LINGUA INGLESE (a.a. 2009/2010)

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Legal system vocabulary

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

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

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

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

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

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

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

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

Binding: if a decision is binding, it must be followed. For example, precedents set by a higher court must be followed by lower courts.

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

Canon law: also referred to as **ecclesiastical law**. This is the law of the church.

Case law: refers to the decisions made by judges applying legal principles from **legislation** and **binding precedent** (see **doctrine of binding precedent**) to the circumstances of the particular disputes before them.

Certiorari: this order usually transfers a case from an appeal court, and in certain special cases from a trial court, to the US Supreme Court for judicial review.

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

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

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

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

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

Common law: a system of law which originated in medieval England and was later applied in former British colonies, including the United States. Common law is based on judicial precedent arising from cases rather than law based on codes or other forms of legislative enactments.

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

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

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

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

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

Coroner's Court: holds an inquest where death appears to be violent, unnatural or sudden and the cause is unknown.

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

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

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

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

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

Custom: this is unwritten law that is legally valid if a practice can be shown to have been continuously in operation since time immemorial.

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

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

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

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

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

Doctrine of parliamentary sovereignty: all legislative power in England is vested in Parliament or is derived from the authority of Parliament, Parliament being the House of Commons, the House of Lords and the Crown. Parliament has the right to make any laws it wishes to make, although these laws must now be in keeping with European Union law.

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

Employment Tribunal: tribunal in the English system with the jurisdiction to hear almost all individual disputes based on statutory employment law claims and common law contract claims up to a set maximum.

Equitable title: under the principles of law developed by the court of equity, one piece of property could be subject to two sorts of interest: a legal interest and an **equitable interest**. The legal owner of the property holds the **legal title**, which was protected by the common law. The one with the equitable interests holds an equitable title, which was protected by the chancellor in the court of equity. The person holding the equitable title is the one intended to benefit from the property, even though that person is not the legal owner. An equitable title is still protected in law against all but the bona fide purchaser without notice.

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

European Court of Justice: is the highest court for all those countries that are members of the European Union. It has the competence to make decisions regarding European Union law (see chapter 3).

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

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

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

House of Lords: the House of Lords as a court should be distinguished from its function as the upper house of Parliament. Only those members of the upper house who are Law Lords may hear appeals. The court hears appeals for both civil and criminal cases where the matter is of public importance. As of 2004 it is still the highest appeal court at a national level. However, the British government wishes to reform the court system and one possible reform is that the House of Lords as an appeal court will be replaced by a so-called 'Supreme Court' similar to that of the USA.

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

Judicial review: an examination by judges of a higher court. This examination may either be of a decision made in an inferior court or of decisions made by public authorities that affect the rights of individuals. In the US Supreme Court, judges may reject any legislation, whether state or federal, that is not in keeping with the US Constitution. Judges in the English system were never allowed to reject parliamentary legislation, as only Parliament could revoke one of its own acts. However, since becoming a member of the European Union, English judges are allowed to review whether parliamentary legislation is in keeping with European Union law.

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

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

Juror: a member of a jury.

Jury: a cross-section of the public called upon to hear a case. In England and in the US federal system a trial jury consists of twelve persons (**petit jury**), and in some states in the USA of six persons. Some states in the USA also have a **grand jury** of up to twenty-three persons to see whether the accusations should result in an indictment (the indictment sets out the charges against the accused) being filed.

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

Legal certainty: to protect the expectations of individuals by ensuring that laws are applied consistently and predictably.

Legal remedy: means provided by the law to redress the harm suffered by one party because another party has acted contrary to the rules of law.

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

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

Magistrate: term given to an inferior judicial officer both in England and the United States. In the English court system, magistrates are often lay people.

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

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

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

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

Overrule: a court reaches the decision that a precedent laid down in a different case no longer has precedential value.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

US Tax Court: a federal court hearing tax cases.

Voir dire: see jury vetting.

Legal system terminology in context

1 INTRODUCTION

For both the law student and the young practitioner who have not studied law in English, the time may nonetheless come when it is necessary to deal with English legal terminology relating to the operation of a legal system. This necessity may arise in various guises. The law student may find, for instance, that he has to study English or American cases as part of his course work. Reading these law reports requires not just an understanding of the legal issue dealt with in the case, but also of the operation of case law in common law jurisdictions. For example, the student needs to be able to distinguish what part of the case report sets out the **binding precedent** and what parts are **obiter dicta**. It may also seem strange to some students that the opinion of a judge who does not agree with the majority decision is still reported. With respect to the young practitioner, he will often find himself in the position of having to explain the operation of his own legal system in English to a foreign client. Translating the workings of a civil law system into English (common law) terminology can be extremely difficult, as all those who have ever attempted it will know. The reason for the complexity is simple; translating from one system to another system is far from straightforward. When, for example, a Dutch lawyer has to explain his legal system to a common law lawyer, it is not simply a matter of replacing Dutch words with English words. The Dutch system is not a carbon copy of the English system, which means that there will not always be equivalent English terminology at hand for translation purposes. In order to use English legal terminology correctly and effectively, the practitioner must not only be familiar with his own legal system but also have a basic grasp of the structure of the common law system.

The English legal system is a **common law** system. The common law developed, in essence, as a system of case law; authoritative decisions were laid down by judges in court. Over the course of time, the **doctrine of binding precedent** developed which meant that decisions made by judges in the past should be upheld by judges in new cases if these new cases showed marked similarities to those that had gone before. When the English set about establishing colonies, this common law system was often implemented in the colonial regime. Although there is no longer a British empire, the common law system has remained in force in various former colonies, for example, the United States, Canada and Australia.

The common law system should be distinguished from the **civil law** system. Civil law systems are **coded systems**, the laws being laid down in written form. Civil

law has been heavily influenced by Roman law. Although it would be incorrect to assert that Roman law has had no effect on the common law, its impact has been considerably less and more indirect. The code drafted under Napoleon in 1804, the 'Code Napoleon', must also be acknowledged as a source and example for many civil law systems in Europe and beyond. The common law and the civil law are often treated as two entirely different approaches to the practice of law. However, these two systems are not as worlds apart as some lawyers maintain. Codes will always have to be interpreted and that will necessarily generate case law. And anyone who thinks a common law system derives its law only from the courts would be very wide of the mark. As can be seen below, **legislation** plays a vital role in all common law systems today.

As explained in the introduction, the basis for all terminology will be English law, as all other common law jurisdictions have grown from English roots. However, these common law jurisdictions have developed in their own way over the years and, although there is still a substantial body of shared terminology, variations in development have led to certain terminology being relevant to some but not necessarily all common law jurisdictions. To give the reader an indication of how terminology may vary, the United States has been selected for comparison.

In this chapter, attention will be paid to the terminology of three elements associated with the legal system. These three elements are:

- the administration of justice via the court structure;
- the legal profession;
- the operation of a common law system.

2 THE COURT STRUCTURE

Trying to find a good English translation for the name of a court in a different law system can sometimes be quite difficult. For this reason, the following sections describe the courts and their **competence** in the English and American court systems. It is common to find the names of the US federal court system used for translation purposes. In general, the highest court in a land is usually translated by the term **Supreme Court**, the appellate court level by **Court of Appeal** and the trial initialisation level by **District Court**. However, court systems vary from land to land and sometimes there is simply no equivalent in the Anglo/American system for a particular court in another system.

2.1 England

The English court structure is not a particularly coherent system as it has been modified from time to time to fit the needs of the day. Although there are courts specialised in criminal cases or civil cases, most courts actually hear both. One generalisation that can be made is the division of English courts into **superior** and **inferior** courts. The **jurisdiction** of the superior courts is not limited to a specific geographical area or to the value of the claim being brought. The jurisdiction of the inferior courts is limited in this way. The superior courts are the House of Lords, the Court of Appeal, the High Court, the Crown Court (and the Restrictive Practices Court and the Employment Appeal Tribunal, which have specialised jurisdictions). The most important of the inferior courts are the County Courts and Magistrates' Courts. The distinction between superior and inferior is important with respect to the **doctrine of binding precedent** (see below).

- **House of Lords**: decisions made by the House of Lords are binding on all the courts below it in the court hierarchy, although the House of Lords itself is not bound by its own previous decisions.
- **Court of Appeal**: is bound by the decisions of the House of Lords and both civil and criminal divisions of the Court of Appeal are bound by their own previous decisions unless certain exceptions apply.
- **High Court**: is bound by the House of Lords and the Court of Appeal but not by itself.
- **Crown Court**: the position of the Crown Court in the hierarchy, in relation to the doctrine of precedent, has not been authoritatively determined. It may depend upon whether a High Court judge is presiding or a lower judge, such as a circuit judge or recorder (a recorder is a part-time judge).
- **County Court**: the jurisdiction of these courts has increased considerably in recent years and their decisions are sometimes reported.
- **Magistrates' Court**: these decisions are not binding on any court.

Note 1: a number of other courts and tribunals exist in addition to this mainstream structure. For example, the **Coroner's Court** and the **Employment Tribunal**.

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

Note 3: in June 2003 plans were announced by the British government to reform the legal system. One such possible reform would be the abolition of the House of Lords as the final (national) appeal court, to be replaced by a court on similar lines to the US Supreme Court.

Note 4: there is no parallel separate system of administrative courts, such matters being mainly dealt with by High Court judges.

2.2 USA

The distinction between federal and state competence means there are both federal courts and state courts. The **federal courts** may be seen as the creation of the US Constitution. The jurisdiction of the federal courts is set out in the US Constitution and the federal courts have only the powers expressly conferred on them by that Constitution. **State courts**, unlike the federal courts, have a far more general competence. They have the competence to hear most legal controversies, either state or federal, within the geographical area of their jurisdiction, unless federal legislation explicitly states otherwise.

There may be concurrent jurisdiction between federal and state courts. For example, if in a car theft, the car has been driven from one state to another, the case could be tried either in a federal court or in the state court of one of the states involved. Federal courts are typically used where the parties to a dispute are citizens of different states or are US citizens and aliens. The overlapping of competence has given rise to so-called **forum shopping**, where parties select the court they believe to be most favourable to their claim.

2.2.1 Federal court structure

- **US Supreme Court**: the court is composed of a Chief Justice and eight Associate Justices. There is no absolute right to be heard by the US Supreme Court; it hears only a limited number of cases that it is asked to decide. Those cases may begin either in federal or state courts and usually involve important questions concerning constitutional or federal law. An application to be heard has to be made by **certiorari**. The judges of the US Supreme Court have extensive powers of judicial review; they have the power to throw out any legislation, whether state or federal, not in keeping with the US Constitution.
- **US Courts of Appeal**: the ninety-four US judicial districts are organised into twelve regional circuits, each of which has a US Court of Appeal. It hears appeals from the district courts located within its circuit, except in the few cases where there is a direct appeal to the Supreme Court. It also reviews decisions made by federal administrative agencies. The Courts of Appeal also have a nationwide jurisdiction to hear appeals from specialised courts, such as patent laws and cases decided by the Court of International Trade and the US Court of Claims.
- **District Courts**: the district courts are the trial courts of the federal court system for all matters of federal law. There is at least one district court in each state. Within the limits set by the Congress and the US Constitution, they have the jurisdiction to hear nearly all categories of federal cases both criminal and civil. Cases may be heard either by a single judge or a judge and jury.
- **US Bankruptcy Courts**: the federal court system has the exclusive jurisdiction over bankruptcy cases. This means that bankruptcy cases cannot be filed in a state court.
- **US Tax Court**: is a tax cases court.
- **US Claims Court**: this court hears claims against the United States. It has a nation-wide jurisdiction.
- **Court of International Trade**: specialises in cases that involve international trade. It has a nation-wide jurisdiction.

2.2.2 State courts structure

Each state has its own court system. This means that each court system is unique as there are significant differences in the ways in which each state organises its judicial institutions. Some state court systems have many different courts whereas others may only have three courts: a supreme court, a court of appeal and a district court. Names of courts also vary widely. There are fifty state court systems plus the District of Columbia and Puerto Rico. State courts deal with the vast majority of all court cases in the United States.

2.3 Translation note

Sometimes it is not possible to use English or American court names as a translation. For example, the common law system has traditionally not used separate courts to deal with public law matters. This means that where a specific public law court must be given an English name, the best translation may be a simple description of the function of the court, such as the 'Constitutional Court of Spain'. In other cases, the best approach may be to use general terms to describe the position of the court in the court hierarchy. In this way, someone unfamiliar with that court system will be able to gather what kind of status of court is being referred to.

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

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

It is recommended that the English translation of the name of the court should always be accompanied by the actual name of the court in the original language (put in brackets after the English translation).

2.4 Alternatives to the courts

Outside the mainstream court systems in both countries there are agencies, tribunals hearing specialised cases, and alternative dispute resolution (**ADR**). The idea behind ADR was that it would be less formal, quicker than the mainstream courts and less expensive. There are three types of ADR: **mediation, conciliation** and **arbitration.**

Many civil law lawyers, when trying to draft an English translation for their business cards, have been forced to conclude that translating their legal qualifications and position in their legal profession into English is not as straightforward as might be expected. For example, in the Netherlands there are two main strands in the legal profession: notaries (notarissen) and advocates (advocaten). As the English legal profession is also split into two main strands, solicitors and barristers, it would seem the translation is ready-made. Unfortunately, that is not the case as the competence of solicitors and barristers is divided in a different way from that of the Dutch notaries and advocates.

A Dutch notary does indeed do the type of work that would be typical of some of the work of an English solicitor, but a Dutch notary would not prepare work for litigation whereas an English solicitor would and an English solicitor may also act as an advocate in the lower courts. On the other hand, a Dutch advocate may have the type of practice which resembles that of an English solicitor far more than it does that of an English barrister. In an international context, Dutch law firms tend to use anglicised versions of their professional functions: notaries and advocates. However, it should be pointed out that the term 'notary' does not denote a separate strand of the legal profession in the USA or England. A 'notary public' has authority to witness and draw up certain documents, and so make them official. In England this is usually done by a solicitor. In the USA, this can be done by an attorney but it can also be done by a private individual who has applied to act as a notary, for example, a real estate agent or clerks in a shop. Those Dutch law firms that are aware of this tend to use the expression 'civil law notaries'. This has the advantage of making their common law colleagues take note that some sort of unfamiliar function is involved here, but the term is not one that will be self-evident to them. Just to add to the complexity of translation, there are even differences in the way the legal profession is organised between England and the USA.

With respect to translating university degree titles, this too may pose unexpected problems. The duration of a university law degree course may vary between countries, as often will the letters used to indicate a degree title. For example, Dutch law graduates have the right to put the letters 'mr' in front of their name (this is easily misunderstood by English and American lawyers who suppose the 'mr' is the English abbreviation for 'mister', as in Mr. Smith. This is particularly confusing if the 'mr' in question turns out to be a woman!). Finding an abbreviation that will be recognisable to the English and Americans will at least soon be simple for those graduating from the universities of the Member States of the European Union. With the introduction of a bachelor/master system of accreditation in the European Union, law degrees will in the future generally be indicated by the letters LL.B for a bachelor's degree and LL.M for a master's degree.

Translating the role and qualifications of legal professionals of a different system into English is not the only problem area. As mentioned above, the functions of legal professionals may be different from that of legal professionals in another land. Ignorance of this may cause irritation. The Dutch lawyer unfamiliar with the organisation of the English legal profession may have no idea why for certain cases he needs two sets of lawyers, a solicitor and a barrister. In order to assist both in translating and in understanding the competence of the legal professional, the following sections give an overview of the English legal profession and that of the USA.

3.1 England

In the English legal system, a practicing lawyer must have one of two professional qualifications: he must either have been admitted to practice as a solicitor or have been called to the bar as a barrister. An English lawyer may not act both as a solicitor and as a barrister. This traditional split in functions was, however, affected by the Courts and Legal Services Act 1990. Solicitors lost their monopoly on conveyancing, probate and the conduct of litigation. Barristers lost their monopoly over the **right of audience** in the higher courts. A solicitor, if granted an advocacy certificate, would have the same rights of audience as a barrister. And a barrister could perform tasks normally the preserve of solicitors. However, there seems to be at present little momentum from English lawyers to give up the division of the legal duties and fuse to become a unitary profession. As yet there has been no rush by solicitors for an advocacy certificate to take over barristers' tasks, or solicitors going out of business due to the loss of old monopolies.

3.1.1 Solicitor

A **solicitor** holds a university degree and has completed a period of professional training. He then enters a firm of solicitors as a trainee. After passing his examinations and finishing his traineeship, he can apply to the Law Society to be admitted. He is then formally a solicitor of the Supreme Court. Solicitors' offices are usually partnerships, and senior solicitors act as partners in the firm. The solicitor's professional body is the Law Society. Misconduct on the part of the solicitor may lead to the Law Society striking his name off the list.

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

3.1.2 Barrister

A **barrister** holds a university degree and will go on to complete a period of vocational training. A barrister must belong to one of the four Inns of Court. Having

passed his bar examination and eaten a set number of dinners in his Inn of Court, he will be called to the bar by his Inn and must then follow a period of practical training (called pupillage) of one year under an experienced barrister. The professional governing body of the bar is the Bar Council.

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

The work of many barristers is that of an advocate, arguing a client's case in court. Barristers have a right of audience in all courts. All practicing barristers are called junior counsel. However, a barrister who has been in practice for ten years can apply to become a Queen's Counsel (QC), which is called taking silk. A QC only appears in the most important cases. He is also known as a leader or leading counsel because he is often accompanied in a court case by one or two junior counsels. When representing a party in court, the barrister is referred to as **counsel** (for the client or in criminal cases for the defence or prosecution). Barristers are often specialists in certain legal domains. Some specialist barristers, for example chancery barristers, will spend most of their time producing written opinions on cases rather than speaking in court.

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

3.2 USA

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

In order to become an attorney, it is first necessary to gain a bachelor's degree, which takes four years, and then go to Law School for a period of three years. The degree from the law school is called Juris Doctor and the graduate may add the letters 'JD' after his name. However, graduation from an approved law school does not give the right to practice law. To do so, he must become an **attorney-at-law**, which means passing the bar examination and being admitted to the bar of one of the states. Only then will a license to practice law be issued. A period of apprenticeship is not necessary. Lawyers who work for companies in their legal departments or for a government agency must also be members of the bar: they are referred to as in-house counsel or staff attorneys.

An attorney may only practice law in the state for which he has been admitted to the bar. This means that a lawyer only has the right to be heard in the state courts of the jurisdiction for which he has been admitted. Separate admission to practice in the federal courts must be obtained.

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

3.3 Judges in the common law system

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

One of the functions of judges is to carry out **judicial review**. The term judicial review covers two situations: that where a higher court examines a case first dealt with by an inferior court or tribunal or where the decisions made by a public body affect the rights of individuals. In England, public law challenges or administration of justice disputes are usually heard by High Court judges. English courts may now also query Acts of Parliament if these do not conform to European Union legislation. In the USA, federal judges may review whether state or federal action is in keeping with the United States Constitution.

In England, senior judges are still mainly appointed from the ranks of practicing barristers with at least ten to fifteen years experience before the courts, although opportunities for solicitors to become judges have increased more recently. In the USA judges are also mainly chosen from outstanding members of the bar. Federal judges are appointed by the President and the Senate for life. As for state judges, the method of appointment depends on the state. Judges may be chosen from outstanding members of the bar by the governor, or by the mayor for lower courts, or elected by the public, or a combination of both methods. This system of appointment stands in stark contrast to some civil law jurisdictions, for example the Netherlands, where law graduates can train specifically to become a judge and where a judge is a civil servant.

In England, for many centuries the most senior judge was the Lord Chancellor. He was not only the most senior judge but also a member of government with a seat in the cabinet. He headed the Lord Chancellor's Department; there is no Ministry of Justice in England. However, one of the legal reforms proposed by the Labour

government in June 2003 was the abolition of the position of Lord Chancellor. His tasks would become the responsibility of the Department for Constitutional Affairs. In 2004, it is still unclear whether the office of Lord Chancellor will disappear, but the Lord Chancellor's department has been renamed the Department for Constitutional Affairs.

At present, the Lords of Appeal in Ordinary sit in the House of Lords and the Lord Justices of Appeal in the Court of Appeal. In the High Court are the High Court or puisne judges, who may also sit in the Crown Court, and in the lower courts circuit judges and district judges. At the bottom of the judicial hierarchy in England are the **magistrates**. Many of these justices, who sit in the Magistrates' Courts, are lay people. They are responsible and respected people in their community, sitting on average one day per fortnight. Magistrates are not paid, but only receive expenses. They are advised by magistrates' clerks, who are usually law graduates, or have a special clerk's diploma. In addition to these lay magistrates there are also many salaried, legally qualified magistrates who do not need to sit with a clerk. These judges were formerly known as stipendiary magistrates. Legally qualified judges in the Magistrates' Courts are often district judges.

In the USA, as mentioned above, the state courts have many different names and the types of judges are also various, for example, there may be municipal justices and police magistrates. There is, however, no system of lay justices parallel to the system of lay magistrates in England. At the federal level, the US Supreme Court has at its head a Chief Justice assisted by Associate Justices. At the trial level there are district judges assisted by magistrate judges.

Finally, in this overview mention should be made of the Law Officers. In the English system, one of the most important is the **Attorney-General** (and his deputy, the Solicitor-General). He is a legal adviser to the Crown. The Attorney-General has political duties which include advising government departments. His permission is also necessary to bring certain criminal proceedings and he appears on behalf of a section of the public where public nuisance is involved. Similarly, in the USA there is also an Attorney-General. He is the head of legal affairs in a state or in the federal government. If he is in the federal government, he is in charge of the Department of Justice. The USA also has a district attorney. This is an officer of a governmental body, such as a state, county or municipality with the duty to prosecute all those charged with crimes. District attorneys working for the federal government are called US attorneys.

Note: the common law is often described as a case law system, as being judge-made law. Yet it has long been argued in the theory of the common law that judges do not create law but only interpret the law. They apply existing principles of law to the facts before them in individual cases. Some judges are adamant that any far-reaching changes to the law should be left to the legislature and should not be achieved by the judge in court. However, whether judicial decision-making never creates new law is a moot point; some judicial decisions could be interpreted as doing exactly that. This discussion, as to whether judges simply apply the law or actually create law, is not one that is confined to countries with a common law system. For example in the Netherlands, Paul Scholten argued that finding the law was not a matter of applying the text of a law to a case in a servile way, but rather a creative process. It demanded the construction of a just solution by taking into account unwritten general principles of law within the existing law.

3.3.1 The jury

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

In England, the appearance of a jury in civil cases is now rare. There is no right to jury trial for most civil cases, although certain lawsuits, such as defamation, can still be heard before a jury. In criminal cases, only very serious criminal offences, those on indictment, are heard before a jury. The vast majority of criminal cases are heard by magistrates on summary trial or triable either way offences (offences that may be tried either as summary offences or as indictable offences) where the accused has opted for summary trial.

A jury consists of twelve **jurors** who are laymen and who are supposed to represent a cross-section of the community. In civil cases, the jury decides upon liability and sometimes assesses the damages under the guidance of the judge. In criminal cases, the jurors listen to the facts of the case and, after the judge's summing up of the prosecution and defences cases, they have to reach a verdict: guilty or not guilty. The jury has no part to play on questions dealing with law or legal procedure or on sentencing in criminal cases.

In the USA, the right to jury trial is guaranteed by the US Constitution. Many civil trials are before juries, but if both parties agree to do away with the jury, as this is cheaper and quicker, the case will be resolved by the judge. With respect to criminal cases, the Sixth Amendment of the Constitution guarantees a defendant the right to trial by jury. However, as in England, petty crimes are not heard by juries. In the US a crime must first be punishable by six months or more in prison. Some states, for example Washington, have a **grand jury** of up to twenty-three jurors to see if there is a case to answer; in other words, whether the accusations warrant an indictment. A **petit jury** is the ordinary trial jury, traditionally composed of twelve jurors. Federal courts have twelve jurors as do most state courts, but state court juries may consist of six jurors.

In both England and the USA there are proceedings for the selection of jurors, although this procedure is far more extensive in the USA than in England. In the United States, the French term **voir dire** usually refers to the examination by the court or by the attorneys of prospective jurors. In England it is more commonly referred to as **jury vetting**. Jurors can be **challenged** either by the defence or by the

prosecution. They can be challenged 'for cause' (for a reason) or 'without cause' (reason not stated). Another term for a challenge without cause is peremptory challenge.

4 Operation of a common law system

Today a common law system is based on three major sources of law: **common law**, **equity** and **legislation**. At one time, common law courts could not administer equity as this was the province of the separate court of equity. That was swept away in the latter part of the nineteenth century in England and now all law courts (also in the USA) administer common law and the principles of equity in their courts. Equity developed its own principles, and therefore its own terminology. As this distinction between common law and equity is a characteristic of the common law system, and one unfamiliar to those schooled in the civil law, attention is paid to the development of equity and its terminology in section 4.2 below. The third major source, legislation, has long played an important role in common law systems. Written law has certainly become a significant part of the law of any common law jurisdiction today.

Other sources of law that have played a role in the development of the common law system include **canon law**, or **ecclesiastical law**, certain textbooks and custom. Canon law is the law of the church. It affected the common law with respect to criminal law and matrimonial law. It also influenced the development of equity because of its strong moral content. With respect to textbooks, there are only nine ancient textbooks which are treated as sources of law, the last one being published in 1765. Modern textbooks are not sources of authority although they may well be referred to in the courts. Counsel may adopt their arguments and these arguments are **persuasive** (i.e. should be taken into account, but are not binding). Finally, certain **customs** have survived, for example, in the form of a right of way or rights with respect to the village green.

4.1 Legislation

Even though the English and American legal systems are common law systems, **legislation** plays an important role in law-making. **Statutes** have been in use for centuries, but the momentum for written laws stemming from legislative bodies increased considerably in both England and the United States in the nineteenth century. As commerce and industry progressed, so did governmental regulation.

In England today, legislation rather than the judge in court is more usually responsible for wholly new principles of law. It is also increasingly common for whole areas of law to be put into statute form, for example tax law. Many statutes are a form of codification of certain areas of law, for example the law on theft is now in the form of an Act. The old common law usually forms the basis for the statute, but the legislature takes the opportunity to amend and update the old law.

The same development can be seen in the USA. Federal legislation is published in the 'US Statutes at large' and a 'US Code' which is a compilation of laws dealing with a specific subject. Each state has its own set of statutes and most jurisdictions have now codified a substantial part of their laws. Uniform laws are also of significance. As each state has its own law, the idea behind the development of uniform laws was to cut down the differences in law between all the various states of America. The most successful uniform law is the Uniform Commercial Code (UCC).

Statutes often adopt the old common law terminology, which means that they are very difficult to understand for those with no knowledge of the common law. The judicial interpretation of statutes is, furthermore, in accordance with the common law tradition. The interpretation of statutes by the courts has in turn led to a considerable body of authoritative case law being built up alongside statutory law.

4.1.1 The English system

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

However, this doctrine has had to undergo a certain modification because of England's membership of the European Union (EU). The concept of the supremacy of EU law above that of national law (see chapter 3) means that the national courts of Member States are required to override national legislation where it conflicts with EU law. This has extended the rights of English courts with respect to **judicial review**, as the court may, for example, hold that certain provisions of an **Act of Parliament** are inoperative because they are in breach of EU obligations.

Some terminology is specifically relevant to the legislation itself. A **statute** is a piece of written law, in particular an Act of Parliament. An Act of Parliament is called a **bill** before it has been formally approved. An Act comes into effect from when the royal assent is given unless it contains its own starting date. Every Act is given a chapter number. An Act of Parliament is divided up as follows:

- a heading setting out the aim of the Act;
- the Act is divided into **parts**, each with a number and a title;
- each part is divided into **sections**;
- each section is divided into **subsections** and **paragraphs**;
- at the end of the Act come the **schedules**.

For an example showing how this terminology is used, see the extract from the Unfair Contract Terms Act 1977 in the Appendix.

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

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

4.1.2 The system in the USA

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

The federal legislature has at its head the President, with the duty to make sure that the laws are faithfully executed and the power to make treaties and veto laws. The federal legislative body is the **Congress**, consisting of the House of Representatives and the Senate, having the power to make 'necessary laws'. Regulations are also developed by federal agencies and departments. Any state legislation which conflicts with the federal laws is void.

States, headed by a governor, have their own legislatures (consisting of two houses except in Nebraska). States have jurisdiction over all matters not reserved to the federal competence.

4.2 Equity

To understand the terminology of equity, it is necessary to look, if only briefly, at the historical development of the common law. Whereas civil law systems developed many of their legal principles from a Roman law basis, the English legal system remained comparatively uninfluenced by this source. The common law developed in the Middle Ages and was the law administered in the king's courts. As the law of the king's courts, it was superior to local customary law. The various local customs were either assimilated or abandoned and gradually the common law of the king's courts became the uniform law of England and Wales.

However, as a form of procedure called the writ system became integral to the common law, the common law became rather rigid and inflexible. If a writ could not be issued, a person had no **legal remedy**. For example, someone who had bought the right to use land but did not own that land, could not obtain a writ to enforce his right of use as the common law only recognised a legal title to land. Those who had no redress at common law turned to the king's chancellor for help. A court of equity developed, where principles of fairness referred to as **principles of equity** prevailed. **Equity** supplemented and remedied the deficiencies in the common law. Equity and common law long remained administered in separate courts. Today, all courts can apply rules from the common law and principles of equity.

The development of the principles of equity has had a profound and lasting effect, particularly with respect to property law. A **legal title** to property was recognised at common law, but the courts of equity also recognised an **equitable title**. In the common law system, a legal title and an equitable title can co-exist in the same property. The person with the legal title may be holding the property for the benefit of an individual with an **equitable interest**, for example, where there is a **trust**. To set up a trust, a **settlor** (also called a donor or in the USA a trustor) gives person A property with the intention that he will hold it for the benefit of a specified third person, B. A would have the legal title, and would be the **trustee**, B, the **beneficiary**, would have the equitable title. An equitable title is well protected by the law. However, the legal title usually prevails where there is a conflict between legal and equitable interests if the legal title is sold to a purchaser and bought in good faith, such a purchaser being described as a 'bona fide purchaser without notice'. In common law jurisdictions today, trusts are often set up for a variety of purposes: for individuals, charities, clubs, unit trust schemes and as security for a particular loan.

The equity court also provided remedies that were not available in common law courts. The main remedy at common law is **damages**. Equity offered remedies other than damages, such as the **injunction** and **specific performance** (these terms are dealt with in chapters 2, 4 and 5). The merger of common law and equity courts meant that equitable remedies were no longer the prerogative of one type of court. Nonetheless, they cannot be claimed as a right: equitable remedies have remained **discretionary**.

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

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

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

4.3 The common law: case law

Despite the increasing growth of legislation in common law jurisdictions, case law is still extremely important. **Case law** refers to the decisions made by judges applying legal principles to the circumstances of the particular disputes before them.

Common law lawyers must be familiar with past cases because the rules of law laid down in these cases remain the law unless they have been overruled.

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

4.3.1 Binding precedent

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

It is argued that binding precedent ensures flexibility while giving **legal certainty**. No code or statute, no matter how carefully drafted, can anticipate all the legal problems which can arise from variations of facts. While the judge in a civil law system must generally decide cases on the basis of broad principles, the common law judge will look to see if the legal problem has been raised before in a case and adopt that solution.

Must a precedent always be followed? The answer to that is no, not if a case can be **distinguished**. Cases can only be distinguished on their facts. The facts or a fact in the new case must in some important way be different from the facts or a fact of the case that came before. The court regards as material any fact that was not common to the case which came before. The word **material** is used in general to indicate that something is important or vital, hence material facts, material evidence, material witness. The Americans often use the term **key** in this context.

4.3.2 Case reports

Obviously, in a system where case law is so important there must be a sophisticated system of law reports. Law reports can be traced back to the seventeenth century. In England and the USA, precedents are almost always contained in law reports, and these reports are now of a fairly standardised nature. In England cases are reported in various series, for example:

- Law Reports, four series: Appeal Cases (A.C.), Queen's Bench (Q.B.), Chancery (Ch) and Family (Fam.);
- Weekly Law Reports (W.L.R.);
- All England Law Reports (All E.R.);
- all decisions of the Crown Court, High Court and above are stored on legal databases.

In the USA, there are various possibilities for tracking down case law. Federal or state court decisions are published by the court (official report) or by specialised private companies (unofficial report), such as the 'National Reporter System' and 'American law reports'. Case law may also be found by using the digest system, such as that of West Publishing Co. The digest system makes it possible to track down case law on any area. Citations, in particular those of Shepard, contain texts which give the researcher the history of cases, statutes and other material. Other sources include two major encyclopaedias, 'American Jurisprudence' and 'Corpus Juris Secundum', and so-called Restatements, which are attempts to clarify the status of the law in certain areas (published by the American Law Institute). As in England, cases may be accessed in digital form via data banks.

Each case is given a reference. The form of this reference will depend upon whether the case is a criminal case or a civil case. The reference is followed by the year the case was heard and (an abbreviation of) the name of the series in which the case is reported.

English criminal cases are given the following type of reference:

R v Smith

The 'R' stand for the Latin word Rex or Regina, in other words, the criminal prosecution is brought in the name of the Crown. A different type of annotation may also be found in English criminal cases:

DPP v Smith

Here DPP stands for the Director of Public Prosecutions, who is the head of the Crown Prosecution Service. This is a national service for public prosecutions independent of the police. Criminal proceedings may be taken over by the director where the case is very important or very difficult.

In the USA, the type of reference in criminal cases depends on whether the criminal prosecution is brought by a state or at a federal level. The prosecutor in state cases is then the state itself, for example:

Commonwealth of Massachusetts v Smith

And where the prosecuting authority is federal, the reference would be:

United States v Smith

In civil cases, the names of both parties are used as the reference. For example,

Miliangos v George Frank (Textiles) Ltd

Miliangos is then the plaintiff or claimant, the one bringing the claim, and George Frank is the defendant.

Note 1: in some civil law countries, for example the Netherlands, it is common for textbooks to refer to cases by key words, such as 'the case of the gassed onions'. English and American textbooks typically refer to cases by the names of the participants.

Note 2: the 'v' in the case citations stands for 'versus'. The Americans, rather logically, pronounce the v as versus but in England this is not done. Versus is said as 'and': Miliangos and Frank. Beware, when you hear a reference in this way, as the parties so coupled are not joint parties but opponents.

Every case report sets out:

1 the material facts;
2 the statement of the principle of law applicable to the legal problem disclosed by the facts. This is called the **ratio decidendi**. It is the grounds for the decision. In the USA, the ratio decidendi is referred to more commonly as a **holding**;
3 the judgment based on 1 and 2.

For the parties part 3 is vital. For the purpose of the doctrine of binding precedent part 2 is vital. The judgment itself and the facts are not **binding**, only the ratio decidendi is binding.

Not every statement of law made by a judge in a case is part of the ratio. It may be, for example, that a judge gives his opinion about a hypothetical case while discussing the case at hand. Opinions about a hypothetical case cannot be part of the ratio of the actual case. It is therefore necessary to distinguish what is ratio and what is dictum. Everything outside the ratio decidendi is called **obiter dicta**: things said by the way. The ratio is binding, the obiter dicta are not binding. Obiter dicta are **persuasive** as these comments can be used to help establish legal principles in a future case. When judges agree with each other they are said to **concur**. When a judge disagrees with the majority decision, he is said to **dissent**. A **dissenting judgment** is also published in full but it is classed as obiter dicta.

When the judgment is published in a law report, it begins with a head-note summarising the key facts, the legal principles arising and the decision. This is a convenient short summary and most students read no further than the head-note (an example of a head-note, that of the case of McLoughlin v O'Brian 1982, can be found in the Appendix). In English reports, this head-note is followed by the individual judgment of the judge or judges in that case. Therefore, if five judges have heard the case, five individual opinions will be reported. Consequently, the length of law reports can vary considerably. By reporting each individual judgment, it is possible to see exactly what each judge thought. This approach to law reporting is not universal. Whereas some law systems also publish all the judges' individual opinions, some others only publish an individual opinion if it is a dissenting opinion. There are also civil law systems that opt for the so-called 'secret of the judges' chamber' approach, as in the Netherlands. The result is that only one, amalgamated opinion is published and it is impossible to see what individual judges thought.

4.3.3 Appeal

A decision is **reversed** when a higher court on appeal comes to the opposite conclusion than that of the lower court. An appeal court can either approve or disapprove a precedent. It can **overrule** a principle that has been established in a previous case. This means that the court makes a decision on a point of law that is fundamentally different from that made by a court in a prior case. Once overruled, a decision no longer has any precedential value. Reversing differs from overruling. A decision reversed on appeal directly affects the parties involved in that case. Overruling goes only to the rule of law contained in a decision; it does not affect the parties who were involved in those cases.

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

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

Legal system discussion questions

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

2 "The common law was developed by practicing lawyers and judges rather than academics, and that is only too painfully obvious!". Discuss.

3 Where more than one judge has heard a case, should the reasoning of the individual judges be kept secret or does publishing each judge's opinion enhance law reporting?

4 Do you think it is preferable to have a uniform legal profession or a split profession such as in England?

5 Is it better to train law graduates directly as judges or to select judges from those who have worked for years as advocates?

6 Is it useful to have a system of binding precedent?

7 Is jury trial the best way to try cases?

Legal system knowledge questions

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

2 What are magistrates in the English court system?

3 What is meant by the term 'forum shopping'?

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

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

6 What does the English term 'jurisprudence' mean?

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

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

9 What is statute law?

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