The English legal system is unlike that of any other European country. An outline knowledge of the features which make the English system so distinct is essential to an understanding of English law and the English legal process.

1.1.1 Antiquity and continuity

English law has evolved, without any major upheaval or interruption, over many hundreds of years. The last successful invasion of England occurred in 1066, when King William and his Normans conquered the country. King William did not impose Norman law on the conquered Anglo-Saxons, but allowed them to keep their own laws. These laws were not uniform throughout the kingdom. Anglo-Saxon law was based on custom and in different parts of the country different customs prevailed.

In the second half of the twelfth century King Henry II introduced a central administration for the law and began the process of applying one set of legal rules, 'the common law', throughout England. Since that time, English law has evolved piecemeal. For this reason the English legal system retains a number of peculiarities and anomalies which find their origins in mediaeval England.

The world history of the past few hundred years has been a litany of revolution and conquest. The new rulers of a country tend to start afresh with the law. In the Soviet Union the communists introduced Soviet law, in France Napoleon introduced the Napoleonic code, in the United States the founding fathers wrote the American Constitution. But England is one of the very few countries to have survived the last nine hundred years with no lasting revolution from within or foreign conquest from abroad. Some English laws and legal practices have evolved continuously since the time of King Ethelbert, who became king of Kent in the year 580. The Norman Conquest was a major
upheaval, but even that was not a fresh beginning for the law.

English law does not become inoperative merely because of the passage of time. When we study the law of contract we shall see that two ancient cases, *Pinnel’s Case* (1602) 5 Co Rep 117a and *Lamplough v Brathwaite* (1615) Hob 105, are still important precedents. Although these cases have been refined and developed by subsequent cases, there would be no reason why a modern lawyer should not cite them in court. In the same way, statutes remain in force indefinitely or until they are repealed. A statute loses none of its authority merely because it has lain dormant for many years. In *R v Duncan* [1944] KB 713, for example, a defendant was convicted of fortune-telling under the Witchcraft Act 1735, even though the statute had long since fallen into disuse.

Occasionally a litigant springs a major surprise by invoking an ancient law. In 1818 the defendant in *Ashford v Thornton* (1818) 1 B & A 405, claimed the right to have an appeal against his conviction for murder settled by battle. Trial by battle had been a method of resolving disputes shortly after the Norman Conquest but had fallen into disuse before the end of the thirteenth century. In *Ashford v Thornton*, the offer of trial by battle was declined and so the defendant was discharged. The Appeals of Murder Act 1819 was hurriedly passed. Until Parliament passed this Act trial by battle still existed as a possible means of settling some types of legal disputes.

### 1.1.2 Absence of a legal code

In most European countries the law has been codified. This means that the whole of the law on a particular subject, for example the law of property, can be found in one document or code. Such some codes merely provide a framework for the law, others attempt to provide a complete statement of the law. As we shall see, the bulk of English law has been made by judges in individual cases. Rules of law made by senior judges must be followed in later cases. In the majority of cases brought before an English court a lawyer who is trying to establish a legal principle will cite earlier cases to prove that the principle exists and that it should be applied in the current case. Often a statute, an Act of Parliament, will provide the main legal rules applicable to a particular case. A statute ranks higher as a source of law than the previous decision of any court. But even where a statute does apply to a particular case, the court is likely to be guided as to the meaning of the statute by earlier cases which have considered its meaning.

In general, the important cases on a particular area of law are not reported in one special volume of law reports devoted to a particular area of law, such as the law of contract. (There are exceptions; specialist law reports can be found on some areas of law such as employment law or road traffic law. The system of law reporting is examined in the following chapter at 2.9.) Generally, cases are reported as they are decided and are therefore to be found in the law report volume devoted to the year in which the case was decided. As lawyers and students are only too well aware, it can be very difficult to find all the cases relevant to a particular legal issue.

Occasionally, Parliament codifies an area of law with a statute such as the Partnership Act 1890. Such an Act aims to take all the relevant case law on a particular subject and to codify it into one comprehensible statute. The Law Commission, an important law reform institution set up in 1965, has the codification of appropriate areas of law as one of its objects. But as we shall see, the vast majority of English law remains uncodified. Nor does Britain have a written constitution, as most other democratic countries have.

### 1.1.3 The law-making role of the judges

In most European countries the judges interpret the legal code. In doing this they do not themselves deliberately set out to create law. Later in this chapter, when we study the doctrine of judicial precedent, we shall see that the English courts are arranged in an hierarchical structure and that courts lower down the hierarchy must follow the previous decisions of courts which are higher up. Senior English judges therefore have a dual role. First, they interpret the existing law, which is to be found in legislation and previous decisions of higher ranking courts. Second, they create the law by making legal principles which courts lower down the hierarchy are bound to follow.

### 1.1.4 Importance of procedure

In the Middle Ages a legal right could only be enforced by means of a writ (an order signed by the King, requiring a defendant to appear in court to answer the claim being made). There were few types of writ and,
if a claim could not be brought within the confines of one of the writs then no remedy was available. To some extent lawyers were people who knew the procedure of obtaining a remedy, rather than people who knew the substantive principles of the law. A person with a perfectly just claim would need a lawyer to fit the claim within the procedures of one of the writs. If the correct procedure was not rigidly adhered to, then the claim would fail, even if the substance of the claim was perfectly valid. To some extent this is still true today. If a litigant fails to follow the correct procedure it is possible that his claim will be struck out. Recent reforms of the judicial process, which we consider in Chapter 2, have attempted to reduce the importance of procedure. However, in cases which involve a substantial claim there is no doubt that procedure remains very important.

### 1.1.5 Absence of Roman law

The Romans occupied England from 55 BC to AD 430. Roman law was extremely sophisticated by the standards of its day. The other European countries which were part of the Roman Empire have retained elements of Roman law. But English law has almost no direct Roman law influence, although Roman law is still taught as an academic subject at some English universities and some areas of law have been indirectly based on Roman law concepts. Scotland was not conquered by the Romans, but Scots law has more of a Roman law influence than English law. This influence has been brought about by the traditional alliance of France and Scotland. During the Renaissance, when the modern European world began to develop, Scotland and Continental Europe saw a revival of interest in Roman law. This interest was largely absent in England.

### 1.1.6 The adversarial system of trial

The English system of trial is adversarial. This means that the lawyers on either side are adversaries, who ‘fight’ each other in trying to win judgment for their client. The judge supervises the battle between the lawyers, but does not take part. Today the battle is metaphorical, one party’s lawyers try to establish that there is a case, the other party’s lawyers deny this by whatever means permissible. In the early Middle Ages the battle could be real enough, as certain types of dispute were resolved with a Trial by Battle. In such a trial the parties would fight each other, both armed with a leather shield and a staff and it was thought that God would grant victory to the righteous litigant. If either of the parties was disabled, too young or too old, he could hire a champion to fight for him. This was no doubt considerably more entertaining than a modern trial, but eventually it came to be realised that it was not the best way to achieve justice. Lawyers therefore replaced the champions. But the idea of a battle survived and a trial is still a battle between the lawyers, even if the shields and staffs have given way to witnesses and precedents.

Most other countries have an inquisitorial system of criminal procedure where the judge is the inquisitor, determined to discover the truth. A French investigating judge (juge d'instruction), for example, has enormous powers. He takes over the investigation of a criminal case from the police. He can interrogate whoever he wishes. He can compel witnesses to give evidence and can surprise witnesses with other witnesses, hoping that the confrontation will point the finger of guilt. In a civil case, too, a French judge will take a much more interventionist approach than an English judge and it is the judge, rather than the lawyers, who manages, the case.

When a French case reaches court it is often all but decided. By contrast, no one can ever be certain of the outcome of an English trial. The lawyers will fight for their clients on the day and either side might win. The judge should be disinterested in the outcome, merely ensuring that the lawyers fight by the rules. However, since the introduction of the Civil Procedure Rules in 1999 civil trials have become less adversarial and the judge manages the case to some extent.

An important aspect of the adversarial system of trial is that it is the task of the lawyers to bring the relevant legal rules to the attention of the court. If a lawyer in court makes a perfectly true statement of law, such as the statement that all goods sold in the course of business must be of satisfactory quality, he must provide authority for this statement. This means that the lawyer must quote the case, or in this instance the statute, which made the law. Similarly, students must cite authorities. At all levels of study, a statement of law with no authority to back it up is not regarded highly.

Two other features of the English legal system, both of which are examined in Chapter 2, are worth mentioning here. First, the legal profession is divided, lawyers being either barristers or solicitors. Second, in...
almost all criminal trials the innocence or guilt of the accused is decided by laymen, rather than by lawyers or judges. If the accused is tried in the Crown Court it will be a jury who decides whether the accused is guilty. If the crime is tried in the magistrates' court it is generally a bench of lay magistrates who make this decision.

Commonwealth and former Commonwealth countries, such as Australia, Canada and New Zealand, have retained the adversarial system of trial and most other features of the English legal system. In the United States of America trials are adversarial and some features of the English legal system have been retained. As we shall see both in this chapter and in Chapter 2, there is now considerable pressure to change many of the traditional features of the English legal system, which are increasingly perceived to be ill-suited to the needs of the twenty-first century.

1.2 CLASSIFICATION OF ENGLISH LAW

English law can be classified in three main ways: as public law or private law; as common law or equity; or as civil law or criminal law. Each of these classifications is worth considering in some detail. It is also worth considering the distinction between law and fact.

1.2.1 Public law and private law

Public law is concerned with decisions made by bodies which are governmental in nature. Private law is concerned with the legal relationships of individual citizens. Criminal law, for example, is regarded as public law. Citizens are prosecuted by the State. The law of contract, on the other hand, is private law. A person who sues for breach of contract acts as one individual suing another individual. The State provides a framework for such a dispute to be resolved. That is to say, it provides the courts and the judges, but it plays no part in bringing or defending the action.

There are three main areas of public law. Constitutional law is concerned with the workings of the British Constitution, deciding such matters as the powers of Government Ministers. Criminal law makes certain types of behaviour criminal offences, giving the State the power to prosecute and punish those who commit such offences. Administrative law deals with disputes between citizens and Government agencies, such as the Department for Work and Pensions.

Private law is also called civil law and can be broadly broken down into five main areas: contract, tort, property, trusts and family law.

1.2.2 Common law and equity

The term common law is used in three distinct senses. First, it is used to distinguish countries which have adopted the features of the English legal system from those countries which have not. The features of the English legal system were explained at the beginning of this chapter. Countries which adopt these features are said to have a common law system. Countries which adopt the central European system are said to have a civil law system. Second, the term common law denotes that body of law which was made by the judges in the King's (or Queen's) courts, rather than the body of law made by the judges in the courts of equity. Third, common law means judge-made law as distinct from statute law.

It is, perhaps, unfortunate that the term common law is used in three different ways. However, the context in which the term is used will generally make apparent the sense in which the term is used. Here we are considering the difference between the law made by the judges in the King's courts and the law made by the judges in the courts of equity. To understand this distinction and to understand the meaning of equity, we must know something of the historical development of the law.

A hundred years after the Norman Conquest, Henry II began the process of applying one set of legal rules, the common law, throughout the country. The King's representatives travelled from London to the provinces, checking on the procedures in the local courts. Gradually these representatives became judges rather than administrators. When they arrived they would try the cases which had been waiting for them (a system which survived into the 1970s). The decisions of these first travelling judges began to be recorded. Subsequent judges followed the earlier decisions, in order to provide a uniform system of law. Gradually one set of legal rules became common to the whole country and it therefore became known as the common law.

The common law grew to have several defects. First, legal actions could only be commenced through the issuing of a writ. By the middle of the thirteenth century there were around 50 writs, to cover different types of cases. In the reign of Henry III, after political
pressure from the barons, the Provisions of Oxford in 1258 ruled that new types of writs should not be created. The development of the common law was very much hindered by this. Sometimes existing writs could be stretched to cover new situations, but more often they could not.

A second defect of the common law was that procedure was extremely hidebound. If a writ contained the slightest defect in its wording it was rendered useless. There were also problems with fictitious defences. Originally the truth of these defences had been checked by the King's knights, but later the defences became very effective delaying tactics. A third major defect of the common law was that it had only one civil remedy at its disposal, the payment of damages. In some cases, such as those where a nuisance was being continually committed, the payment of damages was not much of a remedy. What the litigant really wanted was that the defendant be ordered to stop committing the nuisance.

In the Middle Ages people who could not gain a remedy under the rigid rules of the common law could petition the Chancellor, the highest ranking clergymen, to ask him to intervene.

The Church was the one mediaeval institution where men of ability could better themselves. Generally speaking, only clergymen could read and write. Clergymen were trained in Canon Law. This was based on God's law, and on the laws of conscience, and therefore contained an element of natural justice. The Chancellor could order litigants to appear before him, without the use of writs. There were no complex rules of evidence or procedure and the Chancellor could order justice to be done in various ways. In particular, he could issue injunctions which ordered a person to behave in a certain way. This justice dispensed by the Chancellor became known as equity.

Equity was not designed to be a rival system to the common law system. Originally it was intended to supplement the common law, to fill in the gaps. But gradually equity developed into a rival system and gradually it became just as hidebound as the common law.

For several hundred years, until the Judicature Act 1873 which came into effect in 1875, England had two separate systems of courts and laws. The systems did not always deal with separate matters. In the Earl of Oxford's Case (1615) 1 Rep Ch 1 it was decided that if common law and equity conflicted then equity had to prevail.

The Judicature Acts 1873–1875 merged the two systems of law. These Acts created the modern court structure, designed to apply both common law and equity side by side in the same courts. This has not meant that equity has ceased to exist. Equity still plays an important part in English law. The administration of common law and equity may have been fused, but the separate rules of each branch of the law have lived on. Equitable remedies remain discretionary and can be withheld from those who have behaved inequitably (unfairly). This was reflected in the maxim, 'He who comes to Equity must come with clean hands'. An example can be seen in Falcke v Gray (1859) ER 4 Drew 651 in Chapter 7 at 7.2.4.

Any court can now apply both legal and equitable rules. However, barristers still tend to regard themselves as either common law barristers, dealing with contract, tort or crime, or Chancery barristers, dealing with trusts and property.

1.2.3 Civil law and criminal law

The distinction between civil and criminal liability is fundamental to English law. The courts themselves are divided into civil courts and criminal courts and the two sets of courts have quite different purposes. The civil courts are designed to compensate people who have been caused loss or injury by the wrongful acts of other people. The criminal courts are designed to punish people who have committed a criminal offence.

Table 1.1 shows the essential differences between civil and criminal law.

Despite the differences shown in Table 1.1, it is quite possible that the same wrongful act will give rise to both civil and criminal liability. For example, if a motorist injures a pedestrian by dangerous driving then both a crime and a tort (a civil wrong) will have been committed.

The State might prosecute the driver for the crime of dangerous driving and if found guilty the driver will be punished. (Probably by a driving ban and possibly by a fine or imprisonment.) The injured pedestrian might sue the driver in the civil courts for the tort of negligence. If the driver is found to have committed this tort then damages will be sought to compensate for the pedestrian's injuries.

The different functions of the civil and criminal courts can be further demonstrated if we consider what would have happened if the driver's behaviour had been much worse.

Let us now assume that the driver was very drunk, driving very badly and had killed the pedestrian.
criminal courts are designed to punish bad behaviour. The worse the behaviour, the more severe the punishment. The civil courts are not concerned with the heinousness of the defendant's behaviour, they are concerned with compensating a person for injuries suffered as a consequence of the defendant's wrongdoing. Almost all businesses will insure themselves against civil liability. However, this will not make them indifferent to incurring such liability. Once a claim on an insurance policy has been made, insurance will be more expensive the following year.

As we have seen, crimes which cause injury to a victim will also give rise to a civil action. But 'victimless' crimes will not. Possessing a dangerous drug, for example, is a crime and the possessor of the drug might be prosecuted by the State. But the fact that a person possesses the drug does not directly injure anyone else, and so no one will have any right to sue him. Although the criminal courts have as their purpose the punishment of offenders, rather than

<table>
<thead>
<tr>
<th>Purpose of the case</th>
<th>Criminal</th>
<th>Civil</th>
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<tbody>
<tr>
<td>To punish a wrongdoer.</td>
<td>To compensate a person who has suffered loss or injury or to prevent unlawful acts.</td>
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<table>
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<tr>
<th>The parties</th>
<th>The State prosecutes a person (the defendant) e.g. Regina (Queen) v Smith.</th>
<th>An individual (the claimant) sues an individual (the defendant) e.g. Smith v Jones.</th>
</tr>
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</table>

| The outcome | The defendant is either acquitted or convicted. | The claimant either wins the case or does not. |

| The consequences | If convicted, the defendant will be sentenced. | If the claimant wins he will be awarded a remedy. |

| The courts | The case is first heard in either the magistrates' court or the Crown Court. | The case is first heard in either the county court or the High Court. |

| The costs | Legal aid is often available to the defendant. If convicted, he must pay towards the costs. | Generally, the loser pays both sides' costs. Insurance against losing is encouraged. Legal aid may be available to the very needy. |

| The facts | Decided by bench of magistrates (occasionally by a district judge) or by the jury. | Decided by the judge. |

| The law | Decided and applied by the judge or by the magistrates on the advice of the legally qualified clerk. | Decided and applied by the judge. |

| Burden and standard of proof | The prosecution must prove the defendant's guilt beyond reasonable doubt. | The claimant must prove his case on a balance of probabilities. |

| Examples | Murder, theft, committing unfair trade practices, failure to observe health and safety provisions. | Negligence, trespass, breach of contract, disputes as to ownership of property. |
the compensation of the injured, they do have the power to make compensation orders. Section 35 of the Powers of Criminal Courts (Sentencing) Act 2000 gives magistrates the power to make compensation orders of up to £5 000 per offence. The compensation is paid by the perpetrator of the crime. The Crown Court is given the power to make a compensation order of any amount, although it is required to have regard to the defendant's means. If a court does not make a compensation order in a case in which it is empowered to do so, it must give reasons for not making the order when passing sentence. An award made in the magistrates' court does not preclude a later civil claim by the victim of the crime. Compensation orders can generally not be ordered when the offence is a motoring offence.

The Criminal Injuries Compensation Authority can also award compensation to victims of violent crime, but any award is reduced by the amount of any compensation ordered by a criminal court. The Authority has reference to a list of suggested awards for various types of injury. For example, the suggested award for the loss of a front tooth is currently £3 300, and for the loss of one eye £27 000. The suggested award for loss of both eyes is £110 000.

Most civil wrongs are not crimes. If a person breaks a contract or trespasses on another's property that person might well be sued, but in general will have committed no crime.

The burden of proof is placed upon the party who must prove the case. In criminal cases the burden is placed upon the prosecution. In civil cases the burden is placed on the claimant. The standard of proof is concerned with the extent to which the case must be proved. In criminal cases the prosecution must prove the guilt of the accused beyond reasonable doubt. In a civil case the claimant must prove the case on a balance of probabilities.

1.2.4 The distinction between law and fact

In general, civil cases require the claimant to prove not only the facts which give rise to the claim, but also the principles of law which provide a remedy in respect of the facts proved. So a pedestrian run over by a car will first need to prove that the defendant did run him over and will also have to prove that the law of negligence provides him with a remedy in respect of this. Generally, the criminal law also requires the prosecution to prove both fact and law. The prosecution must prove beyond a reasonable doubt that the defendant did the act for which he is being prosecuted and must also prove that such an act amounts to a criminal offence.

It can be important to distinguish law and fact for three main reasons. First, only statements of law can become precedents. (Judicial precedent is examined below at 1.3.2.) Second, in many cases an appeal may only be possible on a point of law. In other cases an appeal on the law would go to one court, whereas an appeal against a finding of fact would go to a different court. Third, in a criminal trial conducted in the Crown Court the jury’s function is to determine the facts, whereas the correct application of the law is the function of the judge.

Often it is obvious enough whether or not a question is one of law or fact. The well-known case *Carlill v The Carbolic Smoke Ball Company* [1893] 1 QB 256, which is set out in Chapter 3 at 3.1.2, can be used as an example. Whether or not Mrs Carlill really did use a smoke ball and whether she really did catch flu were questions of fact. Whether or not the advertisement was an offer or an invitation to treat was a question of law.

Sometimes it must be decided whether certain facts fit within a definition made by a statute, or fit within a rule made by the common law. These questions can be regarded as a question of mixed law and fact, or law and degree as they are sometimes known. For example, in *Cosen v Brutus* [1975] AC 854 the defendant was charged with using insulting behaviour whereby a breach of the peace was likely to be occasioned, contrary to s.5 of the Public Order Act 1936. The defendant had interrupted the Wimbledon tennis tournament by blowing a whistle, sitting down on the court and attempting to hand a leaflet to the players. The magistrates held that the defendant's behaviour had not been insulting. The Court of Appeal considered that whether or not the defendant's behaviour was insulting was a question of law and went on to define the meaning of insulting in this context. As they regarded the magistrates' finding as provisional, they sent the case back to the magistrates to continue the hearing. The House of Lords reversed the decision of the Court of Appeal and held that whether or not the defendant's behaviour had been insulting was a question of fact. It had therefore been properly
decided by the magistrates and so no appeal against their finding could be made.

The conflicting decisions of the Court of Appeal and the House of Lords demonstrate the difficulty of classifying some questions as either questions of law or questions of fact. In deciding such matters the courts will, of course, try to reach the correct conclusion. However, there is perhaps a tendency to classify such questions as matters of fact to reduce the number of precedents being made and to reduce the number of appeals which will be allowed.

The United Kingdom joined the European Economic Community, now called the European Union, in 1973. It is arguable that membership of the European Union means that the United Kingdom Parliament is no longer truly sovereign. This matter is considered below at 1.4.4.

1.3.1 How is a statute passed?

The Government of the day is formed by the political party which wins a majority of the seats in the House of Commons. The Government takes the political decisions as to what legislation should be enacted in each sitting of Parliament. Then Government departments, such as the Department for Business, Innovation and Skills, propose legislation for approval. Parliamentary draftsmen (lawyers who specialise in drafting legislation) then draw a Bill up and the Bill starts its parliamentary journey.

To become a statute the Bill must pass through both Houses of Parliament, that is to say the House of Commons and the House of Lords, and then gain the Royal Assent. Many Bills achieve this without significant alterations. Others have to be amended to gain parliamentary approval and some Bills fail to become statutes at all.

Bills usually start in the House of Commons. The initial stage is the First Reading. This merely gives the title of the bill and announces the date of the Second Reading. At the Second Reading the principles of the Bill are debated. If the Bill passes this stage, on account of more MPs having voted in favour of it than against it, it is referred to a standing committee which considers the details of the Bill and recommends amendments. Any such amendments are considered by the House of Commons at the report stage, after which the Bill then proceeds to the Third Reading. Like the First Reading, this is a short stage where only minor amendments to the content of the Bill, rather than amendments to the general principle of the Bill, can be made.

The Bill is then sent to the House of Lords, where the whole process is repeated. The wording of the Bill must be the same for both Houses of Parliament. If the House of Lords disagrees with the wording or refuses to pass the Bill, the Parliament Acts 1911 and 1949 can be invoked. The effect of these Acts will be that the Bill can go ahead without House of Lords approval, after a delay of one year. (This happens for example, s.3 of the Compensation Act 2006, which is considered in Chapter 12 at 12.2.4.2.)
very rarely.) A Money Bill, which would contain only financial provisions, can become a statute without being passed by the House of Lords after a delay of only one month.

After passing through both Houses of Parliament, the Bill will then receive the Royal Assent. It is a convention that the Queen does not withhold consent and no monarch has done so since 1707. (The Queen does not give assent personally but through the Lord Commissioners or by notification to both Houses of Parliament.)

Once the Bill has received the Royal Assent it becomes a statute (an Act of Parliament) which the courts must enforce, either from a date agreed by Parliament or when an order is passed by the relevant Secretary of State.

Almost all Bills are introduced into Parliament by the Government of the day. A Government with a large majority has enormous power to ensure that Bills it proposes become enacted. The system is subject to the criticism that the Government can ignore not only the wishes of opposition MPs but, if its majority is large enough, can also ignore the wishes of many of its own MPs. However, not all Bills are introduced by the Government. Every year a ballot is held to identify 20 MPs who may attempt to introduce Private Member’s Bills. In fact, only an MP who was close to winning the ballot will have a reasonable chance of seeing his Private Member’s Bill become the law. The Abortion Act 1967, which liberalised the law on abortion, was introduced as a Private Member’s Bill by David Steel MP.

### 1.3.1.2 Codifying, consolidating and amending Acts

We have seen that, in general, English law is not codified. However, certain areas of law have been the subject of a codifying Act. Such an Act attempts to put all the existing law on a particular subject, whether common law or statutory, into one comprehensive statute. In doing this the law may be changed and if the Act is inconsistent with the law which it codified, the Act prevails. The major codifications in English law have been the Bills of Exchange Act 1882, the Partnership Act 1890, the Sale of Goods Act 1893, and the Theft Act 1968.

A consolidating Act re-enacts all the law on a given area, so that the law contained in several existing statutes is re-enacted as one new statute. Minor changes to the law may be made, but the purpose of a consolidating Act is not to change the law, but to make it more easily accessible. The Trade Union and Labour Relations (Consolidation) Act 1992, for example, consolidated existing legislation relating to collective labour relations. An amending Act changes one or more sections of an existing Act.

### Example

The effects of the three types of Act can be considered by looking at the history of sale of goods law. Prior to 1893 sale of goods law was almost entirely common law, that is to say it was made by the courts in innumerable cases. In 1893 the Sale of Goods Act, a codifying Act, codified the common law.

No real changes were made until 1973, when the 1893 Act was amended very slightly to make it more appropriate to the needs of consumers. These minor changes were made by an amending Act, the Supply of Goods (Implied Terms) Act 1973. In 1977 the Unfair Contract Terms Act made more amendments. In 1979 the Sale of Goods Act 1979, a consolidating Act, was passed. This Act, which is the Act currently in force, consolidated the 1893 Act and the amendments which had been made to it. Three amending Acts have been passed since 1979: the Sale of Goods (Amendment) Act 1994; the Sale and Supply of Goods Act 1994; and the Sale of Goods (Amendment) Act 1995. The amendments achieved by these Acts are incorporated into the Sale of Goods Act 1979.

Parliament has the power to repeal any statute. As we saw earlier, a statute remains in force until it is repealed even if it has become obsolete.

### 1.3.1.3 Delegated legislation

Delegated legislation is the name given to legislation passed otherwise than as a statute. Most delegated legislation is concerned with relatively narrow, technical matters. However, it is arguable that delegated legislation is a more important source of law than statute. This argument is based on the fact that nowadays there is far more delegated legislation than statute law. Once delegated legislation is enacted, it generally has the same force as the statute which enabled it to be enacted.

Delegated legislation can take several forms. The most important form is a statutory instrument. This legislation is not passed as a statute. Instead, a statute called an enabling Act is passed and this enabling Act gives a Government Minister the power to introduce the legislation. The statutory instrument will contain
a preamble which sets out the authority under which it was passed. It will also contain a statutory note which sets out its purpose and its scope. Statutory instruments are made in the name of a Minister but are drawn up by the legal department of the relevant ministry. The Deregulation and Contracting Out Act 1994 allows Ministers to change certain Acts of Parliament, by way of statutory instrument, without going through the normal parliamentary procedure. The 1994 Act is used to repeal or amend provisions in primary legislation which impose a burden on business or others. In later chapters we shall see that legislation of considerable importance, such as the Commercial Agents (Council Directive) Regulations 1993, takes the form of statutory instrument rather than the form of a statute. Many statutory instruments, such as the 1993 Regulations, are used to implement EU Directives. (Directives are examined later in this chapter at 1.4.2.4.)

Orders in Council are made by the Privy Council. When making such orders the Privy Council is generally made up of four ministers in the presence of the Queen. The Government of the day can use orders in council to introduce legislation without going through the process of enacting a statute. Orders in Council can be used to implement emergency legislation, where there would not be time to have formal debates in the Houses of Parliament. Orders in Council are also used to give effect to provisions of the European Union which do not have direct effect, to shift responsibilities between Government departments or in relation to matters which affect the constitution. Many statutes only become operative when an Order in Council provides that they should, the power exercised by the Order in Council being contained in the statute itself.

Bye-laws made by local authorities and other public bodies are another type of delegated legislation. These are used to introduce local rules of minor importance. The power to enact bye-laws is given by an enabling Act, such as the Local Government Act 1972.

Delegated legislation has certain advantages and disadvantages. The advantages usually claimed are that it can be enacted without using up parliamentary time, that it makes use of particular expertise held by those who enact it, and that it is flexible enough to deal speedily with changing circumstances and emergencies. These claims in general seem to be true. Parliament often does not have time to pass all of its legislative programme, even though the vast majority of this is already contained in statutory instruments. In 2008 over three thousand statutory instruments were passed, but only 33 Public Acts. It is also true that MPs are not particularly knowledgeable about the details of the types of matters which are enacted by statutory instrument. These matters are often extremely technical, dealing with a huge variety of matters, such as the safe storage of hazardous materials, or the intricacies of housing benefit. A separate justification is that if there were to be a true emergency, such as a major leak of radiation, legislation might be needed quickly and there would not be the time to pass a statute and have debates in the Houses of Parliament. Also, the type of matter which arises from time to time, such as financial eligibility for housing benefit, are obviously better dealt with by delegated legislation than by statute. The same is obviously true of local bye-laws. MPs have no real interest in areas other than the areas which they represent, or in which they live, and could not therefore determine whether or not a bye-law was needed.

Delegated legislation is also criticised on several grounds. First, there is the danger that the Government can pass legislation setting out new principles by abusing the process of delegated legislation. Second, some delegated legislation gives ministers the power to alter statutes, possibly including the very enabling Act which conferred the power to make the delegated legislation in question. In Hyde Park Residence Ltd v Secretary of State for the Environment, Transport and the Regions [2000] 1 PLR 85 the Court of Appeal held that although it was possible for one statute to confer a power to amend another statute by delegated legislation, this power should be construed narrowly and strictly. Third, it is possible that the enabling Act states that the delegated legislation should not be subject to judicial review by the courts, or that it is worded so widely that the courts would not be able to say that its powers had been exceeded. (Judicial review is considered in Chapter 2 at 2.6.1.)

Certain controls over delegated legislation do exist. Ministers are often required by the enabling Act to consult various bodies before enacting delegated legislation. Statutory instruments must be published and made available for sale to the public. In addition to these controls, delegated legislation is controlled both by Parliament and by the courts. Although some non-contentious statutory instruments just become law on the date stated in them, most are required by their enabling Acts to be laid before both Houses of Parliament. If this process is subject to the negative resolution procedure the legislation must
be laid before both Houses for 40 days, during which time either House can pass an annulment or negative resolution, which will cause the statutory instrument to be rendered ineffective. Any MP can put forward a motion for annulment. The affirmative resolution procedure requires the instrument to be laid before one or both Houses for a specified time, usually 40 days, after which time an affirmative resolution agreeing to the instrument must be passed or the instrument will have no effect. Delegated legislation to deal with politically contentious or emergency matters generally requires this procedure. However, the majority of delegated legislation is subject only to the negative control. It is most unusual for either House of Parliament to have the power to amend a statutory instrument. They either allow it to be passed or annul it.

The courts have the power, through the process of judicial review, to declare a statutory instrument ultra vires on the grounds that it tries to exercise a power greater than that conferred by the enabling Act. It is presumed that an enabling Act does not confer the power to raise tax; or to retrospectively alter the law; or to prevent a person from having access to the courts; or to take away civil liberties. However, if the enabling Act was sufficiently clear it could confer these powers. A statutory instrument can be declared invalid on the grounds of being unreasonable only if the objectives of the instrument were so outrageously unreasonable that Parliament could not have intended that the powers created by the enabling Act would be used in the way in which they were used. The courts can also declare a statutory instrument ultra vires on the grounds that some mandatory procedure, such as a mandatory duty to consult, was not adhered to.

Below (at 1.4) we examine the effect of European Community legislation, much of which is implemented into UK law by statutory instrument under s.2(2) of the European Communities Act 1972.

1.3.1.4 Interpretation of statutes

The three approaches

When considering the meaning of legislation, the courts are guided by three approaches. These approaches are often called rules – the literal rule, the golden rule and the mischief rule. The rules contradict each other to a certain extent and it cannot be certain which rule a court will apply. In general, the court will tend to use whichever of the approaches seems best suited to achieving justice in the case it is hearing. However, the literal approach is generally used when interpreting criminal or tax legislation, and the purposive approach is preferred when interpreting legislation emanating from the EU.

When the literal rule is applied words in a statute which are not ambiguous are given their ordinary, literal meaning, even if this leads to a decision which is unjust or undesirable. An example of this approach can be seen in *Inland Revenue Commissioners v Hinchy* [1960] AC 748, in which the House of Lords was considering the effect of the Income Tax Act 1952. Section 25(3) of the Act stated that a person found guilty of tax avoidance should ‘forfeit the sum of £20 and treble the tax which he ought to be charged under this Act’. Hinchy’s lawyers argued that this meant a £20 fine and treble the amount of tax which had been avoided. Unfortunately for Hinchy, the House of Lords decided that the literal meaning of s.25(3) was that a tax avoider should pay a £20 fine and treble his whole tax bill for the year.

The outcome of the case was that Hinchy had to pay slightly over £438, even though the amount he had avoided was only £14.25. This was obviously a severe blow for Hinchy. (In 1960, £438 could be a year’s pay for an unskilled worker.) But the implications for other tax avoiders were terrifying. Under the system of precedent, all other English courts are bound to follow precedents formulated in the House of Lords. So other tax avoiders appearing before the courts would have to be fined on the same basis as Hinchy had been fined.

A court hearing the case of a wealthy businessman, who rightly paid £1 million tax in the year but avoided paying £5, would be bound to fine him £3 000 035!

It is almost certain that the meaning applied by the House of Lords was not what Parliament had in mind when the Income Tax Act was passed. The statute was badly worded. The blame for this must lie with the Parliamentary draftsmen. But at the same time it must be realised that they have a near impossible task. Skilled lawyers though these draftsmen are, they cannot possibly foresee every interpretation of the statutes they prepare. But once the statute has become law, any lawyer in the land might be looking for an interpretation which would suit his client. In Hinchy’s case the Revenue lawyers, with typical ingenuity, spotted a literal meaning that had not been apparent before. The House of Lords gave the words in the statute their literal meaning, holding that the words of the statute were not ambiguous. When the literal rule
is applied the court is seeking not what Parliament meant to say when it enacted the statute, but rather the true meaning of the words which Parliament used.

If Parliament considers that the application of the literal rule by a high-ranking court causes a statute to be interpreted in a way which is contrary to what was intended when the statute was enacted, it can pass an amending Act to rectify the situation.

There has been a movement away from the literal approach in recent years. In McMonagle v Westminster City Council [1990] 2 AC 716 the House of Lords unanimously indicated that the literal rule would not be applied where to do so would produce an absurd result. In such a case the golden rule, also known as the purposive approach, would be applied. When the golden rule is used a judge gives the words in a statute their ordinary, literal meaning as far as possible, but only to the extent that this would not produce some injustice, absurdity, anomaly or contradiction.

The idea that the court should prefer an outcome which is not absurd to the one which is absurd seems obviously to be correct. An example of the golden rule being used in this way can be seen in Adler v George [1964] 2 QB 7. The defendant had got into an RAF station, which was classified as a prohibited place by the Official Secrets Act 1920. He was arrested and charged with obstructing a member of the armed forces ‘in the vicinity of a prohibited place’, contrary to s.3 of the 1920 Act. The defendant argued that as he was actually inside the prohibited place he was not in the vicinity of it and should not therefore be convicted. The Divisional Court rejected this argument and held that the proper construction of s.3 was to read the words ‘in the vicinity of’ as ‘in or in the vicinity of’. Lord Parker CJ gave the only judgment of the court and said that it would be absurd to read the section as the defendant had argued that it should be read.

When the words of the statute are not ambiguous but would, if interpreted literally, produce an absurd result, the golden rule is sometimes seen as an extension of the literal rule. First, the court considers the literal rule. Seeing that the literal rule would lead to a manifestly absurd result and wishing to avoid this result, the court chooses to apply the golden rule and give the statutory words a meaning other than their normal meaning. The following case provides an example. In R v Allen (1872) LR 1 CCR 376 the defendant was charged with bigamy. He had married another woman even though his first wife was still alive and he was not divorced from her. Section 57 of the Offences Against the Person Act 1861 provided that a person should be guilty of bigamy if ‘being married, [he or she] shall marry any other person during the life of the former husband or wife’. The defendant argued that he was not guilty of the offence as he had not legally married the second wife, because you cannot legally get married if you are already married. He claimed that he had only gone through a ceremony of marriage with the second woman. The court gave the word ‘marry’ in s.57 the meaning of going through a ceremony of marriage, rather than the meaning of contracting a legal marriage, and therefore convicted the defendant. Had they not done this, bigamy would have been impossible to commit. In Bloomsbury International Ltd v Sea Fish Industry Authority [2011] UKSC 25 the Supreme Court considered ambiguous words in the Fisheries Act 1981. Lord Mance said that the starting point should not be that words have a natural meaning, an idea which he did not always find very helpful. Rather the starting point should be the statutory purpose of the legislation and the general scheme by which it was to be put into effect. He also said that where an Act has been amended, as the 1981 Act had been, it should not lightly be concluded that Parliament had misunderstood the general scheme of the legislation when making the amendment. Lord Phillips said that if a certain meaning had been given to the ambiguous words for thirty years then this, at the very least, led to a presumption that this meaning was the correct one.

The oldest of the three main rules of statutory interpretation is the mischief rule. In Heydon’s Case (1584) 3 Co Rep 7a it was established that before applying the mischief rule the court should ask itself four questions. First, what was the common law before the Act was passed? Second, what mischief or problem did the Act seek to rectify? Third, what remedy had Parliament decided upon to cure the mischief? Fourth, what was the reason for providing the remedy? Having considered these four questions, a court would be guided as to how the statute should be interpreted. This rule is only to be used when a statute is ambiguous, it should not be used to deal with a clear, but absurd, meaning. The following case provides an example of the rule.


**Smith v Hughes** [1960] 1 WLR 830

Two prostitutes, standing either on a balcony or behind the windows of their house, attracted passers-by to invite them into the house. They did this by tapping on the balcony rail or the window panes. They were charged under s.1(1) of the Street Offences Act 1959, which made it an offence to solicit 'in a street or public place' for the purposes of prostitution. The defendants argued that they were not guilty as they had not been in the street or in a public place when they had been soliciting customers.

**Held.** Applying the mischief rule, the defendants were guilty. It did not matter that they were not literally in the street when soliciting, if the solicitation was projected to and aimed at somebody who was walking in the street.

**COMMENT** Lord Parker CJ, ‘For my part, I approach the matter by considering what is the mischief aimed at by this Act. Everybody knows that this was an Act intended to clean up the streets, to enable people to walk along the streets without being molested or solicited by common prostitutes. Viewed in that way, it can matter little whether the prostitute is soliciting while in the street or is standing in a doorway or on a balcony, or at a window, or whether the window is open or shut or half open; in each case her solicitation is projected to and addressed to somebody who was walking in the street. For my part, I am content to base my decision on that ground and on that ground alone.’

In **Inco Europe Ltd v First Choice Distribution** [2000] 1 WLR 561 Lord Nicholls, giving the only speech of the House of Lords, considered the circumstances in which the court could read words into a statute to correct an obvious drafting error. Lord Nicholls said:

‘This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters:

(1) the intended purpose of the statute or provision in question;
(2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and
(3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed.

The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation.’

Lord Nicholls went on to say that even if the three conditions were satisfied the court might nevertheless sometimes find itself inhibited from interpreting the statutory provision in accordance with what it was satisfied was the underlying intention of Parliament. This might be the case if the alteration in language would be too far-reaching, or if the subject matter of the statutory provision called for strict interpretation of the statutory language, as in penal legislation.

The Court of Appeal recently applied the mischief rule in **Wolman v Islington LBC** [2007] EWCA Civ 823 (2007) 104(32) LSG 24. A GLC bye-law made it a criminal offence to park a vehicle with one or more wheels ‘on any part of’ a pavement. The claimant, a barrister, parked his motorbike on a stand in such a way that its wheels were above the pavement but not actually on it. He therefore claimed not to have committed the offence. Applying the mischief rule, the Court of Appeal held that the offence was committed if one or more of the bike’s wheels were either on or over the pavement.

Finally, it should be remembered that the rules relating to statutory interpretation are guiding principles, rather than rules which must be obeyed. In **Maunsell v Ollins** [1975] AC 373, Lord Reid said: ‘They [the rules of construction] are not rules in the ordinary sense of having some binding force. They are our servants, not our masters. They are aids to construction, presumptions or pointers. Not infrequently one “rule” points in one direction, another in a different direction. In each case we must look at all relevant circumstances and decide as a matter of judgment what weight to attach to any particular “rule”.

**Minor rules of statutory interpretation**

Other, less important, rules of statutory interpretation are applied by the courts. The **ejusdem generis rule** (of the same kind rule) means that general words
which follow specific words must be given the same type of meaning as the specific words. For example, the Betting Act 1853 prohibited betting in any ‘house, office, room or other place’. In Powell v Kempton Racecourse Company [1899] AC 143, the House of Lords held that the Act did not apply to betting at a racecourse. The specific words, ‘house, office, room’, were all indoor places and so the general words, ‘or other place’, had to be interpreted as applying only to indoor places.

The rule expressio unius est exclusio alterius (to express one thing is to exclude another) means that if the statute lists specific words and these are not followed by any general words, then the statute only applies to the specific words listed. For example, in R v Inhabitants of Sedgeley (1831) 2 B & Ad 65, a statute which raised taxes on ‘Lands, houses, tithes and coal mines’, did not apply to other types of mines such as the mine in question, a limestone mine.

Aids to construction of statutes

When considering the meaning of a statute, a court may consider certain aids to construction. These aids are usually labelled either intrinsic aids, which are part of the statute itself, or extrinsic aids, which are not part of the statute itself. Intrinsic aids would include interpretation sections of the Act, which state the meaning of words used in the Act. The Act’s title and punctuation are also of relevance as intrinsic aids. It is not clear to what extent marginal notes and headings are to be regarded as aids to construction of the statute. It is probable that both can be considered.

Extrinsic aids to interpretation include dictionaries, previous statutes concerning the same subject matter, and the Interpretation Act 1978. Despite the name of this Act it is concerned with relatively minor matters such as: unless there is an indication to the contrary, the singular includes the plural; and, when a statute refers to the masculine it also includes the feminine.

Until relatively recently, a judge interpreting a statute was not allowed to consider the speeches which MPs made when the statute was being debated. However, in the following case, a landmark decision, the House of Lords held that Hansard could be consulted if this was the only way to solve an ambiguity.

Pepper (Inspector of Taxes) v Hart [1992] AC 593 (House of Lords)

Masters at a fee-paying school were entitled to have their sons educated at the school at one fifth of the usual price. During the years in question, the school was never full and so no pupils were turned away in consequence of this right. Section 61 of the Finance Act 1976 provided that masters who took advantage of the scheme should be taxed on the cash equivalent of the benefit they had received. The masters contended that the cash benefit was the marginal cost of admitting their sons and therefore practically nothing. The Revenue argued that the cash equivalent could be found for each pupil by dividing the whole costs of running the school by the number of pupils attending the school. The statute was ambiguous as to which meaning was correct.

Held. The masters should only be taxed at the marginal cost of their sons attending the school. This was the intention of Parliament, as could be discovered by consulting Hansard. The rule that Parliamentary material could not be considered by a court should be relaxed if (i) the legislation was either ambiguous or obscure, or led to absurdity, and (ii) the material relied upon consisted of statements made by the relevant Minister, or promoter of the Bill, or other material such as was necessary, and (iii) the statements relied upon were clear.

Presumptions

There are certain presumptions which a court may make when in doubt as to the meaning of a statute. These are: a presumption against changing the common law (so a statute does not change the common law in any particular way unless it makes clear that it does); a presumption against ousting the jurisdiction of the courts (only if clear language is used is a statute to be read as taking away the right to take a case to court); a presumption that citizens will not have their liberty, property or rights taken away; presumption against criminal liability without mens rea (for the meaning of mens rea see Chapter 22 at 22.1); a presumption that a statute does not bind the Crown; a presumption that Parliament does not intend a statute to conflict with international law; and a presumption against a statute having retrospective effect. Some statutes clearly state that they are to have retrospective effect. (See, for example, s.3 of the Compensation Act 2006, set out in Chapter 12 at 12.2.4.2.)
1.3 Sources of English law

Impact of the Human Rights Act 1998
Later in this chapter, at 1.5.1, the Human Rights Act 1998 is considered. As we shall see, s.3(1) of this Act requires that, so far as it is possible to do so, all legislation must be read and given effect in a way which is compatible with the Convention rights. In R v A (2001) 2 AC 45 Lord Steyn said that a declaration of incompatibility was a measure of last resort and to be avoided. Such a declaration should be made only when it was plainly impossible to avoid making it. In S (Children) (Care Order: Implementation of Care Plan), Re [2002] UKHL 10, [2002] 2 AC 291, [2002] 2 WLR 720 Lord Nicholls said that use of s.3(1) was obligatory and that it was not an optional rule of construction. The new approach seems to be first to ask if the Act in question is incompatible with a Convention right. If so, then to ask whether any incompatibility could be avoided by using the purposive approach, the mischief rule or Pepper v Hart. Finally, the Act in question must be read in accordance with s.3(1) of the Human Rights Act, unless there was evidence that Parliament had intended to legislate in a way which was contrary to the Act.

Test your understanding 1.2

1. What three procedures must be satisfied before a Bill becomes a statute?
2. What is the meaning of a codifying Act, a consolidating Act and an amending Act?
3. What is delegated legislation? What are the main types of delegated legislation?
4. What are the three main rules of statutory interpretation? What is the effect of these rules?
5. What is the effect of the expressio unius est exclusio alterius rule and the rule ejusdem generis?
6. What intrinsic and extrinsic aids can be used to assist in interpreting a statute?

1.3.2 Judicial precedent

The doctrine of judicial precedent, or stare decisis, holds that judges in lower-ranking courts are bound to follow legal principles previously formulated by judges in higher-ranking courts. As so much of the law in this book is derived from precedent, it seems important to examine the system in some detail.

1.3.2.2 The hierarchy of the courts

The courts are arranged in an hierarchical structure. The structure of the courts is considered in more detail in Chapter 2. Here it is enough to outline the five levels in the hierarchy.

The Supreme Court (formerly The House of Lords)
The Supreme Court is the most senior of the English courts. It replaced the House of Lords on 1 October 2009. The court is comprised of 12 judges, known as Supreme Court justices (Law Lords), five of whom usually sit in any one case. The Supreme Court is not bound to follow any previous precedents. Furthermore, the decisions of the Supreme Court are binding on all courts beneath it. Until 1966 the House of Lords was bound to follow its own previous decisions. However, in 1966 a Practice Statement was made by Lord Gardiner on behalf of the other Law Lords. This statement said that the House of Lords recognised that if the doctrine of precedent was too rigidly adhered to, the development of the law might be hindered and injustice might be caused in a particular case. The House of Lords would therefore normally treat its own decisions as binding, but would depart from them where it appeared right to do so. In doing this the Lords would bear in mind the danger of disturbing agreements previously entered into. The Supreme Court will adopt a similar approach.

In practice, the House of Lords only rarely departed from one of its own previous decisions. In Horton v Sadler [2006] UKHL 27, [2006] 2 WLR 1346 Lord Bingham said, ‘Over the past 40 years the House has exercised its power to depart from its own precedent rarely and sparingly. It has never been thought enough to justify doing so that a later generation of Law Lords would have resolved an issue or formulated a principle differently from their predecessor … As made clear in the 1966 Practice Statement ([1966] 1 WLR 1234) former decisions of the House are normally binding. But too rigid adherence to precedent may lead to injustice in a particular case and unduly restrict the development of the law. The House will depart from a previous decision where it appears right to do.’

Sometimes seven, or nine, judges sit rather than five. (See, for example, Kay and others v Lambeth LBC [2006] UKHL 10, [2006] 2 AC 465 below at 1.3.2.2.) However, a later sitting of the court can still refuse to follow the decision made by the seven or nine-member court.

The Supreme Court justices also hear appeals from the courts in Her Majesty’s dominions and from
some Commonwealth countries. When they sit in this particular capacity they are known as the Judicial Committee of the Privy Council, commonly shortened to the Privy Council. Countries from which appeals are still heard by the Privy Council include Barbados, Bermuda, the Falkland Islands, Gibraltar and Jamaica. Technically, decisions of the Privy Council are not binding on English courts. However, in practice they are usually regarded as having the same authority as Supreme Court decisions. (An example of this can be seen in Chapter 12 at 12.2.4.3, where the Privy Council decision in *The Wagon Mound* [1961] AC 388 is generally taken to have overruled the long-standing Court of Appeal decision in *Re Polenis* [1921] 3 KB 560.)

**The Court of Appeal**

The Court of Appeal is the next rung down the ladder. Its decisions are binding on all lower courts. They are also binding on future Court of Appeal judges. In terms of precedent the Court of Appeal is the most important court, hearing many more appeals than the Supreme Court. There are 38 Court of Appeal judges, known as Lord Justices of Appeal. However, the Supreme Court hears cases of greater public importance and there is no doubt that its decisions have the greatest authority.

Following Lord Gardiner’s Practice Statement of 1966, the Court of Appeal made several attempts to depart from its own previous decisions. However, the Practice Statement itself stated that it was not meant to apply to any court other than the House of Lords. It is plain, therefore, that the Court of Appeal is bound by its own previous decisions, the only exceptions to this principle having been formulated in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718. In that case it was decided that the Court of Appeal could depart from its own previous decisions in only three circumstances.

1. Where there were two conflicting earlier Court of Appeal decisions it could decide which one to follow and which one to overrule.
2. If a previous Court of Appeal decision had later been overruled by the House of Lords the Court of Appeal should not follow it.
3. A previous Court of Appeal decision should not be followed if it was decided through lack of care, ignoring some statute or other higher-ranking authority such as a previously decided House of Lords case.

Although the principles set out apply to both the Civil and Criminal Divisions of the Court of Appeal, it is generally recognised that the Criminal Division has slightly wider powers to depart from its own previous decisions. It can do so where justice would otherwise be denied to an appellant. In *R v Magro* [2010] EWCA Crim 1575, [2010] 3 WLR 1694 the Court of Appeal rejected an argument that a five judge Court of Appeal (Criminal Division) was entitled to disregard the only previous decision of a three judge Court of Appeal (Criminal Division) on a distinct and clearly identified point of law, reached after full argument and close analysis of the relevant legislative provisions. This was particularly the case where the consequences of doing so would be to the disadvantage of the defendant.

Generally, the Court of Appeal is comprised of three judges. Sometimes a full court of five judges sit in the Court of Appeal. A full court of the Court of Appeal has no greater power to depart from its own previous decisions than an ordinary court.

**Divisional Courts**

Each of the three divisions of the High Court has a Divisional Court, staffed by three High Court judges. In certain areas of business law the Queen’s Bench Divisional Court makes a large number of significant precedents. This court hears appeals from lower courts, as explained in Chapter 2. Decisions of the Divisional Courts are binding upon other sittings of the Divisional Court (subject to the *Young v Bristol Aeroplane Co Ltd* exceptions), on High Court judges sitting alone and on all inferior courts. Decisions of the Divisional Court are not binding upon the Employment Appeal Tribunal (EAT). (The jurisdiction of the EAT is explained in Chapter 20, Introduction.) Divisional Courts are bound by the decisions of the House of Lords (now the Supreme Court), the Court of Appeal and by previous decisions of Divisional Courts. In criminal cases a Divisional Court may depart from the decision of a previous Divisional Court where it would cause injustice not to do so.

**The High Court**

Judges sitting in the High Court are bound by decisions of the House of Lords (now the Supreme Court) the Court of Appeal and the Divisional Courts. There are currently 108 High Court judges. High Court decisions are binding upon all lower courts. High Court judges are not bound by the decisions of other High Court judges. However, High Court judges do tend to follow each other’s decisions as not to do so can lead to uncertainty, particularly as regards decisions made...
and agreements reached on the strength of the earlier judgment.

**Inferior courts**
The decisions of inferior courts (the Crown Court, the county court and the magistrates’ court) are not binding on any other courts. Judges sitting in these courts do not make binding precedents.

All English courts must take into consideration decisions made by the European Court of Human Rights. The effect of this is considered below at 1.5. The European Court of Justice, which gives authoritative opinions on matters of EU law, does not use a system of precedent. However, the decisions of this court are binding upon all English courts, a matter considered below at 1.4.

**1.3.2.2 The binding part of the case**
The *ratio decidendi*, loosely translated from the Latin as the reason for the decision, is part of the judgment which is binding on other courts. The *ratio decidendi* might be described as any statement of law which the judge applied to the facts of the case and upon which the decision in the case is based. The ratio of a case will be decided by future courts when they are considering whether or not they are bound by the ratio. Cases may contain more than one ratio.

Statements of law which did not form the basis of the decision are known as *obiter dicta* (literally, other things said). Obiter can arise as statements of law based on facts which did not exist. It commonly happens that judgments state what the law would have been if the facts had differed in some material way. Statements of law which were wider than was necessary to deal with the facts of the particular case are also *obiter dicta*. Examples of obiter can be found in most cases. Obiter are not binding on lower courts, no matter which court made the *obiter*. However, if the judges in a superior court strongly express an *obiter* then a lower court judge would almost certainly follow this in the absence of a binding precedent.

Courts to which appeals are made (appellate courts) usually have more than one judge sitting. Fortunately, it is an odd number of judges rather than an even number. A majority of judges will therefore decide for one of the parties or for the other. If the decision is unanimous, for instance the Court of Appeal decides 3 : 0 for the defendant, then the ratio of the case can be found in the judgments of any of the three judges. If the Court reaches a decision by a majority of 2 : 1, then the ratio must be found in the decisions of the two judges in the majority. The decision of the judge in the minority may be persuasive as *obiter*, but it cannot form a ratio which will bind future courts.

**Example**

If you read the case of *Carlill v The Carbolic Smoke Ball Company* [1893] 1 QB 525 (Court of Appeal), which is set out in Chapter 3 at 3.1.2, you will see that it concerned whether or not an advertisement made by the company was an offer which could be accepted by a member of the public buying a smoke ball, using it and catching flu. The Court of Appeal held that the advertisement was an offer and that the claimant was entitled to the £100 reward as she had accepted the offer and thus created a contract between herself and the company. This famous case can be used to demonstrate several points.

First, the ratio of the case will be decided by later courts. However, it seems fairly safe to say that the ratio is something like: ‘Newspaper advertisements offering rewards to members of the public who perform certain well-defined actions can amount to contractual offers, which can be accepted by members of the public who perform those actions, as long as the advertisement was not too vague to be understood by an ordinary member of the public.’ Further ratios might be that an offer can be made to the whole world and that the offer of a unilateral contract can be accepted without notification of acceptance, merely by performing the action requested by the offeror. An example made by Bowen LJ, concerning a reward offered for a lost dog, was clearly *obiter dicta* as it was based on facts which did not arise. As this case was decided in the Court of Appeal, the *ratio decidendi* of the case would be binding upon later sittings of the Court of Appeal and upon all inferior courts, but not upon the Supreme Court. Bowen LJ’s *obiter* could be persuasive if a court was considering a case concerning a reward for finding a lost dog or more generally by way of analogy.

A higher-ranking court can *overrule* a ratio created by a lower ranking court. The Supreme Court, for instance, could overrule *Carlill’s case* later this year and hold that newspaper advertisements cannot be offers. (This is most unlikely, it is merely an example.) If the Supreme Court were to overrule the decision then the ratio of *Carlill’s case* would be deemed to have been wrongly decided. When overruling a case, the superior court specifically names the case and the rule of law being overruled. A statute may overrule
the ratio of a particular case, but the statute will not mention the case concerned. (See, for example, s.3 of the Compensation Act 2006, which is considered in Chapter 12 at 12.2.4.2.)

Many cases are reversed on appeal. Reversing is of no legal significance. It merely means that a party who appeals against the decision of an inferior court wins the appeal. No rule of law is necessarily changed. For example, in the fictitious case Smith v Jones, let us assume that Smith wins in the High Court and Jones appeals to the Court of Appeal. If Jones's appeal is allowed, the Court of Appeal have reversed the judgment of the High Court.

Disadvantages of the system of precedent
In addition to the 12 Supreme Court justices, the 38 Lord Justices of Appeal and the 108 High Court judges, there are five Heads of Division. The Heads of Division are: the Lord Chief Justice, who is also Head of Criminal Justice; the Master of the Rolls, who is also Head of Civil Justice; the President of the Queen's Bench Division; the President of the Family Division, who is also Head of Family Justice; and the Chancellor of the High Court. Every sentence of every judgment made by a High Court judge might contain a precedent which would be binding on future judges. Plainly, it is an impossible task for anyone to be aware of all of these potential precedents. In fact, so many High Court judgments are made that most are not even reported in the law reports.

Law reporting is not a Government task but is carried out by private firms. The law reporters are barristers and they weed out the vast number of judgments which they consider to be unimportant. Even so, as students become aware when they step into a law library, the system of precedent does mean that English law is very bulky. There are so many precedents that it can be very hard for a lawyer to find the law he is looking for. The fact that major law reports are now available on the Internet has made them more easily accessible.

Precedent suffers from another disadvantage and that is that bad decisions can live on for a very long time. As we have seen, before 1966 a House of Lords decision was binding on all other courts, including future sittings of the House of Lords. If a bad House of Lords decision was made, then before 1966 it could be changed only by Parliament, which was generally far too busy to interfere unless grave injustice was being caused. So an argument can be made that errors are perpetuated.

A third disadvantage is that the vast number of precedents can take away the very certainty which the system is said to promote. This is particularly true when appellate courts apply the law creatively to achieve justice in the particular case in front of them.

A fourth disadvantage is that the higher courts cannot choose to hear a case unless the parties appeal that case to the court in question. So the Supreme Court, for example, might wish to overrule or modify an earlier precedent but would be unable to do so until an appropriate case was appealed all the way to the Supreme Court.

It might also be a disadvantage of the system that decisions of precedent-making courts act retrospectively as well as prospectively. That is to say they alter the law not only in the future but also in the past. This can be unfair if a person has relied on the law as it was, only for a precedent-making court to change the law when deciding a case. The House of Lords considered this matter in Re Spectrum Plus [2005] UKHL 41, [2005] 3 WLR 58 and rejected an argument that their rulings should be prospective only. There are exceptional circumstances in which retrospective effect would not be appropriate, but generally precedents are effective retrospectively as well as prospectively.

These disadvantages of the system of precedent are thought to be outweighed by the advantages of the system. One final criticism which might be made is that under the system of precedent judges make most of the law. Most laymen might be surprised to find that this is the case and might question whether it ought to be. Some have argued that as regards decisions which might be classed as 'political' the judges are not the most appropriate body to create the law. However, it seems hard to imagine that anyone other than the judiciary could so effectively create law of a technical nature, such as the law of contract, and so effectively allow it to respond to the changing needs of business.

The Supreme Court Justices are careful not to usurp the role of Parliament. In Gregg v Scott [2005] UKHL 2, [2005] 2 AC 176, for example, Lord Hoffmann said that to change the law in a way which a barrister had suggested would be such a radical change as to amount to a legislative act and that if the law was to be changed in this way that was a matter for Parliament. (The case considered whether a person who had lost a chance should be able to sue in the tort of negligence and is considered in Chapter 12 at 12.2.4.2.) However, in April 2011 the prime minister, David Cameron, speaking to voters in Luton, said that he was uneasy that privacy law was being developed by the judiciary rather than by Parliament. He said, 'What ought to happen in a parliamentary democracy is Parliament, which you elect and put there, should decide how much protection do

...
we want for individuals and how much freedom of the press and the rest of it. So I am a little uneasy about what is happening... It is an odd situation if the judges are making the law rather than Parliament.’ His comments seem apt as regards the creation of law which might be regarded as ‘political’.

**Advantages of the system of precedent**

The first advantage is that the device of distinguishing a case means that the system of precedent is not entirely rigid. A judge who is lower down the hierarchy can refuse to follow an apparently binding precedent if he distinguishes it on its facts. This means that the judge will say that the facts of the case he is considering are materially different from the facts of the case by which he appears to be bound. This device of distinguishing gives a degree of flexibility to the system of precedent. It allows judges to escape precedents which they consider inappropriate to the case in front of them.

A second and more important advantage of precedent is that it causes high quality decisions to be applied in all courts. Judges in appellate courts have the time and the experience to make very good decisions, often on extremely complex matters. These decisions can then be applied by much busier and less experienced lower court judges, who do not have to give the same consideration as to whether the principles of law involved are right or wrong.

It must be realised that the House of Lords, the highest English court in England, until it became the Supreme Court, was quite different institution from the Parliamentary House of Lords. Historically, it has been possible for people of no great ability, whether through inheritance or public service, to gain entry to the Parliamentary House of Lords. It is nowadays impossible for any but the very able to become Supreme Court Justices.

The way in which a person might become a Supreme Court justice demonstrates that only those of the highest ability could achieve it. Until recently, judges were chosen only from the ranks of barristers. Now solicitors too can become judges. The Bar is a career, rather like acting, which has extremes of success and very many talented young people enter it. If a barrister gains promotion and becomes a circuit judge he will sit in the Crown Court or the county court. This is an honour and an achievement. Even so, a circuit judge will make no law. He will supervise proceedings, decide who wins civil cases, award damages and sentence those convicted in the Crown Court. But no matter how brilliant a circuit judge’s analysis of the law might be, it will not form a precedent.

High Court judges are a different matter. There are only 110 of them and they make the law of England from the very first case in which they sit. Every word they speak is open to scrutiny by the other judges, by lawyers and by academics. If they were not very able, this would soon be noticed.

About 50 judges are promoted beyond the High Court to the Supreme Court or Court of Appeal. These days it seems unthinkable that any but the very able should go this far.

It is not only on the grounds of ability that the Supreme Court ought to come to very high quality decisions. Unlike lower court judges, the Supreme Court justices do not decide a case there and then. They hear the facts and the arguments in the case and then reserve their judgment. They talk to each other informally to see whether there is a consensus of opinion. If there is a consensus one of the judges is chosen to write the judgment. If there is no consensus the minority will write their own dissenting judgments. In a particularly difficult case the process of writing the judgment can take a very long time.

English Commercial Law is very often adopted by businesses of different nationalities when they contract with each other. In the event of a dispute they consult English lawyers and settle their cases in the English courts or in front of English arbitrators. The earnings to the United Kingdom from these disputes amount to a considerable invisible export. English law would not be adopted in this way if it were not thought to be the most suitable system of law for resolving commercial disputes. The main reason why it should be thought the most suitable is that the system of precedent allows for excellent updating of the law in a way which can keep up with changing business trends.

A third major advantage of the system of precedent is that it is consistent and certain. Lawyers can predict the outcome of most cases, as almost any legal problem will have been previously considered by the courts and a precedent made. This certainty enables the vast majority of cases to be settled without the need to go to court. (The practical importance of this is explained in Chapter 2 at 2.4.) In *Broome v Cassell & Co Ltd* [1972] AC 1027 Lord Hailsham said, ‘in legal matters, some degree of certainty is at least as valuable a part of justice as perfection’.

**Impact of the Human Rights Act 1998**

In *Kay and others v Lambeth LBC* [2006] UKHL 10, [2006] 2 AC 465 the House of Lords considered whether or not a lower court should follow...
though, he thought that the facts of the case which undermined the policy upon which the decision was made, and if no reference was made to the European Convention in any of the Lords' opinions. Even here was not being followed would have to be of an 'extreme character' so as to make the case a 'very exceptional case'. All of the other six members of the House of Lords agreed with what Lord Bingham said.

Alternatives to the system of precedent
Most other countries do not use a system of precedent. France, which is fairly typical of European countries, has a codified system of law known as a civil law system. The civil law is contained in the various Civil Codes. French judges, who are civil servants rather than lawyers, do not feel compelled to interpret the Codes according to previous decisions until those decisions have for some time unanimously interpreted the Codes in the same way. Scotland has a mixed legal system. It is based on the civil law system, but has strong common law influences. In Scotland the system of precedent is used, but a precedent does not have quite the same force as in England.

Test your understanding 1.3

1. What is meant by the doctrine of judicial precedent?
2. What are the five main levels of the courts, for the purposes of precedent?
3. What is meant by ratio decidendi and obiter dicta? What is the significance of the distinction?
4. What is meant by overruling, reversing and distinguishing?

1.4 EUROPEAN UNION LAW

In 1952 the European Coal and Steel Community was set up with the object of preventing any European country from building up stockpiles of steel and coal, the raw materials needed to wage war. Following the success of this, the European Economic Community (the EEC) came into existence in 1957. The six original Member States signed the Treaty of Rome, which was also known as the EEC Treaty, which founded the European Economic Community or the 'common market'. These six original countries were Germany, France, Italy, Belgium, the Netherlands and Luxembourg. Part of the founding philosophy of the Community was to provide an appropriate response to the Soviet Bloc countries to the East, but the motivation was also more pragmatic in that there seemed to be obvious advantages to the creation of a free market in Europe. At the time of writing there are 27 Member States, the original six having been joined by Austria, Bulgaria, Cyprus, the
The Treaty of Lisbon was signed by all EU leaders in December 2007. However, it could not become effective until all Member States ratified it. In June 2008, Irish voters rejected the Treaty in a referendum. In October 2009, at the second time of asking, they voted in favour of the Treaty. The Treaty came into force in December 2009 when the Czech Republic became the last country to ratify it.

The Treaty amended the existing treaties, incorporating them into a new treaty called the Treaty on the Functioning of the European Union. This has four main aims: to make the EU more democratic and transparent; to make it more efficient; to promote rights, values, freedom, solidarity and security; and to make the EU an actor on the global stage.

The first of these aims involves increasing the power of the European Parliament so that it will be placed on an equal footing with the Commission. As regards most EU legislation, the Parliament and the Commission will approve legislation using a co-decision procedure. A greater role in making EU law will be given to national Parliaments in areas where they can achieve better results than the EU. A Citizens’ Initiative will allow 1 million citizens from several Member States to ask the Commission to introduce new policies. The relationship between the EU and Member States will be clarified, and States which wish to do so will be allowed to withdraw from the EU.

Great efficiency will be achieved by extending qualified-majority voting. From 2014, a qualified majority will be achieved if a dual majority of 55 per cent of Member States, and Member States representing 65 per cent of the EU’s population, vote in favour. The EU Commission will be reduced in size and a new President of the European Council will be elected by national governments for a period of office lasting two and a half years. The European Council will be separate from the Council of Ministers, the leaders of which will continue to be elected on a six-month rotating basis. The European Council will not have legislative powers but will guide policy. The promotion of rights, values, freedom, solidarity and security will be achieved by guaranteeing the principles set out in the Charter of Fundamental Rights, and by giving them legal force. This charter set out principles of human rights to be applied throughout the EU but at present it has no legal force. In addition, the EU will be given a greater role in fighting
crime and preventing terrorism. New provisions relating to humanitarian aid, civil protection and public health will enhance the EU’s ability to respond to threats to its citizens. The EU will be made a stronger actor on the global stage by creating a High Representative for Foreign Affairs and Security Policy, and by encouraging the EU to act as a single legal personality.

The provisions of the Treaty will be introduced gradually, and may take about ten years to become fully adopted.

1.4.1 The Institutions of the European Union

The original EEC Treaty set up four principal institutions. These institutions are now known as: the Council of the European Communities; the European Commission; the European Parliament; and the European Court of Justice. The first three of these are considered immediately below. The European Court of Justice is considered below at 1.4.3. In addition, there is a Court of Auditors and two advisory bodies: the Economic and Social Committee and the Committee of the Regions. The Court of Auditors monitors the Community’s accounts. The Economic and Social Committee gives advisory opinions to the institutions. The Committee of the Regions is a consultative body which promotes the interests of the regions at European level. Both of these committees have 344 members. Each Member State has between six and 24 representatives, depending upon the size of the State.

1.4.1.1 The Council of the European Union

The Council of the European Union, generally known as the Council, is not a permanent body. It consists at any given time of one Minister from the Government of each Member State, and the President of the European Commission. Which Government Ministers will constitute the Council of Ministers depends upon the nature of the measures which the Council is considering. For example, if the measures relate to agriculture then it will be the relevant Ministers of Agriculture. Often the Council is made up of heads of Government or the Member States’ Foreign Ministers. Up to four times a year the presidents or prime ministers of all of the countries along with the President of the European Commission, hold meetings as the ‘European Council’. At these meetings overall EU policy is set and issues which could not be settled at a lower level are settled.

The Council passes legislation, co-ordinates EU policy, concludes international agreements, approves the EU budget and develops the EU Common Foreign and Security Policy. The Council passes legislation, generally in conjunction with the European Parliament. It does this by means of a system of qualified majority voting. However, a Treaty might require unanimity for votes on certain matters such as the common foreign security policy, police and judicial cooperation in criminal matters, asylum and immigration policy, economic and social cohesion policy or taxation. Under this system each country is allocated a certain number of votes in relation to its population. The United Kingdom is one of four countries having the maximum voting weighting of 20 votes. Malta has the fewest votes, with just three. There are 345 votes in total. A qualified majority is reached in two circumstances. First, if 255 (73.9 per cent) votes are in favour. This means that 91 votes can defeat a proposal and so at least four countries must vote against. Second, if a simple majority of Member States approve. However, if a matter which was not based on a proposal from the Commission is being voted upon a two-thirds majority of Member States must approve. Additionally, any Member State can require confirmation that votes representing at least 62 per cent of the total population of the EU were in favour. If it is discovered that this figure was not reached then the proposal voted upon will not be regarded as having been accepted.

Article 11 of the Treaty of Amsterdam gives effect to the Luxembourg Accord and allows any Member State to argue that unanimity, rather than a qualified majority vote, should be required on any particular proposal. When such an argument is raised, the Council will delay taking a vote in order to enable the dissenting State to gain the support of other Member States. However, if it is unsuccessful in this the issues will anyway be resolved by a qualified majority vote.

Two committees assist the Council. The Committee of Permanent Representatives (COREPER) prepares the work of the Council and performs other administrative functions. This committee is comprised of senior diplomatic representatives of the Member States. The Economic and Social Committee (ECOSOC) has a consultative role.

1.4.1.2 The European Commission

Twenty-seven individual commissioners are appointed by the Member States to serve in a full-time capacity for a term of five years. When these commissioners
1.4 European Union law

1.4.1 The European Commission

The Commission is supported by large executive and administrative systems. The commissioners are expected to act completely independently of their Member States but in practice tend to guard the independence of their Member States. They are selected on political grounds, and all UK commissioners have previously played a leading role in UK politics. In 2014 the number of commissioners will be reduced to two-thirds of the number of Member States.

The most powerful position in the EU is the President of the Commission. The President is the figurehead of the EU and has a strong political influence upon it. The Council selects the President and the appointment must then be approved by the European Parliament.

The Commission is involved in broad policy-making. It prepares specific proposals to be submitted to the Council. It also manages and implements EU policies and the EU budget, it acts jointly with the Court of Justice to enforce EU law and it acts as the EU’s representative when dealing with other countries. It is politically accountable to the European Parliament which can demand that the whole Commission resigns. Individual commissioners can be forced to resign if the President of the Commission demands this and the other commissioners agree. In addition to its major roles, the Commission also commissions research and prepares reports on matters which concern the Community and negotiates with non-Member States on these matters. It also prepares the draft Community budget.

1.4.1.3 The European Parliament

Members of the European Parliament are elected directly by Member States, using a system of proportional representation. The European Parliament has 736 MEPs, representing the 27 countries in the EU. MEPs do not sit in national state blocks but as members of seven groups which represent different political views. One of the Parliament’s most significant powers is to approve or amend the EU budget. The Commission prepares a draft budget, which is submitted to the Council and then to the Parliament. The Parliament must approve, amend or reject the budget within 45 days. When the budget is amended by the Parliament the Council is given 15 days to consider the amendments. If no challenge is made to the amendments then the budget is deemed to have been accepted as amended. If the Council does challenge the amendments, the budget is resubmitted to the Parliament. The Parliament then has 15 days to amend or reject the modifications made by the Council. This must be done by a 60 per cent majority and a majority of members must vote. If no such vote is passed, the Council’s modifications are adopted as the budget.

The Parliament must approve the Commission when it is first appointed and must also approve the new President. It must also approve the accounts of the Commission and new appointments to the Commission. Article 201 of the EC Treaty gives the Parliament the power to pass a vote of censure to dismiss the Commission. Such a vote must be passed by a two-thirds majority. In January 1999 a vote to remove the Commission on account of nepotism and corruption failed: 232 MEPs voted for removal, 293 voted against. However, the whole of the Commission resigned in March 1999, on publication of a report made by an investigative committee.

Initially the Parliament had few real powers. It had to be consulted about EU legislation but had no powers to block any legislation. The EU Parliament still does not have the power to legislate in the way that the UK Parliament has. It passes law by ‘co-decision’ with the Council. On many matters the Parliament and the Council have equal standing, but on others the Council has the power to legislate after consulting the Parliament. The Parliament also has the power to ask the Commission to put forward proposals for legislation.

1.4.2 Sources of community law

1.4.2.1 Applicability and effect

In order to understand the effect of EU law it is necessary to understand the distinction between the terms ‘direct applicability’ and ‘direct effect’. If EU legislation is directly applicable, it automatically forms part of the domestic law of Member States, without those States needing to legislate to bring the law in. However, this would not necessarily mean that individuals could directly rely upon the legislation in the domestic courts of their own countries. In order for such reliance to be possible, the legislation would have to be capable of having direct effect. Where EU legislation has direct effect an individual can directly
rly upon the legislation, either as a cause of action or as a defence, in the domestic courts of his or her country. The Articles of the EC Treaty are always directly applicable, as are Regulations, but as we have seen this does not necessarily mean that they have direct effect.

No EU legislation can have direct effect unless it satisfies the criteria laid down by the European Court of Justice in *Van Gend en Loos v Nederlands Administratie der Belastingen* [1963] ECR 1. These criteria will be satisfied only if the legislation is sufficiently clear, precise and unconditional, and if the legislation intends to confer rights. Many Treaty Articles do not meet these criteria as they are mere statements of aspiration. Even if Community legislation does meet the *Van Gend* criteria, it may have only direct vertical effect, rather than direct horizontal effect. If it has direct vertical effect it can be invoked by an individual only against the State and against emanations of the State, such as health authorities. A provision which has direct horizontal effect can be invoked against other individuals as well as against the State and emanations of the State.

If an EU law does not have direct effect it might nevertheless have indirect effect. An indirectly effective EU law could not be enforced in national courts. However, these courts would be obliged to interpret their own national law, to the extent that this is possible, in such a way that it did not conflict with the indirectly effective EU law.

### 1.4.2.2 Treaty Articles

The Treaty on the Functioning of the European Union has over 350 articles. These are directly applicable. Whether or not a Treaty Article has direct effect depends first upon whether it satisfies the criteria in *Van Gend*. As we have seen, some will not satisfy these criteria as they are merely statements of aspiration. Some of the Articles are much more significant than others. Article 157 of the Treaty on the Functioning of the European Union requires Member States to ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work. The effect of this Article has been highly significant, as we shall see in Chapter 21, and has caused the Sex Discrimination Act 1975 to be amended to make sure that the Article is not contradicted. Although Article 157 is addressed to Member States, individuals have successfully invoked it against other individuals, usually their employers. Article 157 therefore has direct horizontal effect.

Some Treaty Articles, like Article 157, have both direct horizontal and vertical effect, others have only direct vertical effect. Whether or not they have direct horizontal effect will depend upon the wording of the Article and the interpretation of the Article by the ECJ. For example, Article 34 of the TFEU, which prohibits restrictions on the free movement of goods, only has direct vertical effect. It can therefore only be invoked by an individual against the State or against an emanation of the State. One private company could not invoke Article 34 against another private company which was not an emanation of the State.

### 1.4.2.3 Regulations

Regulations are binding in their entirety and are directly applicable in all Member States without any further implementation by Member States. A regulation may specify the date on which it is to come into effect. If it does not do this, it will come into effect 20 days after the date of its publication in the *Official Journal of the European Union*. Regulations may be directly invoked, sometimes both vertically and horizontally, providing the *Van Gend* criteria are satisfied. Even if these criteria are not satisfied, a Regulation may have indirect effect. This means that, although an individual cannot invoke the Regulation, the courts of Member States are bound to take account of it.

### 1.4.2.4 Directives

Directives are addressed to the Governments of Member States and must be published in the *Official Journal of the European Union*. Directives are not directly applicable. It is therefore left to each individual Member State to implement the objectives of the Directive in a manner and form that is best suited to its own particular political and economic culture. All Directives are issued with an implementation date and Member States are under a duty to implement by this date. If the Directive is not implemented by the due date, the Commission has the power to take proceedings against the Member State in question.

Before the implementation date has been reached, Directives have no effect at all. However, in the *Wallonie ASBL* case [1997] ECR I-7411 the European Court of Justice held that a Member State should not
enact legislation or implement measures that significantly conflict with the objectives of a Directive that has yet to meet its implementation date. Generally, the UK Government will implement EU Directives by delegated legislation. Several statutory instruments which we consider in this book, such as the Commercial Agents (Council Directive) Regulations 1993, were enacted to give effect to Directives. (It is slightly confusing that these statutory instruments are usually called Regulations, given that EU Regulations are a quite different matter.) Once an EU Directive has been implemented by UK legislation then, obviously, an individual can invoke the domestic legislation against another individual. For example, the Commercial Agents (Council Directive) Regulations 1993 are regularly invoked by individuals against individuals.

There can, however, be a problem if the UK Government either fails to implement a Directive at all, or does not implement the Directive properly. Once the implementation date has been reached, whether or not the Directive has direct effect depends first upon whether the Directive satisfies the Van Gend criteria, and second upon the relationship between the parties involved. Where the parties to a legal action are in a vertical relationship (for example, patient and health authority), the Directive is capable of having direct effect. Where the parties are in a horizontal relationship (for example, a consumer suing a shop), the Directive does not have direct effect. In other words, Directives which should have been implemented are capable of having direct vertical effect, but not direct horizontal effect. (This can mean that a person employed by an emanation of the State, such as a worker in the NHS, might have more rights against his employer than a person employed by a person who is not an emanation of the State.) However, when dealing with a case between two individuals the domestic courts are under a duty, by virtue of Article 10 of the EC Treaty, to attempt as far as possible to give indirect effect to the EU Directive which should have been implemented. This means that they have to try, as far as possible, to interpret the domestic legislation so as to give effect indirectly to the objectives of the Directive.

In situations where it is not possible for the domestic court to give direct or indirect effect to an EU Directive, the remedy of last resort is for the aggrieved individual to sue the Member State for failure to implement. If found to be in breach, the Member State could be ordered to pay compensation to the aggrieved individual. This right was set out in the following case.

**Francovich and Bonifaci v Republic of Italy** [1993] 2 CMLR 66 (European Court of Justice)

Mr Francovich’s employer went into liquidation, while owing money to Mr Francovich and others. A Directive required Member States to set up compensation funds to deal with this type of situation. However, Italy had not set up such a fund. The Directive in question was not sufficiently precise to have direct effect. Mr Francovich asked for damages against Italy to compensate for its failure to set up a fund.

**Held.** Article 10 impliedly allowed for an individual to be compensated on account of a Directive not having been implemented, but only if three conditions were satisfied. First, the Directive must relate to rights conferred upon an individual. Second, the contents of those rights must be identifiable from the Directive’s provisions. Third, a causal link must exist between the State’s failure to implement the Directive and the loss suffered by the individual.

In **Brasserie du Pêcheur SA v Germany** [1996] ECR I–1029 the ECJ refined the Francovich criteria in the following way. First, the rule of law in question must confer rights upon individuals. Second, the breach must be sufficiently serious. Third, there must be a direct causal link between the breach and the damage. That the breach should have been sufficiently serious, means that the Member State must have ‘manifestly and gravely’ disregarded the limits on its discretion. In deciding whether or not this had happened, account will be taken of the following matters: the clarity of the legislation in question; whether the rule in question allowed any measure of discretion; whether the failure to implement and the damage caused were deliberate; whether the error had been induced by the acts or words of the Council or the Commission; whether the error was contrary to settled ECJ case law; and the speed with which the error was corrected.

The legal effect of the Treaties, Regulations and Directives is shown in Figure 1.1.
**Treaty Articles**
Directly applicable once the treaty is ratified (Therefore automatically forms part of the law of Member States.)

Is the Treaty Article sufficiently clear, precise and unconditional as to satisfy the Van Gend criteria?
- Yes
- No

Article has direct vertical effect. It may also have direct horizontal effect, depending upon its wording and interpretation by the ECJ.

**Regulations**
Directly applicable (Therefore automatically forms part of the law of Member States.)

Is the Regulation sufficiently clear, precise and unconditional as to satisfy the Van Gend criteria?
- Yes
- No

Has both direct vertical and horizontal effect.

**Directives**
Not directly applicable (Therefore not automatically part of the law of Member States.)

Must be implemented by a certain date.

Is the Directive sufficiently clear, precise and unconditional to satisfy the Van Gend criteria?
- Yes
- No

Has no direct effect. It may have indirect effect.

The implementing legislation can be relied upon like any other legislation.

If properly implemented
- Has direct vertical effect, but not direct horizontal effect.
- Has no direct effect.

If this is not possible, the aggrieved party may be able to make a Francovich type of claim.

Domestic courts are under a duty as far as possible to try to give indirect horizontal effect to the Directive.

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**Figure 1.1** The legal effect of Treaty Articles, Regulations and Directives
1.4.2.5 Decisions
Decisions are addressed to one or more Member States, to individuals, to categories of individuals or to institutions. They are binding in their entirety, without the need for implementation by Member States, but only on those to whom they were addressed. They do not need to be published in the Official Journal. Decisions can only be invoked against the person to whom they are addressed. In practice, decisions are of little practical importance.

1.4.2.6 Recommendations and opinions
The Commission has the power to make recommendations and opinions. These have no binding legal force. However, where a Member State passes legislation to comply with a decision or an opinion a national court may refer a case to the ECJ to see whether or not the decision or opinion applies and how it should be interpreted.

1.4.3 The European Court of Justice
The European Court of Justice (ECJ), which sits in Luxembourg, is made up of 27 judges, one from each Member State. These judges are assisted by eight advocates-general. The judges and advocates are appointed by common consent of the Member States and hold office for a six-year term which may be renewed.

The decisions of the court are signed by all the judges, without any indication that some may have dissented. Eighty per cent of cases are referred to one of the six chambers where either three or five judges sit. The Grand Chamber of the court consists of thirteen judges, and disputes involving Member States tend to be heard by a Grand Chamber. The number of judges sitting is always odd, so that a majority decision can always be reached. The more important the issues thought to be involved, the greater the number of judges sitting. The judgments of the court are available free on its website, but cases typically take between 18 months and two years to be heard. The advocates-general must act with complete impartiality and independence, in open court, making reasoned submissions on cases brought before the Court. They do not therefore argue the case for either of the sides involved. Each case has an advocate-general assigned to it. The advocate-general makes a summary of the facts, an analysis of all the relevant Community law and a recommendation as to what the decision of the court should be. The parties cannot comment on this and the judges deliberate upon it in secret. The Court has no obligation to agree with the advocate-general’s recommendation but generally do agree.

When ready to vote the most junior judges vote first and then the other judges vote in order of reverse seniority. The court does not use a system of precedent. It can and does depart from its own previous decisions. Certain matters may be referred to the Court of First Instance rather than to the European Court of Justice. This Court of First Instance operates in a very similar way to the way in which the ECJ operates. Article 51 of the EC Treaty provides an automatic right of appeal on a point of law, but not on a point of fact, from the Court of First Instance to the ECJ.

1.4.3.1 Jurisdiction of the ECJ
Apart from hearing appeals from the Court of First Instance, the ECJ has three separate heads of jurisdiction.

First, it can express an authoritative opinion on EU law, if requested to do so by a national court. Once the ruling has been made by the ECJ the case returns to the court which asked for the ruling so that that court can apply the ruling. Article 267 TFEU allows a national court to request an authoritative ruling as to three types of matters: the interpretation of the EU legislation; the validity and interpretation of acts of institutions of the Community; and on the interpretation of statutes of bodies established by an act of the Council, where those statutes so provide. Any national court or tribunal may refer a matter within Article 267 to the ECJ if it thinks this necessary to give judgment. Although a national court has a discretion to seek a preliminary ruling, a court of final appeal has an obligation to do so where a relevant point of EU law is at issue and where there has been no previous interpretation of the point by the ECJ. However, there is no such obligation where the point is so obvious as not to require a ruling.

The rulings of the court, not by the parties to the case. Although a national court has a discretion to seek a preliminary ruling, a court of final appeal has an obligation to do so where a relevant point of EU law is at issue and where there has been no previous interpretation of the point by the ECJ. However, there is no such obligation where the point is so obvious as not to require a ruling.

The second area of jurisdiction arises under Articles 263 and 264 TFEU, which allows the ECJ to review the legality of acts adopted by the European Parliament or other Community institutions. The ECJ
The legal system can also review a community institution’s failure to act. This review process is similar to the process of judicial review whereby the High Court ensures that the Government and others do not exceed their powers.

The third area of jurisdiction arises under Article 258, which allows the Commission to bring actions against Member States to make sure that they fulfil their Community obligations. Article 259 allows Member States to take other Member States to the ECJ for failure to live up to their Treaty obligations.

1.4.4 Supremacy of EU law

EU law can only be effective if it overrides national law. If every Member State were free to pass legislation which conflicted with EU legislation, the EU would be rendered ineffective. In Costa v ENEL [1964] ECR 585 the ECJ stated that the EEC Treaty had become an integral part of the legal systems of Member States and that the courts of Member States were bound to apply the Treaty. It also stated that Member States had, by signing the Treaty, limited their sovereign rights, within limited areas, and created a body of law which bound both their citizens and themselves. The case specifically decided that Italian legislation which was incompatible with Community law, and which had been passed after Italy had signed the Treaty, could have no effect.

In R v Secretary of State for Transport, ex parte Factortame (No. 2) [1991] 1 AC 603, Spanish companies sought judicial review of the Merchant Shipping Act 1988, which they claimed breached two Articles of the EC Treaty. The companies asked for an injunction to suspend that part of the Act which was in breach of the relevant Treaty Article. The House of Lords held that injunctions could not be effective against the Crown and refused to grant the injunction. However, the case was referred to the ECJ, under what is now Article 267 TFEU, which held that UK limitations on the availability of remedies should be overruled and that the injunctions should be available. Subsequently, the House of Lords immediately suspended the operation of the offending part of the Act. A few years after Factortame in Equal Opportunities Commission v Secretary of State for Employment [1994] 1 All ER 110, the House of Lords suspended the operation of a section of the governing employment legislation on the grounds that it was in breach of the EU Equal Treatment legislation. However, it should be noted that this power of UK courts to suspend conflicting domestic legislation will only be used sparingly in cases involving serious breaches of directly effective EU legislation.

Whilst the United Kingdom remains a member of the EU it is therefore arguable that it has surrendered Parliamentary sovereignty. However, two points should be noted. First, other Treaties such as those which provided that the United States had direct command over US soldiers based in the United Kingdom, have at some time or other meant that the United Kingdom did not have true Parliamentary sovereignty. Second, the UK Parliament could vote to repeal the European Communities Act 1972 and leave the EU. It must be said, however, that this option becomes increasingly unlikely and would become virtually impossible if full monetary union were ever achieved.

Test your understanding 1.4

1. What is the role of the Council of the European Communities?
2. What is the role of the European Commission?
3. What is the role of the European Parliament?
4. What is meant by EU legislation being directly applicable?
5. What is meant by EU legislation having direct effect?
6. What is the difference between direct vertical effect and direct horizontal effect?
7. Are Articles of the EC Treaty and Regulations directly applicable? Do they have direct effect?
8. What is the legal effect of a Directive both before and after implementation?
9. Can an individual sue a Member State on account of a Directive not having been correctly implemented?
10. What is the jurisdiction of the European Court of Justice?

1.5 THE EUROPEAN CONVENTION ON HUMAN RIGHTS

1.5.1 The Human Rights Act 1998

The Human Rights Act 1998 came into effect in October 2000. This Act incorporates the main provisions of the European Convention on Human Rights into UK law. However, the implementation is not
complete as Parliamentary sovereignty is preserved. Section 2(1) of the Act states that a court or tribunal which is determining a question which has arisen in connection with a Convention right must take into account both the Convention and decisions of institutions of the Convention, such as the Court of Human Rights.

Section 3(1) of the Act requires that, so far as it is possible to do so, all legislation must be read and given effect in a way which is compatible with the Convention rights. This can be regarded as a new rule of statutory interpretation and it is not to be restricted to statutory provisions which are ambiguous. Section 4 allows any precedent-making courts (the High Court, Court of Appeal and Supreme Court) to make a declaration of incompatibility in any legal proceedings in which a court determines whether or not UK legislation is compatible with a Convention right. This is a last resort and is not an alternative to trying to interpret the legislation in such a way that it is compatible with the Convention. Such a declaration of incompatibility does not affect the validity of the legislation in question, and is not binding on the parties to the litigation. However, where a declaration of incompatibility is made, the relevant Minister has the option to revoke the offending legislation, or amend it so that it is no longer incompatible.

Section 10 gives the Minister power to do this by remedial order so as to achieve the change by a ‘fast-track’ procedure. However, the Minister will revoke or amend the legislation only if he considers that there are compelling reasons for doing either of these things. As the Minister can leave the incompatible legislation in place, Parliamentary sovereignty is preserved. The relevant Minister has the same power to revoke, amend or leave primary legislation in place following an adverse ruling from the European Court of Human Rights. Primary legislation includes Acts of Parliament and certain Orders in Council. Secondary legislation includes all delegated legislation other than certain Orders in Council. If secondary legislation is found to be incompatible with Convention rights, any domestic court can declare the legislation invalid, unless the Parent Act provides that the secondary legislation is to prevail even if it is incompatible. If the Parent Act does not allow the legislation to be declared invalid, a precedent-making court has the power to make a declaration of incompatibility. The process of judicial review (see Chapter 2 at 2.6.1) can also cause secondary legislation which is invalid to be declared ultra vires the Parent Act (see 1.3.1.3, above).

Since the Act came into effect, positive consideration must be given as to whether new legislation is compatible with the Convention. Before the Second Reading of a Bill in Parliament the relevant Minister will have to make a written statement to Parliament, either stating compatibility with the Convention or stating incompatibility. If stating incompatibility, the Minister will need to state the Government’s intention to proceed with the legislation anyway. The Minister does not need to state the way in which the legislation is incompatible. Obviously, stating incompatibility might lead to political difficulties. By mid-2010 there had been 27 declarations of incompatibility which had not been reversed by a higher court.

Section 6(1) provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. However, this is not the case if the public authority could not have acted differently as a result of primary UK legislation. Section 6(1) will have a considerable impact on many UK businesses, as s.6(3) defines a public authority as including not only a court or a tribunal, but also any person certain of whose functions are functions of a public nature. Therefore, businesses such as private nursing homes, private schools, security firms and housing associations are subject to the effect of s.6(1).

Earlier in this chapter, at 1.3.2.2, Kay and others v Lambeth LBC [2006] UKHL 10, [2006] 2 AC 465 was considered. In this case Lord Bingham thoroughly reviewed how the HRA 1998 affected the doctrine of judicial precedent. Section 7 creates a new public tort which allows individuals to bring legal proceedings against public authorities breaching Convention rights. It is only the ‘victim’ of a breach of Convention rights who has the standing to bring proceedings under s.7. Where proceedings are brought a court may order such remedies as it considers just and appropriate.

Section 13(1) provides that if a court’s determination of any question arising under the Act might affect the exercise by a religious organisation of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.

An outline of the effect of the Human Rights Act can be seen in Figure 1.2.
UK courts and tribunals must take into account judgments, decisions etc. of the European Court of Human Rights. However, they are not bound to follow such judgments etc.

As far as possible, all UK legislation must be interpreted in a way which is compatible with Convention rights.

What if UK legislation is not compatible?

With regard to secondary legislation:

Does the Parent Act state that the secondary legislation is to prevail even if incompatible with Convention rights?

With regard to primary legislation, any precedent-making court can make a declaration of incompatibility.

The relevant Minister has the option to amend the incompatible legislation under s. 10.

If the Minister states incompatibility, there is no need to state how the Bill is incompatible and no need to amend the Bill.

Public bodies (widely defined) may not act in a way which is incompatible with a Convention right. This is not the case if the public body could not have acted differently on account of primary UK legislation.

Any court may declare the legislation invalid.

Precedent-making court can make declaration of incompatibility.

**Figure 1.2** The effect of the Human Rights Act 1998
1.5.2 The European Convention on Human Rights

We have seen that the Human Rights Act incorporates the main provisions of the European Convention on Human Rights into UK law. It is therefore necessary to consider the effect of the Convention. The Articles are set out below, but Articles 1 and 13 have not been incorporated into UK law.

Article 2 provides that everyone’s right to life shall be preserved by law, except in carrying out a death sentence properly passed by a court.

Article 3 provides that no one shall be subjected to torture or to inhumane or degrading treatment or punishment. In Ireland v UK (1978) 2 EHRR 25 the Court of Human Rights found that the UK’s interrogation of suspected terrorists was inhumane and degrading, although it fell short of being torture. In D v UK (1997) 24 EHRR 423 it was held that deporting a person with Aids to a country where there would be no treatment and where he would be destitute breached Article 3. In Tyrer v UK (1978) 2 EHRR 1 it was held that birching on the Isle of Man breached Article 3.

Article 4 provides that no one should be held in slavery or servitude or be required to perform forced or compulsory labour. There are exceptions for prisoners, the military, for work done as part of normal civic obligation, or service required in the case of an emergency or calamity threatening the life or well-being of the community.

Article 5(1) provides that everyone has the right to liberty and security of person. No one is to be deprived of their liberty except in the following circumstances: after conviction by a court; upon arrest; to prevent the spread of infectious disease; or to treat the mentally ill; or in the case of alcoholics, drug addicts or vagrants. Article 5(2) gives anyone arrested the right to understand, of the reason for the arrest and the charges against him. Article 5(3) requires that those arrested are brought promptly before a judge. If anyone is arrested in contravention of Article 5 he is given an enforceable right to compensation.

Article 6(1) guarantees the right to a fair trial. The trial must be a public hearing within a reasonable time of arrest by an independent and impartial tribunal established by law. Judgment has to be pronounced publicly. Article 6(2) holds that everyone charged with a criminal offence is presumed innocent until found guilty according to the law. Article 6(3) sets out the minimum rights of those charged with a criminal offence. These include: prompt information as to the details of the charge; adequate time and facilities to prepare a defence; the right to choose a lawyer and to be given free legal assistance if the interests of justice demand this; to have the same rights to require witnesses to attend as is enjoyed by the prosecution; to have the prosecution witnesses cross-examined; and to have the free assistance of an interpreter if one is needed.

Article 7 provides that no one should be guilty of a criminal offence which did not exist at the time when the act was committed, unless the act was criminal according to the general principles of law recognised by civilised nations.

Article 8(1) provides that everyone has the right to respect for his private and family life, his home and his correspondence. However, Article 8(2) provides that public authorities may interfere with this right on the following grounds: in the interests of national security, public safety or the economic well-being of the country; for the prevention of disorder or crime; for the protection of health or morals; or for the protection of the rights and freedoms of others.

Article 9 gives the right to freedom of thought, conscience and religion. However, this right is balanced against the rights of others to free expression, which includes criticism of religious beliefs and practices.

Article 10(1) gives a right to freedom of expression. This does not prevent the State from requiring broadcasters to hold licences, but does insist upon freedom to hold opinions, and to receive and impart information and ideas without interference by public authority. Article 10(2) provides that the freedoms set out in Article 10(1) carry duties and responsibilities and therefore may be subject to formalities, conditions, restrictions or penalties as are prescribed by law and as are necessary in a democratic society for the following reasons: to secure the interests of national security, territorial integrity or public safety; to prevent disorder or crime; to protect public health or morals; to protect the reputation or rights of others; to prevent the disclosure of confidential information; or to maintain the authority and impartiality of the judiciary.

Article 11 gives the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and join a trade union. This right does not apply to the armed forces or the police. Restrictions are also allowed in the interests of national security or public safety, to prevent disorder.
or crime, to protect health or morals, or for the protection of the rights and freedoms of others.

Article 12 gives members of the opposite sex the right to marry and form a family if they are of marriageable age.

Article 14 provides that the rights set out in the Convention shall be secured without discrimination on any ground. This Article cannot be invoked on its own. The discrimination in question must have taken place in relation to a different Convention right.

Article 15 allows derogation from the Convention in time of war.

Article 16 provides that Articles 10, 11 and 14 do not prevent restrictions on the political activities of aliens.

Article 17 provides that nothing in the Convention allows a person the right to do anything which would deny other rights under the Convention, except to the extent that this is provided for in the Convention. So racist groups could not use the right to freedom of expression to attack other rights such as freedom of religion.

Two Protocols, the First and the Thirteenth, have also been incorporated into UK law by the Human Rights Act 1998.

The First Protocol, Article 1 provides that every natural or legal person is entitled to peaceful enjoyment of his possessions. Nobody should be deprived of his possessions except in the public interest and subject to provisions provided for by law.

The First Protocol, Article 2 provides that no one should be denied the right to education.

The First Protocol, Article 3 provides that States must agree to conduct free elections at regular intervals by secret ballot so as to allow the people to choose freely the legislature.

The Thirteenth Protocol outlaws the death penalty in all circumstances.

The UK has been allowed one derogation from the Convention under Article 15(3) with regard to Article 5 of the Convention. This allows the authorities to detain anyone suspected of terrorist offences in line with the provisions of the Prevention of Terrorism (Temporary Provisions) Act 1989.

1.5.3 The European Court of Human Rights

It is important to realise that this court, which sits in Strasbourg, is quite separate from the European Court of Justice, which sits in Luxembourg. The ECJ is the supreme court of the European Community and its decisions are binding upon the Member States of the European Community. The European Court of Human Rights hears cases concerning breach of the Convention on Human Rights. Forty States have signed the Convention and although this includes all of the Member States of the European Union, it also obviously includes other States which are not EU members.

There are 47 judges in the plenary Court of Human Rights. One judge represents each signatory State. The plenary court sets up Chambers to hear complaints against States. These Chambers are made up of seven judges, the President of the Chamber, a judge from the country against which the complaint is being made and five other judges. Each Chamber sets up Committees of three judges to consider applications and to dismiss as early as possible those which are unfounded. Manifestly inadmissible applications can be dismissed by a single judge. An individual with a complaint applies to a judge, known as a rapporteur, who passes the complaint on to a Committee or Chambers. Particularly difficult cases can be passed on to a Grand Chamber of 17 judges. The Grand Chamber also acts as an appeal court. Judges hold office for six years, with half being replaced every three years. Applicants do not need to be legally represented but usually are. All hearings are held in public and are put on the court’s web site on the same day. The deliberations of the judges are, however, secret.

Article 35 of the Convention provides that an applicant to the court must prove:

(a) that the complaint involves a breach of the Convention by a country which has ratified it;
(b) that the breach occurred within the jurisdiction of that country; and
(c) that all domestic remedies have been exhausted and that the application to the Court has been made within six months of these remedies having been exhausted (it is possible, however, for the Court to proceed on the basis that domestic remedies are deemed to be exhausted on account of their being unsatisfactory).

It can be seen that the European Court of Human Rights is very much a court of last resort. A person who thinks that his human rights have been abused will generally seek a remedy through the process of judicial review, which is explained in Chapter 2 at 2.6.1. The decisions of the Court are delivered in open
court. Although the decision is binding on the State to which it is addressed, the Court cannot enforce it. If a violation is found the procedure is to send details to the Committee of Ministers of the Council of Europe, which confers with the State in violation to see how the judgment should be executed and future violations prevented. The Court can also, however, order ‘just satisfaction’, which could order the payment of compensation and costs. In McCann v UK (1995) 21 EHRR 97, which involved IRA members being shot dead by the SAS in Gibraltar, the United Kingdom was ordered to pay the legal costs of the relatives of the dead IRA men. These costs amounted to £38 000.

The Court does not use a system of precedent. It does, however, adhere to a doctrine of proportionality, meaning that every formality, condition, restriction or penalty must be proportionate to the end which is trying to be achieved. In interpreting the law the Court adopts a broad, purposive approach rather than a technical ‘letter of the law’ approach.

In 2006 the European Court of Human Rights awarded £3 350 damages and £1 340 costs to George Blake, the traitor who escaped from the United Kingdom to the Soviet Union, over the distress and frustration to him caused by the length of time the Government took in its legal action to prevent him benefiting from his autobiography. (The case itself is considered in Chapter 7 at 7.2.6.1.) The legal action took more than nine years to resolve. Part of this delay was the fault of Blake. However, the appeal to the Court of Appeal took 17 months and the appeal from there to the House of Lords took 31 months. These delays breached Blake’s right to a fair trial. The European Court of Human Rights took five years and eight months to decide the case.

1.5.4 The impact of the Human Rights Act

In March 2009 Lord Hoffmann, the second most senior Law Lord, delivered the Judicial Studies Board Annual Lecture, in which he was highly critical of the European Court of Human Rights. In criticising the Court, Lord Hoffmann made it clear that he has no problem with either the European Convention on Human Rights or with the Human Rights Act 1998. Unlike the European Court of Justice in Luxembourg, the European Court of Human Rights in Strasbourg had no mandate to attempt to unify the laws of Europe. However, Lord Hoffmann said that the Court had been unable to resist the temptation to aggran-
breached because statements of a witness who was not present at the trial had been ‘the sole or, at least, the decisive basis’ of their conviction. The Supreme Court held that the defendants in Horncastle had received a fair trial. Even before the Convention had come into force the rule against ‘hearsay’ evidence had ensured that defendants received a fair trial in the way that Article 6 was designed to ensure. Furthermore, application of the ‘sole or decisive rule’ would cause practical difficulties if applied in England and Al-Khawaja did not establish that it was necessary to apply the rule. Lord Phillips, who gave a judgment with which the other six Supreme Court Justices all agreed, said,

‘The requirement to “take into account” the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this Court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this Court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this Court and the Strasbourg Court. This is such a case.’

Lord Brown distinguished Secretary of State for the Home Department v AF (No.3) [2009] UKHL 28, [2009] 3 WLR 74. In that case the House of Lords had felt that it had no alternative but to apply a definitive judgment of the Grand Chamber, A v UK (2009) 49 EHRR 29, on the very point at issue. In SSHD v AF Lord Rogers had said, ‘Strasbourg has spoken, the case is closed.’ Lord Hope agreed with this point of view as SSHD v AF was not only a decision of the Grand Chamber but was much more clearly reasoned than the Chamber’s ruling in Al-Khawaja.

In a speech given in Jerusalem in March 2011, Lord Judge, the Lord Chief Justice, defended the judiciary against accusations that they were making inappropriate human rights rulings. Explaining that their hands were tied, he said:

‘What, however, needs to be examined, is the way in which the criticism of “Human rights” and the judgments made by reference to them, is that the incorporation of the Convention, and the statutory requirement that the decisions of the European Court of Justice must be applied (whether we judges in the United Kingdom agree with them or not), and the decisions of the European Court of Human Rights must be taken into account, represents the law of the United Kingdom as decided in Parliament by the ordinary legislative process. Judges are obliged to apply the legislation enacted by our sovereign Parliament, and the European Communities Act 1972 and the Human Rights Act 1998 are two such Acts. No more and no less.’

He criticised lawyers for inappropriately using ECHR authorities and said that ECHR authorities should not be cited if a Supreme Court decision had overruled them. However, he was not, as he made very clear, advocating any particular changes.

Test your understanding 1.5

1 Which courts have the power to make a declaration of incompatibility? What is the effect of such a declaration?
2 Can new UK legislation be passed by Parliament if it is incompatible with the Convention?
3 What is the position of public authorities under the Human Rights Act?
4 In what circumstances can an individual bring a case before the Court of Human Rights?
Law which originated in the King’s or Queen’s courts is known as common law and is contrasted with law which originated in the courts of equity, which is known as equity.

Any court can now apply both common law and equitable principles.

The criminal law is designed to punish wrongdoers who have broken the criminal law. The civil law is designed to compensate those who have been caused loss or injury by the wrongdoing of another.

In criminal cases the prosecution must prove the accused’s guilt beyond reasonable doubt. In civil cases the claimant must prove his case on a balance of probabilities.

It can be important to distinguish between law and fact for three reasons: only statements of law can become precedents; an appeal may only be possible against a question of law, or may be required to be made to a different court depending upon whether the appeal is against a finding of law or fact; and, in Crown Court trials the judge decides the law but the jury decide the facts.

Legislation

Bills are introduced into Parliament by the Government. (A very small number of Bills are introduced by individual MPs.)

To become a statute, a Bill must pass through both Houses of Parliament and gain the Royal Assent. A Bill which does not pass through the House of Lords can be enacted without approval of the House of Lords after a delay of one year.

A codifying Act reduces the existing law to one comprehensive statute. A consolidating Act re-enacts as one Act several pieces of legislation which concern the same subject. An amending Act alters some of the sections of an existing Act.

Delegated legislation is passed other than as a statute. Once passed it has the same effect as a statute. Statutory instruments are introduced by Government Ministers upon whom power has been conferred by an enabling Act. Orders in Council are introduced by the Privy Council. Bye-laws are passed by local authorities.

The literal rule of statutory interpretation requires that unambiguous words in a statute are given their ordinary, literal meaning.

The golden rule allows the court to avoid giving the words in a statute a meaning which is manifestly absurd. It also allows a court to prefer the less absurd or undesirable interpretation when the words of a statute are ambiguous.

The mischief rule allows a court to be guided by consideration of the problem which the statute sought to rectify.

The ejusdem generis rule is that where general words in a statute follow specific words the general words must be interpreted as having the same type of meaning as the specific words.

The rule expressio unius est exclusio alterius means that where a statute lists specific words which are not followed by any general words then the statute applies only to the words listed.

In the very limited circumstances set out in Pepper v Hart a court may consider Parliamentary material when interpreting a statute.

Judicial precedent

The doctrine of judicial precedent holds that the decisions of higher-ranking courts are binding upon lower-ranking courts.

The courts are arranged in an hierarchical structure. The decisions of the Supreme Court (formerly House of Lords) bind all inferior courts. Decisions of the Court of Appeal bind all inferior courts and, almost always, future sittings of the Court of Appeal. Decisions of the Divisional Court of the High Court bind other High Court judges sitting alone and all inferior courts. They also generally bind future sittings of the Divisional Court. Decisions of High Court judges sitting alone bind inferior courts but do not bind other High Court judges.

The binding element in a case is the ratio decidendi, which might be defined as any statement of law which the judge applied to the facts of the case and upon which the decision in the case is based.

Statements of law made by a judge which are not part of the ratio decidendi are known as obiter dicta. These are of persuasive authority only.

A statute or a higher court may overrule a decision, in which case the overruled decision ceases to operate as a precedent.

A decision is reversed when an appellate court allows an appeal. No rule of law is necessarily changed.
A judge can refuse to follow a precedent by distinguishing it, that is by saying that the facts of the case in front of him are materially different from the facts of the case which created the precedent.

**The European Union**

- The United Kingdom became a member of the EU in 1973. The European Communities Act 1972 provided that Community law should be directly applicable in the UK courts.
- The Council of the European Communities is the main policy-making body of the EU. Membership of the Council varies, being made up of relevant Ministers of the Member States.
- Each Member State has one Commissioner and some of the larger States have two. (However, after the Treaty of Nice is fully effective, each Member State will have a maximum of one.) The Commission makes broad EU policy and drafts secondary legislation. It also ensures that Member States adhere to the Treaties.
- The European Parliament does not pass legislation. It has a consultative role which is becoming increasingly powerful.
- Treaty Articles and EU Regulations are directly applicable. This means that they automatically form part of the domestic law of Member States.
- EU legislation can only be relied upon by an individual in a legal action if it has direct effect. It will only have direct effect if it satisfies the *Van Gend* criteria of being sufficiently clear, precise and unconditional.
- EU legislation which has only direct vertical effect may only be invoked by an individual against the State or against an emanation of the State. Legislation which has direct horizontal effect may be invoked by one individual against another.
- Before their implementation date, Directives have no effect (subject to the *Wallonie* principle). After their implementation date they can have direct vertical effect but not direct horizontal effect. This is only likely to be of importance where they are not properly implemented by UK legislation.
- The European Court of Justice expresses authoritative opinions on EU law when requested to do so by the national courts of Member States.

**The Human Rights Act 1998**

- The United Kingdom signed the European Convention on Human Rights in 1951.
- The Human Rights Act 1998 incorporates the Convention into UK law, but preserves Parliamentary sovereignty.
- When determining a question which has arisen in connection with a Convention right, a UK court must take into account any decisions of the European Court of Human Rights.
- As far as it is possible to do so, UK legislation must be read and given effect in a way which is compatible with the Convention rights.
- A precedent-making court can make a declaration that UK legislation is incompatible with a Convention right. The relevant Minister would then have to consider amending or revoking the UK legislation, but would have the power to leave the legislation in place.
- New legislation requires positive consideration by the relevant Minister as to whether or not it is compatible with the Convention. However, the Government may still introduce legislation which is incompatible with the Convention.
- A public authority may not act in a way which is incompatible with a Convention right. However, this is not the case if the public authority could not have acted differently on account of UK legislation. Individuals are given the power to sue public authorities which breach this duty.
- The major rights set out in the Convention are: the right to have one's life preserved by law; the right not to be subject to torture or inhumane or degrading punishment; the right not to be made retrospectively guilty of a criminal offence; the right to respect for private and family life; the right to freedom of thought, conscience and religion; the rights to freedom of assembly and freedom of association with others; and, the right to marry a member of the opposite sex.
- An individual can only bring a case before the Court of Human Rights after all domestic remedies have been exhausted.
- Protocols have added that every natural or legal person is entitled to peaceful enjoyment of his possessions, that no one should be denied the right to education, that States must agree to conduct free elections at regular intervals by secret ballot so as to allow the people to choose freely the legislature and that the death penalty is outlawed.
Multiple choice questions

1 Which one of the following statements is not true?
   a Principles of law may still be classified as equitable, but both common law and equitable principles can now be applied by all courts.
   b Equitable remedies are discretionary and can be withheld from those who have acted inequitably.
   c In a criminal trial the prosecution must prove the accused’s guilt beyond reasonable doubt. In a civil trial the claimant must prove his case on a balance of probabilities.
   d An act committed by a person cannot give rise to both civil and criminal liability.

2 Which one of the following statements is not true?
   a The power to pass a statutory instrument is conferred by an enabling Act.
   b Once properly passed, a statutory instrument can give a Minister the power to alter a statute without the need to pass an amending Act.
   c The courts have no power to declare either a statute or a statutory instrument void.
   d Some Acts of Parliament are introduced as Bills by individual MPs, rather than by the Government of the day.

3 Which one of the following statements is not true?
   a All deliberate statements of law made by the Supreme Court when deciding a case will be binding upon all inferior courts.
   b The Court of Appeal is almost always bound by its own previous decisions.
   c The decisions of the Divisional Court are binding on High Court judges sitting alone, but the decisions of High Court judges sitting alone are not binding upon other High Court judges.
   d Circuit judges do not make precedents.
   e A court which distinguishes a case refuses to follow an apparently binding precedent on the grounds that the facts of the case which created the precedent are materially different from the facts of the case it is considering.

4 Consider the following statements.
   i The European Parliament enacts EU legislation, but its power to do this is very much subject to the control of the European Commission and the European Council.
   ii EU legislation which is directly applicable in Member States cannot always be relied upon by an individual in a legal action.
   iii Whether EU legislation has direct vertical effect will depend upon whether it is sufficiently clear, precise and unconditional as to satisfy the Van Gend criteria.
   iv Regulations which are directly applicable will have only direct vertical effect, whereas Treaty Articles which are directly applicable will always have direct vertical and horizontal effect.
   v Only the House of Lords can refer a case to the European Court of Justice, which acts as a final court of appeal on issues of EU law.

Which of the above statements are true?
   a i, ii and iv only.
   b ii and iii only.
   c ii, iv and v only.
   d ii, iii and v only.

5 Which one of the following statements is not true?
   a The European Court of Human Rights is the highest court of the European Union.
   b The European Court of Human Rights is the highest court of the European Union.
   c The European Court of Human Rights is the highest court of the European Union.
   d The European Court of Human Rights is the highest court of the European Union.
   e The European Court of Human Rights is the highest court of the European Union.
b New legislation which is incompatible with a Convention right can still be passed by the UK Parliament.

c It is now possible for a person to sue a public authority for breach of a Convention right.

d Even if a precedent-making court makes a declaration of incompatibility, the relevant Minister will not need to ensure that the UK legislation is amended so as to become compatible with Convention rights.

Task 1

Your employer has asked you to draw up a report, briefly explaining the following matters:

a The different senses in which the expression ‘common law’ is used.

b How statutes and delegated legislation are passed.

c The main rules of statutory interpretation.

d The way in which the system of judicial precedent operates.

e The ways in which EU law is created and the effect of EU law in the UK.


Visit www.mylawchamber.co.uk/macintyre to access study support resources including interactive multiple-choice questions, weblinks, glossary, glossary flashcards, legal newsfeed, answers to questions in this chapter, legal updates and an overview of this chapter all linked to the Pearson eText version of Business Law which you can search, highlight and personalise with your own notes and bookmarks.

Use Case Navigator to read in full some of the key cases referenced in this chapter with commentary and questions:

Carlill v Carbolic Smoke Ball Co. [1893] 1 QB 256

Gregg v Scott [2005] 4 All ER 812