

The three most important characteristics of the English legal system:

Accident of geography as much as history

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Contemplating the essence of one's legal system is a daunting task. In the case of England it is particularly problematic. Perhaps more than for those from elsewhere, the initial hesitation is one of stance. What is 'my country'? The question induces a mild crisis of identity afflicting all those in the UK or Great Britain or England. The United Kingdom as a unitary sovereign constitutional body is most evident in the composition of its Parliament and most absent in the football and rugby grounds during international competitions. There are significant distinctions in the administration of justice between Scotland, Wales, Northern Ireland and England to focus upon the English legal system for this paper. Whilst much of the discussion also relates to the other regions of the United Kingdom, Scotland in particular has a distinctive legal and constitutional history sufficient to understandably enrage any attempt to talk of a UK legal system.

The complexity and nuances of legal culture in this part of Europe serves as a reminder of a more global phenomenon. The legal system operating in the UK has distinctive characteristics and essential features which define its approach to dispute resolution, the exercise of state power and the organisation of its polity, which along with all others, are the product of its history, location and culture. The significance of history and place is reflected in the three characteristics that I have identified as essence of the UK legal system: its common law inheritance, its European emergence and its international dependency.

Common law inheritance

The single most distinctive characteristic of the English legal system is its common law heritage¹. Most of the features popularly associated with English law and its administration of justice are attributable to the early development within Western Europe of the civil and common law traditions. The common law has been explained as an accident of history resulting from the Norman conquest².

Glenn identifies the custom and local basis of the common law as part of the chthonic tradition of which orality is evidently a primary feature³. The idea recognises the essential connection between law and location, emphasising its local, community, or tribal provenance, in contrast to continental civil law systems where the central authority of the monarch or the pope was reflected in widespread codes. As Goodman observes "several characteristic consequences flow from the fact that law did not emanate from one centralised authority such as papacy, king or parliament."⁴

Such a perspective seems far distant from efforts today to harmonise law throughout the expanding European Union. The peculiar development of the common law in England evolved it seems from a happenstance congruence of the adoption after the Norman conquest by successive monarchs of indigenous customs as the basis for the administration of justice. Dispute adjudication, particularly relating to land title, was a primary function for justice. If there was to be no central authority to the law, a loyal judiciary was essential:

¹See, for example, R C Van Caenegem, *Birth of the English Common Law*, 1988, (2nd Ed), CUP, Cambridge, Chap 4; Ellen Goodman, *The Origins of the Western Legal Tradition*, 1995, Federation Press, Sydney, Chap 8; and H'Patrick Glenn, *Legal Traditions of the World*, (2nd edition) 2004, OUP Oxford Chap 7

² Van Caenegem, , op. cit. note 1 at p. quotes in Glenn at p

³ Glenn, op. cit. note 1 at p. 63

⁴ Goodman op. cit. note 1 at p 222

“This immediately marks off a common law tradition from all others. There was here no loyal chthonic people, no available revelation, no corpus of learned, indigenous doctrine. You needed a corps of loyal adjudicators, able to bring a newer, more efficient king’s peace to the different parts of the realm.”⁵

Judges were appointed by the king to travel the country and resolve arguments assisted by a local jury incorporated by Normans into workings of royal courts⁶. The trial assumed a pivotal role in the resolution of disputes⁷.

In the wake of the courts came growing significance of lawyers⁸. Initially these were experts in legal French who provided the necessary technical and linguistic expertise⁹ at the royal courts in Westminster.

With the lawyers emerged a distinctive approach to legal education. Roman and canon law was taught at Oxford and Cambridge, but neither judges nor lawyers had need of either. An emerging non-clerical profession in the 13th century developed its own education in the Inns of Court¹⁰. The universities in England limited themselves to Roman Law¹¹, unlike continental jurisdictions where the civil law was the subject for exposition and amendment by Universities such as Bologna¹².

Nowadays the universities have assumed the primary role for legal education. It has followed the rest of Europe in treating legal scholarship as a subject for intellectual and theoretical enquiry suitable for undergraduate study. As one of the leading comparativists, John Merryman, noted, English legal education became “more like the legal education in the typical European (sic) or Latin American university than that in most American law schools”¹³. Law is taught at undergraduate level in most other common law jurisdictions, with the significant exception of the US. In the UK law schools have traditionally concentrated on the substance and principles of its legal systems, focusing particularly on the decisions of its appellate courts and their reasoning. The nature of English scholarship was therefore peculiar to the common law, prompting Geoffrey Wilson to observe that in England “the role of legal scholars often looks more like that of parents clearing up clothes left lying around by wayward and careless judges”¹⁴.

Technical legal expertise is delivered in separate one year vocational programmes validated by the professions and taught universities or by private providers¹⁵. Change is an ongoing process, however, and recent years have brought major innovations into the established order. One provider has merged the technical, vocational stage with the undergraduate stage. Private providers have been allowed to grant degrees. The professions are investigating further reforms and mechanisms for introducing more work-based learning and alternative pathways for obtaining legal training. European Union responsibilities for harmonising the processes and educational

⁵ Glenn, op. cit. note 1 at p 222

⁶ Ibid. at p 232

⁷ Goodman op. cit. note 1 at pp 232 - 236

⁸ Ibid. pp 237

⁹ Ibid. p 240

¹⁰ Ibid. p 241

¹¹ Glenn op. cit. note 1 at p 226

¹² Goodman op. cit. note 1 at p 241

¹³ J H Merryman, *Legal Education There and Here*, 1975, 27 *Stanford Law Review*, 859-878, reproduced in R Rogowski, *Civil Law*, 1996, Dartmouth, Aldershot at p 86

¹⁴ ‘Enriching the study of law’, *Frontiers of Legal Scholarship*, 1995, Geoffrey Wilson (ed.), Wiley, Chichester p 229

¹⁵ For a brief account of the various pathways to professional qualification in the UK see Julian Lonbay, ‘University Training: the implications of the Bologna Declaration for the UK’, 2001, 0 *European Journal of Legal Education*. 11-29, accessible at <http://elfa.bham.ac.uk/site/default.htm>

standards for legal practice are affecting higher education at undergraduate and particularly postgraduate level¹⁶.

In the absence of a code or other orthodoxy, the common law became an amalgam of whatever arguments and values were introduced. The judges' role was to adopt the indigenous processes, including trial by ordeal etc.; get the right questions asked; and co-opt local worthies as a jury to determine the result¹⁷.

Goodman argues that the indeterminate nature of the early common law meant that it was receptive to a wide range of adoptions and adaptations. "Its plural jurisdictions and plural subsystems are the hallmarks of the common law"¹⁸. She identifies its pluralistic basis, including its receptiveness to ecclesiastical law¹⁹; Glenn pays tribute to the influences in English common law of Islamic laws and practices²⁰.

Perhaps because of its mongrel roots and pluralist methods, the common law has become associated with malleability and aptitude for change²¹. The extent to which this reflection English legal system holds any credibility today is debatable, particularly amongst constitutional lawyers. All legal systems need change,

"Legal systems are not static in the least. They change, sometimes quite rapidly. They are rapidly changing today."²²

The process and values of change are now significant considerations for all and law reform is a priority for all legal systems.

A common law tradition is of course shared by many others as a result of military conquest, colonisation or adoption. The English legal system, pivotal although it has been in the histories and development of others, has evolved with perhaps less traumatic foreign interference than have other countries. Legal systems with strong traces of the common law in them, have often acquired these in more violent circumstances²³. Each is distinctive however and the product of its own history where diffusion provides a better metaphor than transplant. Glenn argues for example that the genius of US law has been its constructive combination of both civil and common law.²⁴

European partnership

If the common law tradition is the formational characteristic of the English legal system, which distinguishes it from its European neighbours, the participation of the UK in the European Union signals its second dominant characteristic. The impact of membership has refocused its legal system, introducing a new level of legal authority, fresh laws, novel approaches to regulation, and additional court systems. The emergence of the EU has redrawn maps of jurisdiction, smudging the boundaries between civil and common law interests²⁵. The implications are extensive and profound.

¹⁶ See Lonbay, 2001, op.cit

¹⁷ Ibid. at p 224

¹⁸ Ibid. at p 222

¹⁹ Ibid. at p 224

²⁰ Glenn op. cit. note 1 at p 226

²¹ . "Though the common law may float, statutory law does not, and access to it is strictly controlled" Glenn op. cit. note 1 at p 253.

²² Lawrence Friedman, 'Some comments on Cotterell and Legal transplants', *Adapting Legal Cultures*, 2001, David Nelken and Johannes Feest (eds.), Hart, Oxford

²³ The process of legal change and the evolution of legal systems has recently been the focus for much scholarship. In particular see Glenn (op.cit. note 1); Nelken and Feest (supra note 21); and William Twining, "Diffusion of Law: A Global Perspective" *Jo. Legal Pluralism* 1-43 (2004)

²⁴ Glenn at p 251

²⁵ For a discussion of the challenges to mapping law by reference to nation-state legal systems see William Twining, *Globalisation and Legal Theory*, 2000, CUP, Cambridge

For the purposes of this paper I shall concentrate upon the implications for legal education. I have already referred to the impact of EU membership for the regulation of higher education and its consequences for professional qualification. Entry into the EU has resulted in new courses for the undergraduate curriculum, and revision to the subjects that the professions require students to take to qualify for entry. Wilson recognised the freedom that membership of the EU promised for legal scholarship,

“Everyone takes for granted the fact that law and legal systems differ in different countries. But it is also true of legal scholarship. One reason for this is the different responsibilities legal scholars have in different countries for the maintenance and development of the local law. One result is that legal scholars in different countries may have different agendas and this may affect the subject matter, scope and even the form and style of the local legal scholarship.”²⁶

EU membership has introduced an entirely fresh understanding of the role between national and regional legal systems. England and other member states each approach this transformation in their own idiosyncratic cultural environments. Each maintains their distinctive if modified national legal systems, although these cease to be as clearly defined as they have been to nation state limits or local sovereignties. The European experience is most commonly studied for its legal implications inwardly – for its implications for member states and their citizens. Its impact however is global. Just as it has become inaccurate to study the characteristics of an isolated ‘English’ legal system, so the idea of a European legal system is understandable only by reference to wider trans-national influences. The third characteristic of the English legal system is its dependence upon its surrounding international legal environment.

International dependency

It’s a truism to remark that a national legal system is only comprehensible in the context of other systems. Without an understanding of the functioning and priorities of alternative legal cultures, our own environment has little meaning, and is restricted to local experience and acontextual understanding.

At the empirical level the English legal system has a specific international resonance. Most obviously this lurks in its imperialist interventions along with other European nations across the globe. The common law legacy of British rule is matched by civil law conquests. Despite the imposition of national administration by military might, the histories of indigenous peoples and post colonial developments are best explained by the notion of diffusion²⁷ or adoption²⁸ rather than transplant²⁹. The result has been a kind of embedding of common law thinking with that of multiple nation-states³⁰.

From the point of view of the English legal system the common law legacy is fading as it engages further and further with other European legal cultures and as other European nation states are inculcated by practices and procedures that bear clear strains of a common law pedigree. One example of this is the adversarial process in the criminal trial. As Hodgson traces in her comparison of French and English prosecution procedures, there are features of each system to be found in the other. Wider afield the impressive pace of reform of the criminal justice process in Chile (and to some extent elsewhere in South America) borrowing substantial elements of the adversarial trial form but fashioning a specifically Chilean approach.

²⁶ Wilson, 1995, op. cit. note 14 p. 229

²⁷ Twining, 2004, op cit note 24

²⁸ Nelken and Feest, , op cit note 22

²⁹ Alan Watson, *Legal Transplants*, 1993 (2nd ed), Georgia University Press, Athens, Georgia

³⁰ Glenn op. cit. note 1 at at p 247

One of the most powerful economic features of the English legal system in recent years which is illustrative of its dependence upon the wider international community is its success as a centre for international dispute resolution. Dominance of the legal services market along with New York has produced, along with the contributions to GDP for the UK³¹, a strong dependency on international trade.

Concluding observations

A seemingly innocuous request to identify and prioritise within one's native legal system its 'most important' characteristics presented a big challenge. At the root of the quest lay an understanding of the notion that the processes and values underpinning different communities' experiences of law are capable of explanation by the idea of a legal system. I approached the task as one of describing the operation of law in one's society by reference to characteristics that are sufficiently widely shared but exclusively privileged as 'legal' to be ascribed a particular organisational form³². The English experience, along with all others, only has meaning in an international context and can only be understood by reference to its international location both historically and geographically.

This particular account may hold some reflections for a wider discussion:

1. Features of legal systems are invaluable tools for a comparative appreciation.
2. The English legal system is illustrative of the variety and complexity of institutions, principles, processes and personnel involved in the governance and the administration of justice
3. Legal systems are constantly changing and there is a strong obligation on scholars to investigate the process of change and the development of legal cultures in order that we can better understand how to change legal systems
4. Legal systems are both culturally specific and mutually inter-dependent whatever their pedigree or longevity.
5. Whilst the concept of legal system can be a useful tool for comparative analysis and practical development, its ambiguities and uncertainties suggest the limits of its usefulness.

³¹ The legal services market in the UK in 2006 was estimated at £20 billion (or 2% of GDP). See Stephen Mayson, "Legal Services Reforms: "Catalyst, Cataclysm Or Catastrophe?" 2007, College of Law, Inaugural Speech as Professor of Strategy and Director of the Legal Services Policy Institute, March 2007. http://www.college-of-law.co.uk/uploadedFiles/News/Articles/Current_Year/stephen_mayson_speech.pdf
Accessed on 12.10.07

³² The problem of the concept of what is 'legal' is explored by William Twining in his essay, 'General Jurisprudence' in M. Escamilla and M. Savedra (eds.) *Law and Justice in A Global Society*, 2005, pp. 563-650 (Proceedings of the XXIInd World Congress on Legal and Social Philosophy, Annales de la Catedra Francisco Suarez, Granada) at p31