

Origins and development of English law

Europe uses two major systems of law that have developed from each country's specific history and customs: the Roman system (codified law) and the English common law system. The Roman system was adopted in France and remains the basis of many other modern systems notably in continental Europe whereas other countries, including USA, have adopted the common law system.

Two Kinds of law

England is often referred to as a common law country whereas continental legal systems are described as civil law systems. Law professors of continental legal systems, influenced by Roman law, approach the law from an academic perspective and raise questions of rights and duties in contrast with the judges of common law countries who would work from a practical perspective and focus on concrete remedies.

Custom

The historical origins of custom

Custom law first took hold during the Anglo-Saxon period when local customs determined most laws. Before 1066, there was no unified body of law in the country. Local unwritten customs were used to oversee, compensate and punish members of the community.

From custom law to common law

The Norman conquerors sought to establish their rule in England by introducing their methods of administration. William I appointed itinerant justices to examine different local practices dealing with disputes and crimes, with the goal of rejecting the less pragmatic and reasonable ones and founding a set of regulations to be applied uniformly throughout the country. Common law was built up from both custom and judge-made law.

Custom today

Today, custom consists of established patterns of behaviour that can be verified objectively within a particular social setting. A given custom must meet several conditions to be legally enforceable. It must be reasonable, in existence since "time immemorial", clear and certain, specific to a particular geographical region, uninterrupted, exercised in a peaceful manner, consistent with other local customs, in conformity with existing statutes.

Case law

Common law and its developments

Firstly, it was a rigid system, especially because it was based on a system of writs. The plaintiff needed to select the appropriate writ to start his action. Secondly, in some cases the remedies awarded by the courts were inadequate. Thirdly, the common law only recognized certain rights.

The difference between common law and equity

An equitable remedy is at the discretion of the court. Equity recognizes rights that the common law does not, such as the equity of redemption and the rights of a beneficiary under the trust. Equity was created to remedy the deficiencies of common law and in the long term, it challenges it.

The doctrine of precedent

Case law is often referred to as “judge-made law” because of the present-day role of judges as lawmakers is much reduced compared to the past. Their decisions are systematically collected and assembled into volumes of reported cases, law reports, probably the most important source of law for the legal profession.

The basis of the system of precedent is known as the principle of stare decisis (“stand by what has previously been decided in a similar case”). A statement of law by a judge in a case can become binding on judges of inferior courts in similar cases. The decisions of the Supreme Court are binding on all lower courts. The doctrine of precedent governs the development of case law; it is rather more flexible than might at first appear.

UK legislation

The major source of UK law is statute law. Legislation can be either primary or secondary. The British Parliament at Westminster enacts primary legislation in the form of Acts of Parliament. Government ministers are empowered by Parliament to introduce a great volume of legislation known as secondary legislation or delegated legislation.

European Union legislation

The United Kingdom is a member of the European Union; hence, European Union legislation is also a source of English law. The interaction between EU law and national law covers those areas where the two systems complement each other. Nevertheless, the principle of the primacy of European Community law over national law was pronounced by the European Court of Justice in the case Costa vs. Enel (1964). EU legislation is having an increasing effect on all aspects of life in the United Kingdom.

The European Convention on Human rights

Most of the European Convention on human rights has now been “incorporated” into English law by virtue of The Human Rights Act 1998.

The British Constitution

According to Dicey in *An introduction of the Study of the Law of the Constitution*, Constitutional law, as the term is used in England, appears to include all rules which directly or indirectly affect the distribution of the exercise of the sovereign power in the state”. Contrary to widespread belief, the UK has a Constitution, but it is not single formal document: The Habeas Corpus Act (1679), The Bill of Rights (1689), The European Communities Act (1972), The Human Rights Act (1998).

Habeas corpus is under attack, say critics of the government's anti-terror bill. Habeas corpus is Latin for "You may have the body". It is a writ requires a person detained by the authorities be brought before a court of law so that the legality of the detention may be examined. It does not determine guilt or innocence, merely whether the person is legally imprisoned. These days it is rarely used, although it has greater effect in US, where its common use is by prisoners after conviction. It has a "mythical status". The Anti-terrorism, Crime and Security Act 2001 passed in the aftermath of 9/11 set aside habeas corpus in regard to terrorism suspects who cannot be persecuted.

The separation of power in historical perspective

In England power started with the Crown. Power was not conferred though the force of a revolutionary constitutional document.

In the Tudor period (1485-1603), great monarchs ruled in England. For England, it was a time of intellectual and cultural development, of commercial success, and of military domination. At the centre of everything was the Crown. Parliaments were summoned, and dissolved, at the Crown's will.

The combined effect of the constitutional statutes is that monarchs reign in England not because they have a divine right to do so but because Parliament had permitted it. Power started with the Crown, but it continues to vest in the Crown only because, and for only as long as, Parliament continues to wish.