

## The English Legal System

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The United Kingdom is a non-federal state that consists of three countries<sup>1</sup> and one principality.<sup>2</sup> The United Kingdom remains a monarchy<sup>3</sup> and the extent of the Monarch's powers remain the subject of some debate. Although some argue that the monarch is a 'figure head' others argue that it is possible the monarch wields real powers.<sup>4</sup> Certainly it is known that most powers (for example, the appointment of judges and the declaration of power) are exercised by the government rather than the monarch in person. The government exercise these powers in the name of the monarch and they are collectively known as the Crown Prerogatives. Earlier in 2007 Gordon Brown, the new Prime Minister,<sup>5</sup> has announced an intention to consult on the standing of crown prerogatives with the intention of transferring many of the powers to the legislature.

The legislature of the United Kingdom is known as the Houses of Parliament and consists of two houses. The lower house is known as the House of Commons and its members are entitled to the suffix M.P.<sup>6</sup> There are 646 Members of Parliament each of which is elected by direct suffrage.<sup>7</sup> The upper house is known as the House of Lords and its members are known as peers. Traditionally members of the House of Lords were entitled to sit by right of birth since the peerage<sup>8</sup> was hereditary.<sup>9</sup> When the Labour administration headed by Tony Blair was elected in 1997 their manifesto included a commitment to constitutional change. In the 10 years since their election

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<sup>1</sup> England, Scotland and Northern Ireland.

<sup>2</sup> Wales.

<sup>3</sup> The current head of state being Her Majesty Queen Elizabeth II.

<sup>4</sup> The monarch continues to receive detailed state papers and has a weekly audience with the Prime Minister. The monarch (theoretically) retains the final decision as to when Parliament is to be dissolved.

<sup>5</sup> The Prime Minister is the political head of the State. By convention (although not law) it is understood that the Prime Minister should be a member of the lower house (House of Commons). The Prime Minister is traditionally the leader of the largest party in that House.

<sup>6</sup> Meaning Member of Parliament.

<sup>7</sup> The voting age in the United Kingdom is 18.

<sup>8</sup> There are 5 ranks of peerage (from lowest to highest being) Baron, Viscount, Earl, Marquis and Duke.

<sup>9</sup> Save for certain offices which attracted a 'life' peerage, i.e. a non-hereditary barony. The most famous example of these were (and still are) the Lords of Appeal in Ordinary (see below).

the constitution has changed significantly and one of the earliest measures was the enactment of the *House of Lords Act 1999* which stripped all but 92 hereditary peers of the right to sit in the House of Lords.

Whilst there is some law that exists across all of the United Kingdom there are actually three separate legal systems within the U.K. The three are:

- The legal system of England and Wales.
- The legal system of Scotland.
- The legal system of Northern Ireland.

The differences between the legal systems can be significant, perhaps most notably between the legal systems of England & Wales on the one hand and Scotland on the other. The *Acts of Union 1707* ensured the continuity of the Scottish legal system and it continues to have its own courts and legal tradition.

In this paper I seek to concentrate on the legal system of England and Wales. Traditionally this has always been abbreviated to the English Legal System since, as a result of annexation, the laws and systems of Wales are the same as in England.<sup>10</sup>

## **Background**

England is perhaps the most famous common-law country, with its influence being found across the world as a result of its colonial past. England does, however, differ from many other common-law countries in two principal ways. The first is that it does not have a written constitution, a distinction it shares only with New Zealand and Israel, both of which are considered to be ‘common law’ countries. Of course that it is not to say that neither England nor the United Kingdom has a constitution, there is undoubtedly a body of law that is of constitutional significance.<sup>11</sup> However it must be accepted that the absence of a written constitution does make it more difficult for UK citizens to understand their role with the State. In 2007 it was announced that the new Prime Minister, Gordon Brown, was considering the idea of introducing a written constitution although it is likely that this will be a long-term issue.

The second principal way that England differs from many common-law countries is that its law is not codified. Many states, including (for example) New Zealand, have attempted to codify some or all of their law (most usually the criminal law). The principal advantage of codification is that it brings a degree of certainty to the law, i.e. it is possible for a citizen to easily identify whether something is unlawful and also how allegations of illegality will be investigated and prosecuted. One possible disadvantage is that it may make the law slightly inflexible. This is perhaps

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<sup>10</sup> See the *Laws of Wales Acts* of 1535 and 1543. Devolution may eventually change this and the *Government of Wales Act 2006* will, if implemented, eventually lead to Wales being allowed to pass some laws applicable only to its territory.

<sup>11</sup> Perhaps most notably, and obviously, the *Acts of Union* that led to the creation of the United Kingdom through the merger of England and Scotland (1707) and then the United Kingdom and Ireland (1801, later obviously reduced to Northern Ireland).

particularly true where technological advancements proceed beyond that which the legislators contemplated.

The common-law focus and absence of either codification or a constitution raises a number of issues surrounding the role of the courts. The courts are central not just to the adjudication of the law but also the very development of the law. “Judge-made” law remains an important feature of the English Legal System although in modern times more deference has been shown to the legislature. Perhaps the best-known example of judge-made law is that of murder. In England and Wales no statute states what the definition of murder is. The definition has evolved through the common law and whilst Parliament has chosen to amend it<sup>12</sup> the fact remains that it is a common-law crime. The issues of most relevance given the background to the English Legal System are:

- Precedent.
- The supremacy of Parliament.
- The separation of powers.

### **The hierarchy of the courts**

In order to bring certainty to the law the courts have adopted the principle of *stare decisis*<sup>13</sup> or the doctrine of precedent as it is often referred to. The courts are divided into two classifications; superior courts of record and inferior courts of record. The House of Lords, is the most senior court but it is not strictly speaking an English court but rather it is a UK court since it exercises appellate jurisdiction for all three legal systems.<sup>14</sup>

The superior courts of record are currently also referred to as the Supreme Court. In essence they consist of the Court of Appeal, High Court and the Crown Court although the latter is only a true superior court when it is sitting in connection with trials on indictment. It is sometimes said that a notable feature of a true superior court is that it is able to exercise unlimited jurisdiction, i.e. where a statute does not state where a matter should be heard (or indeed whether a matter raises a legal issue) a superior court of record can deal with this. However this does not, strictly speaking, hold true. For example the Court of Appeal’s jurisdiction is limited by statute and yet it is a superior court of record. The Crown Court does not have unlimited jurisdiction either, its jurisdiction is subject to statutory limitations, although admittedly where the matter is a common-law crime then the Crown Court has jurisdiction.

A more proper way of identifying the difference between a superior and inferior body is how it can be reviewed. A superior court cannot be reviewed but its matters can be

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<sup>12</sup> Perhaps most notably when it abolished the common-law rule that death must arise within a year and a day, see *Law Reform (Year and a Day Rule) Act 1996*.

<sup>13</sup> Meaning “let the decision stand”.

<sup>14</sup> However the jurisdiction is not universal. For example, whilst there is a right of appeal to the House of Lords against civil actions in Scotland no such right exists for criminal matters.

the subject of appeal. Where a right of appeal does not arise then that is the end of the matter. An inferior tribunal can be both appealed and reviewed. The usual reason for review is that an inferior body has acted in an illegal,<sup>15</sup> improper<sup>16</sup> or irrational<sup>17</sup> manner. The other feature of superior courts is that they are the only courts that lay down precedent, i.e. a decision that inferior courts must follow. However this cannot be considered to be a definitive hallmark of a superior court since the Crown Court does not set any precedent.

The system of precedent is based on the fact that the lower courts must follow the rulings of the superior courts. For example, if the Court of Appeal rules on a civil matter the High Court, County Court and Magistrates' Court must follow that decision. The judgment (decision) of a case is divided into two forms; the *ratio decidendi* (or the reason for the judgment) and *obiter dicta* (things said in passing). Only the *ratio* is binding on a court below. Whilst *obiter* statements will be listened to, the courts need not follow them. Identifying the ratio of a case can be extremely challenging and whilst every case must have a *ratio* it does not follow that every case will only have one ratio. In many situations it is easier to work out what is not a ratio than what is the ratio, not least because in many cases two or more judges are issuing separate judgments rather than a single majority and minority judgment.

Assuming that the ratio is identified then the lower courts will ordinarily be obliged to follow this rule. The exception to this rule is where a court believes that it is possible to escape precedent on the basis that it can be *distinguished*. Distinguishing a case means that the material facts of a case are sufficiently different from the ratio and therefore the decision of that case could not possibly have been meant to apply in these circumstances. Distinguishing can be relatively easy to do but judges are cautious about doing so because (a) it could introduce uncertainty, and (b) because if they are wrong the appellate courts may reverse their ruling.

The issue of most controversy is over who can overrule precedents (i.e. declare that they no longer apply or that they were wrongly decided). The general rule is that a court can overrule a lower court's precedent. Accordingly the Court of Appeal could overrule a precedent set in the Divisional Court. What of decisions of the same court? The House of Lords was the first to decide that it could overrule itself<sup>18</sup> and although the Court of Appeal tried to do so the considered position is that it cannot.<sup>19</sup>

### **Supremacy of Parliament**

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<sup>15</sup> Meaning that it acted outside the powers given to it by Parliament.

<sup>16</sup> Meaning that it acted outside the process it was told to follow.

<sup>17</sup> Meaning a decision that no reasonable body would arrive at (see *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223).

<sup>18</sup> *Practice Direction (House of Lords: Judicial Precedent)* [1966] 1 WLR 1234.

<sup>19</sup> *Davis v Johnson* [1979] AC 264 *cf* *Young v Bristol Aeroplane Co Ltd* [1944] KB 718.

An issue of particular importance in common-law countries, especially one like England & Wales where the judges continue to develop the law, is who has priority? The legislature, executive or judiciary? The separation of powers (see below) suggests neither as each is a check on each other but even in the United States of America this does not happen fully.

In England and Wales it is quite clear that Parliament considers itself to be supreme and that common law ranks below statutory law. The courts have, for the most part, mainly supported this belief including stating on a number of occasions that the courts cannot examine how Parliament passes legislation.<sup>20</sup> Unlike in some countries, most notably the United States of America, the courts in England & Wales have no right to 'strike down' laws as unconstitutional or inappropriate. The closest the courts have to doing this is declaring that a law is incompatible with the European Convention on Human Rights<sup>21</sup> but crucially this does not interfere with its legality. All that a declaration does is to serve notice on the government that the courts consider the provision to be incompatible and allow Parliament to remedy the breach using secondary legislation.

Whilst the courts cannot strike down legislation they can, of course, interpret the meaning of statutory terms. The usual rule adopted to statutory interpretation is the literal rule, which simply requires the courts to use the ordinary everyday meaning of a word. The *Human Rights Act 1998* allows for a more purposive approach where a human rights issue is relevant. In these circumstances the court is entitled to interpret the terms in such a way as to provide compatibility with the Convention.<sup>22</sup> However this can only be taken so far. If it is not possible to interpret a term then the only available remedy is the declaration of incompatibility. Of course precisely what is open to interpretation is an issue of some debate and the interpretation of statutes has long been the source of tension between the government and the judiciary. This is an area that is likely to continue to raise tensions in the future.

Some query whether membership of the European Union abrogates the sovereignty of Parliament. Certainly it remains a live political issue. Within a paper of this size it is not possible to rehearse all of the arguments. Section 2, *European Communities Act 1972* makes it clear that certain E.U. laws will become directly effective within the English legal system, i.e. they become part of our laws. To an extent this would suggest that Parliamentary sovereignty has been abrogated since Parliament does not have an opportunity to scrutinise these laws. However the counter-argument is that Parliament still remains sovereign since it could, if so wished, pass either incompatible legislation or repeal the *European Communities Act 1972* in its entirety. Legislation in the United Kingdom is not subject to entrenchment and thus the 1972 Act could be repealed as easily as any other statute. Whether any government would do so is, respectfully, a political rather than purely legal issue.

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<sup>20</sup> See, most notably, *R (Jackson and others) v Attorney-General* [2005] 3 WLR 733.

<sup>21</sup> s.4, *Human Rights Act 1998*.

<sup>22</sup> *Ibid.*, ss.2 and 3.

## Separation of Powers

Montesquieu famously suggested that the three organs of State (legislature, executive and the judiciary) should be separated. Arguably the paradigm example of this is the United States of America where the legislature (Congress), executive (President) and judiciary are held by different people. The United Kingdom has never fully subscribed to this belief and, for example, the boundary between the legislature and executive is blurred since the executive is usually formed by the largest party in the House of Commons. Until recently there was concern about the link between the judiciary and the executive and legislature.

The principal concern was over the status of the Lord Chancellor. The office of Lord Chancellor is one of the most ancient within the UK and until 2005 it meant the holder was the speaker (chair) of the House of Lords (legislature), senior cabinet member (executive) and the most senior judge of the UK (judiciary). The *Constitutional Reform Act 2005* altered this providing for the Lord Chief Justice to become the senior judge (known as the President of the Courts of England and Wales) and for the House of Lords to appoint their own chair as Lord Speaker. This left only the cabinet position, something that has been retained with the current Lord Chancellor also holding the office of Secretary of State for Justice.<sup>23</sup>

However one further step is required. The highest court in the United Kingdom is the House of Lords. The judges who sit in that court are known as the Lords of Appeal in Ordinary (or “Law Lords” as they are colloquially known). As their name suggests, they are given peerages upon appointment and all are either life barons or baronesses. This means that members of the judiciary sit in the legislature (the House of Lords) potentially causing conflict. The *Constitutional Reform Act 2005* has addressed this issue through the creation of a Supreme Court. This court will, when it comes into effect in 2008, take over the functions of the House of Lords and at that time the existing Law Lords will become Justices of the Supreme Court. Whilst they will not be stripped of their peerages, they will not be able to sit in the House of Lords whilst an active member of the judiciary. The existing Law Lords will be able to return to the legislature upon their retirement and it is not yet known whether future appointed members of the Supreme Court will also be given a peerage or whether the link between the legislature and the judiciary will be broken completely.

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<sup>23</sup> The holder, Rt.Hon. Jack Straw MP, is also the first member of the House of Commons to hold the title Lord Chancellor.