CHAPTER 1

The English Judicial System

To begin with, one should be aware of a possible misconception: can one talk of a British legal system[1]? Our contention is that, although the United Kingdom has three legal systems whose foundations share a great many common traits, it is misleading to include them in the same set, for the very reason that the Scots legal system is a mixed system –it is a cross of the Common Law **(1)** and civil law **(2)** systems; moreover, there are some differences in law and procedure between Northern Ireland and England and Wales.

The English and Welsh judicial system is, it may be suggested, the epitome of a Common Law legal system, which means in a somewhat self-evident way, that it has been heavily influenced by law made by judges and that, contrary to most European civil law legal systems, its law is not propped up by Roman Law nor is it enshrined **(3)** in Codes. This is not to say that Roman Law is totally unknown in England and Wales, or that codification never was a temptation there.

The Statute of Westminster (1275), also known as "the first Statute of Westminster", is a codification of England's then existing law into one legal document numbering fifty-one chapters. The issuance **(4)** of this instrument is even singled out as the point of reference for the concept of "time immemorial" **(5)**, a concept that has since been used in the Common Law to signify that a property or benefit has been enjoyed for so long that its owner does not have to prove how they came to own it.

Today this Norman-French legal phrase is still used in a somewhat different sense to convey the notion of time before legal history actually started, or alternatively a time beyond legal memory –legal memory starting really with King Richard I's accession to the throne on 6 July 1189.

And yet, to date, English Law has never undergone any real, formal process of codification despite a vague desire expressed from time to time about doing so for some part of it. Rather, it generated piecemeal **(6)** by Parliament or judges sitting in the Common Law courts and applying statutes and legal precedents.

Another striking feature of English Law is its criminal law system –which is both adversarial **(7)** and accusatorial **(8)**. The trial judge in England and Wales presides over proceedings which are adversarial in that both prosecution and defence prepare the arguments to be presented before the court. Yet, at the same time, these criminal proceedings can also be said to be accusatorial because they involve accusation by a prosecutor and a verdict reached by an independent and even-handed **(9)** judge or jury.

Most Continental civil law jurisdictions follow an inquisitorial system of criminal adjudication in which judges, generally called "examining magistrates", investigate the conflicting claims by going into the evidence to be presented at the trial, whilst other judges also contribute to the process by preparing their own reports.

1. See footnote on page 7 above for the authors' explanation of the terminology adopted in this book.

The adversarial criminal law system is supposed to uphold the so-called "presumption of innocence" and provide the defence with adequate rights; although nowadays it stands accused of unduly favouring rich defendants who can afford large legal teams, while, conversely, it is perceived by some as being very harsh on poor defendants.

What cannot be gainsaid is that the English legal industry is currently doing rather well and that the criminal law system put in place in England and Wales was probably a contributory factor in its development.

A THE ENGLISH AND WELSH COURT SYSTEM

The English and Welsh jurisdiction is undeniably the biggest of the three existing at present in the United Kingdom. It is structured around a court system that looks like an inverted funnel-shaped construction: there are three hundred and thirty magistrates' courts **(10)** at the bottom and just one Supreme Court at the apex of the edifice.

Theoretically one could adopt either a bottom-up or a top-down approach to anatomize the system, depending on whether one wishes to highlight the demotic **(11)** or meritocratic quality of its hierarchical order.

However, the English and Welsh court system has logically to be studied from a top-down perspective, as the existence of a hierarchy among the different English courts has become a pre-requisite for the Common Law to work through the operation of the doctrine of judicial precedent. Indeed, the doctrine of judicial precedent implies that courts will be bound to each other, with the top one(s) predominating.

The Common Law is a body of law evolved from local customs that were used in lieu of legal rules for the decisions handed down in the various baronial courts which were scattered all over England in the early Middle Ages. It was streamlined by the King's itinerant judges, most of whom, hailing from London, would travel from town to town dispensing the King's justice –some say that the very term "Common Law" was used to describe the law held in common between the judicial circuits and the different stops in each circuit.

Thus, the Common Law is a creation of the London judges, and London always was the legal centre of the English jurisdiction, even after the country had been formally divided up into six regional judicial circuits in the late Middle Ages[1]. Therefore, it should come as no surprise to find the highest court of the land located there today.

THE SUPREME COURT OF THE UNITED KINGDOM

That the highest court in the United Kingdom should have been sited in the west end of London next to the seat of the executive and legislative branches of Government, whilst the heartland of the legal industry is situated in the City is also certainly not quite accidental.

London's legal geography is truly worth examination: Temple[2] has always been the hub of lawyerly London, although, at the same time, there always was an outgrowth of the judiciary in Westminster. Indeed, the Court of Common Pleas, one of the three Royal Courts[3], was housed in Westminster Hall for several centuries.

1. This happened in 1328.
2. Thus is the legal district in London called.
3. The other two were the Court of Exchequer and the King's Bench. These institutions gradually became separated from the *Curia Regis** that sat at Westminster, very often in the absence of the King.

At the beginning of the nineteenth-century, a judicial offshoot was even grafted onto the legislative branch of Government through the setting-up of a Judicial[1] Committee in the House of Lords. Of late, the judicial branch of Government has acquired a self-sufficiency of its own with the refurbishment on Parliament Square of a courthouse **(12)**, formerly belonging to the county of Middlesex[2], which now houses both the Supreme Court of the United Kingdom and the Judicial Committee of the Privy Council[3].

Although there is some overlap in the staffing of these two courts, there is no denying that the former is more significant than the latter from a constitutional point of view as it has become one of the cogs of a political system that has put the transfer of central power to the regions (*i. e.* devolution) at the heart of its modern "customary" constitution.

The first thing to be said about the Supreme court of the United Kingdom is that it is a fairly recent creation, since it came into being on 1 October 2009, as a result of the implementation of the *Constitutional Reform Act 2005*[4]*.*

The enactment of the *Human Rights Act 1998*, which provided for the incorporation of the European Convention for the Protection of Fundamental Freedoms and Human Right[5] into British domestic law, had in fact rendered this exercise in sanitizing the British constitutional order almost compulsory; the Lord Chancellor with his foot in the three branches of Government was a walking contradiction of the theory of the separation of powers and, therefore, symbolically undermined a central plank in the British constitutional scheme, the rule of law.

It has to be stressed that the Supreme Court of the United Kingdom is a far cry from being a supreme court in the American sense of the word; it only bears the same name but could be, and indeed has been characterised by some, as a "glorified appeal court". It is certainly not without reason that the forerunner of this newly created institution was known as the Appellate Committee of the House of Lords. Nevertheless, the intervention of the Supreme Court in the "Gina Miller" case [*R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2018] AC 61] in the wake of the Brexit referendum of 23 June 2016, may have somewhat altered that perspective.

Be that as it may, the United Kingdom still does not have a codified constitution against which to measure the constitutionality of its laws, and in any event there is no need for such an instrument since senior judges in the United Kingdom, let alone lower ranking members of the judiciary, are not endowed with the power of declaring a law "unconstitutional".

1. It was also very often styled "the Appellate Committee of the House of Lords". This judicial body ceased to exist on 31 July 2009.
2. Middlesex, a defunct administrative area, only exists today as a county for cricket purposes; it used to cover the north-western part of Greater London.
3. The Privy Council, through its Judicial Committee, formerly acted as the highest court of appeal for the whole British Empire (other than for the United Kingdom itself), and continues to hear appeals from Crown Dependencies, the British Overseas Territories, and some independent Commonwealth states.
4. The key points of this piece of legislation are popularly, and perhaps erroneously, thought to have been jotted down on the back of an envelop at an emergency meeting between the then Lord Chancellor, the Lord Falconer of Thoroton, and the Prime Minister at the time, Tony Blair. On 14 May 1997, a fortnight after Tony Blair had become Prime Minister, Charles Leslie Falconer was created a life peer as Baron Falconer of Thoroton. Some might see this as a fine example of cronyism, while others may interpret this move as a sign that the Prime Minister had his hidden constitutional agenda already well set in place and that he knew whom to appoint to mastermind it.
5. The short title of this piece of legislation is the *European Convention on Human Rights* (ECHR).

At the end of the day, as is very often the case in many walks of life in the United Kingdom, the American tropism held sway when it came to giving a new name to the highest court in the land. Yet –and the point bears repeating –such an appellation sits somehow ill at ease with a polity that has enshrined, but not entrenched, the principle of the legislative supremacy of Parliament at the heart of its Constitution.

So, what is the use of the Supreme Court of the United Kingdom apart from lending, by its very name, an air of greatness to the three jurisdictions making up the United Kingdom? The Supreme Court's main function is to focus on cases that raise points of law of importance for the general public. Concerning civil law, appeals from many fields of law are likely to be selected for hearing, including commercial disputes, family matters and judicial review[1] claims **(13)** against public authorities. The Supreme Court of the United Kingdom also hears some criminal appeals, but not from Scotland, as there is no general right of appeal from the High Court of Justiciary **(14)**, Scotland's highest criminal court, other than with respect to devolution issues.

The Supreme Court of the United Kingdom also, significantly, adjudicates over devolution issues (as framed by the *Scotland Act 1998*, the *Northern Ireland Act 1998* and the *Government of Wales Act 2006*). These legal proceedings will bear upon the powers of the three devolved administrations of Wales, Scotland and Northern Ireland, as well as the remit **(15)** of the three legislative bodies set up in these three countries.

Most devolution issues (previously heard by the Judicial Committee of the Privy Council) are about compliance with rights under the *European Convention on Human Rights*, brought into the national law of these three regions of the United Kingdom by the Devolution Acts and the *Human Rights Act 1998*.

Ordinarily, not all of the twelve members of the Supreme Court of the United Kingdom hear every case. For hearing appeals, the Supreme court will consist of an uneven number of judges, of whom more than half are permanent judges.

Typically, a case is heard by a panel of five justices, though sometimes the panel may consist of three, seven or nine members –or even eleven members as was the case in the "Gina Miller" affair[2].

In addition to herself[3], the Deputy President, and the ten permanent Justices, the President of the Supreme Court may request some senior judges to sit as "acting judges[4]" of the Supreme Court. This actually means choosing among the most senior of the senior territorial judges in the three jurisdictions making up the polity of the United Kingdom –which, for example, would involve in England and Wales calling upon some judges of the Court of Appeal.

1. Judicial review will be used throughout this book in its British English acceptation; in the American English one, it would be translated into French as "*contrôle de constitutionnalité*".
2. See above middle of page 11 for reference.
3. The President of the Supreme Court of the United Kingdom is currently a female justice, Lady Brenda Hale.
4. The President of the Supreme Court of the United Kingdom may also approve in writing retired senior judges' membership of a "supplementary panel" if they are under 75 years of age –this is a second group of "acting judges" which is potentially at the disposal of the Supreme Court of the United Kingdom.

THE COURT OF APPEAL OF ENGLAND AND WALES

Established in 1875, the Court of Appeal of England and Wales today comprises two divisions, criminal and civil, led by the Lord Chief Justice and Master of the Rolls respectively.

The criminal division hears appeals from the Crown Court, while the civil division hears appeals from the County Courts, the High Court of Justice of England and Wales, and several tribunals. Leave to appeal to the Court of Appeal of England and Wales is required from either the lower court or the Court of Appeal itself.

The civil division of the Court of Appeal is always bound by previous decisions of the Supreme Court of the United Kingdom, and it is also generally bound by its own previous decisions. There are, however, four exceptions to this rule. Three of these exceptions come from the case *Young v Bristol Aeroplane Co Ltd*, in 1944 – (1) where the previous decision was made without the judges knowing of a particular law; (2) where there are two previous conflicting decisions; and (3) where there is a later conflicting Supreme Court (previously House of Lords) decision. The fourth exception –where a law was assumed to exist in a previous case, but actually did not –was set out in *R (on the application of Kadhim) v Brent London Borough Housing Benefit Review Board* in 2001.

Although the Lord Chief Justice is senior to the Master of Rolls, the civil division is much broader in scope than the criminal division in the Court of Appeal. The *Administration of Justice (Appeals) Act 1934* abolished the appeal of County Court decisions to the High Court of Justice and instead sent them automatically to the Court of Appeal[1]. With only three judges on the bench (rather than five or more in the Supreme Court), this allows the Master of the Rolls wide-ranging opportunities for shaping the Common Law.

The criminal division of the Court of Appeal was established in 1966, although the process known as "leapfrogging" **(16)** –appealing from the High Court of Justice to what was then the (Judicial Committee of the) House of Lords without needing to go through the Court of Appeal –was subsequently phased in by the *Administration of Justice Act 1969*.

The criminal division of the Court of Appeal, as a result, only hears appeals from decisions of the Crown Court (which are in connection with a trial on indictment, *i.e.*, with a jury), and where the Crown Court has sentenced a defendant committed from the magistrates' Court. It also exercises the jurisdiction to order the issue of writs of *venire de novo**[2]. This division, while bound by the Supreme Court of the United Kingdom, is also very flexible in relation to binding itself, by virtue of the heightened stakes in cases where deprivation of liberty (a prison sentence) may ensue.

Retired Lord and Lady Justices will occasionally sit on cases heard by the Court of Appeal of England and Wales, as has been the case with retired Law Lords[3]. In addition, High Court judges are also occasionally allowed to sit on the bench in the Court of Appeal of England and Wales, while, in the criminal division, there are even a number of senior Circuit Judges **(17)** authorized to sit as judges of the Court of Appeal of England and Wales. These situations

---

1. It was also provided by this piece of legislation that civil appeals to the Judicial Committee of the House of Lords could only take place with the consent of the Court of Appeal or the Law Lords themselves.
2. Initially issued by the Queen's Bench Division, this writ vacates the verdict of a lower court and directs the sheriff of a county to summon fresh jurors. See *R v Rose* [1982] AC 822.
3. "Law Lords" was their popular name, as it were, because they were officially known as "Lords of Appeal in Ordinary".

notwithstanding, however, the Court of Appeal's main body of judges remains the Lord and Lady Justices of Appeal themselves.

The *Senior Courts Act 1981* provides that the Court of Appeal of England and Wales comprises thirty-nine ordinary sitting Lord and Lady Justices along with the Lord Chief Justice, the Master of the Rolls, the President of the Queen's Bench Division[1], the President of the Family Division, and the Chancellor of the High Court of Justice of England and Wales. Lord and Lady Justices have, since 1946, been drawn exclusively from the High Court of Justice.

➔ THE HIGH COURT OF JUSTICE OF ENGLAND AND WALES

The Court of Appeal of England and Wales, as well as the High Court of Justice of England and Wales, are both housed in the same premises situated opposite Temple Bar at the entrance of the City of London. That location, the Royal Courts of Justice, consists of a fine Gothic building sitting plumb in the middle of London's legal district. However, the High Court of Justice (of England and Wales) also operates district registries in twenty-six cities scattered around the seven judicial circuits making up today's jurisdiction of England and Wales. Almost all High Court proceedings may be issued and heard at a district registry.

The functions of the High Court of Justice of England and Wales include exercising a supervisory jurisdiction over all subordinate courts **(18)** and tribunals **(19)**, but also acting as a civil court of first instance in contract law cases.

In these cases, its decisions are similar to those of the lower civil court in the system, (i.e., the county court), but the amounts of money involved are higher. Thus, the Queen's Bench Division **(20)** of the High Court of Justice of England and Wales determines contract cases where the damages claimed are substantial (whereas County Courts are limited to jurisdiction over claims not exceeding £50,000) and / or where the issues concerned are complex and / or of public importance.

The jurisdiction of the High Court of Justice of England and Wales is both criminal and civil. Most High Court proceedings are heard by a single judge. However, for such things as fraud, libel, slander, malicious prosecution **(21)** and false imprisonment **(22)**, there is a right to a jury trial. In other instances, the use of a jury is an exception. Certain kinds of proceedings, especially in the Queen's Bench Division, are assigned to a Divisional Court, a bench of two or more judges.

Thus, the Queen's Bench Divisional Court hears appeals on points of law from the magistrates' courts and from the Crown Court. These are known as appeals by way of case stated **(23)**, since the questions of law considered are solely examined on the basis of the facts found and stated by the authority under review.

The High Court of Justice of England and Wales is actually made up of three divisions –the Queen's Bench Division, the Chancery Division and the Family Division **(24)**. These jurisdictions may overlap in some cases, and cases started in one division may be transferred by court order to another where this is appropriate.

Where there are differences of procedure and practice as between the different divisions, these are mainly driven by the usual nature of their work. Thus, for example, conflicting evidence of fact is quite commonly given in person in the Queen's Bench Division, but evidence by affidavit* **(25)** is more usual in the Chancery Division which is primarily concerned with points of law.

1. Of course, it would be called the "King's Bench Division" if the reigning monarch were a male.

The Queen's Bench Division

The work of the Queen's Bench Division consists mainly of claims for damages in respect of personal injury, negligence, breach of contract, defamation, actions for non-payment of a debt, and actions for possession of land or property.

In addition, an array of specialized courts revolve around, and are attached to the Queen's Bench Division –the Administrative Court, the Technology and Construction Court, the Commercial Court, the Mercantile Court and the Admiralty Court.

The Administrative Court[1] of the Queen's Bench Division has a supervisory jurisdiction which covers persons or bodies exercising a public law function. It hears judicial reviews, statutory appeals and applications **(26)**, applications for *habeas corpus**, and applications under the *Drug Trafficking Act* 1984 and the *Criminal Justice Act 1988*. It also oversees the legality of decisions and actions of inferior courts and tribunals, local authorities, ministers of the Crown, and other public bodies and officials.

The Technology and Construction Court is a specialist court which, as its name indicates, is concerned principally with technology and construction disputes.

The Commercial Court deals with complex cases arising out of business disputes, both national and international. The court will adjudge any claim arising out of the transactions of trade and commerce[2], including any claim relating to a business document or contract; the export or import of goods; the carriage of goods by land, sea, air or pipeline; the exploitation of oil and gas reserves or other natural resources; insurance and re-insurance; banking and financial services; the operation of markets and exchanges; the purchase and sale of commodities; the construction of ships; business agency; and arbitration.

The London Mercantile Court also adjudicates over business disputes, both national and international, and is designed to address claims of lesser value and complexity than the Commercial Court.

In this context, it should, for the benefit of those familiar with systems of law outside the United Kingdom, be stressed that, though the latter exists, this does not in any sense imply that "Commercial Law" can definitely be considered as a well-founded, separate area of English Law *per se**- The need to offer such a remark is a throwback to the fact that "Commercial Law" on the Continent is not exactly co-extensive with English Business Law. Furthermore, the label "Commercial Law" is much less used in legal parlance in England and Wales while, in any event, it does not appear to cover all the areas of law encompassed by English Business Law. That having been said, however, the differences between "Commercial Law" and Business Law in the English legal system should not cause us to stray from the task at hand, which is to list the English Courts revolving around the Queen's Bench Division of the High Court of Justice of England and Wales.

It is necessary to mention a last satellite court in this respect, namely the Admiralty Court. The Admiralty Court, not surprisingly in a maritime country such as the United Kingdom, processes shipping and maritime disputes such as collision, salvage, carriage of cargo, liability

1. In 2009, regional offices of the Administrative Court opened in Birmingham, Cardiff, Leeds and Manchester, making it possible for claimants to issue certain types of applications nearby the region with which they have the closest connection. A further regional office of the Administrative Court opened in Bristol in November 2012

2. Commerce refers not only to the buying and selling of goods (trade), but also to other activities such as transport, insurance, warehousing, banking and advertising.

and mortgage disputes. That Court, in particular, can deal with a claim relating to ships themselves, known as "the *in rem** procedure".

➤ The Chancery Division

The Chancery Division is concerned with Business Law[1], Banking Law, the Law of Trusts, Probate **(27)** and Land Law in relation to issues of equity (*i.e.*, cases that require a remedy to promote fairness rather than monetary damages), although it also provides the same Common Law remedies extended to litigants by the other two divisions of the High Court of Justice of England and Wales.

All tax appeals coming from the Tax Appeal Tribunals are also assigned to the Chancery Division, although the greater part of that Division's case-load involves complex business disputes and commercial fraud involving substantial sums of money. Intellectual property cases involving trademarks, copyright and passing-off claims are also dealt with by the Chancery division.

There is also a set of specialist courts attached to Chancery Division –namely, the Companies Court, the Bankruptcy Court, the Patents Court and the Intellectual Property Enterprise Court.

The Companies Court deals with issues relating to the management of companies (many of which international) such as confirmation of reduction of capital or disqualification of directors, winding up of companies that are insolvent, financial services and markets cases.

Meanwhile, the Bankruptcy Court deals with cases relating to insolvent individuals, while the Patents Court deals with matters concerning patents, registered designs and plant varieties.

The Intellectual Property Enterprise Court processes more specifically registered trademarks, copyrights and other intellectual property rights cases, but it also has jurisdiction over the same matters as the Patents Court –apart from appeals against a decision of the Comptroller General of Patents **(28)**, where the amount sought in damages is over £500,000, which will go directly to the Patents Court.

Alongside these functions, the Chancery Division has also retained special authority over certain matters such as rectification of deeds and the administration of estates[2], a jurisdiction that is divided between itself and the Family Division of the High Court.

➤ The Family Division

The Family Division is, relatively speaking, the most modern of the divisions of the High Court of Justice of England and Wales. The *Judicature Acts, 1873* and *1875*, first combined the Court of Probate, the Court for Divorce and Matrimonial Causes and the High Court of Admiralty into the then Probate, Divorce and Admiralty Division of the High Court[3]. That entity was renamed the Family Division when admiralty business was transferred to the Queen's Bench Division and contentious probate business was given to the Chancery Division.

Nowadays, apart from non-contentious probate business, the Family Division deals mainly with matters such as divorce, children and medical treatment. It exercises jurisdiction to hear all cases relating to children's welfare and has an exclusive jurisdiction in wardship **(29)** cases.

---

1. The division is increasingly involved with financial regulatory work, director disqualification and professional negligence, and is regarded as a centre of expertise for Competition Law cases.
2. Presumably, the Probate Court and its 11 divisions spread all over the country do adjudicate over the validity of a will –probate disputes.
3. It was informally called the Court of Wills, Wives & Wrecks.