

LEGAL CULTURE AND LEGAL TRANSPLANTS:
ENGLAND AND WALES

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Introduction. I. *The Legal System of England and Wales as a Whole.* A. Historical Perspective. B. Post-modernist Perspective. II. *Specific Institutions or Legal Mechanisms.* A. Historical Perspective. B. Post-modernist Perspective. III. *Conclusions.* IV. *Bibliography.*

INTRODUCTION

The legal system of England and Wales belongs to the traditional Anglo-American legal system and indeed can be claimed to be the source of that 'family' of law. However the emergence of the system of 'Common Law' was one of reception, adaptation and hybridisation, over an extended period of time and even today remains subject to change due to new influences, especially global and regional ones. Moreover the 'parent' system of England and Wales now looks to its 'adult offspring' in many areas of the law to see how the law has evolved there and whether useful approaches can be adopted or adapted in England and Wales. This process takes place through the considerations of judges, some of whom have served as appeal judges either in these 'younger' common law jurisdictions, or sat a members of the judicial board of the Privy Council to hear cases from those countries which still have appeal to the Privy Council; through the comparative work of the Law Reform Commission; through responses from academics and practitioners to consultation papers, and through the consideration of international and regional obligations, especially in recent years those prompted by membership of the European Union.

As a country of origin for one of the major legal systems of the world it should not be thought that the process of legal transplant or the influence on legal culture has been consistent or uniform. Indeed in many cases it has been incremental and taken place alongside the survival of other legal systems, often resulting in parallel or plural legal systems in countries of reception. Nor should it be imagined that all transplants have survived, or that where they have, they have preserved their original form. There have been many modifications, to the extent that it is often pertinent to question whether a transplant or concept, once introduced, accepted and applied, does not, through that process, change into a different, but recognisable

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thing? (Watson: 1974, suggests that it does and that the transplant is part of the development process). The metaphors of horticulture may be more apt than those of human surgery. The common law of England and Wales may provide the root-stock but the shrub or tree that grows there from takes its own form, adapting to the context and environment in which it finds itself and subject to the way in which it is treated and used thereafter (Orücü prefers transposition but examines a variety of terms used for the process, Orücü: 2002).

As this report is one of many which will be collated to commemorate the Bicentennial Anniversary of the Independence of America, it is perhaps natural that the suggested first period of consideration should be the discovery of America to the 1789 French Revolution. However, much had happened in English law prior to this period, so some consideration will be given to the pre-1492 voyage of Christopher Columbus. Similarly, although for some legal systems the Twentieth Century may not have seemed very significant, for many countries where the law of England and Wales had been introduced or received the movement towards independence marked a moment when there was an opportunity to review a legal system which had been imposed under colonial rule. While the fall of the Berlin Wall in 1989 was a momentous event marking the disintegration of the soviet social state and opening new opportunities for the reception of different legal ideas and institutions into the newly emerging states, perhaps more significant from the legal perspective of England and Wales has been the growing influence of the European Union on legal culture and legal rules, especially in the latter part of the twentieth century.

I. THE LEGAL SYSTEM OF ENGLAND AND WALES AS A WHOLE

A. *Historical Perspective*

1. It was not until around the twelfth century that England and Wales had anything like a unified or national system of law – and even then that date may be too early to include Wales (although some writers would differ see e.g. Wormald: 1999). Prior to the conquest and for some time after, the country was politically fragmented and laws were localised. In Wessex, Mercia and the Earldom of Northumbria the law of the Danes predominated as a result of invasions in the course of the 9th century. Indeed England was ruled by right of conquest by a Danish King from 1016-1035 and further Scandinavian invasions were threatened from 1035-1066, including from Norway. In the South Anglo-Saxons held sway, while in the West, including Wales, and far north-west, the Celtic and Gaelic influence prevailed. Despite the occupation of much of Britain under the Romans, Roman law had little influence except in so far as it later informed cannon or

ecclesiastical law (and later mercantile law), which remained an important source of law, especially in respect of family law, until the Reformation, and the break with the Church of Rome. Roman law was essentially written law and the Romans tended to leave in place the unwritten laws of much of Europe, including Britain. Furthermore, England and Wales avoided the later reception of Roman law under the glossators and commentators, which occurred in much of Europe, although Roman law and canon law were the subjects of legal study at the early universities of Oxford and Cambridge. (The university study of the 'common law' came much later and was for centuries the preserve of the Inns of Court).

Not all law was unwritten by the time of the conquest. In 601 AD The Doms of Aethelbirht had been reduced to writing. Anglo-Saxon law had been reduced to writing under Alfred the Great (871-900) and in the east under the Danish king Canute (1016-1035) written laws had been made and Welsh laws had been collected together in the Laws of Hywel Dda (904-50).

The conquest of Britain – although initially only a part of it as Scotland and Wales had to be held at bay by granting land in the border marches to loyal supporters – by William I of Normandy, of Wessex in 1066 and Mercia and Northumbria in 1071-1072, had a significant long-term impact on the legal system although initially the Norman and Angevin kings left the existing law in place, especially the local law of the courts of the geopolitical units of shires and hundreds which administered local customary law. These were gradually replaced with feudal courts, but these too, tended to apply customary law. Nevertheless, the system of feudalism introduced from North-West France was to have a profound impact on the law of property which, despite the abolition of Feudal Tenures Act in 1960, continues to inform the land law of England and Wales. In 1086 William I had all property listed in a great document: The Domesday Book, which provided an inventory of the property of the realm and served a fiscal purpose, and was a testament to the highly centralised administration instituted by William I. However, the development of collections of laws really started with Henry 1(1100-35) in 1118 and the *Leges Henrici Primi*, a compilation of laws aimed at improving the administration of justice (Robinson et al 1985:221).

However the initial changes following William I's conquest were procedural rather than substantive, being concerned with the issue of the King's writ and the scope of jurisdiction of the King's court. (Zweigert and Kötz suggest that the Common Law in the Middle Ages had many similarities with Roman Law 1998:186). Initially the central court was the court of the King based at Westminster (Curia Regis) with limited

jurisdiction to hear matters concerning royal finances, matters relating to land, and serious criminal matters threatening the peace of the realm. For these emerged three branches: the Court of Common Pleas, the Court of King's Bench and the Court of the Exchequer. Indeed the driving force behind the King's administration of justice was the need to collect taxes, and to have a peaceful kingdom in which to do so. The royal courts were not interested in private law matters such as contract or tort (except in so far as they raised matters of ownership of property or criminal damage – to people, land or goods), and commercial matters fell under the municipal or commercial courts which began to emerge in the 13th and 14th centuries and applied a form of international *lex mercatoria* (which was not integrated into English law until the late 1700s). From this centralised court developed the jurisdiction of the Crown and the courts of common law, which not only generated income by way of fees but was seen as administering a superior form of justice over the local courts. Ecclesiastical courts were also introduced after the Conquest, in which the canon law of the Catholic Church was administered, especially in respect of family law.

The term 'common law' appears around the end of the twelfth century. Glanvill's *Treatise on the Laws and Customs of the Realm of England* emerged in the reign of Henry II indicating that by this time the centralised royal power extended throughout the kingdom. By the end of the thirteenth century the King's writ reached into Wales, Scotland and Ireland, and although local courts continued to be used, the royal courts became increasingly popular. In some cases these writs were only used initially by English settlers in these areas (Glenn 2004: 33-34). By 1300 the Court of Exchequer, the Court of Common Pleas and the Court of King's Bench had become permanent courts. These courts survived until the seventeenth century. Judges from these central courts travelled around the kingdom to hear cases – a feature of the administration of justice in England and Wales which is still found today. In this way both a centralised and unified system of justice developed with the law of the King, applied by his judges, gradually replacing the local laws of the borough and feudal courts. In Wales however local law continued to be applied until the sixteenth century, especially in areas of private law (Glenn 2004:33), only gradually being replaced by English law through mediation, adaptation and accessibility.

However the popularity of the King's courts was challenged by the emergence of the Court of Chancery administered by the Lord Chancellor who received petitions on behalf of the King from litigants who could not find justice in the King's courts of common law, often because of the strict and sometimes rigid procedural requirements that had to be met and the limited 'forms of action' within which they had to bring their claim. These courts of equity developed a separate jurisdiction throughout the fourteenth

century, so that by the time America was discovered the idea of an equitable jurisdiction running alongside and sometimes as an alternative to the common law was well established. The early Lord Chancellors, until 1673, were clerics and brought to the administration of the law principles drawn from Roman and Canon law. Equity developed as a body of substantive and procedural law which was founded on considerations of justice and good conscience rather than those of form and formula, initially providing a flexibility and adaptability which the common law of the King's courts lacked. With popularity and mounting pressure of cases the courts of equity became as principle-bound as those of the common law. Although these two parallel systems of courts merged at the end of the 1800s, the dualism of law and equity remains a feature of the common law and is evident in property law and in remedies available in civil law actions in contract and tort, as well as in the inherent equitable jurisdiction of all courts, which as a last resort may enable judges to address new and unprecedented circumstances needing a legal solution.

The Common law system of a 'divided bar' or two distinct branches of the legal profession was also established before America was discovered. By the early fourteenth century legal practitioners had organised themselves into Medieval guilds in London (Inns of Courts) in order to facilitate the administration of their work, to provide accommodation and legal education for a host of clerks and aspiring lawyers. A distinction was made between those who appeared in the courts to plead a case before the judge (advocates – now barristers) and those who advised clients directly (attorneys – now solicitors). However it was not until the end of the sixteenth century that the Inns of Court became solely the preserve of barristers and the attorneys formed their own society. This system was entirely privately organised, funded by the fees paid by clients and run according to traditional guild rules. The state had no control over legal education. Judges were chosen from these lawyers. This early legal form of education, whereby young lawyers learnt from the practical examples of senior lawyers has continued to inform the way in which law is taught and how lawyers think, even though much of the initial stage of most legal education now takes place in universities. Judges are still selected primarily from private practitioners not from civil servants.

2. The legal system introduced under William I by right of conquest and inheritance (he claimed hereditary title from Edward the Confessor), replaced a mixed legal system of Danish, Celtic, Jute and Anglo-Saxon Laws. In those areas brought under Danish law society was more egalitarian and Scandinavian customs and language prevailed. Forms of feudal tenure and the payment of tithes to local overlords were already in place prior to the conquest as was the use of juries.

William I and his successors put in place a unified system of administration of justice utilising the existing geo-political units of shires and hundreds, and the shire, hundred and borough courts, and the existing Anglo-Saxon feudal social structure in order to facilitate taxation, the dispensing of justice and keeping the peace. Building on the foundations of an existing tenural division of land under the manorial systems found in much of the south and central parts of the country, William introduced a system which combined the administration of justice and land holding.

3. The driving force for the imposition of feudalism was a political one. By vesting ultimate title to all land in the Crown, the King could exert control over his under lords, who in turn were overlords of others. In cases of treason the land would escheat back to the Crown or could be seized or forfeited to the Crown – in principle this remains the case. By granting dispersed parcels of land to his supporters William reduced the likelihood of landlords raising private armies against him. Moreover a system of tenures ensured that throughout the hierarchical social structure those in inferior positions were kept in thrall to their superiors. Although feudal duties soon gave way to monetary payments and eventually disappeared altogether to be replaced by tithes and taxes – which were not in themselves new, the idea that all land vested in the Crown has remained central to the Common Law system and indeed has been transplanted to other countries particularly those acquired under colonial expansion either by conquest, cession or settlement. Consequently the notion of absolute ownership of land is an anathema to English common law, because all ownership is for a period of time - an estate. In practice land may be kept out of the hands of the Crown as long as there are successors in title – either by inter vivos transfer or succession, but it is still the case that where land or other property is unclaimed it reverts to the Crown (*bona vacantia*). This basic principle also applies to moveable property, especially unclaimed money.

1492-1789

There are a number of important historic moments in the development of the Common law. Among those during this period are the break with Rome by Henry VIII in 1533-34, the fusion of the Crowns of England and Wales and Scotland in 1603, and the subsequent fusion of the legislative bodies of the two in 1701 by the Act of Union, the emergence of the Courts of Chancery and the long-running conflict between the jurisdiction of these courts and those of the Crown, the victory of Parliamentary supremacy over the power of the monarch culminating in the Bill of Rights of 1689 and the contribution of certain remarkable individuals to the development of English law, which all helped to shape the Common law as we know it today.

Under the Tudor and Stuart monarchies of the sixteenth century when the royal prerogative was probably at its strongest until the rise of Cromwell against Charles 1, there were a number of fundamental legal changes. The criminal court of the Star Chamber was established to restore civil order following the long period of civil war (1453-1485), and increasingly the Crown sought to be an absolute monarch and the fountain of all justice, with a strong centralised control over the subjects of the realm. Royal prerogative was also the foundation of the early power of the court of Chancery but gradually the courts of the King and those of the Chancellor diverged and conflicted.

Tension between the monarch, the common law courts and parliament culminated in the ascendancy of parliament over the king and victory for the common law, putting an end to any likelihood of Roman law taking roots in England and Wales. In this battle lawyers took sides, most of them preferring the power of parliament over the prerogatives of the king. The Chief Justice of the Court of Common Pleas and later of the Kings Bench, Edward Coke was an outspoken advocate of the rule of common law and his writing was to be an important influence in the portability of English law as well as its preservation.

In 1529 the first secular Lord Chancellor was appointed (Sir Thomas Moore) marking the beginning of a conflict between the application of the law in the King's courts and those of the Lord Chancellor which was not to be resolved until the end of the nineteenth century. In 1615 the first of many clashes culminated in the *Earl of Oxford's Case* (1615) 1 W & T 615, 21 ER 485, in which the King James 1 ruled in favour of the Courts of Chancery, a ruling that has prevailed in cases of conflict between law and equity to the present day and is now found in legislation. At the same time the power of the King to create new courts in competition with those of the common law was curbed and from 1621 decisions of Chancery were reviewable by the House of Lords. This meant that the balance of power in law-making clearly shifted from the sovereign to Parliament.

The development of the law at this time was largely left to the judges, resulting in a vast and unsystematic mass of case decisions emanating from a dual system of courts. Support for bringing order to the chaos by way of codification was advocated by some. For example, Francis Bacon in the late sixteenth and early seventeenth centuries suggested reducing the volume of disorganised statutes into a code or consolidation and introduced a proposal to this effect in Parliament in 1593. A further proposition to create a codification of statutes, an abridged version of the Year Book Reports, an institutional commentary and a law dictionary were proposed in 1614 (Pound 1959 (3):705), but lawyers, to whom the task would have fallen, were

unwilling to fetter the power and discretion of judges. In 1650 Cromwell appointed a Parliamentary Committee to compile a digest of the law and under the chairmanship of Sir Matthew Hale a commission sat to simplify the law from 1652-1656 (Kerr 1980: 518). Nothing however was achieved, and perhaps the dual system whereby litigants could go to and fro between the courts of chancery and those of common law meant that there was less demand for reform. Institutional writers of significance who emerged in the period included Coke (1552-1634) and Blackstone (1723-1780) whose works were to play a significant role in the exportability of English law. Later influential thinkers and writers of the period included Jeremy Bentham (1748-1832) who was a strong advocate of the democratic development of law – through legislation made in Parliament, and a critic of law making by judges. However, the Common law never experienced the key institutional writers which were to influence the reception of Roman law and the emergence of a *ius commune* in Europe.

The discovery of America by Christopher Columbus was one among many voyages of discovery taking place in the course of the fifteenth century and thereafter. Prompted by international competition to discover new trade routes, such discoveries also led to competition in the aggrandisement of nations. Newly discovered land was claimed in the name of the King, although often these voyages were sponsored by private enterprise. The earliest visitors – whalers, trappers, sandalwood merchants, slavers and fortune-hunters probably took very little heed of law – their's or anyone else's. In America the first independent colonies were established in the early seventeenth century: Virginia 1607, Plymouth 1620, Massachusetts 1630 and Maryland 1632. In South Africa and India the East India Company established in 1600 had trade stations in both countries and under their charters were empowered to make such laws as were necessary so long as these did not infringe English laws, statutes and customs.

As settlers arrived however those from England were presumed to take the common law with them in so far as it was applicable to the local circumstances – a principle which continues to apply and was recently asserted in the case of one of Britain's remaining colonies (now called overseas dependencies), Pitcairn Islands. Even when settlement was formalised by royal charters, as in the case of Cape Ann in 1623, granted by Charles I, considerable freedom was granted to the King's representative – the Governor or his Deputy and assistants. He could make any laws which were 'wholesome and reasonable and not contrary to the laws of England'. In the absence of acquaintance with any other legal system it was inevitable that these public servants and the settlers themselves would draw on English law, and where they had it, their own legal experience. In the American colonies however, because of the nature of the religious persecution which

many were escaping (for example, the puritan Pilgrim Fathers in 1620), many of the early settlers also drew on the Bible as a source of law, modifying or ignoring its provisions where necessary to suit local circumstances. There may also have been a conscious or unconscious rejection of many of the characteristics which had shaped the common law, especially the central role of the Crown, inequalities of land tenure and access to justice and the power conferred in the hands of judges.

It is questionable whether this application of English common law beyond the shores of England and Wales, can really be described as a transplant (although Orücü 2002 suggests that this is the true sense of a transplant, fn 1). There was no 'host' body onto which it could be transplanted, and while it was removed to foreign soil, it was transported as a 'cloak' or 'mantle' worn by those who travelled there. Clearly English law was influential. Watson (1974) highlights the influence of local English customs that settlers took with them, procedural approaches derived from the English courts, including those of Chancery (at this time a separate system of courts from the royal courts), and certain forms of legislation which had particular relevance for the early settlers – such as 1563 Statute of Artifices (which regulated apprenticeships), the 1535 Statute of Uses (which influenced conveyancing practices) and the 1563 Statute of Labourers which influenced employment law. Unlike the common law in England however, considerable regard was given to institutional writers such as Coke, and later Blackstone, whose 'Commentaries of the Laws of England', was widely available in America after 1803, at a time when there was a dearth of other legal authorities.

Settlers in the new world also reduced their laws to codes, although this term may have meant no more than a collection of compilation of written laws. For example, Massachusetts 'codified' its laws in 1634, Georgia in 1860 and Pennsylvania in 1682. In some cases these codifications may have been made to overcome the scarcity of written legal sources, nevertheless the act of codification may also have been directed at curtailing the power of magistrates and judges which advocates such as Bentham and Austin were to deplore and, like the civil law codes, was directed at making the law more certain and more accessible. Indeed in 1811 Bentham wrote to President Madison offering to codify the laws of the United States (Honnold 1964: 100-102). Although his offer was not taken up his advocacy was followed by others in America, notably Joseph Story, James Kent and David Dudley Field whose early nineteenth century publications replaced those of earlier English writers.

By the end of this period the early settlements of America had broken away from Britain and formed an independent United States (1776)

and there was no further ‘official reception’ of English legislation (De Cruz 1999: 111). Other countries were still being discovered and either settled – were there was no apparent indigenous inhabitants or no recognisable form of rule, or ceded or conquered where there was.

Although English law had travelled beyond the shores of the UK by the time of the French revolution, England and Wales did not experience the political upheaval of Europe. Indeed if anything, events on the European Continent strengthened an affirmation of difference in England and Wales. The monarchy survived as did the social structure of a privileged, property owning aristocracy which held considerable power. It was not really until the next century that industrialisation and urbanisation was to change the social structure of England and Wales and influence the development of the law, especially commercial law.

1790-1918

The codes inspired by Napoleon spread all over Europe but ‘never crossed the narrow “legal straits of Dover”’ (Seagle 1946: 295). This was not purely due to anti-French sentiment at the time. England and Wales had less need for a codification of a multiplicity of laws. However, some of the ideas behind codification did cross the Channel. In particular the idea of legislative supremacy rather than the casuistic development of the law was championed by Jeremy Bentham, a utilitarian in favour of law reform. John Austin was also a supporter of codification but appreciated the enormity of the challenge. Both however supported the idea of making the law more accessible and certain and saw a need to restrict judges’ powers to the interpretation of legal rules rather than the making of them. Neither Bentham nor Austin completed a draft code. Henry Brougham, later to be Lord Chancellor, also advocated codification, and in 1833 a Royal Commission was established to consolidate statute laws – with no result. In 1853 Lord Chancellor Cranworth requested a further commission, and in 1859 Lord Chancellor Westbury proposed the compilation of a digest of case law and statute law (Kerr 1980: 518-519). A fundamental problem for law reformers at this time was the lack of a Ministry of Justice or a Law Reform body – the first Law Revision Committee was not established until 1934 under Chancellor Sankey. Members of parliament were reluctant to advocate law reform and so advocates of codification were thwarted by technical obstacles as well as political ones.

Although strongly opposed by the legal profession which monopolised legal education through the Inns of Court as well as forming a powerful lobby in Parliament, some reforms were achieved during the course of the nineteenth century. The Bills of Exchange Act 1882, for example, was

seen as being a codification of the law of negotiable instruments (Lord Herschell *Bank of England v Vagliano Bros* [1891] AC 107 at 144). Similar views were taken of the Bankruptcy Act 1883, the Partnership Act 1890 and the Sale of Goods Act 1893, the Factors Act and Arbitration Act 1889, Merchant Shipping Act 1894, Perjury Act 1911, Forgery Act 1913 and the Larceny Act 1916. Although civil lawyers might see these as being more a consolidation than a codification (David and Brierley 1978: 307), nevertheless they may be seen as English expressions of the spirit behind codification if not the form. The mid to late nineteenth century was also a period of considerable social welfare legal reform championed by Victorian philanthropists and often provoked by civil and localised unrest, and the emergence of a politically influential working class.

The late nineteenth and early twentieth century was a period of considerable procedural legal reform in England and Wales. The dual system of common law courts and equitable court merged under the Judicature Acts 1873-75, becoming one uniform court system in which both common law and equity were administered. The ancient 'forms of action' which had hampered the development of the common law were abolished, so that any litigant with a complaint could bring the matter to court. Two developments made the law more accessible: the publication of official law reports (rather than private collections) from 1865, and the systematic presentation of the law in the Laws of England, under the chairmanship of Lords Halsbury. Both of these continue to exist and provide those within England and Wales and those elsewhere in the common law world with access to English law authorities which are constantly being updated. Most are now of course available from electronic data bases.

While English Common Law had already travelled to America – and had been codified in a number of areas and states (for example New York and Massachusetts), this post-French Revolution period was one of rapid expansion of the Common Law world. It was the period of Empire and colonial rule. Countries came under the influence of the Common Law either by right of conquest – which was rare, by cession, which was more common, or by settlement, especially where it was considered that the land was *terra nullius* – belonging to none (as was believed to be the case in Australia) or where the indigenous people were perceived as having no effective legal system (as was initially considered to be the case in New Zealand). English laws were introduced by virtue of being taken with them by settlers (to the extent that the English law was applicable to the infant colony) but also by proclamation of sovereignty over these countries. In some cases however, English settlers were in these territories some time before the nature of the legal system was clarified, usually as traders and planters, see for example, Singapore (where the situation regarding English law was not

clarified until 1826, and Malaysia where this was not done until 1937). Elsewhere English administration strengthened the existing non-English legal systems, for example, in India where English rule officially recognised Hindu law which had previously been dominated by Muslim law (1774). However the presence of English officials and the reach of the courts set up to facilitate trade, combined with the lack of any uniform law across India and diversity of religious laws meant that by the end of the nineteenth century English law applied across the sub-continent and was administered by judges trained in English law. English law influenced a number of areas of substantive private law including contract (Contract Act 1872), property (Transfer of Property Act 1882) and succession (Succession Act 1865). English method and procedure in India and elsewhere also reflected that of the Common Law.

While codification had not taken root in England and Wales, colonial administrators had no hesitation in imposing codes on British colonies in order to facilitate the administration of justice in plural legal systems. In particular codes of law were drawn up for India where it was believed that codification would also achieve legal unification and certainty which in turn would assist and encourage national development. It was also believed that the codification of the common law would facilitate its reception. In 1833 a commission was established under the Charter Act. Notable early members were Lord Macaulay, Sir Henry Maine and Sir James Stephen, all of whom were supporters of codification and the implementation of law reform. The first Anglo-Indian code was the Code of Civil Procedure 1859, followed by a Criminal Code in 1860 (which replaced earlier codes: the Cornwallis Criminal Code 1793 and the Elphinstone Criminal Code 1827), and a Code of Criminal Procedure in 1861. Further codifying statutes for application in India – but not England and Wales, were also passed by the British Parliament. These included: Succession Act 1865, Evidence Act, Contract Act, Specific Relief Act 1872, Negotiable Instruments Act 1881, Transfer of Property and Trusts Act 1882. A code for the law of delict was drafted by Sir Frederick Pollock but not enacted and Sir Fitzjames Stephen drafted an Indictable Offences Bill in 1878. The influence of civil law codes was evident in these pieces of legislation. For example, the Indian Penal Code closely followed the French Penal Code while the Contract Act appears to have been influenced by Field's contract code for Louisiana. These codifications were subsequently used as models for codes and laws elsewhere such as: eastern Africa and the Sudan (David and Brierley 469), Ceylon (Nadaraja 1972: 232), and southern Africa, where a Penal Code founded on English common law was introduced in the Transkei in 1886. The process of codification was also considered in South Africa in the colony of Natal where a Code of Natal Native Law was completed in 1878 and after amendments, promulgated in 1891.

Codes were also introduced into mixed legal systems where common law and civil law co-existed and in some cases common law threatened to overwhelm the civil law – for example, Louisiana, Quebec, Lower Canada and Seychelles.

Elsewhere, the law of England and Wales was introduced as a consequence of declarations of sovereignty, or protection.

For example, British sovereignty was proclaimed over New Zealand in 1840 and New Zealand became subject to English laws in so far as these were ‘applicable to the dependency’ – a phrase that was to be echoed throughout the Empire, and which frequently caused some uncertainty. Indeed in New Zealand in 1858 the English Laws Act was passed to specify which English laws did apply, stating that only those in force in the colony since 1840 were applicable. This solved the problem in respect of legislation but not the common law or equity. See similarly in Singapore the English Law Act 1993.

The extent to which the substantive common law was transplanted or not, depended on the nature of the law-making powers of the respective colony. Smaller colonies tended to be governed by Orders in Council, passed without parliamentary scrutiny, which often conferred considerable law-making autonomy on Governor Generals, Resident Commissioners or their equivalents. The scope of such law making was meant to be guided by the need to make such laws as were for the ‘peace, order and good governance’ of the colony. However it was also possible to make laws for colonies which would not have been tolerated in England and Wales. This was facilitated by the Colonial Laws Validity Act 1865 which allowed Parliament, or the Sovereign through Orders in Council, to make laws for colonies and dependencies which would have been regarded as repugnant if passed for application in England and Wales.

Where colonies had their own law-making assemblies they were empowered to make such laws and provisions as were appropriate for the ‘peace, order and good governance of the colony’ within the powers conferred on them. These domestic laws could also include provisions which, had they been promulgated in England and Wales, would have been void for repugnancy.

The attitude of colonial legislators and judges was to leave in place existing laws except in so far as they were inconsistent with legislation passed for the colony or contrary to the general principles of ‘peace, order and good governance’. For example, in South Africa Roman Dutch law which governed most areas of private law, was predominantly left untouched, as

was the French law in the French territories of North America (Quebec Act 1744). To this extent therefore, although much that was characteristic of the English legal system was transplanted, the substantive private law was a patchwork of different legal authorities including existing customary law and/or religious law where this was in place, and in some countries the laws of other imperial powers.

There were therefore divergencies from English law from an early stage. For example, in New Zealand, divergencies in family law emerged in the latter part of the nineteenth century as regards the prohibited degrees of marriage, the law on adoption and maintenance.

Those colonies that had their own legislative assemblies also patriated English laws taking the English legislation as a model and adapting it as necessary to meet the needs and values of the country. Most recently this has been done in Hong Kong following the return of Hong Kong to China. In some cases the new colony gave effect to laws in advance of reforms in England and Wales – a process that has continued to be a feature of England's relationship with its former colonies.

There was, and continues to be, a borrowing of ideas within the common law family. For example, New Zealand borrowed from Australia the Torrens system of land registration so that by the 1860s the land registration and conveyancing system of New Zealand was markedly different from that of England and Wales, where registration of title was still in its infancy.

1918-1989

From the standpoint of the Common Law, the post-war period saw the end of the Empire, the emergence of the Commonwealth, and the rise of Europe as a regional player in global affairs. It also saw the introduction of English common law in parts of the world that were being re-structured in the aftermath of the world wars especially under the mandated territories of the United Nations. For example, English law was introduced into Palestine, where parts of the Ottoman legal system were replaced by English legislation and case-law during three decades of British administration. Judges were instructed to refer to English law when interpreting legislation made for Palestine and, under Article 46 of the Palestine Order in Council 1922 to refer to the substance of the common law and equity in cases where either Ottoman law or specific enactments did not apply, provided the local circumstances permitted this approach (Tsilly et al 2008). In Israel this provision was only abolished in 1980 when the Foundations of Law Act severed the tie between English law and Israeli law (although the process of

distancing had started much earlier). However, Tsilly and others suggest that the English heritage remains in features such as adherence to the rule of precedent, acceptance of the important and creative role of judges in shaping legal norms, the adversarial role of lawyers, and the unitary structure of the courts.

Post-war the development of the United Nations as an international force led to pressure to liberate the former colonies and assist them towards self-government. It also led to the development of a growing body of international law, which has become increasingly but variably influential, in shaping domestic law.

The achievement of self-government provided a moment in history for countries to take stock of the laws that governed their people. For the most part however the common law was retained, its institutions, procedures and approaches left in place subject to various 'cut-off' dates for the application of statute law and the general principles of common law and equity respectively. The major departures were the movement towards written constitutions and the inclusion of bills of rights or statements of fundamental freedoms within those constitutions. This was particularly the case with those countries that attained independence once the United Kingdom had signed up to the European Convention Fundamental Rights (1953). In some countries the end of colonial rule meant that customary laws could take a place once more among the official sources of laws. A further feature of notable difference was the establishment of a Supreme Court in a number of countries, although in some the court of final appeal remained the judicial committee of the Privy Council in London.

The post-war period also saw the emergence of the role of the Law Commission in the process of law reform and with it a requirement to adopt a comparative approach to the review of the law (Law Commission Act 1965). Moreover the Commission was mandated to 'take and keep under review all the law with which they are respectively concerned, with a view to its systematic development and reform, including in particular the codifications of such law' (Section 3(1)). While this dimension of civil law systems appears to still be of interest to law reformers in England and Wales (although the common law understanding of codification may be more a mixture of reform and restatement than root and branch codification) it has to be said that codification has largely remained of academic rather than practical interest. It is also the case that much of the comparative work of the Law Commission falls on stony ground and there is considerable delay in legislators taking up proposals.

Nevertheless the formalisation of the work of law reform has provided a greater opportunity for consideration of how other legal systems approach similar legal and factual issues. While this may not amount to the adoption of legal transplants it does, as suggested by Orucu, encourage the trans-border migration of legal forms, ideas and institutions (Orucu : 2002).

An example of a reception of a foreign institution in this period is the Scandinavian institution of the Ombudsman first established in England and Wales under the Parliamentary Commission Act 1967. Although the independent power of the English ombudsman to initiate investigations is more limited than a number of his counterparts elsewhere in Europe, there are today a number of ombudsmen with powers to investigate complaints about the health service, local administration, legal services, banking, insurance, pensions, building societies, stock broking and investment

The post-war period also saw the establishment of legal aid for indigent litigants in order to facilitate access to justice, including in the case of private law suits, under the Legal Aid and Legal Advice Act 1949, although it was not until the 1980s that legal aid was to be taken out of the hands of practicing lawyers and their professional body the Law Society. In 1988 the system was formalised and was brought under the control of central government who established the Legal Aid Board. Further amendments were made in 1999 under the Access to Justice Act. Civil legal aid now formed part of the Community Legal Service (CLS). Indeed, today it might be said that access to justice for many depends solely on the availability or not of legal aid.

Entry by the United Kingdom to the European Economic Community in 1972 has resulted in a range of measures passed by Parliament directed at compliance with EEC/EU directives and treaty obligations. These have impacted on many areas of law, for example, consumer contracts, financial services provisions, employment contracts, liability for defective goods and the liability of owners of premises for harm suffered.

1989-Present

The most significant influence of recent years has been the hybridisation of laws as a result of international treaty obligations as well specific projects to harmonise areas of private law such as contract. Although nearly a third of the world's total population live in regions where the Common Law of England and Wales has had an influence and whose legal systems can be claimed to belong to a broadly defined 'Common Law Family', within the European context Common Law is in the minority. Even

internationally as more states have become members of the United Nations, the approach of the common law is less influential, especially when account is taken of countries such as China and Japan and more recently emerging former USSR states.

Although foreign legal materials are more accessible than they ever were (although this should not be seen as a panacea for transplants (Markesinis: 2002), English courts remain reluctant to use comparative approaches to receive or consider transplants from other non-common law systems, despite the advocacy of such approaches in cases such as *White v Jones* [1995] 2 AC 207 and *Gretorex v Gretorex* [2000] 1 WLR 1976, both of which were tort cases. While there is some evidence to suggest that the English courts do refer to the decisions of other common law countries (Orucu 1994) reference to non-common law systems is rare.

B. Post-modernist Perspective

Globalisation and the internationalisation of trade, the movement of people and modern technologies have all contributed to blurring many of the distinctions between legal systems, especially where there are economic, social and political similarities. While there may still be differences of detail, there may be many more common principles than hitherto. So for example, in family law, the welfare of the child has taken centre stage, and considerations of no-fault divorce, the family status of homosexuals, unmarried couples and serial relationships have prompted law reforms with a number of similarities across legal systems. The use of the inter-net for commercial transactions has prompted law reformers to address issues such as e-commerce, data protection and cyber law. Technological and industrial advances have changed the nature of the torts than may be committed, and enlarged the field of potential liabilities to include damage to the environment. New areas of law have emerged which tend to transcend national boundaries – such as environmental law, or are aimed specifically at doing, so such as international private law, the law of the sea/martime law, refugee law and space law.

Nevertheless it is probably still true to hold that there is a conceptual difference between civil lawyers and common lawyers, even if the outcomes that are desired are shared.

4. General Identification Elements of the Common Law of England and Wales. Different commentators have identified different key elements that in combination mark out the English common law. These include the role of case-law, and linked to this the role of the courts and the influence of a small group of judges during the formative stages of the 13th Century (when

there were fewer than twelve judges), a strong centralized monarchy – at least in the formative stages of the law and the centralisation of the administration of justice, especially from Magna Carta 1215. Other characteristics include the lack of a written constitution, the absence of a codifications of laws, a focus on remedies, the emergence and development of equity as an adjectival and substantive source of law (especially during the 15th, 16th and 17th centuries), a divided legal profession (barristers and solicitors) and a general disdain by judges for referring to institutional writers. It is often argued that the Common Law is based on the pragmatic consideration of laws to facts by the courts, rather than on statutory interpretation or abstract concepts (Zweigert and Kötz 1998: 181), or that the Common law disdains forms and formulas preferring an *ad hoc* approach. Others have suggested that the emphasis on procedure rather than substantive rules; on remedies rather than rights; the lack of distinction between private and public law and the categories and concepts of English law distinguish it (David and Brierley 1978: 294). Alternatively that the key features are: the case-based system and reasoning from one case to another by analogy; the hierarchy of precedents; the mix of legislation and case law as authoritative sources of law; distinct institutions – such as the trust and estoppel; a pragmatic legal style; the separation of categories of law – which in civil law systems would be combined, such as contract and tort (law of obligations), and the unique dualism of common law and equity; and the lack of a public/private law distinction in substantive law (De Cruz 199: 102-103).

These various characteristics or key features have waxed and waned over the centuries. Clearly the constitutional monarchy of today is nothing like the monarchy of Henry VIII. Legislation is a far more important source of law than it was in the early days of Parliament and the post-war years have seen a huge increase in legislation, so that judges are frequently engaged in questions of statutory interpretation. Moreover, while the rise of equity was in part due to the need to escape from the rigidity of common law forms of action and a formulaic approach to the law (which was aggravated after 1285 Statute of Westminster which curbed the power of the Lord Chancellor, acting for the King, to grant new writs or forms of action), equity itself became increasingly rigid and the fusion of the two systems of law in the Judicature Acts 1873-75, meant that thereafter the courts of law had a wider range of remedies available to them. The role of the rule of precedent in the courts of common law and those of equity, whereby previous decisions or a court of similar or higher level are regarded as binding (unless the facts can be clearly distinguished or a court is prepared to find an earlier decisions ‘wrong in law’) has meant that few cases can be decided on an ‘ad hoc’ basis, although occasionally Chancery judges have tried to do so (for example, Lord Denning in the 1970s).

As life grew more complicated in the course of the nineteenth and twentieth century it was inevitable that the rationalisation of procedural forms occurred. Increasingly the use of standard forms in a wide range of transactions, such as conveyancing, wills, contracts, agency and negotiable instruments has meant means that the law is less *ad hoc*. As elsewhere, the process of industrialisation meant that new challenges were presented to the law so that although there may not have been a process of conscious legal importation, there were similarities across systems of arriving at desired outcomes to meet new circumstances – for example, damage caused by trains and motorised vehicles. This is a process that has continued into the twenty-first century especially with advances in global technology presenting challenges with transcend legal borders – for example, e-commerce, issues of data protection, questions of offer and acceptance across time-lines, defamation via cyber-space, piracy of copyright, etcetera.

In the administration of justice there have been some changes. For example, some of the barriers between barristers and solicitors have been broken down in those instances where solicitors have rights of appearance before the lower courts, and equity can be administered in all courts rather than in just those of Chancery (Supreme Court Act 1981 replacing the Judicature Acts 1875-95). Court procedures have also changed. Although many of these remain adversarial rather than inquisitorial as is found in Civil Law system, increasingly written pleadings are being used (although the investigative judge of the continent remains unknown in English law). Juries in civil trials are a thing of the past except in cases of defamation, and recently some criminal trials have been held without juries. There are attempts being made to widen the membership of the bench and develop a more representative judiciary, although female judges remain rare, especially at the higher level and the profession of barrister remains predominantly male. Administrative law and judicial review of administrative action have emerged as important areas of law in latter part of the twentieth century and into the twenty-first century and there is increasing specialisation of dispute settlement through the use of tribunals, as well as increasing emphasis on non-litigious dispute settlement, via mediation, alternative dispute resolution and negotiation. More stipendiary (rather than lay) magistrates are being used and there have been efforts made to encourage ethnic minorities to join the legal profession.

While there have been many procedural distinctions which have become more modified over the course of time there are some distinctions that continue to be characteristic of the Common Law. Among these are: the institution of the trusts whereby legal ownership or title is separate from the beneficial or equitable title or interest; the doctrine of consideration in contracts which requires the passing of money or money's worth, or the use

of a formal document such as a deed, to establish privity of contract; the retention of a number of separate nominate torts alongside the more general tort of negligence which developed during the twentieth century; the discretionary nature of equitable remedies and a general reluctance to apply strict liability unless expressly provided for in legislation.

Certain remedies may also be distinctly characteristic of the common law. While damages are standard and available as of right in contract where there is breach, equitable remedies such as injunctions to restrain torts, or to facilitate procedures such as securing evidence for trial or assets from which court orders may need to be satisfied, are also a feature of the common law of England and Wales as is the discretionary power of a court to compel performance of a contract through an order of specific performance. The possibility of raising an estoppel either to hold a person to a promise made in a contractual situation, or to prevent a person from denying another a proprietary right where that person has been encouraged to their detriment to believe that they had such a right, are remedies in equity. The Common law of England and Wales has not gone so far however as the courts in other common law countries of seeing the constructive trust as a remedy for unjust enrichment, although the imposition of trusts by the courts as resulting or constructive trusts may well have a remedial effect.

Even here however, there have been modifications. The Contracts (Rights of Third Parties) Act 1999 allows third parties intended to benefit from a contract the right to sue for performance even though they lack privity of contract. The reluctance to use strict liability in the law of torts has been ousted by legislation which will be applicable in certain circumstances – such as under the Occupiers Liability Act 1957 and 1984. The shift to the registration of land has meant that the significance of a dual system of legal and equitable interests in land has diminished, with increasing emphasis being on the official register and its entries (Land Registration Act 2002). The doctrine of part-performance which was recognised in equity as being sufficient to give effect to a contract has been abolished in the case of contracts for land under the Law Reform (Miscellaneous Provisions) Act 1989. Reforms are also being considered to the freedom of testation currently allowed under the law of England and Wales, although even here there has been some intervention by legislation in the form of the Inheritances (Provisions for Family and Dependents) Act which allows this freedom to be challenged.

5. Legal Hybridization. English law was introduced into a number of systems which already had laws in place, for example, South Africa and Scotland. Often, therefore while laws of procedure, evidence, the structure of the courts and the administration of justice was transplanted, the substantive

law remained unchanged, especially in private law. Elsewhere English laws were introduced alongside laws which applied only to indigenous people, for example, customary private law, as was the case in British colonies in the Pacific and in Africa. Religious laws also remained in place, especially in respect of family law, in many countries that came under the influence of the English common law, for example, India and Pakistan. Where laws were passed in England for any colony or protectorate these laws had to be expressly extended to such colonies – the same was true for other parts of the United Kingdom such as Scotland and Northern Ireland. Sometimes specific laws were made for specific places which did not apply to England and Wales. While colonies and dependencies had their own courts, final appeal to either the House of Lords – as in the case of Scotland in Civil matters, or the Privy Council of the House of Lords, as in the case of New Zealand, and Australia (now abolished) meant that English courts were making final decisions on matters which arose in the colonies and applying English law. It was therefore inevitable that the case-law of the English courts was frequently referred to – and this still happens in a number of countries including Scotland and former colonies, as well as Commonwealth member countries. There was therefore a hybridisation of the law which has persisted post-independence or devolution – in the case of Scotland.

6. Psychological Approach. One of the central tenets of the Common Law is that it is the law of the people, derived from the people, originally by the Crown sending out law finders to establish what local laws were practiced, or using a jury to express opinion on local customs, and ultimately through the expression of popular will in Parliamentary legislation. This personal aspect of law created the idea that when people from England and Wales settled in other parts of the world, where there was no apparent established legal system, or only one which could not be said to apply to them, they took their law with them. In part this may explain the lack of division – found in civil law systems, between private and public law. It may also explain the lack of order and rationality which can be found in civil law systems and not Common Law ones. In England and Wales there was no early movement to put the law in order and explain it in terms of rules, principles and concepts, and it is only in later academic writing that such efforts began to be made. The early development of the Common Law of England and Wales was driven by the need to comply with procedures for bringing a claim to court (for example, rights under trusts could only be brought before the courts' of equity, while an action in debt could be brought before the common law courts). This also influenced legal education and the background to lawyers and judges. Rationality, order and theory were not relevant to the learning and practice of law.

A further aspect is the idea that the law is the result of practice rather than theory, so that people's experiences shape the evolution of law – whether through case-law or acts of Parliament. In part this explains the importance of case-law and the role of judges in formulating the law but it is probably not true of the way in which modern day parliamentary legislation is made. Nevertheless case-law remains an important source of law in private law, whether the matter is one on which Parliament has legislated or not. The power of judges to shape and articulate the law remains significant. Legal rules are derived from the *ratio* or decisions (which are distinguishable from other comments made by judges which are incidental to the decisions – *obiter* statements).

Although there have been efforts to make the law more accessible to people and to de-mystify it, the practice of law remains the preserve of a small and elite band. Judges continue to be drawn from a fairly narrow base and the centralisation of the legal system in London echoes its historical precedents. In the criminal system there is more state involvement but in private law there is very little. With dwindling legal aid resources especially for civil litigation, access to justice is predominantly the preserve of the wealthy and of large corporations. At the same time private law is being increasingly invaded by public law, for example, consumer protection, health and safety regulations, child welfare concerns, employment protection, financial services regulation, environmental regulations and consideration of competing human rights.

II. SPECIFIC INSTITUTIONS OR LEGAL MECHANISMS

A. *Historical Perspective*

As indicated, one understanding of what came to be called the 'common law' of England and Wales, is that the law emanated from the people and reflected generally shared practices. In fact neither of these propositions were entirely true. There was considerable diversity in local customs and practices and a strong central monarch imposed his laws on the people as and when necessary. There were moreover some areas of private life that were subject to canon law rather than common law, and while the canon law was common to all who followed the same faith there were, from quite early on, groups who did not, for example, Jews and later Quakers and dissenters. The common law reflected therefore both universality and diversity. This found expression in the decisions of the courts dealing with the cases which came before them. So the term 'common law' is also used to describe case law rather than legislation emanating from the central parliament. (So one finds the expression 'common law' being used in Scotland for case-law, even though Scotland has a mixed legal system).

As the courts of Chancery evolved in the course of the fifteen and later centuries common law was placed in juxtaposition to the law of the Lord Chancellor – equity. Thus two systems of law emerged side by side, that of the common law, applied in the courts of common law – originally the King’s courts, and that of equity, applied in the courts of chancery. Until the two court systems were merged at the end of the nineteenth century this parallel system of courts and laws prevailed. Even after that there was uncertainty as to how far the two had merged, a debate that continues today.

Within the comparative context Common Law has come to mean a family of laws, bringing under one umbrella heading all those legal systems which can trace links back to the legal system of England and Wales, primarily through the spread of that legal system via British political control of various colonies, territories and dependencies. However, as Glenn points out (2005) the term is also generic in so far as most legal systems have some law that is common to different legal systems – at least in principle if not in detail. Moreover in the post-modern search for the harmonisation of laws there is an endeavour to find the *ius commune*, meaning not only a law for the European and wider community, but also a law that builds on commonalities and negotiates differences. At an international level this endeavour reflects back into the law of England and Wales so that the Common Law has an historical and contemporary meaning.

Procedurally the courts of England and Wales are divided into criminal and civil courts. Private law matters are heard in the civil courts. Somewhat surprisingly, lower courts, notably magistrates courts are still staffed by unqualified judges – Magistrates, although some Magistrates Courts now have stipendiary magistrates. The Civil Law concept of a professional judge, who decides on the career as an undergraduate is not a feature of the administration of justice law in England and Wales, nor are there judges’ colleges. Most, but not all, judges of the higher courts are drawn from the ranks of barristers who have achieved Senior Counsel or Queen’s Counsel status. One of the notable features of judicial decisions is that where there is more than one judge sitting a majority decision is sufficient and dissenting opinions can be given as well as those of the judges who support the decision. In a House of Lords case, for example, there may be five opinions expressed and recorded in the law reports and in the new and recently formed Supreme Court (2009) there is the potential for every judge to express an opinion (there are twelve Supreme Court justices). These are all acknowledged and are never anonymous. The views of individual judges are therefore in the public domain and open to criticism and analysis. This is a feature that can be found in the law reports of all common law countries.

The hierarchical structure of courts gives rise to a system of 'legal precedent' or 'stare decisis' whereby lower courts are bound by the decisions of superior courts unless the facts of the case before the lower court are sufficiently different for that court to be able to 'distinguish' the case of the lower court from that of the superior court. Here much will depend on the skill of legal argument presented by counsel (barristers). While the rule of precedent is meant to make for certainty in the law it can also make for unsatisfactory rigidity. Until the 1960s even the highest court – the Judicial Committee of the House of Lords, was bound by its own decisions. This is no longer the case, so that on occasion the House of Lords (now the Supreme Court) can depart from previous decisions especially if the older decision is found to be out of tune with more contemporary thinking or conditions, or is found to have been wrongly decided. It is also the case that whereas previously a court of law could not rule on the validity of an Act of Parliament – due to the idea of separation of powers, under the Human Rights Act 1998 a court can rule that a law is incompatible with the UK's human rights obligations. This does not amount to the court ruling that the Act is invalid, but it sends a message to Parliament that it should reform the legislation – although it is not obliged to do so. Indeed the Human Rights Act has thrown into question the extent of Parliamentary supremacy.

Although there have been attempts to codify the law, the common law of England and Wales is notable for its lack of codification. This has not prevented the creation of common law codes elsewhere including codes for colonial use - such as the Bantu Native Code in South Africa and the Penal Code in India. It has however contributed to a certain lack of accessibility to the law and preserved the place of lawyers as 'keepers' of the law. It has also allowed judges to have greater freedom than their civilian counterparts in interpreting and applying the law, especially where that law remains unregulated by statute. While there is a fiction that judges do not make the law in Common Law systems, clearly they shape it by giving it practical significance when applied to everyday situations.

Although there have been institutional writers which have had considerable influence, such as Bracton, Coke, Blackstone, Bentham, Halsbury and others, the Common Law of England and Wales has never afforded the same respect to institutional writers as might be found in Scotland, the Netherlands or South Africa for example. While collections of laws are cited, especially Halsbury's Laws of England (and historically Blackstone), in English law there has long been a tradition that no institutional writer can be cited until they are dead. There have occasionally been departures from this convention and where the law raises novel points more modern writers, such as Birks on unjust enrichment, might be cited in

court. The tools of the lawyer are however, more usually the case-reports of previous cases than academic writing.

Although the administration of law and equity is merged in one supreme court system the legacy of the separate development of equity and the common law is still evident in the different remedies that are available. For example, in a breach of contract case, damages are said to be available 'as of right' provided the breach is established, even if those damages are only nominal - recognising the breach and the fact that there has been no, or little actual loss or harm. However an order to perform the contract - an order of specific performance, is an equitable remedy and discretionary. A court will only grant it if damages are found to be inadequate or inappropriate and to grant it will not be prejudicial to third parties or inequitable in the circumstances. The same discretionary approach applies to procedural remedies such as interlocutory injunctions as well as injunctions to prevent torts such as trespass or nuisance. In fact a body of case law has now grown up around when and in what circumstances discretion will be exercised.

The trust remains an example of a unique equitable institution, which permits the legal ownership and management of property - real or personal - to vest in one person or body corporate, for the benefit of others. The institution of the trust is used for family property - ranging from the family home to trust funds of considerable value and diversity, to pension funds of large companies, trade unions, and investment corporations, to the administration of charities of organisations for the public benefit such as hospitals and the British Broadcasting Corporation. Increasingly the administration of trusts has been brought under legislation, especially the powers, duties and liabilities of trustees - whether individuals or trust corporations, nevertheless much of the law remains case-law based (giving rise to principles of common law and equity). As an equitable device the trust has shown itself to be versatile and enduring. Those who benefit under a trust need give no consideration and indeed may not even be aware that they are beneficiaries when the trust is formed. In the case of charitable trusts these can endure in perpetuity and be used to fulfil a wide range of purposes which might otherwise fall on the state, such as education, the relief of poverty, the provision of facilities for recreation, support for arts and culture. Increasingly the trust is being recognised as a useful device and variations are being recognised and utilised elsewhere, most recently in France.

Other aspects of equity continue to be relevant to the law of contract - although some of these have been incorporated into the law by legislation, such as rectification of written contracts which do not accurately reflect the intention of the parties, rescission on the grounds of negligent

misrepresentation or where a contract has been entered into under undue influence.

In the law of delict, while there are still nominate torts (trespass to the person, conversion of property, trespass to land, nuisance), the tort of the twentieth century has been that of negligence which has developed to encompass a wide range of tortious conduct through the extension of the concept of duty of care and foreseeability of harm. Although the extension has at times been cautious, for example, in the case of pure economic loss and nervous shock or non-physical personal injury, increasingly courts have demonstrated a willingness to consider what approaches are being adopted in other common law countries – and occasionally civil law ones, although they have not always followed.

In family law, the common law is less distinct, perhaps because families present similar life moments needing a legal response: birth, marriage, divorce. Provision has been made for the recognition of same-sex partnerships under the Civil Partnership Act 2004, and for those who wish to change their gender to have it recognised under the Gender Recognition Act 2004. While neither of these two Acts permit same-sex marriage, in the first case the legislation means that most of the consequences of marriage in terms of property and rights of support and inheritance are now shared by civil partners. In the second case, official change of gender permits an applicant to receive a Gender Recognition Certificate which means that he or she can now be officially accepted in his or her new chosen gender and marry according to that gender rather than the one he or she was originally registered as having at birth. These changes reflect changes taking place elsewhere in the world in a number of different legal systems.

In the case of succession however, the common law of England and Wales retains the principle of total freedom of testation with no reserved shares for surviving spouse or children. Only where a will or the application of the rules of intestacy are challenged under the Inheritance (Provision for Family and Dependents) Act 1975, may a member of the family who is unprovided for, either under a will or according to the rules of intestate estates, bring a claim. As has been indicated, however, the law of succession is currently under review and changes may be proposed.

B. Post-modernist Perspective

The post-modern period has not been so much one in which models have been received as one in which the culture of legal systems have changed. From the perspective of the law of England and Wales, the increasing relevance of human rights on the drafting and interpretation of

laws, culminating in the incorporation of the European Convention on Human Rights (which the UK signed in 1953) into domestic law in the form of the Human Rights Act 1998, has meant that many areas of private law are now shaped by European jurisprudence when fundamental rights are at issue – for example property law, family law the law of defamation and privacy, and employment law. This is in itself a transplant of a European law into domestic law and may well require a reassessment of the respective role of the courts and parliament within the English legal system (Fredman 2006). One possible outcome is a convergence of approaches to issues affected by human rights across Europe especially where tolerance of the margin of appreciation is diminished. It may also be the case that in interpreting this legislation the approaches of other legal systems may be influential, especially where such systems have a long history of interpreting bills of rights (Singh: 2008; Lustgarten:1999). As the rights protected under the European Convention on Human Rights impact on a number of areas of private law it seems likely that some transplants may occur (for example it has been suggested that the French tort of gross negligence has been introduced into English law through the decision of the European court of Human Rights in *Osman v UK* 1998 (Monti: 1999)). Similarly, decisions of the European Court of Justice may impact on a number of areas of private life, for example, the meaning of family for the purposes of freedom of work and movement within Europe, and issues relating to employment and consumer contracts.

European Law and Human Rights have become compulsory elements in the academic stage of legal training for barristers and solicitors and those in practise are increasingly being urged to continue their professional development by becoming acquainted with these developments.

The globalisation of trade and commerce has also meant that national legal barriers have had to be overcome and, as with the original *lex mercatoria*, institutions and procedures are emerging which borrow from each other. For example, it has been suggested that the 2002 Enterprise Act borrows heavily from its American counterpart, although it is not a direct transplant (McCormack 2007). Certainly the Uniform Commercial Code may be one of a number of models considered for a common commercial law for Europe. Under the influence of the United National International Commission on International Trade Law other similar developments might be expected. In the universities there is increasing emphasis on the ‘international’ dimension of law subjects and in published research – to the extent that there is some concern that the national dimension will be of secondary, and dwindling significance.

The movement in Europe towards the harmonisation of laws, especially in the field of private law, may also be of increasing relevance in the twenty-first century (for example the incorporation of the civil law idea of good faith in contracts under the European Consumer Protection Directive 1994). In part this has been achieved by international treaties, but the real harmonisation has yet to be implemented. This is a work in progress and given the minority position of common law in the European Community, it will be interesting to see if the proposals from projects such as UNIDROIT, the Trento project and others are ever adopted.

Devolution within the United Kingdom is also a factor which may impact on the legal system. The traditional view of English law being the law of England and Wales is being dismantled by the devolution of powers to the Welsh Assembly – which will have enlarged powers from 2011. It has never been correct to refer to the law of the United Kingdom as a single body of law, as Scotland, even under Union, retained its own laws and had some specific laws made by the Westminster Parliament. Since the Scotland Act 1999 it has had its own legislative assembly for making laws on devolved matters. Similarly Northern Ireland has remained a separate legal system throughout its association with the United Kingdom and has its own self-regulated legal profession and increasing devolved powers to make laws for Northern Ireland. The Isle of Man and the Channel Islands also have their own laws. Although there is now a Supreme Court (2009) to determine final matters of appeal and questions of devolution it is too early to know if this institution will operate like a supreme court in a federal state.

III. CONCLUSIONS

In an increasingly international and global legal context it is perhaps unwise to assert that any legal system is entirely distinct from others. Any claim is subject to exceptions and cautions. For example, legislation plays an increasingly prominent role in the common law and much of that legislation is shaped by constraints of European and international law. Although the legal system of England and Wales continues to resist codification, there is legislation that effectively acts as a code of law, for example the Companies Act. Moreover in undertaking re-codifications of the law many civil law countries have had to take on board the development of the law by the judiciary and additional interim legislation. Similarly, judges in England and Wales are increasingly occupied with interpreting and applying written law. International dialogue among practitioners, for example under the auspices of the International Bar Association, the Commonwealth Law Association and others, contributes to a greater sharing of views and practices, while the mobility and exchange of university academics, means that those engaged in

legal criticism and reform have much more opportunity to consider legal approaches from different perspectives.

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