

Chapter 2: Classifications and Concepts

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2.1 Introduction

One of the most difficult aspects of studying law is coping with legal terminology and understanding the different ways in which terms can be used. This chapter aims to familiarise students with some of the vocabulary and concepts they will encounter during their course by examining some of the ways in which law, legal systems and legal rules are categorised.

2.2 Common law

The term common law can be difficult to define as it is used in three different ways:

- to describe the system of law which operates in some states, including England and Wales;
- as a description of case law as opposed to legislation; and
- as a description of the body of case law derived from the old common law courts as opposed to equity which is case law derived from the old courts of equity.

2.2.1 Common law and civil law

When you compare the legal systems that operate in different states around the world, you must distinguish between systems based upon common law and systems based upon civil law. Those states whose legal systems are based upon English law are said to use a common law system. Clearly, in England and Wales we operate a common law system, as do many Commonwealth and former Commonwealth countries such as Australia, New Zealand, Canada, the West Indies and Hong Kong. The United States adopted the common law as it applied in the 13 original colonies at the date of independence. It has since been developed by the States (except Louisiana, which as a former French colony has a very different legal system) and by the Federal Courts and Supreme Court. The main features of common law systems are that, historically, they have evolved from custom and that they are heavily reliant upon case law, or judge-made law. Judges in a common law system have a central role in developing the law, creating or recognising new legal principles that will be followed by judges in later cases through the operation of precedent. One advantage of a common law system is said to be its emphasis upon providing certainty and consistency through the doctrine of binding precedent. Another is its ability to evolve and to create new principles to meet new situations. This inevitably means that when legal systems achieve independence, this evolution will take a different path in the different systems, or jurisdictions, so that the specific rules of the common law are no longer identical, and allowance has to be made for this when making comparisons between the systems, and when putting decisions in one jurisdiction forward as persuasive authorities in another.

A civil law system, on the other hand, originates ultimately from Roman law and is based primarily upon statutory codes designed to encompass all the legal rules in a particular area of law, so a civil law system will have as a minimum a Civil Code and a Criminal Code. These Codes will have been developed by a body of legal scholars who have studied the existing law and established the rules and principles on which it is based. In doing this they will partly have relied on legal principles contained in authoritative texts such as Justinian, and will partly have analysed previous cases and other statements of the law and **inductively** established the principles contained in them. In a sense the drafters of the Code have acted in the same way as common law judges, but they have then produced a comprehensive set of rules. Full investigations of the prior law were undertaken in France early in the 19th century, leading to the **Code Napoléon**, in Germany later in the 19th century leading to the **Bürgerliches Gesetzbuch**, and in Italy leading to the **Codice Civile**. Many states drew heavily on one or more of these sources, so Turkish and Japanese law derive significantly from German models, and French law has heavily influenced the whole of the Middle East. All the legal rules that have been established will be located within those codes and it falls to the judges to interpret and apply those legal codes. Most countries within Europe operate civil systems.

Civil law in practice is said to be **deductive** in nature because it is based on a comprehensive code of principles upon which all subsequent decisions must be based. The solution to any legal problem can be deduced from the code. Its great strength is that it is accessible to all: any citizen can, at least in theory, clearly and easily determine his legal rights and duties by reference to the statutory codes.

Judicial decisions do not have the same status as in a common law system. A decision is one judge's interpretation of the code, and this is not binding. However, the reasoning behind a decision may be influential, and decisions are reported and commented on. Once there is a consensus of opinion, and a number of judges have adopted the same interpretation, it is likely that a subsequent judge will take the same approach. It is referred to as "consistent decision-making" (*jurisprudence constante* in French and *ständige Rechtsprechung* in German). Although the weight of opinion may make it difficult for a judge to take a different view, in principle he can.

The format of a statutory code is the expression of broad general principles and the role of the judges is to apply the code so as to give effect to those principles. A **purposive** approach to statutory interpretation must therefore be adopted under a civil system in contrast to the **literal** approach so widely used by judges in common law countries. (See 3.7 for a detailed discussion of these and other approaches to statutory interpretation.)

The difference between a legal system that is based on common law and one that is based on civil law is largely one of approach. Under a common law system the law develops incrementally, with rules being laid down case-by-case. To this extent, it is said to be **inductive** in nature, that is, working from the particular instance to the general rule. Nowhere is the common law approach more evident than in the development of the criminal law. Murder is regarded as one of the most serious criminal offences, yet it has no statutory definition; instead, the elements that must be established by the prosecution before a jury can convict of murder (killing with malice aforethought) are laid down by case law (the defendant must intend to kill or to cause grievous bodily harm). A state whose legal system is based upon civil law will have

a criminal code within which all the relevant legal principles relating to the offence can be found and from which the solution to the problems created by an individual case can be deduced.

Using these terms to describe the nature of a legal system is both helpful and dangerous. Classifying a legal system as based either on common law or civil law tells us only about the general approach adopted within the legal system of that country. There is a tendency to over-estimate the freedom that judges have to create law within a common law tradition and to underestimate the extent of the discretion available to judges within a civil law system. Legal systems based on common law are not identical, each has developed its own legal principles on case-by-case. Just because a legal system is categorised as a common law system does not mean it will have no statutory code; indeed, we are currently working very slowly towards the adoption of a Criminal Code in England and Wales (the Isle of Man has had a Criminal Code since 1872, in the USA there is a Uniform Commercial Code and in England and Wales a number of statutes in the last quarter of the 19th century were intended as sections of a Commercial Code – **Sale of Goods Act 1893, Partnership Act 1890, Factors Act 1889, Bills of Exchange Act 1882**, etc.).

In 1973 the United Kingdom joined the European Community, now the EU. Unsurprisingly, the legal system of the European Community was based upon civil law since the original six Member States operate such a system domestically. Since, by virtue of the **European Communities Act 1972**, directly effective European law is automatically incorporated into UK law, civil law principles might be said to have become influential in the UK in recent years, despite our common law origins.

Interestingly, although based on civil law principles, judges in the European Court of Justice have adopted a proactive role in developing the law of the EU and clearly regard the growing body of case law as important to its future development. In the early years the judges always based their decisions on the relevant provisions of the **Treaty of Rome**, but more recently they have used earlier decisions as the reference point. Some commentators impute this to the influence of English and Irish lawyers, Advocates General and Judges. Globalisation and the increasing importance of international law have also ensured wide familiarity and probably some convergence of the essential principles of different forms of legal system within all legal systems of the world.

The modern laws of Northern Ireland (and indeed the Irish Republic) are based on the English common law, but the same cannot be said for the law of Scotland. Scottish property and family law, including rights of succession is closer to the civil law jurisprudence of continental Europe than English law is. The law relating to obligations (contract and tort, which the Scots call delict), and much of criminal law is broadly equivalent to common law. In general Scots law is uncodified and follows an adversarial system of trial, rather than the inquisitorial system widely adopted in Europe. For this reason, and because of its respect for judicial precedent, Scotland is categorised as operating a “common law” system.

2.2.2 Common law and legislation

The second way in which the term “common law” is used is to differentiate between “judge-made” law (or case law) and legislation. New legal principles can evolve through cases decided by the courts, for example, the famous case of ***Donoghue v Stevenson [1932]*** (incidentally a Scottish case on appeal

from the Court of Session) gave rise to the “neighbour principle” that provided the foundation for the development of the modern law of negligence. The distinction between case law and legislation is easy to understand, although it is important to appreciate that once a piece of legislation has been passed it is then for the judges to interpret and apply it in cases. This process of statutory interpretation is itself a specialised example of the case law method in operation, as the judges use techniques developed and refined in earlier cases and reach conclusions on the meaning of statutes by looking at how similar expressions have been interpreted by judges in earlier cases.

2.2.3 Common law and equity

The distinction between principles of equity and common law is a matter of history and can be fully understood only by examining their origins; to that end there follows a very brief historical account.

2.2.3.1 The common law

King Henry II (1154–1189) is normally credited with sowing the seeds for the development of the common law and is referred to as “Father of the common law”. Prior to his reign, royal justice was dispensed solely from the King’s Court, known as the *Curia Regis*, normally located at Westminster, which plainly caused problems for people living outside London. Local justice was meted out in Shire Courts and Hundred Courts, based upon local customs, which could vary considerably. The jurisdiction of the local courts was wide, covering decisions relating to bridge building, hedge trimming, road repairs, etc. which we might now regard as being part of local government, as well as dealing with disputes between individuals and lesser crimes. Local landowners presided over “manorial” courts, deciding disputes affecting tenants.

Henry II’s impressive achievements were the creation of the office of judge (known as “justiciar”) and the establishment of the General Eyre. Under this system, judges were required to travel around the country, supervising local government and dispensing justice in the regions. Henry II may well have been motivated, at least in part, by self-interest, since the first task of the travelling judges was to ensure that the King was receiving from the regions all payments to which he was entitled. The second function was to hear “common pleas”, which involved resolving disputes between citizens. A further motive for the King was to remove the threat posed by feudal lords who had previously presided over the local courts and had established their own power base by building private armies.

The General Eyre was viewed with terror throughout the country since the travelling judges were seen as heavy-handed but corruptible. Local administrators were prepared to pay huge sums in return for lenient treatment and even huger sums to prevent the visit from taking place at all!

The Assize system was then established as an extension to the General Eyre and acquired a criminal jurisdiction. The country was divided into six circuits and each of the judges was assigned to a circuit, travelling from court to court around that circuit. Punishments imposed by the Assizes were severe, with mutilation and exile being common sanctions. In 1285, the **Statute of Westminster II** was passed, enabling judges to hear on circuit civil cases that had previously been dealt with at Westminster where the central courts were located.

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