having criminal law responsibilities (what lawyers call *jurisdiction*). **Figure 1.1** provides a basic guide to the structure of the English court system.

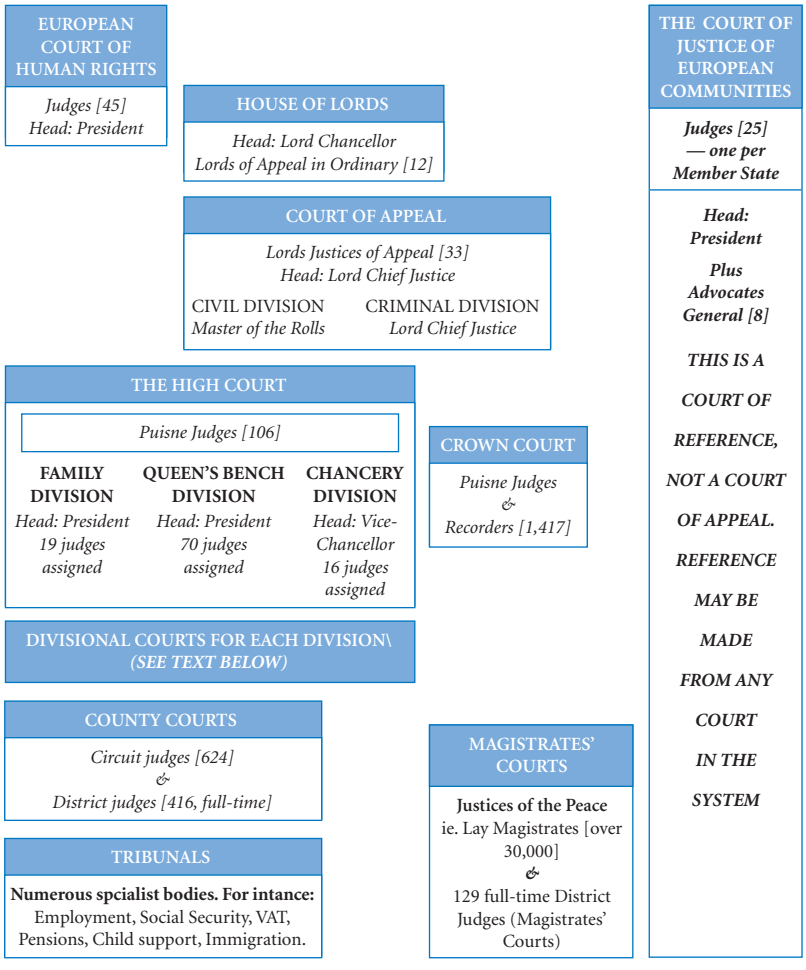

Figure 1.1 The Courts of England and Wales, the ECJ and ECtHR

Before we consider briefly the role of each of the courts we must also note the impact of the Constitutional Reform Act 2005. This Act received the Royal Assent on 24 March 2005. The explanatory notes to the Act state that the Act 'modifies the office of Lord Chancellor and makes changes to the way in which some of the functions vested in that office are to be exercised. The Act also creates the Supreme Court of the United Kingdom and abolishes the appellate jurisdiction of the House of Lords. It creates the Judicial Appointments Commission to select people for judicial appointments in England and Wales, and provides for judicial discipline in England and Wales. The Act modifies the jurisdiction of the Judicial Committee of the Privy Council and removes the right of the Lord President of the Council to sit judicially'.

The 2005 Act is not fully in force at the time of writing, but when it is implemented it will make some alterations to the court system described below. Most of what we have to say will not be changed by the 2005 Act so, to better explain this impact, we will describe

the system as it stands (at 1 November 2005) and then comment on how the changes proposed by the Act affect each court individually. We have adopted this approach because not only must you be aware of the system in force at any given moment but you also need to understand how the system worked in the past when you read older cases. More detailed descriptions of the courts can be found on specialist books on the English Legal System (e.g. Ingman, 2004, and Slapper & Kelly, 2004).

The judicial figures given in **Figure 1.1** are taken from the latest source available (1 October 2005) and details can be found on the web site for the Department for Constitutional Affairs at www.dca.gov.uk.

The House of Lords

The House of Lords is at the top of the hierarchy of English courts. It deals only with appeals, usually from the Court of Appeal, but, by a special procedure (called 'leapfrog'), it may also hear appeals direct from the High Court. Cases are normally heard by five judges, or, exceptionally, by as many as seven or nine judges if the case is felt to raise issues of extreme importance—see, e.g., *Pepper* v *Hart* [1992] 3 WLR 1032; [1993] 1 All ER 42 and *R* v *Bow Street Metropolitan Magistrate ex parte Pinochet Ugarte* [1999] 2 All ER 97. These judges are known formally as Lords of Appeal in Ordinary, or less formally as the 'Law Lords'. The Lords have final jurisdiction over both civil and criminal appeals, but hear few cases by comparison with other courts—usually some ninety to 100 cases a year. This is primarily for two reasons. First, the House of Lords will only allow appeals in respect of cases which raise points of law of 'general public importance'—that means that there must be some significant area of doubt regarding the operation of a rule of law before the Lords will hear the case. Such cases are relatively few. Secondly, the cost of taking a case as far as the House of Lords is extremely high, and this may deter people from exercising the rights of appeal that they may have, unless their claims are financially assisted by the state.

For the first time in history one of the twelve Law Lords currently in post is a woman. Dame Brenda Hale was promoted from the Court of Appeal in January 2004. As a member of the House of Lords she has taken the title of Baroness Hale of Richmond, and is addressed as 'Lady Hale'.

The office of Lord Chancellor has historically carried the status of head of the judiciary, and has included the right to sit as a judge in the House of Lords, though most Lord Chancellors in recent years have exercised that right quite sparingly. However, as part of a process of increasing the separation of judicial, executive and legislative functions, the current Lord Chancellor, Lord Falconer, decided not to sit as a judge. The Constitutional Reform Act 2005 formalises this practice into a constitutional principle, and transfers the judicial functions of the Lord Chancellor to the Lord Chief Justice who, as a result, becomes President of the Courts of England and Wales (note that this is *not* the same as President of the Supreme Court). His full title now is thus the rather unwieldy 'Lord Chief Justice and President of the Courts of England and Wales'. The Lord Chief Justice, however, has not also inherited thereby the right to sit as a judge in the Lords.

Note: Creation of a New Supreme Court

You should be aware that the House of Lords, as a judicial body, is due to be replaced as a consequence of the Constitutional Reform Act 2005. The intention behind the legislation has been to create a final appeal court that is more clearly separated from the legislative arm of government. The present Law Lords can, and occasionally do, sit in the House for legislative business, and this is, we submit, quite rightly recognised as a constitutionally unusual position. It is one that will be resolved in the appointments to the new Court. The existing Law Lords will become the first members of the Supreme Court by virtue of section 23, and, by section 24, the senior Law Lord will become President of the Supreme Court. The judges will no longer be known as Lords of Appeal in Ordinary, but will be styled 'Justices of the Supreme Court'—section 23(6).

The exact date that the Supreme Court will come into operation has yet to be finalised. In large part this will depend on progress in converting the Middlesex Guildhall, opposite the Houses of Parliament, into the new Supreme Court building. The work is currently scheduled for completion in 2008.

The Court of Appeal

The Court of Appeal is divided into two Divisions, Civil and Criminal. The Civil Division will hear appeals from the High Court and county courts. Cases are heard by a minimum of two, but normally three, judges called Lords Justices of Appeal. As at 1 October 2005, of the thirty-three Lords Justices of Appeal, only two were women. There are presently no judges in the High Court or above with black or Asian ethnic origins. For some years the first woman to be appointed (Dame Elizabeth Butler-Sloss) was also referred to as 'Lord Justice', but she (and the others) are referred to now as 'Lady Justice'. Female judges will tell you, however, that they are often referred to in all manner of ways. Thus, female District Judges should be called 'Ma'am', but 'Sir', 'Your Worshipfulness', 'Madam', and even 'Lovey', all betray various confusions or prejudices. The title Lord (or Lady) Justice is written as 'LJ' following the judge's name—hence 'Smith LJ'. The Civil Division is headed by a senior judge known as the Master of the Rolls. He (as yet there has never been a female Master of the Rolls) is referred to by whatever title is appropriate with the suffix 'MR'. The present incumbent is thus Sir Anthony Clarke M.R.

The Criminal Division will hear criminal appeals against either conviction or sentence from the Crown Court. Criminal cases will normally be heard by at least two or three judges drawn from among the Lord Chief Justice, (currently Lord Phillips of Worth Matravers), the Lords Justices of Appeal, and the Judges of the High Court.

Questions have arisen over the years as to whether the 'constitution' of the court—i.e., the number and seniority of judges hearing a particular case—makes any difference to the status of a decision. In the Civil Division, it is generally accepted that the constitution of the court does not matter—see *Young* v *Bristol Aeroplane Co.* [1944] KB 718; *Cave* v *Robinson Jarvis and Rolf* [2001] EWCA 245 [2002] 1 WLR 581. However, a recent decision of the Criminal Division suggests that its practice may be different, since it indicated that a 'full court' of five judges (a rare event in the Court of Appeal) might have greater discretion to depart from an earlier precedent than an ordinarily constituted court—see *R* v *Simpson* [2003] EWCA Crim 1499; [2004] QB 118 and **Chapter 5**.

The High Court

This is the most complex of the courts to understand. The best way to grasp how it operates is to consider the trial functions of the various elements.

You can see in **Figure 1.1** that the Court is sub-divided into three divisions, each of which has a separate jurisdiction to hear cases at first instance (i.e. trials). These divisions are the **Queen's Bench**, which deals with the main areas of common law, such as contract and tort; **Family**, which deals with matrimonial cases and the wardship and adoption of children; and the **Chancery** Division, which deals chiefly with certain property, corporate, and tax matters. That seems simple enough, but now it begins to get more complicated. The English courts have long been important in the development and adjudication of both 'local' and international commercial disputes, not least because of Britain's (and particularly London's) historical importance as a centre of international trade and commerce. Because commercial law itself and the demands of court users have become increasingly complex and specialised, there has been a growing need for specialisation within the two divisions which have significant commercial law jurisdictions: Queen's Bench and Chancery. As a consequence, a number of specialist, commercial, trial courts have been created *within* each of those divisions, with judges being assigned specifically to those courts. The oldest of these is the Admiralty Court, which existed originally as a separate Common Law court in its own right, but was, in the late nineteenth century, amalgamated into a rather curious hybrid, the Probate, Divorce, and Admiralty ('PDA') Division. The functions of the old PDA division were dispersed across all three divisions when the present system was created. The other specialist courts are of relatively recent creation. Their location and jurisdictional responsibilities are represented in **Figure 1.2**.

There is also one specialist court that sits outside the divisional structure. This is the Technology and Construction Court, which was, until, 1998, known as the Official Referee's

CHANCERY DIVISON	QUEEN'S BENCH DIVISON
Companies Court Compulsory liquidation of companies and other matters arising under Insolvency and Companies Acts.	**Admiralty Court** deals principally with the legal consequences of collisions at sea, salvage and damage to cargoes.
Patents Court deal with arange of intellectual property matters, not just patents. Hear s appeals from decisions of the Comptroller-General of Patents.	**Commercial Court** Wide jurisdiction over banking, international credit and international trade matters, including shipping contracts which are not within the Admiralty Court's jurisdiction. Judges of the Commerical Court also have jurisdiction to arbitrate commercial disputes.

Figure 1.2 Specialist Courts of the High Court

Court. It has a very restricted jurisdiction over building and engineering disputes, and, now, computer litigation.

Each division has its judicial 'head'. The oldest of the surviving posts is the position of Vice-Chancellor, which is the title given to the head of the Chancery Division. The present incumbent is Sir Andrew Morritt V-C. The Family Division is led by a President, currently Sir Mark Potter P. The head of the Queen's Bench Division was, historically, the Lord Chief Justice, however the Constitutional Reform Act has relieved him of that role by creating a new post of President. The first President of the QBD, Lord Justice (Sir Igor) Judge took up appointment on 1 October 2005.

In addition to these first instance jurisdictions, each division has appellate functions performed by a 'Divisional Court'. A Divisional Court will normally be presided over by two or three judges. The Divisional Courts of the Chancery and Family Divisions have jurisdiction over certain appeals from the county and magistrates' courts. The main function of the Divisional Court of the Queen's Bench Division has been to exercise what is called the 'supervisory jurisdiction' of the High Court; that is, the power to oversee the quality and legality of decision-making in inferior courts and tribunals. It also (occasionally) hears criminal appeals '*by way of Case Stated*' on points of law from the magistrates' courts and Crown Court. Following recommendations in the Bowman Review of the judicial review process, the Divisional Court of the Queen's Bench Division was renamed the 'Administrative Court' in October 2000. It now also has its own nominated 'lead judge' who is responsible for overseeing its work. Currently this is Mr Justice Collins.

At first instance cases are heard by usually a single Puisne (pronounced 'puny') Judge, referred to as 'Mr Justice . . .' and written as, e.g., 'Brown J' (plural— 'JJ'). The title 'Justice Brown' is an American expression and not used in this country. As at 1 October 2005, there were ten women judges (9.4 per cent) out of a total of 106 sitting in the High Court. They are referred to as 'Mrs Justice', a status which seems to apply regardless of marital status—we do not have a 'Miss', let alone 'Ms Justice'. There appears to be no ruling on this as such, so, should the question arise, there is no reason why we could not follow the Irish precedent set by Miss Justice (Mella) Carroll.

The County Court

Whereas the High Court can trace its ancestry back to Norman times, the county courts are mainly nineteenth-century creations. Two types of judges sit in the county courts: Circuit Judges (the more senior) and District Judges. Work is divided amongst these judges on a set of procedural rules which are outside the ambit of this work. An appeal from the decision of a District Judge (the right to appeal is based on limited grounds) will go to a Circuit Judge. An appeal from the decision of a Circuit Judge goes to the Court of Appeal.

The High Court and the county court deal with the same sort of legal issues. The difference is that the High Court deals generally with the more legally complex and/or higher monetary value claims. For over a century, the jurisdiction of the two courts was determined by assigning a series of upper financial limits on the business of the county court. These limits varied between different forms of action (e.g. as between actions in contract and actions concerning land). Major changes to the procedure of the High Court and the county courts were introduced on 26 April 1999, following

recommendations in *Access to Justice* (1996)—often referred to as the 'Woolf Report', after its author, the then Master of the Rolls, Lord Woolf. While much of the detailed application of these rules goes beyond the scope of this book, we will briefly consider some of the key changes in **section 1.6**, following.

The Crown Court

This court deals almost exclusively with criminal trials and appeals. Most of its case load involves the trial at first instance of the more serious criminal offences, such as homicides, serious physical and sexual assaults, and property offences involving loss or damage of a 'high value'. It is in this context that the Crown Court remains the only court in the English system in which a judge regularly sits with a jury. The function of the judge is to advise the jury on the law; the jury, however, remains the sole tribunal of fact, and it is for the jury alone to decide whether an accused is guilty or innocent as charged. The Crown Court has an appellate function whereby it also hears appeals from the magistrates' courts on issues of fact or law.

The Magistrates' Courts

Magistrates' courts are purely courts of first instance. The bulk of their caseload involves the trial of less serious criminal offences (in fact over 90 per cent of all criminal cases are tried by magistrates), though the courts also have a civil jurisdiction over liquor licensing, tax arrears, and some matrimonial matters. The magistrates' court is unique in that the great majority of cases are heard before Justices of the Peace—lay persons with little formalised legal training, though they are advised on the legal issues by a legally qualified Justices' Clerk. Legally qualified magistrates may sit alone to hear cases: they were formerly called Stipendiaries but now have the title of District Judge (Criminal).

Administrative Tribunals and other Courts

In addition to the formal courts, there is a plethora of administrative tribunals, many of which have been created only since the Second World War (though some, like the Commissioners of the Inland Revenue, are far older). They control a vast range of activities from the issuing of passenger licences to airlines, through employment disputes, to adjudicating on parking fines or the award of social security entitlement. Most of these tribunals have their own rules of procedure and are regulated by specific statutory controls. No tribunals have ever been created by the Common Law. The majority have relatively little contact with the traditional courts, though rights of appeal from some important tribunals exist, either to the High Court or to the Court of Appeal. Perhaps the best known tribunals are the Employment Tribunals (until 1998 known as 'Industrial Tribunals'). Appeals from these tribunals go to a specialist appeal forum known as the Employment Appeal Tribunal, and from there any appeal goes to the Court of Appeal.

In England and Wales there are a number of other local or special courts in existence, which are rather too specialised to merit discussion here. However, you should be aware of three other courts which, formally speaking, are not a regular part of the English court system, but are still of considerable importance to it. These courts are the Court of Justice of the European Communities, the European Court of Human Rights, and the Privy Council.

The **Court of Justice of the European Communities** (ECJ) is the final authority on points of interpretation of European Community law. It is not a court of appeal, but a court to which domestic courts or the European Commission can refer points of European law for clarification and ruling (see further section 1.8). We shall also discuss its role and jurisdiction in greater detail in **Chapter 10**. The Court is commonly called the 'European Court of Justice' (ECJ), and you will usually see it referred to as this in textbooks and articles, though this is not its official title.

The **European Court of Human Rights** is the international court created by, and with power to adjudicate cases involving the application of, the European Convention on Human Rights (on which see section 1.7 and **Chapter 9**). It is a wholly separate institution from the ECJ, and the two should not be confused. Again we discuss the nature and role of this court more fully later, this time in **Chapter 9**.

The **Judicial Committee of the Privy Council** (normally abbreviated to just 'Privy Council') has a number of rather esoteric functions in the English Legal System, relating to matters such as Admiralty cases and appeals from the disciplinary decisions of the General Medical Council. Its jurisdiction was also extended to include adjudicating on the 'legislative competence' of the Welsh Assembly and Scottish Parliament under procedures laid down by the Wales Act 1998 and Scotland Act 1998 respectively (see further **Chapter 9**). Moreover, as a relic of the British imperial past, it has held the function of a final court of appeal for cases from a number of Commonwealth jurisdictions.

Until quite recently its combined overseas and domestic jurisdictions have assured the Privy Council of a caseload similar to that of the House of Lords. However, its jurisdiction is being steadily eroded by continuing UK and international reforms. Appeals from Hong Kong discontinued after the colony's return to China in 1997, and, in 2004, New Zealand become the latest Commonwealth country to remove the right of appeal to London by creating its own Supreme Court. Moreover, the (UK) Constitutional Reform Act 2005 proposes handing over responsibility for devolution cases from the Judicial Committee of the Privy Council to the United Kingdom's Supreme Court when it is established in 2008. In this light it may be just a matter of time before the Privy Council is finally assigned to the history books.

Cases before the Privy Council are normally heard by the English and Scottish Law Lords. Judges from other Commonwealth states are entitled to preside, but that right is not always exercised. Given the status of the judges, Privy Council decisions may carry some considerable, albeit only persuasive, weight within the English Legal System, as well as being binding in the jurisdictions for which it remains the final court of appeal.

1.5.4 Precedent and the Common Law

The Common Law has not, as a system of rules, evolved from the totality of case law. It would be physically impossible to maintain records of and develop principles from every decision of every court that has ever heard a case. Rather, the origins of the Common Law can be traced back to the practice which developed in medieval England, whereby records of arguments used in the Royal courts were kept and circulated, at first unofficially, among the judges and practitioners. This practice gradually hardened into an officially sanctioned

system of *precedent*, whereby important cases were recorded and subsequently used as authority for specific rules of law. As a reflection of that original practice, precedent is still created only by the superior courts—the High Court, Court of Appeal, and House of Lords, though some of the major tribunals have separately created their own internal systems of precedent, and where rights of appeal to the courts exist, they will also be bound to follow the precedents set. Precedent is, in theory, binding on all inferior courts (and tribunals). These include, chiefly, the Crown Court, magistrates' courts, and county courts; the details of our system of precedent will be discussed at much greater length in **Chapters 5** and **6**.

So, in advising our friend we would almost certainly have to take some account of case law, either because the legal rules concerned are actually a creation of the Common Law, or because the courts have considered the operation and effect of some relevant statutory provision. In advising her, we would not only have to know what cases (if any) existed, but also, by reference to the doctrine of precedent, assess what impact those cases might have on any future proceedings against her, which leads us onto our next point: what might those proceedings involve?

1.6 The Importance of Procedural Law

When someone goes to court, there are two kinds of law that need to be taken into account in managing their case. The first is what we call the **substantive law**, that is the specific rules which tell us what the law of contract or crime says about selling flick-knives (to continue with our example). The second is the **procedural law** which lays down the process by which a case is brought before the court, and how it is tried. The procedural law differentiates between civil disputes between individuals and criminal prosecutions brought by the state. Generally procedural and evidential rules tend to be rather more restrictive in the case of the latter, not least because an individual's liberty is often at stake. The details of procedural law are not widely taught in English law schools before the stage of professional training, but a basic knowledge of how cases come to court, and the systemic assumptions underpinning that process, is useful in understanding not just how the legal system works, but how and why cases get to court (and sometimes into the law reports) in the way they do. Let's begin, then, by contrasting the basic assumptions which underpin procedural law in the Common and Civil Law traditions.

One thing procedurally that virtually all Common Law civil and criminal courts (it is much less true of tribunals) have in common is the assumption of what is commonly called an *adversarial process*. This was described by Justice (1974:18) as:

> a fight, a pitting of strengths and wits against each other, a display of aggression mitigated only by the ritual of a complex set of rules and conventions.

This notion of 'trial by battle' is deeply embedded, both historically and psychologically, within English law. It has created a system in which, traditionally, it is the parties themselves who make the running in any case. It is they, not the judge, who select the facts and the legal issues upon which a case is to be fought. Traditionally, the role of the judge

is thus, in theory, reduced to one of a passive umpire, overseeing proceedings and ensuring that the trial is pursued according to the rules of the legal game. Of course, this does not mean that the judge is a silent bystander; he is quite at liberty to interject, for example, either to test the quality of the legal arguments being put forward, to seek clarification of some point of fact or law, or to prevent an improper line of questioning. Even so, it is sometimes said that the system is of rather limited efficacy; that court cases are not about discovering the truth behind a case, but about ensuring procedural fairness. Defenders of the system argue that this way the law is doing the best it can. In *Air Canada* v *Secretary of State for Trade (No. 2)* [1983] 1 All ER 910, Lord Wilberforce put it in these terms (at 919):

> In a contest purely between one litigant and another, such as the present, the task of the court is to do . . . justice between the parties . . . . There is no higher or additional duty to ascertain some independent truth. It often happens, from the imperfection of evidence, or the withholding of it, sometimes by the party in whose favour it would tell if presented, that an adjudication has to be made which is not and is known not to be, the whole truth of the matter; yet if the decision has been in accordance with the available evidence, and with the law, justice will have been fairly done.

This traditional adversarial approach differs somewhat from the *inquisitorial* procedure in the majority of Civil Law systems, though those differences are often overstated. The inquisitorial process is typified by a far more pro-active judicial role than we would expect to find in a true adversarial system. The difference is most marked in civil cases. In criminal cases, there remains, as in France, for example, considerable emphasis on the spectacle of the trial, with its stress upon the examination of oral testimony presented to a full court in a public process, though in the case of serious crimes the role of the trial is diminished by extensive pre-trial judicial investigations. By contrast, the emphasis on public testimony is commonly much less in Civilian as opposed to Common Law civil proceedings (this is one reason why Civilian civil procedure is often described as 'bureaucratic' in style). Typically, it is the judge who makes much of the running. For example, he or she will be responsible for questioning witnesses and compiling a dossier of evidence; he or she will also be largely responsible for identifying the legal issues prior to the final trial. In many cases the judge will decide everything on paperwork alone and never hear from witnesses in person. As regards criminal matters, in France, for example, these functions will be performed by an 'investigating magistrate' known as the *juge de la mise en état* who has no precise equivalent in the Common Law.

The perception of the legal process is accordingly rather different. There is not an assumption, in Civilian systems, that the court's function is to vindicate the winner, to establish that one party has a legal right. Rather there is a more open and free-ranging search for 'truth'. This difference in perception affects the substantive procedures used. Because there is no perceived battle between two sides, there is less need to control inquisitorial proceedings by restrictive procedural and evidential rules (a point we shall explore in more detail in **Chapter 4**). Whether it is more effective at finding the truth is debatable. As Feibleman (1985:34) points out, 'there is nothing in the world cheaper or

more prevalent than the absolute truth. Everybody has one'. Nevertheless, it is common to draw quite a stark contrast between these two types of process, though in reality that is rather artificial. There have always been legal institutions in Common Law countries (including England) which adopt a form of inquisitorial process. Equally, there are Civilian legal systems (such as Italy) where adversarial procedure is much in evidence. There are in any event many specific procedures which have their parallel counterparts in both systems. Having said that, the emphasis upon an adversarial structure explains many of the specific concepts within, and reasoning processes governing, the English Legal System, as we shall see throughout this book.

That said, there are signs that (whether by coincidence or design) the gap is narrowing. This can particularly be seen by reference to the so-called 'Woolf Reforms' of the English Civil Justice system. We will now consider these briefly.

The progress of civil cases in England and Wales is subject now to a largely unified procedure governing both High Court and county court litigation. The rules are contained in two main sources: the *Civil Procedure Rules 1998* (CPR) and a range of supplementary *Practice Directions* issued from time to time by the courts to regulate their own procedure.

Proceedings are commenced by a claimant issuing a claim. This is a formal document submitted to the court and to the prospective defendant(s). Each potentially defended case is then allocated to a 'track' by the court. There are three tracks:

- a 'small claims track' for low-value cases which are normally dealt with by way of small claims arbitration in the county courts;
- a 'fast track' which is designed to deal expeditiously with the simpler, lower value cases (generally in the range of £5,000–£15,000), which will predominantly end up in the county court; and
- the 'multi-track' which deals with the rest of the workload of the county and High courts—i.e. the higher value and more complex cases.

Many cases are managed according to 'pre-action protocols'. These prescribe a standardised range of steps and a timetable for the parties to bring a case to court. They are designed not only to ensure that there is less delay in civil proceedings, but also to achieve fuller disclosure of evidence at an earlier stage of proceedings than under the old rules. Regardless of whether or not a case is subject to one of the protocols, all cases are supervised by a judge, who is responsible for setting the timetable and managing the pre-trail stage of proceedings in conjunction with the parties. This increased emphasis on judicial case management makes our system look more like an inquisitorial one, though if one looks at the detail, there are significant differences still apparent. Moreover, examples of relatively high levels of judicial case management could be found, pre-Woolf, elsewhere in the common law world—in Australia, for example.

Taken together these measures were seen as critical by Lord Woolf to achieving his objective of increasing the efficiency of the Civil Justice system. First, they seek to ensure that cases are brought to court more expeditiously, because the parties are not only subject to a stricter timetable, but they also have less opportunity, and power, to use delay or other possibly doubtful tactics during the pre-trial stage to 'wear down' the opposition.

Secondly, they encourage the parties to look more seriously at opportunities to resolve a case before it reaches court. They have achieved this in two ways:

- by loading more of the costs of bringing an action at an early stage (most litigators we have spoken to acknowledge that this has encouraged them to negotiate earlier, and to be less inclined to issue proceedings as a tactical device for getting the parties to take the dispute seriously), and
- by giving the judge managing the case more opportunities to encourage the parties to investigate settlement options: Again, this is an increasingly common trend across the developed world, as civil courts struggle to manage growing caseloads, and not a trend unique to the Common Law world. In France, similarly, civil procedure is being reformed to increase opportunities for conciliation and settlement within the court process (see Elliott & Vernon, 2000:130–1).

Following from this second point, the CPR has specifically given the judges powers to 'stay' (i.e. suspend) proceedings for up to 28 days to enable the parties to use 'Alternative Dispute Resolution' (ADR)—see **Figure 1.3**, below—in an attempt to settle the matter. This power applies to all cases subject to the CPR, including even those public law matters coming within the jurisdiction of the Administrative Court—see *R(Cowl)* v *Plymouth City Council* [2001] EWCA 1935.

The growth in ADR has some important implications for Legal Method as well as for the legal system more generally. The rise of ADR involves a substitution of private for public forms of dispute resolution. Mediated settlements are usually confidential to the parties and there is, by definition, no adjudication of a claim. Some commentators have

ADR is an umbrella term which, in the context of the English Legal System, refers primarily to two dispute resolution techniques. These are:

- ***mediation***, whereby a trained mediator, as a neutral third party, acts as a go-between, facilitating negotiations between the parties (see, e.g., Genn, 1999 for a simple introduction to mediation);
- ***early neutral evaluation***, where a lawyer (usually a judge, or possibly a barrister) looks at the evidence in a case and presents their evaluation to the parties of how the case is likely to be decided by a judge.

ADR thus differs from court-based adjudication. The mediator or evaluator does not produce a decision as such, they are not 'judges' by a different name. They simply employ different techniques to enable or encourage the parties to reach their own private settlement outside the court. ADR is becoming much more widespread in the English Civil Justice system. A number of mediation schemes are now being operated in conjunction with the courts. Family mediation is widespread, and in fact has been increasingly used since its introduction in the 1970s. It has far less of a history in general civil proceedings, though a Commercial Court scheme has operated since 1993. Since the introduction of the CPR a Court of Appeal scheme has been established and a number of county court schemes piloted: for example, in the Central London County Court and the so-called 'Speed Mediation' alternative introduced for small claims at Exeter.

Figure 1.3 Alternative Dispute Resolution

raised concerns about the wider implications of this shift from public to private ordering. In the USA, for example, Professor Owen Fiss (1984) has thus argued that more private resolution of disputes reduces the power of law to articulate public values, to bring, in Fiss's words, 'a recalcitrant reality closer to our chosen ideals'. It might even be argued that too great a reliance on private and alternative forms of dispute settlement potentially reduces the opportunity for courts to establish points of principle through the public deciding of cases and the development of precedent. These are potentially significant criticisms of ADR, but at present they probably are not substantial problems in practice. In the UK at present, the impact of ADR is probably still not so great as to have a systemic effect of this magnitude. Indeed it seems likely that the costs of conventional litigation are still the greater disincentive to people exercising their rights and establishing legal principles over that 'recalcitrant reality'.

It is still too soon to be sure what impact the reforms to civil litigation introduced by Lord Woolf have had—or will have—on this adversarial approach. The reality of most civil litigation is that, pre-Woolf, there was already much more cooperation between the parties, and intervention by the judges, than textbooks would generally have you believe. There is growing evidence that the Woolf reforms have formalised, and speeded up, that trend, notably by giving judges more extensive 'case-management' powers, and by increasing the pressure on litigants and their representatives to settle early, or use ADR, rather than fight a case to the 'door of the court' and beyond. However, the Woolf reforms also strike at things such as the calling of expert witnesses, e.g., medical experts, engineering experts, etc., in some cases demanding that only one 'joint' expert is called. These sorts of changes may have a knock-on effect on how cases are argued—though they may never affect the real 'adversarial' battles which occur when litigants represent themselves.

Another consequence of the Woolf Reforms, of which you will need be to be aware, is that certain terms and phrases have been changed, apparently in order to make courts more 'user-friendly'. A law student, however, will have to be aware of both the new terminology and the old; the new because that is how the law is practised, the old terms because that is how the case reports prior to 1999 continue to describe matters. Many terms have stayed the same, e.g., Defendant. Here is a shortlist of some of the major changes:

Old terminology	New terminology
Plaintiff (*the person who brings the claim*)	Claimant
Affidavit (*sworn written evidence*)	Witness statement (in most cases)
Pleadings (*the legal basis on which the plaintiff is claiming against the defendant or the defendant is resisting the claim*)	Statement of case
Writ (*a formal document needed to start the case*)	Claim form

(Continued)	
Interlocutory orders (*matters which arise before the actual trial, e.g., injunctions*)	Interim orders
County Court Rules and Rules of the Supreme Court (*the rules by which courts operate, e.g., time limits, papers to be served, etc.; included in 'The White Book' for the High Court and 'The Green Book' for the county court*)	The Civil Procedure Rules (*published by various publishers, including a new unified version of 'The White Book'*)
Mareva injunction (*an injunction which prevents the defendant dealing with certain funds*)	Freezing injunction
Anton Piller order (*an injunction whereby the plaintiff gains access to the defendant's premises to search for documents etc.*)	Search order

So much, then, for procedure and procedural reform. Before we close this chapter, there are two areas of European law which are having an increasing impact on the English Legal System, which we need also to consider.

1.7 English Law and the European Convention on Human Rights

The European Convention on Human Rights (ECHR) is an international treaty which was created in the aftermath of the Second World War. It has been signed by most European governments, including the UK, as a statement of their commitment to the protection of certain fundamental human rights, such as freedom from torture and slavery, freedom of religion, freedom of expression, and the right to a fair trial. The Convention is not one of the EU treaties and is no part of EC law as such. Its political governing body is a separate organisation called the 'Council of Europe'. All current EU members are members of the Council of Europe.

Whether or not individuals can enforce their rights under the ECHR within their own legal systems depends on the rules and structures of each legal system. Many, though not all, Western European legal systems are framed so that treaty obligations entered into by their governments are automatically incorporated into domestic (i.e. national) law. In that situation, a citizen could pursue a Convention right through the domestic courts. The legal position in Britain is different. Here, international legal rights can be directly enforced only where the treaty has been expressly incorporated into law. This normally requires an Act of Parliament. Although the courts and Parliament sometimes made

reference to the ECHR in defining the scope of rights and duties under English law, there had been, prior to 1998, no express incorporation. Consequently, British citizens seeking redress under the ECHR had to rely exclusively on an international institution called the 'European Court of Human Rights' at Strasbourg. There have been a significant number of such cases on a variety of issues, including the freedom of the press; the rights of transsexuals to have public documents such as passports and birth certificates changed to record their 're-assigned' rather than 'genetic' sex; the detention and trial of 'political' prisoners in Northern Ireland; the use of corporal punishment in schools; and so on. Indeed, the British government has had a poor track record before the Court, having been found in violation of the Convention in a total of 50 cases (Greer, 1999:5); this has been one of the key reasons why the political pressure for incorporation of the Convention into English law steadily increased, though for many years neither Labour nor Conservative Governments had supported the move to incorporation as part of government policy.

That changed in 1996 when the Labour Party published an influential policy paper called *Bringing Rights Home*, proposing measures for the incorporation of the ECHR. This policy came to be reflected in Labour's 1997 election manifesto and its first legislative programme after that election. Consequently, after a sometimes rather bumpy ride through Parliament, the Human Rights Bill received the Royal Assent in November 1998. In addition the legislation devolving powers to the new Scottish and Welsh assemblies also contained provisions requiring those bodies to legislate consistently with the rights contained in the ECHR. The Human Rights Act 1998 (HRA) came into force in England on 2 October 2000. We shall explore the role of the Act in greater detail in **Chapter 9**.

The practical impact of the HRA is, as we shall see, quite difficult to quantify, though most commentators acknowledge that its potential is enormous. Not all of these comments have been positive. Lord McCluskey, in his Reith lecture, for example, warned that 'we are going to have to struggle to avoid being buried in new claims of right' (*Guardian*, 8 May 2000). In fact, the feared deluge of claims did not materialise. For example, only 19 per cent of cases received by the Administrative Court in the first 14 months of the Act's operation raised HRA issues (see *The Administrative Court: Annual Statement by the Hon. Mr. Justice Scott Baker* at http://*www.courtservice.gov.uk/notices/divis/ACO-new-annual-statement.doc*). Nevertheless, for us, as lawyers, it creates a whole new set of concepts and rights which must be understood and developed through practice in courts and tribunals. But incorporation also has wider political and ideological significance too. Professor Keith Ewing (1999:79) has thus described the passage of the HRA as 'unquestionably the most significant formal redistribution of political power in this country since 1911, and perhaps since 1688 [the year of the original Bill of Rights]', while Sir William Wade (1998:532) had called it 'a quantum leap into a new legal culture of fundamental rights and freedoms'. As we will see, the Act has already had an impact on that part of legal culture we call 'legal method'. At the same time, there are things that the HRA will not do, partly because of the internal limits and restrictions built into the Act (see further **Chapter 9**), and partly because there is much that the ECHR itself does not do. Human

rights remains a developing area of law, and many of our conceptions of fundamental rights have evolved and changed since the Convention was drafted nearly fifty years ago. There are new forms of human rights, some of which are not yet fully recognised or understood, and about which the ECHR is pretty much silent. These include:

- the rights of minority peoples, for example (see Gilbert, 1996);
- economic rights (so our seller of flick-knives could not use the HRA to argue that laws restricting trade in particular goods are an unwarranted restriction of her right to engage in a particular business) and cultural rights (Van Bueran, 2002); and
- so-called 'third generation' rights (Adjei, 1995:34), which include the recognition of individual and community rights over the environment.

Whether incorporation of the ECHR will have any impact, positive or negative, on the development of such rights in English or UK law awaits the test of time.

Nevertheless, as we shall see in **Chapter 9**, just as the influence of EC law has gradually overtaken this book (as we predicted it would in the first edition), so too issues of human rights are taking on an increasingly pervasive role in shaping British law.

1.8 English Law and the European Community

The European Union is a political and legal organization of 25 Member States (at present—full membership details can be found on the *Europa* web site, listed in **Chapter 2**). It was founded as the European Economic Community by the original six members (France, Germany, Italy and the Benelux countries), and given international legal status by the Treaty of Rome in 1957. As we noted in the preface, the legal order created by that Treaty is still better described as European Community as opposed to European Union law. The United Kingdom has been a member of the European Community (EC) since 1 January 1973. For three decades there has been a gradual, and perhaps irreversible mingling of European and English concepts within the legal system. The days are thus gone when anyone studying Law in this country could afford to concentrate only on English Law and the English Legal System. To this end we have dedicated **Chapter 10** of this book to the European influence and 'European Legal Method', though we have also sought to make some specific comparisons with Civil Law practices and institutions in each chapter. We have also, as here, tried to incorporate specific references to European Community institutions and legal method, where we have thought it helpful in appreciating the context in which our law now operates.

As a general point, our leaving the 'European Community dimension' until the penultimate chapter should not be seen as relegating the topic to an afterthought. The European influence is far too important for that. EC Law is generally taught as a subject in its own right in British law schools, and usually as a compulsory subject at that. However, it is also of much wider significance to the English Legal System, because of the constitutional relationship that now exists between the Community and Britain. It is not like

studying, say, Contract Law where you might decide in your examination revision to ignore Chapter 8 on 'Illegality'. Experience has shown us, however, that a student (on whatever course and at whatever level) who is new to legal studies needs to become accustomed to and comfortable with English Legal System and Method before investigating other systems too deeply. In this chapter we shall simply introduce you to some basic EC concepts which will be developed more fully in the final chapter.

1.8.1 The Legal Foundations of the EC

The Treaty of Rome, as amended now by a number of other treaties, remains the foundation of the Community. In legal terms, the Treaty is significant in two ways.

First, it created the institutions which enable the Community to function. These are the Commission; the Council of Ministers; the European Parliament; and the two Community courts. The Commission and Council wield both political and legal (i.e., law-making) power; the European Parliament, to date, has only a political, advisory function, and so is a very different body from the Westminster Parliament. The two courts are the Court of Justice of the European Communities (ECJ), and the Court of First Instance (CFI).

The Treaty gave to the Court of Justice powers to rule on matters of European Community Law brought before it by the Commission, or by a reference from a court within one of the Member States (this latter process is generally referred to as a reference for a preliminary ruling under Article 234—that being the provision in the EC Treaty creating the power). At this point we should note one impact of the Treaty of Amsterdam which came into force on 1 May 1999. As a result of this Treaty, most of the Article numbers in the original 1957 Treaty of Rome were re-numbered. Thus, Article 177 became Article 234. Consequently, from this point on we have cited all Articles of the EC Treaty under their new numbers.

Private individuals also have rights to bring actions before the Court, but these are strictly controlled by the terms of the Treaty. The Court of First Instance (CFI) has been in operation since September 1989. It was created under Article 11 of the Single European Act, which, despite its name, is a Community treaty and not a statute of any Member State. The CFI was created to take up some of the caseload of the ECJ. However, it presently has a restricted jurisdiction, concerned with competition law, and certain cases arising from the European Coal and Steel Community Treaty of 1951. The CFI is of lower standing than the ECJ, and certain rights of appeal exist from its decisions to the Court of Justice.

Secondly, the Treaty is unusual in that it contains a number of provisions which give individuals (as opposed to nation states) substantive legal rights. A particularly important and well-known example is Article 239, which lays down a general principle that men and women are entitled to equal pay for work of equal value. This has been used in the UK to give rights to equal pay to women who have fallen outside the protection of our own sex discrimination laws (*Garland* v *British Rail Engineering Ltd* [1983] 2 AC 751; [1982] 2 All ER 402).

1.8.2 EC Legislation

Apart from the substantive provisions of the Treaty, there are three types of laws emanating from the EC Commission or Council of Ministers:

Regulations: These are directly applicable in each Member State and take precedence over any conflicting provisions of domestic (i.e. national) law.

Directives: These are binding upon each Member State 'as to result', but not as regards methods of 'implementation'. What this means in plain English is that each state is obliged to pass such laws as are necessary to give effect to a particular Directive, and then usually within a specified period of time. The Commission may commence proceedings against a state for failure to implement within the required period, but generally a Directive may not be enforced by or against private organisations or citizens *before* it is implemented as, say, an Act of Parliament or statutory instrument.

Decisions: These are binding only upon the Member State(s) or individual(s) to whom they are addressed; they thus tend to have a much narrower field of application than either Regulations or Directives. They take effect from the date at which they are notified to the addressee. You should be careful not to get caught up in some terminological confusion. Decisions as referred to here are a species of legislation; they should not be mistaken for the decisions of the Court of Justice, which have a distinct legal status.

1.8.3 The European Dimension of English Law

The EC is not unusual in owing its existence to an international agreement. Many multinational organisations of states are created in this way. What makes the EC unique is that the Treaty itself creates rights and obligations which are enforceable not only within the institutions of the EC (as just considered), but before the national courts of each Member State.

In English law the enforceability of the EC Treaty and of legislation emanating from the EC Institutions (such as Directives) is guaranteed by the European Communities Act 1972—an Act of the Westminster Parliament. Although the effects of that Act are still widely debated by EC and British constitutional lawyers, it seems increasingly to be accepted that, by passing the Act, Parliament has, to a limited extent, ceded some of its sovereign power to the EC. In July 1990, for instance, following a reference to the ECJ, the House of Lords prevented the Secretary of State for Trade from implementing provisions of the Merchant Shipping Act 1988; see *R* v *Secretary of State for Transport ex parte Factortame (No. 2)* [1991] 1 AC 603; [1991] 1 All ER 70.

The House of Lords, in delivering the reasons for its decision, concentrated upon the issues of granting 'interim relief' until the question finally came to court. By so doing their Lordships avoided the necessity of discussing the implications of their decision to disapply the Act. This case is undoubtedly of constitutional significance. Prior to the decision in *Factortame (No. 2)* no English court, in modern times, had accepted that it had the power to disapply an Act of Parliament. Indeed, in the original *Factortame* case the House of Lords had expressly denied that such power existed—see [1990] 2 AC 85; [1989] 2 All ER 692. Although the issue in the *Factortame* cases was a rather technical,

preliminary point regarding the powers of the court to grant 'interim relief' (that is, to give a provisional remedy to a claimant to protect his interests until the case is heard on the substantive issue), the effect of *Factortame (No. 2)* is far more general. It now seems incontestable that, in cases where there is a conflict between principles of directly enforceable Community law and national law, Community law must prevail, regardless of the source of that domestic law. To EC lawyers, this is hardly a shock, since it reflects one of the founding principles of the Community legal order—the principle of supremacy of EC law. As Lord Bridge explained in *Factortame (No. 2)* ([1991] 1 All ER 70, at 108):

> [the principle of supremacy] was certainly well established in the jurisprudence of the Court of Justice long before the United Kingdom joined the Community. Thus whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the 1972 Act it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law. . . . Thus there is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy.

Another more recent case illustrates the constitutional significance of the 1972 Act: *Thoburn* v *Sunderland City Council* [2002] EWHC 195; [2003] QB 151; [2002] 4 All ER 156. The case concerned the conflict between section 1 of the Weights and Measures Act 1985 and, amongst other Statutory Instruments, the Units of Measurement Regulations 1994 (which had implemented Council Directive 80/181 Art. 1, as amended by Council Directive 89/617 and which were stated to be made in the exercise of powers conferred by s. 2(2) and (4) of the European Communities Act 1972). The 1985 Act had permitted the continued use of imperial and metric measures in selling goods loose in bulk (e.g., bananas on a market stall). However, the 1994 Regulations meant that the continued use of imperial measures for trade in such goods was permitted only until 31 December 1999. Thereafter the use of the pound as a primary indicator of weight was forbidden. The arguments before the court related to the doctrine of implied repeal and, in particular, whether the 1985 Act had impliedly repealed the European Communities Act 1972 section 2(2) to the extent that the latter empowered the provision of subordinate legislation which was inconsistent with it.

Lord Justice Laws held that the 1985 Act had not impliedly repealed section 2(2). Section 2(2) is what is sometimes called a 'Henry VIII' clause (a reference to ideas of absolute monarchy): it allows secondary legislation to override primary legislation for the purposes of implementing EC law. The appropriate analysis of the relationship between EC and domestic law, said Laws LJ, required regard to be given to the following propositions:

(1) each specific right and obligation provided under EC law was by virtue of the 1972 Act incorporated into domestic law and took precedence. Anything within domestic law which was inconsistent with EC law was either abrogated or had to be modified so as to avoid inconsistency;

(2) the 1972 Act was a constitutional statute which could not be impliedly repealed.

Exactly what is meant by a 'constitutional statute' is something which you will cover in Public Law or Constitutional Law courses but Laws LJ indicated that these were Acts which governed the relationship between the state and the individual and enlarged or diminished fundamental constitutional rights. These types of statute could never be impliedly repealed and the 1972 Act was one of these. Further discussion of this topic is outside the scope of this book, but it is fair to say that this statement is controversial.

The *Factortame* and *Thoburn* cases illustrate how English and European case law is developing in response to the new legal order established by the EC. But it is important to remember that that legal order is also capable of undergoing change. The scope of Community law today is significantly greater than thirty years ago, when the UK joined the Community. It is more than likely that, in another twenty years, we shall see a legal order that is significantly different from that which exists today.

One implication of this is that, for the lawyer, it is becoming increasingly difficult to identify clear points of demarcation between national and Community law, and to find areas of national law which are wholly unaffected by EC law. Even areas like Criminal Law and Family Law are beginning to be shaped more by a European influence. One illustration of this is the extent to which EC law is beginning to address issues of corporate and transnational crime. So, for example, the EU has issued two Money Laundering Directives (one in 1991, the other in 2001) aimed at coordinating across the EU measures to deal with attempts by criminals to use financial institutions and professionals such as lawyers and accountants to 'launder' the financial proceeds of their activities. Another graphic, and highly emotive, illustration of the more unexpected impact of EC law relates to the Irish laws on abortion.

The Irish Constitution contains, in Article 40, a specific provision protecting the life of the unborn child. The effect of this is to make abortions illegal within the Republic, except in cases where policy dictates that the risks to the life of the mother justify the termination. On the face of it, it is hard to see what connection could exist between such constitutional rights and EC law. However, in 1992, the Irish High and Supreme Courts were asked to rule on the Constitutional legality of Irish citizens travelling to England, where abortion operations are lawfully available on less restrictive grounds than in Ireland—see *Attorney-General* v *X* [1992] 2 CMLR 277. The case concerned a 14-year-old girl who had become pregnant after being raped. Relying on the Irish Constitution, the Irish Attorney-General sought an order preventing her and her family from travelling to England in order to have the pregnancy terminated. In the High Court, the applicant relied in part on the decision of the Court of Justice of the European Communities in Case C–159/90 *Society for the Protection of the Unborn Child* v *Grogan* [1991] ECR I–4685; [1991] 3 CMLR 849 and argued that, if it did prevent travel in this way, the Constitution was contrary to EC law, as contained in Article 50 of the Treaty of Rome and Directive 73/148 (on access to services across the Community). The High Court rejected this argument, but *not* on the basis that EC law did not apply to the issue. Rather, the Court relied on Article 8 of the Directive, which allows Member States to restrict travel in cases where public policy so dictates.

Attorney-General v *X* was ultimately determined in the applicant's favour on other grounds by the Supreme Court, which did not rule on the point of EC law. That left the High Court's decision as precedent on this point. But the story does not quite end there.

In a further Irish High Court case, *SPUC* v *Grogan (No. 2)* [1993] 1 CMLR 197, the applicant sought to overturn *Attorney-General* v *X* in the light of a further Community law development. When the Maastricht Treaty on European Union (see **Chapter 10**) was signed, it contained a specific Protocol guaranteeing freedom to travel to obtain abortion services within the EC. The applicant in *Grogan (No. 2)* thus argued that, as the Irish Government was a signatory to the Protocol, the policy arguments relied on in *Attorney-General* v *X* could no longer apply. This argument was also rejected by the High Court. The applicant could not rely on the Maastricht Protocol itself, as it had yet to be implemented by national law.

To complete the picture, it is worth noting that *Grogan (No. 2)* was ultimately overtaken by developments on the political front. Throughout 1992 the Irish Government had been busy (both at Community and at domestic levels) trying to find a solution to the constitutional dilemma it now faced. These activities culminated in national referenda in November 1992, which put to the people of Ireland three questions concerning their rights (i) to legal abortion within the Republic; (ii) to travel outside Ireland in order to obtain abortion services; and (iii) to obtain information within the Republic about abortion services available abroad. The outcome of this process was that the liberalisation of the abortion laws was rejected by a majority of about 2:1, but the right to travel and right to information were both supported by a clear majority of voters. As a result the Government introduced Amendment No. 14 to the Irish Constitution which qualified Article 40.3.3 so as to make it clear that this did not restrict the freedom of Irish citizens to travel abroad, thereby averting any direct clash between the Irish Constitution and the Maastricht Treaty.

Thus we have a clear example of an area of law, concerning what most people would regard first and foremost as a high *moral*, rather than *economic*, issue in which EC law is not only becoming increasingly significant, but will ultimately override contrary domestic rules of law. Whether the EC should become so involved in determining the fundamental rights and freedoms of citizens remains a moot point, and one which much of the literature on Community law has left underdeveloped.

So, to return to our flick-knife example, if our concern was whether there are any controls on the importation of flick-knives, or whether this was an unfair restraint on cross-border trade, then we might well have to consider Community law. Nevertheless, despite the continuing expansion of European law into new areas, the question as raised would be unlikely to require research into the European dimension.

CONCLUSIONS

In summary, therefore, in solving any legal problem, including the one set at the beginning of this chapter, we need to be aware of the many dimensions of English law. Any advice we give must take into account the kind of issue with which we are dealing. Is it a question of criminal or civil law? Have we considered all relevant Acts (if any), and checked on the existence of any secondary legislation? What about case law? Are there any human rights implications? Have the courts said

anything about the matter, either in interpreting a relevant statute or in applying rules of Common Law? Does the problem have an EC dimension? It is only by appreciating this context that we can, ultimately, find the relevant law to solve our problem. In practice, of course, you quickly overcome the need to run through the kind of checklist we have just presented. Your knowledge and understanding of substantive areas of law will help to make the job of researching legal issues much simpler. Even so, no one can retain sufficient detailed knowledge to make legal research redundant. The next chapter is intended to help you develop the basic research skills necessary to find the law on any basic legal problem.

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