1 Legal system terminology

LEGAL SYSTEM TERMINOLOGY IN CONTEXT

At some point in time, you will be asked to explain your legal system in English. However, translating from one legal system to another legal system is far from easy. When, for example, a Dutch lawyer has to explain his legal system to an English lawyer, it is not simply a matter of replacing Dutch words with English words. The Dutch system is not the same as the English system. That means in order to use English legal terminology correctly and effectively, the Dutch lawyer must not only be familiar with his own legal system, but also have an understanding of the structure of the common law system. In this chapter, attention will be paid to the terminology of three elements associated with the legal system: the court structure, the legal profession and the operation of a common law system.

1.1 The civil law system and the common law system

In the West, the two most important types of legal systems are the common law system and the civil law system. The **common law** system originated in England. The common law developed as a system of case law; the judges in court were very important in establishing what was the law. The common law developed in the Middle Ages and was the law administered in the king's courts. This law gradually replaced local customary law. It was called the common law because it was common to all England and Wales and did not vary from area to area.

Over the course of time, the doctrine of **binding precedent** developed. This meant that judges deciding new cases should follow the decisions made by judges in the past, if these new cases were similar to those that had gone before. When the English set about

establishing colonies, this common law system was often implemented in the colonies. Although there is no longer a British empire, the common law system has remained in force in various former colonies, for example, the USA, Canada and Australia.

The common law system should be distinguished from the **civil law** system. Civil law systems are **coded systems**, the laws being laid down in formal written codes. Unlike the common law system, the civil law system developed from Roman law. The code drafted under Napoleon in 1804, the 'Code Napoléon', must also be acknowledged as a source and example for many civil law systems in Europe and beyond.

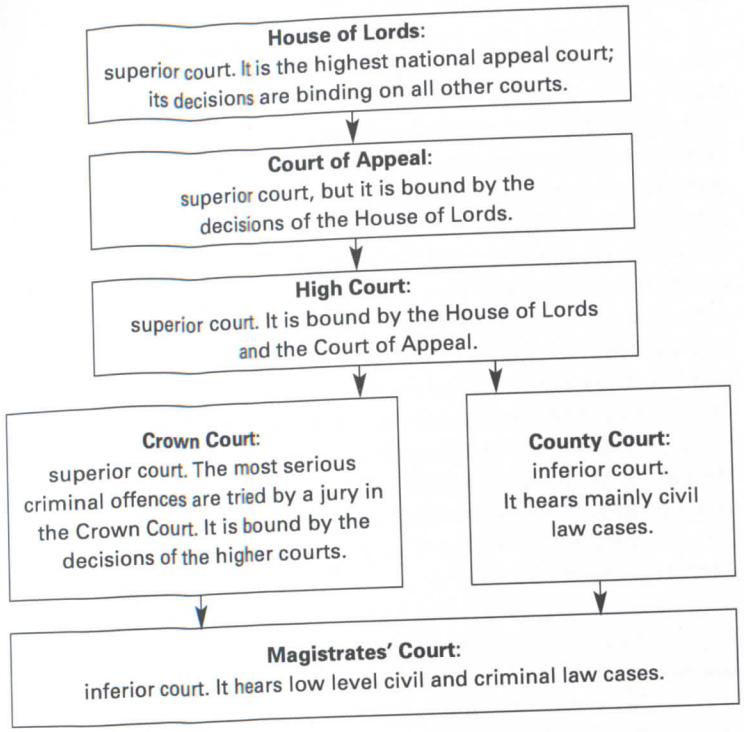
The common law and the civil law systems are often treated as two entirely different approaches to the practice of law. However, these two systems are not as worlds apart as some lawyers maintain. Codes will always have to be interpreted and that will necessarily generate case law. And anyone who thinks a common law system derives its law only from the courts would be very wide of the mark. As can be seen below, **legislation** plays a vital role in all common law systems today.

1.2 The court structure

Trying to find a good English translation for the name of a court in a different legal system can sometimes be quite difficult. For this reason, the following sections describe the courts and their **competence** in the English and American court systems.

1.2.1 England

Although there are courts specialised in criminal cases or civil cases, most courts actually hear both. English courts are classed as either **superior** or **inferior** courts. The **jurisdiction** of the superior courts is not limited to a specific geographical area or to the value of the claim being brought. The jurisdiction of the inferior courts is limited in this way. The distinction between superior and inferior is also important, as the decision of a superior court is **binding**; in other words, the lower courts must follow the decisions of the higher courts. This is called the doctrine of **binding precedent** (see next page).



N Note 1: in addition to this mainstream structure, there are a number of other courts and tribunals. For example, the Restrictive Practices Court, the **Employment Tribunal** and the Employment Appeal Tribunal, which have specialised jurisdictions.

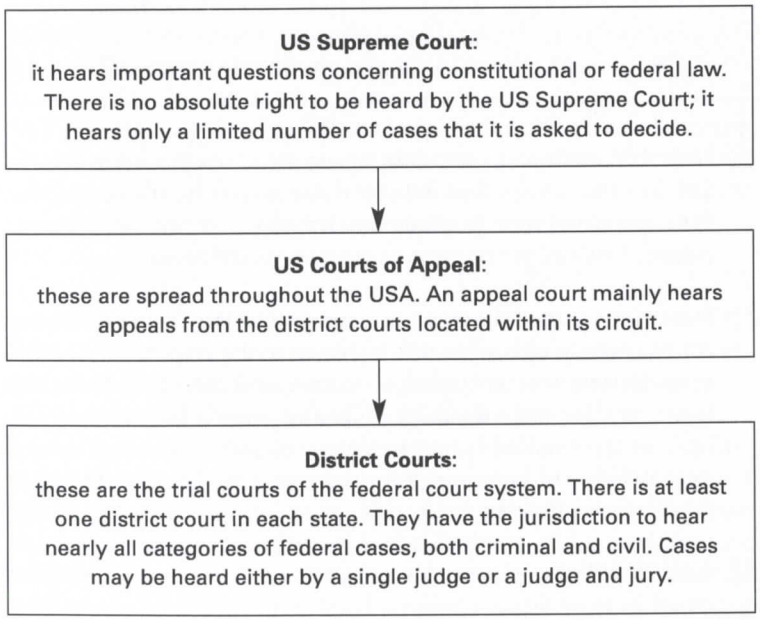
N Note 2: the United Kingdom is a member of the European Union. Although not a national court, the court at the apex of the English court structure for all matters concerning the law of the European Union is the **European Court of Justice**. Its role is to ensure the legal enforcement of European Union obligations and the uniform interpretation of European law throughout the Member States of the European Union.

N Note 3: there is no parallel separate system of administrative courts as in some countries, such matters being mainly dealt with by High Court judges.

1.2.2 USA

The distinction between the federal level and the state level means there are both federal courts and state courts in the USA. The jurisdiction of the **federal courts** is set out in the US Constitution. **State courts**, unlike the federal courts, have a far more general competence. They have the competence to hear most legal disputes.
There may be concurrent jurisdiction between federal and state courts. For example, if in a car theft, the car has been driven from one state to another, the case could be tried either in a federal court or in the state court of one of the states involved. Federal courts are typically used where the parties to a dispute are citizens of different states or are US citizens and non-US citizens. The overlapping of competence has given rise to so-called **forum shopping**, where parties select the court they believe to be most favourable to their claim.

Federal court structure



N Note: other federal courts include: **US Bankruptcy Courts, US Tax Court, US Claims Court, Court of International Trade.**

State court structure
Each state has its own court system. Some state court systems have many different courts, whereas others may only have three courts: a supreme court, a court of appeal and a district court. The names of courts also vary widely. State courts deal with the vast majority of all court cases in the USA.

Translation note
It is common to find the names of the US federal court system used for translation purposes. In general, the highest court in a country is usually translated by the term **Supreme Court**, the appellate court level by **Court of Appeal** and the trial initialisation level by **District Court**. However, court systems vary from country to country and sometimes there is simply no equivalent court in the Anglo/American system that can be used for translation purposes.
That means that the best translation may be a simple description of the function of the court, such as the 'Constitutional Court of Spain'. In other cases, the best approach may be to use general terms to describe the position of the court in the court hierarchy. In this way, someone unfamiliar with that court system will be able to gather what kind of status of court is being referred to.

- Important courts can be referred to by the terms: high court/ superior court/senior court/court of higher jurisdiction.

- Courts of lesser status can be referred to by the terms: lower court/inferior court/court of lower jurisdiction. The term **court of first instance** can be used to describe a court in which proceedings are started.

It is recommended that the English translation of the name of the court should always be accompanied by the actual name of the court in the original language (put in brackets after the English translation). For example, the Supreme Court of the Netherlands (Hoge Raad).

1.2.3 Alternatives to the courts

The idea behind alternative dispute resolution (**ADR**) was that it would be less formal, quicker than the mainstream courts and less expensive. There are three types of ADR: **mediation**, **conciliation** and **arbitration**.

1.3 The legal profession

Lawyers often find that translating their business cards into English is not as easy as they had expected. The way the legal profession is arranged in one country may be quite different from the way it is arranged in another country. For example, in the Netherlands there are two main strands in the legal profession: notaries (notarissen) and advocates (advocaten). As the English legal profession is also split into two main strands, solicitors and barristers, it would seem the translation is ready-made. Unfortunately, that is not the case as the competence of solicitors and barristers is divided in a different way from that of the Dutch notaries and advocates.

A Dutch notary does indeed do the type of work that would be typical of some of the work of an English solicitor, but a Dutch notary would not prepare work for litigation, whereas an English solicitor would, and an English solicitor may also act as an advocate in the lower courts. On the other hand, a Dutch advocate may have the type of practice which resembles that of an English solicitor far more than it does that of an English barrister. In an international context, Dutch law firms tend to use anglicised versions of their professional functions: notaries and advocates.

N Note: the term 'notary' does not denote a separate strand of the legal profession in the USA or England. A 'notary public' has authority to witness and draw up certain documents, and so make them official. In England this is usually done by a solicitor. In the USA this can be done by an attorney, but it can also be done by a private individual who has applied to act as a notary, for example, a real estate agent or clerks in a shop. Those Dutch law firms that are aware of this tend to use the expression 'civil law notaries'. This has the advantage of making their common law colleagues take note that some sort of unfamiliar function is involved here, but the term is not one that will be self-evident to them. You will need to explain it.

1.3.1 England

In the English legal system, a practicing lawyer must have one of two professional qualifications: he must either have been admitted to practice as a **solicitor** or have been called to the bar as a **barrister**. An English lawyer may not act both as a solicitor and as a barrister.

Solicitor

A solicitor may be described as a general legal adviser. Solicitors' offices are usually partnerships and senior solicitors act as partners in the firm. Their usual areas of work are **conveyancing** (law and procedure with respect to the purchase and sale of property), **probate** (procedure to verify a document, often a will, and the winding up and distribution of a deceased person's estate), the negotiation and **drafting** of company and commercial contracts and the preparation of **litigation** (court cases), although in the larger firms of solicitors some solicitors have specialised. They may work as advocates but, without an advocacy certificate, they have only a limited right of audience in the courts.

Barrister

Unlike solicitors, barristers are self-employed, but group together for administrative convenience in **chambers** where they share the accommodation, secretariat and the services of the clerk. It is incorrect therefore to refer to a firm of barristers. Possibly the most important person in chambers is the **clerk**. He acts as a business manager and is now often referred to as the **practice manager**: he attracts the work, arranges the **briefs** (written instructions from a solicitor to a barrister giving him a case) for individual barristers and negotiates the fee with the solicitors, as a barrister's fee is not paid directly by his client but through the solicitor.

The work of many barristers is that of an advocate, arguing a client's case in court. Barristers have a **right of audience** in all courts. When representing a party in court, the barrister is

referred to as **counsel** (for the client or in criminal cases for the defence or prosecution). Barristers are often specialists in certain legal domains.

N Note: the difference between solicitors and barristers is often compared to that between the family doctor and the hospital specialist. For most legal matters, members of the public will visit a solicitor. The solicitor will call in the aid of a barrister if he needs expert advice and/or the client's case will become a court case and the expertise of a barrister is required.

1.3.2 USA

The USA broke with the tradition of distinguishing between solicitors and barristers. A practicing lawyer in the USA is an **attorney**. In the USA, an attorney performs either the functions of a solicitor or a barrister or both functions. The terms 'lawyer' and 'attorney' may be used interchangeably.

An attorney may only practice law in the state for which he has been admitted to the bar. For example, an attorney admitted to the Florida State Bar has no right to act as an attorney in California. Separate admission to practice in the federal courts must also be obtained. Lawyers who work for companies in their legal departments or for a government agency must also be members of the bar: they are referred to as in-house counsel or staff attorneys.

N Note: in the USA, the word 'esquire' (esq) used after the name denotes that that person has been admitted to practice law. However, the word esquire does not have that meaning in England, where it is sometimes used as an alternative to putting Mr. before the name of a man.

1.3.3 Judges in the common law system

The role of the judge in the common law system is somewhat different from that in many civil law systems. The judge is neither adviser nor investigator. In general, the judge must rely upon the advocates to present legal and factual argument, although if a vital precedent has been ignored, he can ask for counsel's arguments on it. The judge acts as an impartial referee in an **adversarial** judicial process (see Vocabulary, Chapter 2). He must base his decision-making on the evidence presented to the court by legal counsel, apply the existing rules of law to those facts, and then give his judgment.

In England, most senior judges are recruited from experienced practicing barristers, although opportunities for solicitors to become judges have increased more recently. In the USA, federal judges are appointed by the President and the Senate for life. As for state judges, the method of appointment depends on the state. Judges may be chosen from outstanding members of the bar by the governor, or by the mayor for lower courts, or elected by the public, or a combination of both methods. This system of appointment is quite different from some civil law jurisdictions, for example the Netherlands, where law graduates can train specifically to become a judge and where a judge is a civil servant.

N Note 1: at the bottom of the judicial hierarchy in England are the magistrates. Many of these justices, who sit in the **magistrates'** courts, are lay people, in other words they are not qualified lawyers. They are responsible and respected people in their community, sitting on average one day per fortnight. Magistrates are not paid, but only receive expenses. They are advised by magistrates' clerks, who are usually law graduates, or have a special clerk's diploma. In the USA, there is no system of lay justices similar to the system of lay magistrates in England.

N Note 2: mention should be made of the Law Officers. In the English system, one of the most important Law Officers is the **Attorney-General**. He is a legal adviser to the Crown. The Attorney-General has political duties which include advising government departments. Similarly, in the USA there is also an Attorney-General. He is the head of legal affairs in a state or in the federal government. If he is in the federal government, he is in charge of the Department of Justice. The USA also has a district attorney. This is an officer of a governmental body, such as a state, county or municipality, with the duty to prosecute all those charged with crimes. District attorneys working for the federal government are called US attorneys.

1.4 The jury

A mistake that is often made by law students from civil law systems without a jury is to equate a jury system with a common law system. Juries are, however, not confined to common law jurisdictions. For example, in Spain and Belgium juries hear certain types of cases. What can be said, however, is that both in England and the USA court room proceedings are geared up to the presence of a jury, whether one is actually in sitting or not.

In England, the appearance of a jury in civil cases is now rare. There is no right to jury trial for most civil cases, although certain lawsuits, such as **defamation** (see Vocabulary, Chapter 3), can still be heard by a jury. In criminal cases, only very serious criminal offences are heard by a jury. A jury consists of twelve **jurors** who are laymen and who are supposed to represent a cross-section of the community. In civil cases, the jury decides upon liability and sometimes assesses the **damages** (financial compensation) under the guidance of the judge. In criminal cases, the jurors listen to the facts of the case and, after the judge's summing up of the prosecution and defence cases, they have to reach a verdict: guilty or not guilty. The jury has no say in questions dealing with law or legal procedure or on sentencing in criminal cases.

In the USA, the right to jury trial is guaranteed by the US Constitution. Many civil trials are before juries, but if both parties agree to do away with the jury, as this is cheaper and quicker, the case will be decided by the judge. With respect to criminal cases, the Sixth Amendment of the Constitution guarantees a defendant the right to trial by jury. However, as in England, juries do not hear cases for minor crimes. Some states, for example Washington, have a **grand jury** of up to twenty-three jurors to see if there is a case to answer before going to trial. A **petit jury** is the ordinary trial jury, usually composed of twelve jurors (but some state court juries may consist of six jurors).

In both England and the USA there are proceedings for the selection of jurors, although this procedure is far more extensive in the USA than in England. In the USA, the French term **voir dire** usually refers to the examination by the court or by the attorneys of prospective jurors. In England it is more commonly referred to as **jury vetting**. Jurors can be **challenged** either by the defence or by the prosecution. They can be challenged 'for cause' (for a reason) or 'without cause' (reason not stated).

1.5 Operation of a common law system

A common law system is based on three major sources of law:

- **common law** (or **case law**)
- **equity** and
- **legislation**.

At one time, common law courts and equity courts were separate. The law administered in the common law courts was based on principles derived from case law. Equity courts administered their own law, based on principles of fairness. Now all law courts apply both common law and the principles of equity in their courts. As this distinction between common law and equity is a characteristic of the common law system, and one unfamiliar to those schooled in the civil law, attention is paid below to the development of equity and its terminology. The third major source of law is legislation. Legislation is formal, written law, as opposed to law that has been developed by the judges in court. Today, legislation has become a major part of the law of any common law jurisdiction.

1.5.1 Legislation

Even though the English and American legal systems are common law systems, **legislation** plays an important role in law making. **Statutes** are laws made by legislative bodies, such as the Parliament in England and the Congress in the USA. The most common form of statute is the **Act**, which is called a **bill** before it has been passed. When a statute is drawn up, the old common law usually forms the basis for the statute, but the legislature takes the opportunity to modify and update the old law. It is also increasingly common for whole areas of law to be put into statute form, for example tax law. Statutes often adopt the old common law terminology, which means that they are very difficult to understand for those with no knowledge of the common law.

The English system

In England the legislative body is the Parliament, composed of the House of Commons and the House of Lords, the laws being approved by the Crown. The **doctrine of parliamentary sovereignty** means that supreme power is vested in Parliament. Until recently, this doctrine stated that only Parliament could make or **revoke** any law by statute, although it could not bind future parliaments. Whatever law Parliament has passed in the form of an Act must be put into effect by the courts and the courts cannot overrule legislation once passed.

However, this doctrine has had to undergo a certain modification because of England's membership of the European Union (EU). The supremacy of EU law above that of national law means that the national courts of Member States are required to **override** national legislation where it conflicts with EU law. This has extended the rights of English courts with respect to **judicial review**, as the court may, for example, hold that certain provisions of an **Act of Parliament** are inoperative because they are in breach of EU obligations.

N Note 1: in English national legislation and in the legislation of some of the states of the USA, reference is made to 'sections' of a statute rather than to 'articles'. However, in American federal legislation and in the treaties and directives of the European Union reference is made to 'articles' rather than to sections.

N Note 2: there is also delegated legislation, meaning that the parliament gives subordinate authorities the power to make laws. The most important form of delegated legislation is the **statutory instrument**, i.e. ministers are given the power to make laws for specified purposes.

The system in the USA

In the USA, legislation takes place at two levels: the federal and the state. Just as EU law is superior to the national legislation of the Member States, federal legislation is superior to state legislation in its areas of competence. It is said to **pre-empt** state legislation where there is a conflict. Any state legislation which conflicts with the federal laws is void. It should also be noted that the US Supreme Court has the power to throw out any legislation not in keeping with the US Constitution.

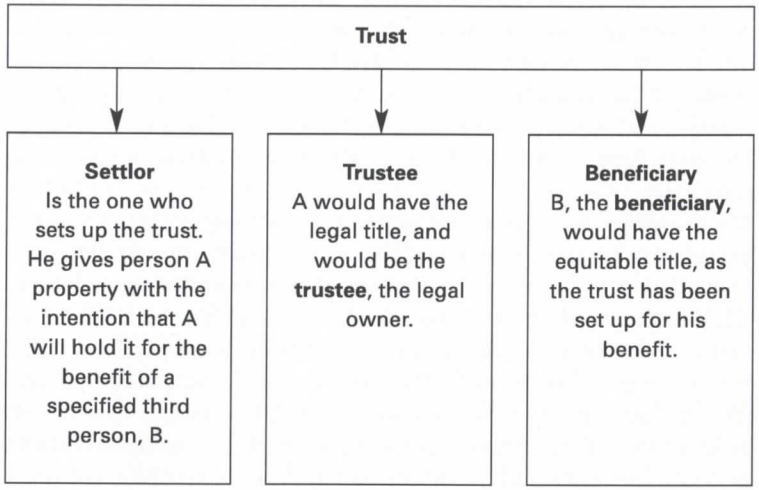
The federal legislative body is the **Congress**, consisting of the House of Representatives and the Senate. The federal legislature has at its head the president, with the duty to make sure that the laws are carried out properly and the power to make treaties and veto laws.

States, headed by a governor, have their own legislatures (consisting of two houses, except in Nebraska). States have jurisdiction over all matters not reserved to the federal competence. In the USA, each state has its own set of statutes and most jurisdictions have now codified a substantial part of their laws. Uniform laws are also important. As each state has its own law, the idea behind the development of uniform laws was to cut down the differences in law between the various states of America. The most successful uniform law is the Uniform Commercial Code (UCC).

1.5.2 Equity

During the medieval period, the common law became rather rigid and inflexible. If a writ could not be issued, a person had no **legal remedy**. For example, someone who had bought the right to use land but did not own that land, could not obtain a writ to have his case heard in court. This was because a court of common law only recognised a legal title to land; it would only enforce the rights of the 'owner' of the land. Those who had no remedy at common law turned to the king's chancellor for help. Under the chancellor, a court of equity developed, where principles of fairness referred to as **principles of equity** were applied. Equity and common law remained administered in separate courts for centuries. Today, all courts can apply rules from the common law and principles of equity. The terminology that was developed in the courts of equity forms a part of English legal terminology.

The courts of equity recognised that the same piece of property could represent two interests: a legal interest and an equitable interest. The person with the legal interest has a **legal title** to the property which was the one recognised at common law. The other person has an equitable interest and an **equitable title** was recognised by the courts of equity, but not by the common law courts. An example of this splitting of interests is where a trust has been set up.



An equitable title is well protected by the law. However, the legal title usually prevails where there is a conflict between legal and equitable interests if the legal title is sold to a purchaser and bought in good faith. In common law jurisdictions, trusts are often set up for a variety of purposes: for individuals, charities, clubs, unit trust schemes and as security for a particular loan.

The equity court also developed legal remedies that were not available in common law courts. The main remedy at common law is damages. Equity offered remedies other than damages, such as the **injunction** and **specific performance** (these terms are dealt with in other chapters). The merger of common law and equity courts meant that equitable remedies became available in all courts. Nonetheless, they cannot be claimed as a right: equitable remedies have remained **discretionary**.

N Note 1: the word 'equity' will be found used in a variety of ways, not just in the sense of a parallel system of law to the common law. For example, equity is also used to refer to the value of property minus any charges that are on it, equity capital is that part of a company's capital that is owned by shareholders and equities are shares.

N Note 2: trusts make use of splitting the same property into two interests, legal and equitable. Some jurisdictions do not allow this use of split interests, for example the Netherlands, although foreign trusts may be recognised.

N Note 3: US antitrust laws do not refer to trusts as outlined above. The term 'antitrust laws' refers in particular to two statutes that deal with agreements or cooperative attempts to undermine free competition in the marketplace.

1.5.3 The common law

Despite the increasing growth of legislation in common law jurisdictions, **case law** is still extremely important. Case law refers to the decisions made by judges, applying legal principles to the particular facts of the dispute before them. Common law lawyers must be familiar with past cases because the rules of law laid down in these cases remain the law unless they have been overruled. This means that decisions made in very old cases can still represent the law.

N Note: the English term **jurisprudence** does not mean case law. The section on 'Jurisprudence' in an English library will direct you to books on the study or philosophy of law. In the USA the term jurisprudence can be found used in the English sense as a science of law, but also in the sense of case law rather than statute law. This dual use of the term is now creeping into English texts due to the influence of American English and the European Court.

Binding precedent

When a judge comes to try a case he must always look back to see how previous judges have dealt with earlier cases with similar facts. These decisions set a **precedent** and a judge will be expected to make a decision consistent with the precedents set already. This doctrine is called the doctrine of **binding precedent**. It is also known by the Latin term **stare decisis**. Precedents set by the senior courts are always binding on all lower courts.

Must a precedent always be followed? The answer to that is no; not if a case can be **distinguished**. Cases can only be distinguished on their facts. The facts or a fact in the new case must, in some important way, be different from the facts or a fact of the previous case. The court regards as a material fact any important fact that makes the new case different from the previous one. The word **material** is used in legal English to indicate that something is important or vital, for example material facts, material evidence, material witness. The Americans often use the term **key** in this context.

Case reports

Obviously, in a system where case law is so important there must be a sophisticated system of law reports. In England and the USA, precedents are almost always contained in law reports, and these reports are now of a fairly standardised nature. Each case is given a reference. The form of this reference will depend upon whether the case is a criminal case or a civil case. The reference is followed by the year the case was heard and (an abbreviation of) the name of the series in which the case is reported. An example of a civil case reference is as follows:

Donoghue v Stevenson [1932] A.C. 562.

If it is a criminal case, the reference would be different as the prosecution is then brought in the name of the state (here 'R' stands for the Latin word regina or rex, i.e. the Queen or King), for example:

R v Beard [1920] A.C. 479.

When the judgment is published in a law report, it begins with a head-note, which is a summary of the case. In English reports, this head-note is followed by the individual judgment of the judge or judges in that case. By reporting each individual judgment, it is possible to see exactly what each judge thought. When judges agree with each other they are said to **concur**. When a judge disagrees with the majority decision, he is said to **dissent**.

Every case report has three major sections:

1 The material facts
What are the relevant facts of this particular case?

↓

2 The ratio decidendi
This sets out the grounds for the decision, the legal reasoning that has been applied to the facts of the case. In the USA, the ratio decidendi is more commonly referred to as a **holding**.

↓

3 The judgment
This is based on sections 1 and 2.
The judge finds in favour of the claimant or defendant in civil cases, or the state or the accused in criminal cases.

For the parties, part 3 is vital. For the purpose of the doctrine of binding precedent, part 2 is vital. It is this part that forms the precedent of the case.

N Note: sometimes a judge makes hypothetical remarks or his judgment is a dissenting judgment because he disagrees with the majority decision. Such comments or a dissenting judgment are called obiter dicta because they are not part of the ratio decidendi. Comments that are **obiter dicta** are not binding, but they are **persuasive**.

Appeal

A decision is **reversed** when a higher court on appeal comes to the opposite conclusion than that of the lower court. So now, for example, instead of finding for the claimant, it finds in favour of the defendant.

An appeal court can also **overrule** a principle that has been established in a previous case. This means that the precedent laid down in that earlier case is no longer binding. Reversing differs from overruling. A decision reversed on appeal directly affects the

parties involved in that case. Overruling goes only to the rule of law contained in a decision; it does not affect the parties who were involved in those cases.

Note 1: in the USA, overruling also applies to a court's denial of any motion or point raised in court, for example, 'objection overruled'.

Note 2: a system of **cassation** courts is not used for appeal cases in England and the USA (see Chapter 2).

Legal system vocabulary

Act: a specific piece of legislation passed by a legislative body, such as Parliament or Congress. An **Act of Parliament** is divided into **parts**, **sections**, **sub-sections**, **paragraphs** and, at the end, the **schedules**.

ADR: these initials stand for **alternative dispute resolution**. This includes **mediation**, **conciliation** and **arbitration**.

Arbitration: a form of alternative dispute resolution where a third party, acting as an arbitrator, delivers an opinion that is binding on the parties.

Attorney-at-law: usually referred to simply as an attorney. An attorney is a legal professional in the USA with the right to practice law in the state for which he has been admitted to the bar.

Attorney-General: in England he is a legal adviser to the Crown. The Attorney-General has political duties which include advising government departments. In the USA there is also an Attorney-General. He is the head of legal affairs in a state or in the federal government.

Barrister: a legal professional in the English legal system with a right of audience before all courts. As well as acting as an advocate, a barrister may also be a specialist in a certain area of law.

Beneficiary: one who benefits from a **trust** and who has an **equitable interest** in the trust property.

Bill: an Act of Parliament is called a bill before it has been formally approved.

Binding: if a decision is binding, it must be followed. For example, an arbitrator's decision is binding on the parties involved.

Binding precedent: the precedent (see **precedent**) laid down in a prior case of a similar nature must be followed. The Latin term for the doctrine of binding precedent is **stare decisis**.

Brief: in the English system this refers to the written instructions sent by a solicitor to a barrister briefing him about a case.

Case law: refers to the decisions made by judges applying legal principles from **legislation** and the **precedents** from previous cases to the circumstances of the particular disputes before them.

Challenge: potential members of a jury can be challenged, either for a reason that is stated before the court or for no reason. This is a way of excluding potential jurors from a jury.

Chambers: accommodation for a group of barristers. Barristers in chambers are self-employed and group together only to share facilities and staff. It would therefore be wrong to refer to a firm of barristers.

Civil law: this term has two meanings. It can be used in the sense of the law concerned with private rights rather than public law. The term may also be used to describe a legal system. Unlike the common law system, a civil law system has its roots in Roman law and is a codified system.

Clerk: the English legal system knows various types of legal clerks, for example, a magistrate's clerk assists lay magistrates. The clerk in barristers' chambers, often now referred to as the **practice manager**, acts as a business manager for the barristers of that chamber.

Coded systems: systems where the codification of the law has taken place, i.e. the laws of the land have been compiled to form a systematic, formal legal code.

Common law: a system of law which originated in medieval England and was later applied in former British colonies, including the USA. Common law is based on case law rather than on codes.

Competence: a court has the competence to hear a case if it has **jurisdiction** over the person or property at issue in that case.

Conciliation: alternative form of dispute resolution where a third party, acting as a conciliator, offers the parties a non-binding opinion.

Concur: verb used to indicate that judges in a case agree with the majority conclusion. The reasons for reaching that conclusion may, however, vary.

Congress: the federal legislative body of the USA. It consists of two houses, the Senate and the House of Representatives.

Conveyancing: drawing up legal documents to transfer the ownership of property from seller to buyer; in general the law and procedure with respect to the purchase and sale of property.

Counsel: when representing a party in court, a barrister is referred to as counsel and an attorney as counsel or counsellor.

County Court: in the English system it hears civil cases in its local area of jurisdiction. The name County Court may also be found in the court systems of several states in the USA, where it has a limited jurisdiction in civil and criminal cases.

Court of Appeal: this is an appellate court to be found in many common law jurisdictions. It hears appeals from lower courts.

Court of first instance: this term can be used to describe a court in which proceedings begin.

Crown Court: this is a court in the English court system that hears primarily criminal cases.

Discretionary: where a remedy is not available as of right but depends upon the consideration of the court.

Dissent: where a judge disagrees with the majority opinion in a case. A **dissenting judgment** is classed as **obiter dicta**.

Distinguish: if a case is distinguished, a judge finds a precedent laid down in a previous case not binding on the case before him because the **material/key facts** in the present case differ from those of the previous case.

District courts: these are the trial courts of the American federal court system.

Doctrine of parliamentary sovereignty: all legislative power in England is vested in Parliament or is derived from the authority of Parliament. Parliament in this context means the House of Commons, the House of Lords and the Crown. Parliament has the right to make any laws it wishes to make, although in practice these laws must be in keeping with accepted customs and values and not contrary to European Union law.

Draft: when a legal document, such as a contract, is being drawn up, the preliminary version (or versions) of the document is referred to as a draft. The draft may be subject to amendments before it is accepted as the final version.

Employment Tribunal: tribunal in the English system with the jurisdiction to hear almost all individual employment law claims.

Equitable title: under the principles of law developed by the court of equity, one piece of property could be subject to two sorts of interest: a legal interest and an **equitable interest**. The legal owner of the property holds the **legal title**, which was protected by the common law. The one with the equitable interest holds an equitable title, which was protected by the chancellor in the court of equity. The person holding the equitable title is the

one intended to benefit from the property, even though that person is not the legal owner. An equitable title is still protected in law against everyone except a purchaser of the property who had no knowledge of the equitable interest.

Equity: historically, equity developed as a separate system of law in England as the common law was too rigid. The court of equity developed its own principles of fairness and its own legal remedies. Now all courts may apply **principles of equity** alongside those of the common law.

European Court of Justice: is the highest court for all those countries that are members of the European Union. It has the competence to make decisions regarding European Union law.

Federal courts: the courts of the USA as distinguished from the courts of the individual states. Federal courts hear cases that involve disputes or issues governed by federal law or the US Constitution or disputes involving citizens from different states.

Forum shopping: where more than one court has the competence to hear a case and parties wish to select the forum which would be most favourable for their case.

High Court: a superior court in the English court system.

House of Lords: the House of Lords as a court should be distinguished from its function as the upper house of Parliament. Only those members of the upper house who are Law Lords may hear appeals. The court hears appeals for both civil and criminal cases where the matter is of public importance.

Inferior: an adjective used to describe a lower court. It does not mean that the quality of the court is poor. It simply means a court of lower jurisdiction.

Judicial review: this term is used in particular to describe the situation when judges review decisions made by public authorities that affect the rights of individuals.

Jurisdiction: the legal power to hear and decide a case. If the court does not have the jurisdiction to hear a case, its decision will be void.

Jurisprudence: the study or philosophy of law. In the USA it is also used in the sense of case law rather than statute law.

Juror: a member of a jury.

Jury: a cross-section of the public called upon to hear a case.

Jury vetting: procedure by which members of the public are selected in court for jury service in England. In the USA, the counsels for the defence/prosecution have far more opportunities to challenge potential members of the jury than in England. This procedure is commonly termed **voir dire** in the USA.

Legal remedy: means provided by the law to help one party because the other party has acted contrary to the rules of law.

Legislation: written laws passed by a legislative body, for example, the Parliament in England and the Congress in the USA.

Litigation: where a party, known as a litigant, brings an action (a lawsuit) to the court.

Magistrate: a judge in England and the USA. In the English court system, magistrates are often lay people.

Magistrates' Court: in the English court system this is an inferior court that hears both civil and criminal cases. However, it should be borne in mind that the magistrates' courts handle most of the cases brought to court.

Material: used generally to denote something of importance in a case, for example, material fact or a material witness. The word **key** may also be used in this context.

Mediation: alternative form of dispute resolution where a third party, acting as a mediator, helps the parties to a dispute to reach an agreement.

Obiter dicta: plural of obiter dictum, meaning passing or incidental remarks in a judicial opinion that do not form part of the **ratio decidendi**. Unlike the ratio decidendi, obiter dicta are not binding.

Override: see **pre-emption**.

Overrule: a court reaches the decision that a precedent laid down in a different case no longer has to be followed.

Persuasive: if the authority is persuasive rather than binding, the judge is not obliged to follow it, but it should be taken into account in reaching a judgment.

Precedent: a decision in a previous case which is recognised as being a source of legal authority for all future cases of a similar nature.

Pre-emption: where one system of law takes precedence over another. In the USA, federal legislation is superior to state legislation and will pre-empt state legislation where there is a conflict. In Europe, the law of the European Union is said to **override** that of the national law of the Member States on matters within its competence.

Probate: legal acceptance that a document, usually associated with the administration of estates, such as a will, is valid.

Ratio decidendi: the reason, or grounds, for the decision. This is the part of the judgment in which legal principles are applied to the facts of a particular case. It is this part of the judgment which forms the precedent. In the USA this may also be referred to as a **holding**.

Reverse: when a higher court, hearing a case on appeal from a lower court, reaches the opposite judgment to that of the lower court.

Revoke: to cancel or annul, for example to annul previous legislation.

Right of audience: the right to appear and conduct proceedings in a court.

Settlor: also referred to as a trustor or donor. This is the person who settles his property on someone, in particular to set up a trust.

Solicitor: is a legal professional within the English system. A solicitor has four main areas of competence: conveyancing, probate, drafting company and commercial contracts and the preparation of litigation. Unless he has an advocacy certificate, his right to be heard in court is in general limited to the lower courts.

State courts: this is the term given to the courts in the individual states of the USA as opposed to the courts in the federal system.

Statute: a form of written law, such as an Act of Parliament, passed by a legislative body.

Statutory instrument: subordinate or delegated legislation, usually made by a minister, under the authority granted by an Act of Parliament.

Superior: this adjective is applied to courts of higher jurisdiction. Precedents set in the superior courts must be followed by the lower courts.

Trust: property, either land or personal property, that is held by one party for the benefit of another party. Property held in trust comprises two interests: a legal interest and an equitable interest. The legal interest is held by the **trustee** and the equitable interest is held by the **beneficiary**.

Trustee: person who holds the legal title to property which is administered for the benefit of someone else.

US Bankruptcy Court: only the federal courts may hear bankruptcy cases.

US Claims Court: a federal court hearing claims against the USA.

US Court of International Trade: specialised in cases involving international trade.

US Supreme Court: this is the top court in the federal court system of the USA.

US Tax Court: a federal court hearing tax cases.

Voir dire: see **jury vetting**.

Legal system discussion questions

1. What are, in your opinion, the advantages and disadvantages of:
   - coded systems of law;
   - traditional common law systems?

2. Do you think it is a good idea to have a uniform legal profession as in the USA or a split profession such as in England?

3. Is it useful to have a system of binding precedent?

4. Is jury trial the best way to try cases?

Legal system knowledge questions

1. Some courts are of a higher status than others. Give two general terms which can be used to indicate more important courts.

2. What are **magistrates** in the English court system?

3. What is meant by the term **forum shopping?**

4. What alternatives are available for a case to be tried other than in a mainstream court of law?

5. Name the two types of practicing lawyer in the English legal system. In what ways are their functions different?

6. What does the English term **jurisprudence** mean?

7. Explain the term **binding precedent**. This term is also known by a Latin term. What is this Latin term?

8. If a judge agrees with the decision reached by the majority of the other judges, he is said to what? What term is used to describe a judge's opinion which does not agree with the majority?

9. What is **statute** law?

10. What is meant by the term **equity** in the sense of a system of law?