Card & James'

BUSINESS LAW

3rd Edition

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OXFORD
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Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
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First edition 2009
Second edition 2012

Impression: 1

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Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2013956030

ISBN 978–0–19–870412–6

Printed in Great Britain by
Ashford Colour Press Ltd, Gosport, Hampshire

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PART I

the English legal system

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1 What is law?

- Theoretical conceptualizations of law
- Classifying the law
- Defining the 'English legal system'

INTRODUCTION

An ordered society is premised upon the adherence to rules. Rules exist in many forms, whether social rules (for example, hats should not be worn in church), scientific rules (for example, $E = MC^2$), sporting rules (for example, in basketball, players may not run with the ball), or legal rules (for example, it is a crime to steal the property of others). Whilst it could be said that all laws are rules, it is certainly not the case that all rules are laws. So why are some rules elevated to legal status and others not? How are the various legal rules categorized? What is the geographical limit of English law? These issues will be explored in this opening chapter.

The purpose of this chapter is to provide students with a rounded conception of what law is. Whilst much of what is discussed is not of crucial importance in the context of how businesses operate, it will aid the students in developing a more thorough appreciation of the theories that underpin English law, as well as in understanding the various ways in which English law can be classified and the parameters of English law. Much of the terminology used in this discussion is embedded in our legal system and will be of considerable aid in subsequent chapters, when we discuss the law as it applies specifically to businesses.

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Theoretical conceptualizations of law

For several millennia, legal philosophers have struggled to find answers to the questions stated above. Given the scope of the arguments involved, a detailed discussion will be beyond the scope of this text. A brief discussion of the principal schools of thought will, however, be of significant aid to any student who is interested in exploring the question of 'what is law'. It may be considered that such theories offer little to a person seeking to understand how the law applies to businesses, but it should not be thought that business law operates in a vacuum. The legal theories that

underpin the law apply to all laws, whether they are applicable to natural persons or businesses. Further, an appreciation of the theory behind the law will result in a more rounded understanding of the operation of the law. Oliver Wendell Holmes Jr, a Justice of the US Supreme Court from 1902 to 1932 and one of the most highly regarded jurists ever, stated that:

> If a man goes into law it pays to be a master of it, and to be a master of it means to look straight through all the dramatic incidents and to discern the true basis for prophecy. Therefore, it is well to have an accurate notion of what you mean by law.[1]

Natural law

In terms of chronology, the earliest identifiable theory discussing the issue of what is law concerns the role of 'natural law'. The first major natural law writings can be traced back to the works of Plato (427–347 BCE) and his pupil, Aristotle (384–322 BCE), but the theory gained prominence during the Judaeo-Christian period with the works of St Augustine (354–430 CE) and St Thomas Aquinas (1225–74 CE). Augustine was the Bishop of Hippo and in his 5th-century text *De Civitate Dei* ('The City of God'), he postulated the existence of the *lex aeterna* (eternal law), an unchanging form of law that derived directly from the will of God. The *lex aeterna* was the highest form of law and, in *De Libero Arbitrio* ('On Free Will'), Augustine infamously stated '*lex iniusta non est lex*' ('an unjust law is no law at all'), meaning that any man-made laws that conflicted or failed to uphold the *lex aeterna* were unjust and need not be obeyed. A similar viewpoint was expressed by St Thomas Aquinas when he stated '*lex tyrannica cum non sit secundum rationem non est simpliciter lex sed magis est quadam perversitas legis*' ('a tyrannical law made contrary to reason is not straightforwardly a law, but rather a perversion of true law'). Therefore, for a natural lawyer, when discussing the issue of what is law, the relationship between law and morality is the crucial factor.

subjective: relating to the thoughts or characteristics of an individual

precedent: an authoritative and binding decision in a case used to decide a later case with broadly similar facts

In time, the influence of natural law waned as a number of weaknesses began to emerge. First, because natural law places great emphasis on the morality of the law, it is a highly subjective theory. If our legal system were to embrace natural law, the result would be severe inconsistency in decisions, because what one judge would regard as moral might be considered immoral by another. If judges were free to base their decisions on their own sense of morality, the doctrine of precedent would become redundant and much of the law's consistency and predictability would be lost.

Second, it could be argued that natural law is not a particularly realistic school of thought, in that an unjust law is just as likely to be applied by the courts as a just one. Judges do not ignore the law simply because they view it as unjust or immoral.

One should not, however, conclude that natural law has no role to play in the English legal system. Judges may not be free to ignore the law if they consider it immoral (although, as we shall see, they do have ways in which to avoid precedent and considerable discretion in the interpretation of statutes), but there does exist a group of persons who can—namely, juries. As shall be seen in Chapter 2, there are numerous examples of cases in which juries have blatantly and unashamedly delivered a verdict contrary to the law on the basis that an application of the law would

1. Oliver Wendell-Holmes Jr, 'The Path of the Law' (1896–97) 10 Harv LR 457, 475.

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produce an unjust result. Further, although judges cannot act overtly on the basis of what is considered moral, the system of law known as 'equity' (see 'Common law and equity' at p 12) is concerned with notions of fairness, equality, and justice—notions that lie at the heart of classic natural law theory.

Ultimately, however, natural law theories do not help us to understand what the law is, but rather what the law should aspire to be. A number of legal philosophers became disenchanted with natural law due to its inherent subjectivity, and sought to propound a theory that was more objective and which better defined what the law actually was. This resulted in the birth of 'legal positivism'.

➔ **objective:** unbiased, impartial, and detached; not affected by personal feelings or opinions

Legal positivism

From a philosophical standpoint, positivism is a school of thought that states that true knowledge can only derive from the perception of our senses—notably, observation. Only that which can be observed and empirically evaluated can be regarded as proven. Accordingly, judgements based on values, morals, or perceptions of good and evil are irrelevant, because they cannot be measured scientifically. From a legal point of view, the fathers of legal positivism were Jeremy Bentham (1748–1832) and John Austin (1790–1859). Bentham objected to the predominant naturalistic legal philosophy of the day and, in a prophetic passage written thirteen years before the events of the French Revolution, Bentham stated 'the natural tendency of such [naturalist] doctrine is to impel a [person]…, by the force of conscience, to rise up in arms against any law whatever that he happens not to like'.[2]

Bentham and Austin's answer was to devise the 'command theory of law'. According to this theory, a law can be viewed as a command issued by an unfettered sovereign that is backed up by the imposition of a sanction. The views of Bentham and Austin have come to be doubted by modern legal positivists who argue that:

- not all laws are in the form of commands;
- the command theory is based upon an unfettered sovereign, but in many modern countries the 'rule of law' is dependent upon the state's powers being limited; and
- only breaches of criminal law are backed with sanctions.

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Accordingly, the command theory fell out of favour and more modern positivist theories have emerged, the most prominent of which derived from HLA Hart's 1961 text, *The Concept of Law*.[3] Hart chose to base his definition of law on rules, as opposed to commands, and he argued that rules were of two types. Primary rules set out the basic rights of obligations of citizens (that is, what they should and should not do). Hart recognized, however, that a body of primary rules would be ineffective in itself, in that there would be no mechanism for their interpretation, alteration, and enforcement. Accordingly, there also had to exist secondary rules, which would establish how the primary rules should be administered, enforced, and reformed.

Just as Hart rejected 'commands' in favour of rules, so, in turn, have recent theories rejected 'rules' in favour of 'rights'. Notably, Ronald Dworkin[4] has argued against legal positivism, partly on the ground that it is too preoccupied with rules.

2. Jeremy Bentham, *A Fragment on Government* (Basil Blackwell 1967) [19].
3. HLA Hart, *The Concept of Law* (2nd edn, OUP 1997).
4. Ronald Dworkin, *Law's Empire* (Harvard University Press 1986).

Dworkin argued that a legal system is not only made up of rules, but also of rights, principles, and policies, and that very often, these rights, principles, and policies are more important than the rules. As an example, Dworkin cites the case of a man who murders his grandfather in order to claim his inheritance early.[5] According to the strict letter of the law, the murderer would be entitled to the inheritance, but the courts denied his claim, applying the public policy principle that a person should not be allowed to profit from his own crime. Accordingly, policies and principles often determine the operation of the law.

Classifying the law

Criminal law and civil law

Perhaps the most fundamental legal distinction is that between criminal law and civil law. Understanding whether a particular act constitutes a crime or a civil wrong (or both) is fundamental in determining where the case will be tried, what the parties will need to establish, what procedural rules apply, and what the potential outcome may be. Fortunately, distinguishing between civil and criminal acts is usually straightforward, because civil and criminal law cases are tried in different courts, and have different procedures, outcomes, and terminology. Table 1.1 clearly outlines the fundamental differences between criminal and civil law cases.

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TABLE 1.1 Distinguishing criminal law and civil law

	Criminal law	Civil law
Purpose of the law	To preserve social order by punishing wrongdoers and deterring others from committing crimes	To compensate a person who has suffered loss or injury due to the acts or omissions of another
Parties in the case	The state (*R*—*Regina* ('Queen') or *Rex* ('King')) prosecutes the defendant (for example, *R v James*)	The claimant (the person who has suffered loss) initiates a claim against the defendant (the person alleged to have caused the loss) (for example, *Card v James*)
Outcome of the case	If innocent, the defendant is acquitted. If guilty, the defendant is convicted and a sentence (for example, imprisonment, fine, community service) is imposed	The claimant either wins the case and is awarded a remedy, or loses and is not awarded a remedy
Courts involved	First heard in either a magistrates' court or the Crown Court	First heard in either a county court or the High Court (although some civil cases can be heard in a magistrates' court)
Burden/ standard of proof	The prosecution must prove the guilt of the defendant beyond a reasonable doubt	The claimant must prove his case on a balance of probabilities
Examples	Murder; manslaughter; theft; sexual offences; offences involving the misuse of drugs; terrorist offences	Breach of contract; negligence; slander; employment law disputes; cases involving the sale of good

5. The case in question, *Riggs v Palmer* 115 NY 506 (1889), was a US case, but the English case of *R v National Insurance Commissioner, ex p Connor* [1981] QB 758 (DC) has almost identical facts and came to the same conclusion.

Based on Table 1.1, it can be deduced that the most effective way in which to determine if an act is a crime or a civil wrong is not to focus on the act itself, but rather to focus on the consequences of the act. For example, if the legal consequence of an act is the prosecution and punishment of the perpetrator, then the act will constitute a crime. If a person is seeking compensation, the case is likely (although not necessarily) to be a civil one.

It should, however, be noted that the criminal/civil distinction is not mutually exclusive (that is, that an act can result in both criminal and civil liability), as the following example demonstrates.

Eg Crimes and civil wrongs

Joanne leaves her coat in a nightclub cloakroom. Andrew, the cloakroom attendant, searches through Joanne's coat and steals her mobile phone, which is secreted in one of the pockets. In such a case, Andrew would be guilty of the crime of theft. He would also have committed several civil wrongs—namely, the tort of **conversion** and breach of contract (his actions would breach the contract between him and his employer).

conversion: interfering with goods in a manner that is consistent with another's right to possession (see p 427)

The distinction between criminal law and civil law is further blurred by the existence of 'hybrid' offences that combine criminal and civil legal proceedings. For example, the Protection from Harassment Act 1997 provides that it is a criminal offence to act in a manner that causes another person to fear, on at least two occasions, that violence will be used against him.[6] Section 3 goes on to provide a civil remedy for victims of harassment that can result in the payment of damages or the imposition of a restraining order. Although such an order is a civil remedy, its breach will result in the commission of a criminal offence.[7]

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Public law and private law

This textbook is concerned primarily with private law topics—but in order to understand what we mean by 'private law', it is important to explain how it differs from public law. At its simplest level, public law concerns laws that regulate the relationship between the state and its citizens (this would include legal persons, as well as natural persons). Examples of public law topics would therefore include criminal law (the state prosecutes and punishes persons who commit crimes), human rights (persons may initiate proceedings against the state if their human rights have been breached), and administrative law, which deals with disputes between persons and government agencies.

Conversely, private law concerns laws that regulate the relationships between persons. In private law cases, the role of the state is limited to providing a forum within which to remedy disputes and the subsequent enforcement of that forum's decision. Examples of private law topics include family law (laws regulating disputes between spouses, children, etc), contract law (laws governing the rights and obligations of contracting parties), and company law (laws governing the rights and responsibilities of directors, shareholders, etc). Table 1.2 illustrates the principal differences between public law and private law.

In recent years, however, the line between public law and private law has become blurred, because the state has become increasingly involved in traditional private law

6. Protection from Harassment Act 1997, ss 1 and 4(1).

7. ibid s 3(6).

TABLE 1.2 Distinguishing between public law and private law

	Public law	Private law
Regulates the relationship between	The state and persons (both natural and legal)	Persons (both natural and legal)
Purpose	Focuses on conduct that the state wishes to discourage	Focuses on enforcing the rights and obligations of persons
Case usually initiated by	The state	The person alleging wrongdoing
Role of the state	Undertakes responsibility for detection, prosecution, and (if relevant) punishment.Also provides a forum for dispute resolution and mechanisms to enforce the forum's decisions	Limited to providing a forum for dispute resolution and enforcement of that forum's decision
Examples	Criminal law; human rights breaches; constitutional law; administrative law	Contract law; the law of torts; company law; property law; the law of trusts

disputes. For example, historically, contract law has been a quintessentially private law topic, with little, to no, state involvement. However, as consumer protection has become an increasing priority for governments, the state's role in contract law has grown considerably—notably, through statutory measures, such as the imposition of implied terms in consumer contracts. For example, s 14(2) of the Sale of Goods Act 1979 implies a term into sale of goods contracts that goods will be of 'satisfactory quality'.

implied terms: terms added to the contract by the law, which usually serve to protect consumers (discussed at p 173)

Common law and civil law

To understand fully the operation of the English legal system and its place within the legal systems of the world, it is necessary to understand the various meanings of the term 'common law'. Matters are complicated, however, by the fact that the phrase has three different meanings. At its broadest level, it refers to those countries around the world that have based their legal system on that of England—namely, the Commonwealth countries (notably, Australia, New Zealand, and Canada) and the USA (at both federal and state level).[8]

Juxtaposed with common law systems are civil law systems. Just as the phrase 'common law' has several different meanings, so too does the term 'civil law'. It has already been noted that it can refer to laws that are not criminal in nature. A second meaning refers to those legal systems that are based largely on Roman law.

The civil law system is undoubtedly the most widespread legal system in the world and is especially dominant in Continental Europe. In fact, the only common law systems in Europe belong to the UK and the Republic of Ireland. Civil law systems are characterized by a codified written body of laws that will attempt to set out the entire law in a certain area (for example, all of the crimes that can be committed may be found in a single Code).[9] Such Codes tend to be less specific and more

8. Except the state of Louisiana, which, being a former French and Spanish colony, has a civil law system.
9. It should, however, be noted that common law systems may also have certain areas of the law codified.

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abstract than legislation in common law systems. The reason for this is that, in civil law systems, the judiciary and the legislature appear to cooperate more harmoniously than in common law systems. Civil law judges view their role as simply interpreting the various Codes in line with the intention of the legislature and do not seek to create law. Conversely, the role of judges in common law countries tends to go beyond interpretation into law creation, and when common law judges do interpret legislation, it has not always been consistent with the legislature's intentions. As judges in civil law countries cooperate more closely with the legislature, there is no pressing need for a system of binding precedent, although the decisions of 'higher' judges do tend to be followed.

The role of the judiciary when interpreting legislation is discussed in 'Statutory interpretation' at p 53

Table 1.3 sets out the main differences between common law and civil law systems.

TABLE 1.3 Distinguishing between common law and civil law legal systems

	Common law systems	Civil law systems
Origins	Originated during the Norman Conquest in 1066, but it was during the reign of Henry II that the foundations of the modern common law system were established	Originated in Roman law—notably, the *Corpus Juris Civilis ('Body of Civil Law')* created by Emperor Justinian during the period 529–34 Ce
Source of laws	The bulk of the law is usually found in case law (deriving from the courts), but statute (deriving from Parliament) is playing an increasing role	All laws tend to be set out in a number of written documents known as 'Codes'
Role of the judiciary	Judges in common law systems both create and interpret law	To interpret the law in line with the legislature's intentions and not to create law
Role of precedent	Common law systems have a well-established system of binding precedent	Civil law systems tend not to have a doctrine of binding precedent, but, in practice, the decisions of 'higher' judges are usually followed
Authority of academic writings	Rarely cited and of little weight, although there is evidence that this is changing	Not a source of law, but accorded significant weight—often greater weight than previous judicial decisions
Recruitment of judiciary	Normally recruited from the ranks of legal practitioners	Civil law systems tend to have a career judiciary, who are trained to be judges straight from university

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Common law and statute law

The second meaning of the term 'common law' refers to the body of laws and procedures created by the judiciary and applied via the doctrine of precedent. Conversely, statute law concerns laws created by Parliament in the form of legislation. The last century has witnessed a substantial increase in the amount of legislation passed by Parliament, due largely to the increasing role played by the state in certain areas. This legislation needs to be interpreted and applied, and Parliament relies upon the judiciary to interpret legislation in a manner that is consistent with the intention of Parliament.

Common law and equity

The third meaning of the term 'common law' relates to the system of law that emerged following the Norman Conquest in 1066. Prior to this, England lacked a unified legal system; instead, different regions of the country had their own system of laws, based on a mixture of custom and the incorporation of laws imposed by invading forces. For example, Viking invaders who had settled in northern England during the ninth century caused the northern counties of England to have a system of laws that was based heavily on Danish law.

The Norman Conquest brought about a legal revolution that paved the way for the system in place today. Although William the Conqueror is often credited with commencing the process that led to the establishment of the common law, it was actually a century later, during the reign of Henry II, that we find the genesis of our modern legal system. When Henry took the throne in 1154, there were only eighteen judges in England.[10] Five of those judges remained in Westminster and established the Court of King's Bench. The remaining judges travelled the country[11]—but applying what laws? It is generally believed that the most appropriate customs of the counties of England were selected to form the basis of a unified, national body of laws. In reality, the travelling judges applied laws that were created predominantly by the King's Bench and many local customs were replaced by a body of laws deriving from Westminster that were soon being applied throughout the country. For the first time in England's history, its people were subject to a body of laws that were common to all (hence the 'common law'). The decisions of the judges were recorded and applied in similar cases throughout the country, thereby creating the beginnings of our system of precedent. However, as the system grew, a number of problems began to emerge.

➜ **damages:** an award of money designed to compensate loss

➜ **writ:** a written command from the court requiring either the performance of, or the abstention from, an act

- Initially, the only remedy at common law was an award of **damages**—but damages are not always an appropriate remedy. For example, an award of damages would be of little use to a landowner who is plagued by ramblers who unlawfully enter his land. He would prefer a court order prohibiting the ramblers from entering his land, but such a remedy was not available under the common law.
- To commence an action in the common law courts, the claimant needed to obtain a **writ**, with different writs existing based upon the different types of case. The claimant would need to demonstrate that his case fell within the parameters of an existing writ. If it did not, he would be unable to proceed with his claim. Further, during the reign of Henry III, the passing of the Provisions of Oxford meant that new forms of writ could not be created, thereby hampering the expansion of the common law. Even if the claimant could obtain a writ, the slightest defect in the writ's wording would defeat the claim.
- Whilst the broad-brush approach of the common law made the law certain, it also made it inflexible and, in cases involving unusual or unforeseeable circumstances, following previous decisions could often lead to an unjust result.

The result was that many persons with legitimate grievances could not obtain justice. The response was to permit persons to petition the King directly for a remedy.

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10. Today, there are over 9,100 judges (including Tribunal judges), and just over 23,000 magistrates.
11. This system, whereby a core group of judges remained in London and the remaining judges travelled the country, was to continue for over 800 years. It was finally abolished in 1971.

As the number of such petitions grew, they were delegated to the Lord Chancellor and a specific court created to hear them—the Court of Chancery. The important point to note is that these cases were not based upon obtaining writs, or following strict procedures and precedents; rather, these cases were decided based upon fairness, morality, and natural justice. For this reason, this supplementary system of law became known as 'equity'.

In time, equity developed new remedies (notably, injunctions and specific performance) for situations in which damages were inappropriate. However, unlike at common law, winning a case did not guarantee a remedy. As equity is based upon fairness, the claimant would only be granted a remedy if he had acted fairly. The famous equitable maxims were developed, chief among them being 'He who comes to Equity must come with clean hands', meaning that a claimant seeking an equitable remedy must himself behave equitably. To ensure that the principles of equity could not be defeated by the rigidity of the common law, the courts held that where equity and the common law conflicted, equity would prevail.[12]

injunction: a court order restraining an act, or requiring an act to be performed

specific performance: a court order requiring performance of an act, normally to fulfil a contract

Although equity was never intended to be a rival system to the common law, in time, it came to be regarded as such. As the common law was based upon consistency and predictability, and equity was based upon morality and flexibility, it was inevitable that conflict would arise. Further, the administrative and procedural rigidity that plagued the common law courts soon came to affect the Court of Chancery too, and equity cases soon gained a reputation for being lengthy and expensive. The problems largely derived from having the two systems of law being based in separate courts. Therefore, the Supreme Court of Judicature Acts of 1873 and 1875 merged the courts to create the modern court structure that we have today. The administration of the common law and equity was fused, but the systems of law themselves continued to exist separately. Any court could apply common law or equitable principles and, if a claimant had a cause of action in common law and equity, he could bring his case in a single action, as opposed to two.

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Equity as a supplementary system of law remains of crucial importance. In fact, equity's continuing importance is demonstrated in that the rule providing that equity prevails over the common law has now been codified.[13] As time progressed, new equitable remedies were developed, but it is still a fundamental principle that they are discretionary and the courts will not hesitate in denying a remedy to a person with a valid claim/defence if his conduct does not meet with equitable principles, as the following case demonstrates.

codified: the placing of law into statute

D&C Builders Ltd v Rees [1965] 3 All ER 837 (CA)

FACTS: Rees owed £482 to D&C Builders Ltd. Knowing that the company was in financial difficulty, Rees's wife offered it £300 in settlement of the debt, adding that if it refused, it would receive nothing. The company accepted, but later sued for the remaining £182. Rees's wife attempted to rely on the doctrine of promissory estoppel.

HELD: The Court of Appeal did not permit Rees to rely on the equitable doctrine of promissory estoppel, because his wife's conduct had been improper (that is, she had not come to equity with clean hands).

Promissory estoppel is discussed at p 157

12. *Earl of Oxford's Case* (1615) 1 Rep Ch 1.

13. Senior Courts Act 1981, s 49(1).

Table 1.4 clarifies the main differences between equity and the common law.

TABLE 1.4 Distinguishing the common law from equity

	Common law	Equity
Origin	Derived from the body of precedent created by circuit judges following the Norman Conquest in 1066	Derived from decisions of monarchs and, later, of Lords Chancellor sitting in the Court of Chancery
Status	A complete system of law	A supplementary system of law created to remedy the harshness of the common law, but which could not exist without the common law
Availability of a remedy	The claimant acquires a remedy as of right upon winning the case	Remedies are granted at the discretion of the court, and subject to maxims, including: • 'He who comes into Equity must come with clean hands' • 'Delay defeats equity' • 'Equity regards that as done which ought to be done'
Examples of remedies	Damages	Injunctions; specific performance; estoppel; rectification; rescission

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Defining the 'English legal system'

Laws have geographical limitations. A person resident in England would not usually be subject to the laws of France whilst he is present in England—he is subject to the laws of what judges, academics, and practitioners universally refer to as the 'English legal system'. Those not familiar with the historical, political, and cultural factors that led to the creation of the United Kingdom could be forgiven for thinking that the laws of the English legal system apply only to those within England, but the truth is somewhat more complex, leading to the term 'English legal system' being somewhat inaccurate. Having discussed what law is and how it may be classified, it is equally important to understand to whom the laws of the English legal system apply.

Geographically, the United Kingdom[14] consists of four countries (Wales,[15] England, Scotland,[16] and Northern Ireland). From a legal point of view, however, the United Kingdom is anything but united, with three separate legal systems existing within the UK, namely:

1. the legal system of England and Wales;
2. Scots law; and
3. the legal system of Northern Ireland.

14. Or, to give it its full title, the 'United Kingdom of Great Britain and Northern Ireland'.
15. There is debate as to whether Wales is a country or is still regarded as a principality (that is, a state ruled by a prince). Current weight of opinion would appear to lean towards it being a country.
16. It is worth noting that a referendum is due to take place in Scotland on the 18 September 2014, which will determine whether or not Scotland remains part of the United Kingdom.

England and Wales

Although England and Wales may constitute two separate countries, they essentially constitute one legal system. The Law in Wales Acts of 1535 and 1542 provided that the laws of England would also apply fully in Wales, thereby legally annexing Wales to England. Therefore, when we refer to the 'English legal system', we are actually discussing the laws that apply usually to both England and Wales (so, technically, we should refer to the legal system of England and Wales).

Recent developments have complicated matters. Although the move towards **devolution** in Wales has not been as pronounced as that in Scotland and Northern Ireland, significant steps have still been taken. The Government of Wales Act 1998 created the National Assembly for Wales, but did not grant it legislative competence. This was redressed in part by the Government of Wales Act 2006, which allowed the Assembly to pass **delegated legislation** in relation to specified devolved areas.[17] Potentially more significant is the fact that the 2006 Act provided that, upon the passing of a referendum in Wales, the Assembly would gain the ability to pass **primary legislation**, thereby bringing the Welsh Assembly onto a footing similar to that of the Scottish Parliament. In March 2011, such a referendum was passed, thereby allowing the Welsh Assembly to create primary legislation in the form of Acts of the National Assembly for Wales.[18] To date, the Assembly has passed twelve Acts, some of which have introduced extremely significant reforms (e.g. the Human Transplantation (Wales) Act 2013, which aims to increase the number of donor organs available by introducing an opt-out system).

Despite the considerable law-making powers of the National Assembly, in relation to areas that are not devolved (for example, defence and immigration), the UK Parliament will still make laws for Wales and so the phrase 'English legal system' will continue to refer to the system in England and Wales,[19] and it will be some years before the general legal systems of the two countries differ.

➜ **devolution:** the transfer of power to a lower level (for example, from central government to local government)

➜ **delegated legislation:** legislation made by those authorized by Parliament to create legislation (see 'Types of legislation' at p 46)

➜ **primary legislation:** legislation passed by Parliament in the form of an Act (see 'Acts of Parliament' at p 46)

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Scotland

Unlike Wales, which gained its own Assembly relatively recently, Scotland can trace the existence of its own Parliament back to the mid-thirteenth century. Prior to the Acts of Union 1707, England and Scotland had their own Parliaments creating and administering their own laws. The 1707 Acts joined the kingdoms of Scotland and England to form the 'United Kingdom of Great Britain'. The Acts also dissolved the Parliaments of England and Scotland, and replaced them with the UK Parliament, based in Westminster. Crucially, whilst the 1707 Acts dissolved the Scottish Parliament, they preserved Scots law, with the result that, to this day, Scotland has its own legal system and set of laws. Following a referendum in Scotland in 1997, a new Scottish Parliament was created (under the Scotland Act 1998), which has the power to create legislation in certain devolved areas. Note however, that the Parliament at Westminster remains the supreme legislature in Scotland, and can pass laws that apply to Scotland with the same force of law as in England and Wales. However,

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17. Government of Wales Act 2006, Pt 3. The list of devolved matters can be found in Sch 5.

18. ibid s 107. The ability to pass primary legislation is limited to twenty devolved areas—see Sch 7.

19. Compare Timothy Jones, John Turnbull, and Jane Williams, 'The Law of Wales and the Law of England and Wales?' (2005) 23 Stat LR 135, 145, arguing that it may be time to recognize formally the 'law of Wales'.

following the move towards devolution, the convention is that an Act of Parliament will only apply to Scotland (and Northern Ireland, discussed next) if it expressly states as much.

Northern Ireland

Home Rule: the granting of independence or self-government to a constituent part of a state or country

***de jure*:** 'in law'

***de facto*:** 'in fact'

In 1801, the United Kingdom of Great Britain became the 'United Kingdom of Great Britain and Ireland' when the Acts of Union 1800 were passed. As with Scotland, Ireland retained its own legal system and laws, but dissatisfaction soon grew with the union and there were increasing calls for Irish independence. Following numerous failures to achieve Home Rule, the Government of Ireland Act 1920 was eventually passed, which split Ireland into two distinct regions: six predominantly Protestant counties became Northern Ireland, and the remaining twenty-six predominantly Catholic counties became Southern Ireland. Whilst Northern Ireland became a fully functioning region with its own Parliament and executive, in Southern Ireland, no government was ever established and its Parliament never passed any laws, with the result that whilst Southern Ireland may have existed *de jure*, it never really existed *de facto*.

The passing of the Anglo-Irish Treaty 1921 created an independent Irish republic, although the Parliament of Northern Ireland exercised its treaty right to opt out of the republic and remain part of the UK, thereby creating the current United Kingdom of Great Britain and Northern Ireland.

The Government of Ireland Act 1920 was eventually repealed by the Northern Ireland Act 1998, which provided for a process of devolution in Northern Ireland similar to that in Scotland. The Northern Ireland Assembly, like the Welsh Assembly and the Scottish Parliament, has the power to legislate in certain devolved areas. As in Scotland, convention states that an Act of Parliament will only apply to Northern Ireland if the Act expressly states so.

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Chapter conclusion

A sound understanding of what is law is fundamental to understanding the legal topics that will be discussed throughout this text. It may be thought that much that was discussed in this chapter is of limited relevance to those seeking to understand the laws that regulate businesses, but this is not the case. For example, in an era dominated by increasing globalization and the prevalence of multinational corporations, many businesses will operate in, or import or export goods to, countries all around the world. In such cases, understanding the geographical limitations of a country's legal system is crucial.

Having discussed in this chapter what law is, how it is classified, and its geographical extent, the next chapter moves on to discuss the practical issue of how the law is administered, by discussing those persons and bodies that are responsible for applying, interpreting, and debating what the law is, and how their decisions are put into practice.

Key points summary

- Natural law theories concentrate on the relationship between law and morality.
- Legal positivists are not concerned with morality or values that cannot be scientifically evaluated. Validly created laws are laws, irrespective of their content.
- The term 'common law' has three meanings:
  1. a legal system that is based on the system existing in England;
  2. the body of law created by the judges via case law; and
  3. the body of law that operates alongside the system of equity.
- The term 'civil law' has two meanings:
  1. the body of law that regulates the rights and obligations existing between persons;
  2. a system of law based upon Roman law and characterized by a codified set of laws.
- Equity is a supplementary system of law designed to mitigate against the potential harshness of the common law.
- The phrase 'English legal system' refers to the legal system of England and Wales.
- Wales, Scotland, and Northern Ireland all have their own bodies with various legislative powers, but the Parliament at Westminster retains legislative supremacy.

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Self-test questions

1. Define the following:
 (a) positivism;
 (b) common law;
 (c) civil law;
 (d) equity;
 (e) public law;
 (f) private law;
 (g) devolution.

2. Explain and critically evaluate natural law theory. Does legal positivism provide a more attractive definition of what law is and, if so, why?

3. Parliament passes the (fictional) Punishment of Terrorists Act 2014. Section 10 of the Act allows suspected members of Al Qaeda to be detained, questioned, and executed without charge or trial. How would a natural lawyer and a legal positivist view the Act?

4. What are the three domestic legal systems operating in the UK?

Further reading

Andrew Gillespie, *The English Legal System* (4th edn, OUP 2013) ch 1
Provides a clear and lucid account of what is the 'English legal system', focusing on the meaning of the words 'English', 'legal', and 'system'

Timothy Jones, John Turnbull, and Jane Williams, 'The Law of Wales and the Law of England and Wales?' (2005) 23 Stat LR 135
Discusses how statutes that apply only to Wales can be reconciled with the notion that England and Wales comprise a unified legal system and contends that the time may be right to recognize the 'law of Wales'

Ian Mcleod, *Legal Theory* (6th edn, Palgrave 2012) chs 3 and 4
Provides a clear and well-structured discussion regarding the basics of natural law and legal positivism

Gary Slapper and David Kelly, *The English Legal System* (12th edn, Routledge 2011) ch 1
Contains a particularly clear discussion of how the law is classified

Websites

<http://assemblywales.org>
The website of the National Assembly for Wales

<http://www.niassembly.gov.uk>
The website of the Northern Ireland Assembly

<http://www.scottish.parliament.uk>
The website of the Scottish Parliament

Remember to visit the **Online Resource Centre** at **<http://www.oxfordtextbooks.co.uk/orc/roach3e>** to access the following resources for Chapter 1, 'What is law?': more **practice questions** and answers; a **glossary** of key terms; **multiple-choice questions**; and **revision summaries**. Updates to the law can be found on Twitter by following **@UKBusinessLaw**.

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