CHAPTER 4

# THE ENGLISH COMMON LAW SYSTEM

## INTRODUCTION

The English common law system, which consists of several characteristic legal traditions, is rightly regarded as one of the two major legal systems in the world, as well as one of the two most influential. Although not the oldest legal system in existence, it is the oldest national law in existence common to a whole kingdom. It is also comparable to the oldest, the civil law system, in the extent of its spread throughout the world, and in its remarkable influence, having been adopted by a wide range of countries and cultures, even in their post-colonial era. As with the civil law system, the English legal system has been spawned from a particular sequence of historical events, a set of *distinctive legal sources, ideologies, doctrines, institutions, and a distinctive mode of legal thought* which, *collectively, constitute* the English *common legal tradition*. This legal tradition was successfully 'transplanted' from England to many countries throughout the world which are culturally, as well as geographically and linguistically, different from England and English culture. Those traditions, in places, such as Australia, South East Asia, India and Hong Kong, were then formalised and made part of the predominant legal system of that particular jurisdiction. Remarkably, this uniquely English set of sources, institutions and laws co-existed with the indigenous culture, religions and local customs of those places, and a dualist system often emerged. Indeed, despite respecting and preserving local culture, the administration of justice and government was soon transformed into an infrastructure which was readily identifiable as the English style of government and administration. This 'legal transplantation' (Watson) is a testimony to its genius and its adaptability, particularly where the 'reception' of English law was not legislatively imposed but voluntarily adopted.

Initially, reception of English law was the result of British colonisation, trade missions and the dominance of the British empire during vital periods in world history. However, several former colonies, well into their post-colonial era, and after their 'nationalist' stage of development, continue to use the common law approach and legal philosophy in their legal system.

Key events which shaped English legal history were the early centralisation of courts, mainly brought about by Henry II, wherein the royal courts (the common law courts) became the main source of the law common to the whole country, the writ system which ensured a particular style of development geared to existing writs, which were later supplemented by the

creation of the Courts of Chancery, which developed a separate body of law (known as 'equity'), both of which gave rise to a remedy orientated, pragmatic approach which had no need for scholarly input or advice. Therefore, English law developed through judicial decisions (or 'case law') and equity could, up to the late 19th century, only be administered by the Courts of Chancery. Equity and the common law were eventually 'fused' by the Supreme Court of Judicature Acts of 1873–75 in their jurisdictional application, but continue to exist as separate bodies of law, which may now be utilised by one and the same court.

English law never 'received' Roman law in the way that it was received in civil law countries. The rigidity of the common law procedures, the need to conform to the framework that had been created, and the centralised courts, all helped to mould a diversity of local customs and primitive Anglo-Saxon practices into a law that was followed by the whole country, which thus became a common, unified law.

It has been said that the common law 'dates from time immemorial', but it really dates from about the middle to the late 12th century when a common law was identifiable and could be said to be in place. Furthermore, at the time of the 12th and 13th century, when there was a frisson of Roman law 'intellectualism' running through continental Europe, consisting of learned treatises on the *Corpus Juris*, Romano-Canonical treatises on procedure, customary law and royal legislation, all of which had undergone a massive absorption of Roman law, English law had already experienced its era of 'modernisation'. The English common law tradition and the common law courts were already established and were, by that time, impervious to any 'reception' of Roman law or, indeed, any foreign law.

English law also created prerogative writs (certiorari, mandamus and prohibition) which enabled administrative decisions of State organs and officials to be challenged, which, therefore, rendered unnecessary any separate administrative courts such as those that developed in civil law countries.

Examples of common law jurisdictions are Australia, the United States, Singapore, Malaysia, New Zealand, large parts of Africa, India, Pakistan, South East Asia and North America. Despite acquiring independence, several Commonwealth nations have maintained links with the United Kingdom and, although they have adopted written Constitutions, their judges have continued to interpret these in accordance with typical English legal methods, doctrines and legal conventions.

# TERMINOLOGY

A legal tradition is not the same thing as a legal system, although the legal system inevitably forms part of the legal tradition and *vice versa*. The term 'legal system' may been used to refer to of an operational set of legal rules, procedures and institutions (Merryman (1977)). Such a system may be grouped within the category of a so called *parent* legal system or *major* legal system such as the *civil law* or *common law* systems. Systems possessing common characteristics associated with each of the main legal families may thus be *prima facie* classified as belonging to its corresponding legal family. A system that relies heavily on codes as definitive statements of the law with very little reliance on case law would, *prima facie,* qualify as a civil law type of system, because of the predominance and pre-eminence of the codes. On the other hand, you could have a common law system which uses comprehensive codes for one area of law, such as criminal law (as in India), but their predominant mode of interpretation and weight attached to case law, in applying these codes, will usually determine their eventual classification. As we have seen, writers, such as David and Brierley (1985), also refer to three main *legal families*, that is, the common law, civil law and socialist law generic groups. However, the term 'legal tradition' suggests certain forms of legal practice, or legal rules or norms, substantive or procedural, which have been established over a period of time and whose origins are not of recent vintage. It also suggests a well defined, consistent and reasonably well established, 'historically conditioned set of attitudes' (Merryman (1977)) about the relationship between legal rules, law and society. The term 'legal tradition' will be used particularly, but not exclusively, in referring to those legal systems which are not the parent legal system or family.

The term 'common law' may refer to:

(a) the English legal system developed in, applicable to and common to England (and Wales, but not Scotland);

(b) that part of English law which was created by the king's courts, or common law courts (and developed as case law) in England from about the 12th century, rather than 'statute law', or the law enacted by Parliament as opposed to the body of rules and principles of equity, as established by decisions of the courts of equity (or, as they were otherwise known, Courts of Chancery) which began to be developed from around the 14th century;

(c) the modern usage, which includes English cases and statutes, including principles developed and established by common law courts and the courts of equity; and

(d) that part of English law which has been 'received' by a given jurisdiction and which applies, therein, either through colonisation, or via unilateral and voluntary enactment by that jurisdiction.

The common law should also be distinguished from international law, which applies between States, and canon or ecclesiastical law, which derived from the church and was administered by the church courts. Although the common law is not derived from Roman law, it is, in many respects, closer to ancient Roman law, in some of its jurisprudential content and procedural practices, than the modern civil law systems.

If the law on a particular topic happens to be identical under English law and in American jurisdictions, it is frequently referred to as the Anglo-American legal position. Despite the radical 'Americanisation' of the law in the United States, English law continues to be a major source of law or, at least, still represents the primary source of law in relation to several major areas of law in the United States. It may be argued, with some justification, that, in many cases, it is no longer accurate to use the term 'Anglo-American' law in the way that has been done since the early 20th century because American law has now developed a character of its own and diverges from the English common law in so many different ways (see Atiyah and Summers, in *Form and Substance in Anglo-American Law* (1987), an Anglo-American academic enterprise).

## THE ENGLISH COMMON LAW TRADITION

The key features of the common law tradition are:

(a) a case based system of law which functions through analogical reasoning;

(b) an hierarchical doctrine of precedent;

(c) sources of law which include statutes as well as cases;

(d) typical institutions like the trust, tort law, estoppel, and agency. Although some of these institutions appear in one form or another in other legal systems, the 'trust' concept is unique to the common law system. Civil law jurisdictions have utilised a general notion of unjustified enrichment (see Zweigert and Kotz (1977) Vol II, p 208 *et seq*) to cope with situations where English law has utilised a 'trust' concept;

(e) a distinctive improvisatory and pragmatic legal style;

(f) categories of law such as contract and tort as separate bodies of law as well as two main bodies of law: common law and equity, which may, nevertheless, be administered by the same court. Remarkably, in classical Roman law, there also existed two bodies of law that bore a remarkable resemblance to English common law and courts of equity, but the fact that modern civil law, as embodied in its codes, is a product of the last two centuries, and was able to combine precise general rules and equitable principles, rendered an 'equitable' jurisdiction unnecessary in civil law countries; and

(g) no substantive or structural public/private law distinction as that which exists in civil law systems.

The common law tradition is typically identified with a case based system but although cases play a dominant role, the primary sources of English law include not just case law, which is a body of principles derived from court decisions regulated by the doctrine of precedent (*stare decisis*), but also statutes, which is the law contained in legislative enactments. In more recent times in England, legislation has become not just an authoritative source of law, but sometimes the primary source of law where no cases are relevant to the issue at hand, or even where decided cases do exist. The law applicable may depend on the particular facts of the case and/or the interpretation of the 'intention of the legislature' in the statute concerned.

The doctrine of precedent governs this case law system. Thus, decisions of higher courts are generally binding on lower courts, a practice which probably originated around 1800 when law reports acquired a degree of reliability sufficient to sustain the consistent application of such a doctrine. That part of the case which is considered binding on a subsequent court is the *ratio decidendi* (the reason for the decision), which is broadly the principle established by the case. Any other comments of the judge are, *prima facie*, classified as *obiter dicta,* or comments uttered in passing which are not strictly binding on the court. However, depending on the particular area of law, the ultimate status of a judicial pronouncement may depend on what a subsequent higher court says about it.

The English Court of Appeal generally disposes of between 800–900 cases a year and the House of Lords hears between 50–70 appeals. This may be contrasted with the thousands of cases (25,000 cases in 1987) which the French Court of Cassation handles per year. However, the courts in France are regionalised, they have far more judges generally, particularly in the Cour de Cassation, and are more specialist. There is, it would seem, a very different attitude between civil and common law to the right of appeal.

The typical common law style may be called pragmatic and improvisatory, primarily geared to the adjudication and resolution of disputes. One reason for this is that English law is not codified, in the civil law sense of being contained in enacted collections of authoritative and *prima facie* exhaustive rules of law. Civil law, *ex facie*, is codified in the authoritative sense. Countries like France, Germany, Italy, Spain and Portugal all possess a collection of codes, including a Civil Code, a Commercial Code, a Code of Civil Procedure, a Penal Code and a Code of Criminal Procedure, but England has not, by tradition, enacted any code on the lines of the Continental codes, and the only area in which it has attempted to 'codify' the law is in commercial law, and, to a certain extent, company law. Unlike France and Germany, England has no written constitution or any comparable, comprehensive piece of constitutional legislation.

Although statutes are an authoritative and burgeoning source of law in English law, the typical English legal attitude towards statutes, with some rare exceptions, is that statutes are passed to consolidate or clarify existing law, and are intended to build on existing case law, which may legitimately be invoked to interpret any ambiguities or uncertain meanings in a statute. Hence, while civil law codes (and, therefore, judges) think in terms of solutions to problems, derived from systematic and authoritative expositions of the law and work towards solutions, from general clauses and principles, English law judges see their primary function as the arbiters of disputes and that their task is to resolve disputes. They therefore pay special attention to the particular facts of a case, examine the legal question to be decided (the 'issue') and make a ruling based on a careful study of whether that case 'fits' into any previously decided case whose facts happened to be similar. If they found that there was a similar case decided by a higher court (such as the Court of Appeal or the House of Lords), they would usually apply the *ratio* of that case to the present one.

If an English judge did not wish to follow a previous decision, he has the option of 'distinguishing' it (that is, decide it is not applicable) on the basis of its facts, or law, or both. If there is a statute that appears to govern the instant case which is in conflict with a judicial decision, the rule is that the statute would prevail.

Another source of law in Britain today is the law of the European Communities, which is supposed to take direct effect in the United Kingdom without the need for implementing legislation to be passed. This is the result of Britain's accession to the Treaties establishing the European Communities and the UK European Communities Act 1972.

Academic or scholarly writings are cited occasionally in English courts, but not usually in a favourable light. The notable exceptions are cases where the law is relatively uncharted as in medical ethics cases or child law cases dealing with novel issues of courts sanctioning, what it regards as, 'life saving' medical treatment despite an adult refusing consent to such treatment (caesarean section cases). Doctrinal writing in common law countries does not have the status of authoritative sources of law as in Continental countries, but the situation may well change, particularly in the newer areas of law.

The public law/private law distinction was recognised in England, at least, by the late 19th century. In civil law countries, it is crucial to the process of allocation of the court which has jurisdiction to hear the case, whereas English common law makes a distinction between the procedure to be used, depending on whether the purpose of the case is to enforce the public duties of a State agency or State body, or the private rights of a citizen. English academic writers have used the term 'public law' to cover both constitutional and administrative law. When English lawyers think of public law, it is thought of primarily in terms of the application for judicial review.

The practical importance of the distinction in English law is that, if a private citizen wishes to question the exercise of a public law function by an administrative body, the special procedure for doing so is known as an application for judicial review. This will not be heard by any special administrative court, since there is no separate administrative court system within the 'ordinary' civil courts' system. However, there are specialist administrative tribunals, but these are still subject to the normal review and appeal powers of the ordinary courts of judicature, and have never really caught the imagination of the general English public.

Judicial review is similar to the Court of Cassation's powers which merely pronounces on the legality of actions, and the court has no power to substitute the original decision with its own. There are no English public law rules separate from the general principles of common law. Contracts between private citizens and the State will be subject to the same principles as those which govern contracts between citizens. The English judiciary do not generally see a sharp and clear dividing line between public and private law. This was confirmed by two House of Lords' cases, *Davy v Spelthorne* [1983] 3 All ER 278 and *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 All ER 705. The result of *Roy* has been to render meaningless the so called rule in *O'Reilly v Mackman* [1983] 1 AC 147, whereby procedural law had been separated from the substantive law. Lord Diplock has argued that public law cases must normally be pursued under the special procedure under Ord 53 of the Rules of the Supreme Court, whereas private law cases (even those involving substantive issues of judicial review) must be pursued in the ordinary courts.

The historical reasons for English law's traditional dislike of the public law/private law distinction have been well documented (see Samuel (1988); Beatson (1987); Harlow (1980); Weir, *International Encyclopedia of Comparative Law* (1971) Vol II). The disputes of the early 17th century culminating in the abolition, in 1641, of the prerogative courts were really concerned with the nature and scope of the 'absolute' prerogative of the English Crown. The relationship between the 'public' and 'private' capacities of the Crown remains a source of confusion and debate even today.

However, in most continental legal systems, apart from criminal matters, the jurisdiction of the ordinary courts is generally limited to disputes governed by private law. When the ordinary courts found it difficult to cope with the increasing volume of public law disputes, special administrative courts were set up in France, headed by its Conseil d'État and this was then imitated in other continental countries.

The existence of special prerogative orders (formerly prerogative writs), as well as tort actions against public officials who would be sued in their individual capacity, meant that there were legal devices available for dealing with alleged abuses of power by government agencies and officials. No immunity attaches to public officials simply because of their status. Certiorari

prohibits a tribunal from exceeding its jurisdiction and mandamus compels a government official to carry out his duty. The writ of prohibition can prevent a tribunal from exceeding or abusing its jurisdiction.

Although the ordinary courts have jurisdiction over matters of public and private law alike, there are many hundreds of specialist administrative courts, called tribunals, of which there are 70 different types. The law established and developed by these administrative, industrial and domestic tribunals, often consisting of professional and lay assessors, which deal primarily with small cases, has been growing very rapidly and is notable for its sheer volume. These have been created to determine claims by citizens against public authorities or vice versa and deal solely with public law matters. They exercise administrative and/or judicial functions, but have limited or special jurisdiction and were created to provide a means of settling disputes efficiently and speedily, without the formalities of a court of law. Tribunals hear about six times the number of contested disputes heard by the High Court and county courts of law. Their proliferation has been a distinctive feature of the development of judicial administration in Britain, over recent decades, and the workload of these tribunals greatly exceeds that of the High Court and county courts (The Royal Commission on Legal Services, Cmnd 7648, 1979, London: HMSO, para 15.1, Tables 2.1 and 2.2). Their main defects are the lack or limitations of rights of appeal, the limited efficacy of claimants' remedies and preclusion of legal representation by certain administrative tribunals.

The French tribunal does not correspond to the English term 'tribunal', in its narrow sense, and none of the French terms (*cour*, *juridiction* and *tribunal*) are reflected in the English language. The French Conseil d'État and the hierarchy of administrative courts represent the deluxe model of administrative courts on the Continent, and have earned deserved admiration from most countries in continental Europe. The Councillors of State are legally trained and are competent to adjudicate on all conflicts in which public authorities are involved. These courts have built up an imposing body of case law, and have generally succeeded in protecting the citizens' civil rights and pecuniary interests against the errors of bureaucracy and officialdom. They have the right to annul administrative acts, decisions and regulations and have the right to award damages to those who have suffered injury or damage as a result of a wrongful act on the part of a public servant acting in the course of his duties.

In the United States, there is a multiplicity of administrative tribunals and regulatory agencies which deal with most areas of social and economic life. Access to these bodies is, as in Britain, easier and cheaper than to the ordinary courts. A major preoccupation of the United States Supreme Court has been the review of administrative actions. Around one-third of its full opinion cases generally deal with such issues, whereas only a quarter of the Supreme Court's cases have adjudicated on constitutional law issues proper.

The civil law and commercial law distinction, common in civil law systems, does not have a great deal of significance in English law. In English law, the subject may be fragmented into subjects such as agency, bailments, and sale of goods. Commercial law, having developed separately from common law, is now part of the English common law and 'consists in an extension of the general principles of contract law to special transactions of a mercantile character' (Gutteridge, 'Contract and commercial law' (1935) 51 LQR 91). For the most part, common lawyers do not draw a sharp distinction between civil law and commercial law and most textbooks indicate that such a distinction is either not perceived or, by not being mentioned, is actually obscured (see Weir, *International Encyclopedia of Comparative Law* (1971) Vol II, p 111 and books cited therein).

# THE COMMON LAW IN THE UNITED STATES

## Preliminary observations

When we look at how the English common law has fared in the United States, several points should be borne in mind. First, the law of the United States comprises Federal and State laws as well as constitutional law. It is therefore an example of English law being transplanted into a legal and constitutional set up which is radically different from the common law homeland. Secondly, both English law and the laws of the United States have now reached a stage in legal evolution when a long, hard look needs to be taken to decide if it is any longer legitimate to maintain this 'Anglo-American' unity of appellation. Thirdly, by virtue of the first point, given the complexity of the territory, its unique cocktail of foreign influences, systems within systems, as in Louisiana, and its immense size and pace of development, it is very rarely possible to state what the 'American law' is on a particular subject. Clearly, this often varies from State to State, but it might also depend on whether there is a possible conflict between State law, Federal law or constitutional law. Clearly, all these factors make meaningful comparisons difficult.

The United States has undergone profound changes not just in technology, economics and culture, but in its development of concepts and principles of law which have transformed its legal scenario, with themes like individual liberty, checks against abuse of power and the pre-eminence of the Constitution. Many articles and tomes have been written about these far reaching and significant developments. The following section merely presents an overview of a selection of areas for comparison.

## Linguistic issues

The famous observation by the English playwright, George Bernard Shaw, that England and America were 'separated by a common language' rings true today even more than it did nearly 50 years ago. At the most basic level, there are problems of translation – not least because there is 'American English' and also 'American legal language' which is not always equivalent to English legal language. For example, in American usage, 'High Court' refers to the United States Supreme Court whereas, in England, it refers to the only court of first instance with unlimited jurisdiction. Another striking example is the term 'judicial review', which we have examined earlier with regard to English law where it refers to the power of the English High Court to scrutinise the legality (but not the merits) of a decision taken by an inferior court or a public body. In America, judicial review is 'the power of any court to hold unconstitutional and hence unenforceable any law, any official action based upon it and any illegal action by a public official that it deems to be in conflict with the 'United States Constitution' (Abraham (1952) p 251). On a broader comparative note, it is a power that ordinary courts possess in Australia, Brazil, Burma, Canada, India, Pakistan and Japan.

## History of American law: some observations

### *Early legal development*

The story of the development of American law in the 50 different States, has been told elsewhere and it is not my intention here to recount it in any sort of detail. However, certain historical events may be highlighted which may give some insights into the way it has developed since that first English settlement occurred, in 1607 at Jamestown, Virginia.

Legal development in the original 13 colonies occurred at different stages, since the colonies were established at different times, and each had its own separate charter, being separate units under the English Crown. As with other British charters of this nature, most of the colonies' charters provided for limited local autonomy. But, there was diversity as to the extent of Crown control, and the dates of settlement.

English settlers brought with them the law with which they were most familiar. Thus, if they came from provincial towns and villages, the law they were most conversant with was really that of local customs as they existed in their boroughs, manors and villages, not the 'common law' administered by the royal courts of Westminster. But, the English common law was increasingly utilised when society became more complex, which was inevitable when the population grew, and shipping, commerce and industry also developed. Appeals from the colonial courts were still directed to

London, but ecclesiastical courts were never established in the colonies. Significantly, the institution of trial by jury in both criminal and civil cases was adopted with great enthusiasm, and one of the key grievances of the colonists, in their struggle with England, was their resistance to any attempts by the British Government to shift political cases to vice admiralty courts where there were no juries.

### *The First Continental Congress*

In 1774, the First Continental Congress was formed and met in Philadelphia and this comprised about 55 delegates from almost all the colonies. This was one of the first concrete signs of union among the colonies and of war against England. There was strong feeling among the colonists that the individual rights of the English and the Bill of Rights of 1689 should be followed and introduced into the American colonies.

### *Post-revolutionary status of English law*

Once independence had been won in 1776, it was clear that the English common law had become the basis of the legal systems in each of the 13 colonies. By that time, English law had come to be highly regarded and, indeed, essential to the needs of increasing commercial enterprise and to support effectively grievances that were expressed to the Crown. Each colony had a Bar of trained, able and respected professionals, capable of working with a technical and refined system of rules. The colonial legal profession had also achieved considerable economic success and social standing. Of 56 signatories to the Declaration of Independence, 25 were lawyers (see Farnsworth (1987) p 8).

But, different 'cut off' dates (as to when English law would cease to apply) were statutorily enacted by different colonies. Indeed, after the Revolution, some colonies exhibited a reaction against the application of English law, and their legislatures prohibited the citation of English decisions which had been rendered after independence. The adoption of a written constitution was seen as a break with English tradition. Louisiana, when purchased from the French in 1803, and admitted to the Federation in 1812, continued to maintain the French law tradition, and, indeed, traces of its period of Spanish rule. Louisiana adopted several codifications based on the French model, including the French Civil Code.

Around this time, there was a period of uncertainty caused by anti-British sentiment and since there was no adequate body of American case law to replace the 'banned' English decisions, the American Bar lost a number of their most able lawyers and, despite the fact that law reports began to be published at the end of the 18th century, they were too few in number to be used effectively. French and Roman law were considered as possibilities to

replace the gap left in the law, and European writers were cited as authorities, especially in the field of conflict of laws and commercial law. But, civil law failed to make its way into the United States, primarily because there were insufficient numbers of judges who were conversant with foreign languages, English reports and treatises were still available and the French Civil Code did not appear until the beginning of the 19th century.

In early American legal history, English common law principles were applicable only insofar as they did not contradict the constitutional, political, or geographic conditions of the new States (see Rheinstein, *International Encyclopedia of Comparative Law*, Vol I, p U-137). However, the law actually administered was apparently a 'simplified version of the law of England' (Rheinstein). The law that was being relied upon was gleaned from books such as Blackstone's *Commentaries of the Laws of England*, which first appeared in America, in 1803, and acquired a wide American readership. This ensured that legal language, legal methodology and basic concepts of private law in America were to remain firmly rooted in the English legal tradition.

But, there was no formal or organised system of legal education in mid-18th century America and it was not until the beginning of the 19th century that the American law school and scholarly writing tradition began, with the establishment in 1829 of the Harvard Law School by Justice Joseph Story who wrote a set of treatises on the main branches of the law. A steady flow and ever burgeoning number of textbooks, many written by professors of the increasing number of law schools, marked the co-operation that was to distinguish the special relationship between legal practice and scholarship, which has played a dominant part in shaping the development of the law in the United States.

The early part of the 19th century witnessed a revival of interest and a return to the English tradition with the publication of the works of James Kent and Joseph Story, which eventually replaced Blackstone. The growth of agriculture and trade began to dominate the economy as efforts were directed to shaping English law to fit the westward expansion that had gathered momentum. The foundations of contracts, torts, sale of goods, real property and conflict of laws were laid during this period, mainly by a reappraisal of pre-Revolutionary English law, but sometimes the law was derived simply from local customs and usages. This occurred in the case of farmers and gold miners and cattle raising, where English principles were adapted to suit the different conditions.

Codification was seen as an important issue in the 19th century and, while English common law was seen as unwieldy, the French Code was considered an impressive model. Codification first took root in Massachusetts, which was followed by New York. The famous Field Code of Civil Procedure drafted by David Dudley Field, a lawyer, was accepted by New York in 1848 and

codification started to gain impetus. But, by 1865, Field's Civil Law Code was greeted less enthusiastically because the codification movement had begun to lose its popularity.

### *Diversity of American cultural influences*

The diversity of religions, nationalities and economic groups gives some idea of the range of cultural, religious and linguistic influences America was enriched by. Although the English were in the majority, there were also Dutch, French, German, Irish, Scots and Swedish settlers. Of course, several States were under Spanish rule and so there is also a trace of this heritage in the law of marital property and the law relating to Spanish-Mexican land grants. But all the community property States (such as Louisiana, Texas, New Mexico, Arizona, California, Washington, Idaho and Nevada) have experienced modification and modernisation of the old laws. The Spanish tradition continues to play a dominant role in the Commonwealth of Puerto Rico which was acquired from Spain after the Spanish-American War, in 1898. Spanish remains the predominant language in Puerto Rico, but common law concepts govern most private law fields of endeavour, the law of procedure and a large area of public law matters.

### *Constitutional developments*

There was no official reception of English statute law since 1776 and English common law developments after that date were not considered as having to form part of American law. In 1776, State constitutions began to be adopted, but not without considerable political debates and bitter inter-State hostilities. A movement away from the loose Confederation gathered momentum among the delegates at the Constitutional Convention, in 1787, who were seeking to preserve the union. A vitally important decision taken at the Convention was that there should be a central government with extended powers designed to have control over individuals, not States.

In September 1787, the Federal Constitution was signed and submitted to Congress. It become effective with a two-thirds majority of the States in July 1788, and the first president, George Washington, was inaugurated in April 1789. It contains the notions that the people are sovereign and that their government is based on a social contract. However, there was no guarantee of basic human rights. This was soon introduced under 10 amendments to the Constitution which were proposed by Congress in 1789, and ratified in 1791.

### *Separation of powers*

Three Articles in the Constitution expressly delineate the three major governmental powers: legislative, judicial and executive which represented

the concept of the doctrine of 'checks and balances', or separation of powers between these three limbs. Americans were undoubtedly familiar with the writings of Locke and Montesquieu and they had long experienced the practical operation of the doctrine in their own governments in the colonial period. Although the distribution of governmental powers was contained in the Constitution, it was only in 1803, with the landmark case of *Marbury v Madison* 5 US 1 Cranch 137 (1803), that the scope of judicial review of these powers was clarified. In 1789, Congress had passed the First Judiciary Act which appeared to contemplate Federal judicial review of State court decisions in certain cases. The Act implemented the judiciary Article of the Constitution, by creating lower Federal Courts and, by defining their jurisdiction together with that of the Supreme Court. The new Federal Courts began to declare State legislation as contrary to the Federal Constitution itself.

In the famous case of *Marbury v Madison* (see above), the Supreme Court refused to give effect to a section of a Federal statute, on the ground that Congress had exceeded the powers granted it by the Constitution when it enacted that statute. The court held that its review powers, under the First Judiciary Act 1789, were not limited to the review of State law for its constitutionality, but included examination and review of Federal legislation. Federal government had limitations on its powers, as defined under the Constitution, and thus, Federal legislation would be subject to judicial review in the Federal Courts. This decision was not based on any express provision in the Constitution, but was derived from the basic philosophical approach of the Americans, honed by colonial experience of the problems caused by excess of powers and from constitutional tradition. It gave effect to the principle of separation of powers. *Fletcher v Peck* 10 US 6 Cranch 87 (1810) was subsequently decided by the Supreme Court, in 1810, which confirmed the authority of the Federal Court under the Federal Constitution to review the constitutionality of State legislation. These decisions helped to unify the law in this area, making the principle of separation of powers an actionable claim for the observance of the 'rule of law' in the United States. Equally, a State court can also refuse to enforce a State or Federal statute on the grounds that it violates the Federal Constitution, but its interpretation is subject to review by the United States Supreme Court.

### *State law and the Federal Courts*

Another important matter is the scope of powers of the Federal Courts. The essential is that Federal law is supreme only in limited areas. In either a State or Federal Court, an action based on a right derived from State law may be met by a defence based on Federal law. Alternatively, a case based on State law may be met by a defence based on Federal law. Hence, Federal Courts frequently apply State law, but the role of State law in the Federal Courts should be noted briefly.

The landmark case of *Swift v Tyson* 41 US 1 (16 Pet) (1842) saw the United States Supreme Court recognising the duty of the Federal Courts to give effect, on questions within the law making competence of the States, to State law that was 'local' in character, for example, State statutes and decisions which interpreted these. However, where the State law was regarded as part of the 'general law' or general provisions of the common law, the Federal Courts were under a duty to ascertain the relevant legal principles independently and to apply them irrespective of what the courts of the particular State would have done.

The Supreme Court therefore declared that the Federal Courts have developed a 'Federal common law' that was uniform throughout the United States, which finds its ultimate expression in United States Supreme Court decisions. This Federal common law was, therefore, binding on Federal Courts but not on State courts. The outcome of litigation might, therefore, depend upon which court, State or Federal, heard the case and many felt that this would cause uncertainty, injustice due to 'forum shopping', and the frustration of State policies.

*Swift v Tyson* was eventually overruled by the United States Supreme Court in *Erie Railroad Co v Tompkins* 304 US 64 (1938) which held that the Constitution of the United States did not empower the Federal Courts to create any common law of their own, that the common law was entirely State law and that, in areas reserved by the Constitution to the States, the Federal Courts were bound to apply State law, just as they were bound to apply the statute law of States. Subsequent cases have established that the exclusive State law character applied, not only to the substantive common law, but also to the branch of the common law known as the conflict of laws. A nationally uniform law of conflict of laws thus exists only in relation to those matters which belong to the sphere of Federal regulation, as indicated under the Constitution.

In cases involving choice of law, in order to determine what foreign law to apply, the Federal Court must, in cases where it is giving effect to State law, follow the choice of law principles of the State in which it sits. In cases involving a diversity of jurisdiction, therefore, a Federal Court adjudicating claims arising from State law must arrive at substantially the same outcome as would a court of the State in which it sits. The law in this area appears to be unnecessarily complex and could probably be resolved by legislation. It will not, however, be a simple matter to reconcile the difficult jurisdictional and constitutional issues which bedevil this area.

The demands of a rapidly increasing industrial society led to the need for a stable system of law which could cope with the developments in corporations, public service companies, railroads and insurance. During the final quarter of the 19th century, the judge's role changed from a law creator to a systematic applicator and interpreter of the law. It is therefore only in the 1800s that it is possible to speak of any sort of distinctive 'American law' existing as such.

By the end of the 19th century, the general consensus was that the system of judicial decision on a case by case basis had failed to match the speed of political, economic and social changes. Legislation began to come into its own as an instrument of change, consolidation and adaptation, and was used extensively to cope with the needs of a newly emergent society.

### *Reception of equity*

The move to integrate law and equity began in 1848 with the adoption of the Field Code in New York. This provided for a single civil action and laid down that 'the distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing are abolished'. Fusion of the two systems was accomplished for the Federal Courts in 1838 and, in 1947, New Jersey reorganised its court system, and retained a Chancery Division. The only States which still administer law and equity separately are Alabama, Arkansas, Delaware, Mississippi and Tennessee.

## Uniformity and diversity in American law

### *Continuing differences*

There is no common Supreme Court of Law and Equity, since the Supreme Court has limited itself to matters of constitutional importance which involve the Constitution of the United States and to Federal legislation, including international treaties. For most States, the Supreme Courts' decisions are final. But, there is a considerable diversity among the various States in:

(a) their matrimonial property regimes, where the majority of States have separation of assets (as in English law) but eight States of the South and West (as well as Puerto Rico) have community property regimes;

(b) the law of real property;

(c) the laws of divorce.

However, State laws have all been built on the basis of the English common law, and the same conceptual and institutional frameworks are applied by the judiciary who follow the same basic approach and procedure.

A simplification of procedure has taken place so that there is far less formality in court proceedings, and a number of changes were made to abolish professional monopolies, and to make the criminal law more humane. Judges are publicly elected in the United States for set periods ranging from 10 to 20 years and have to justify their re-election. The judge has been characterised by Roscoe Pound as a 'social engineer' who can only perform his job effectively if he understands the full circumstances of each case, and the full consequences of his decision. Hence, a notable difference in American

court judgments, apart from the single judge delivering the main judgment in appellate cases, is the court's approach to medical information, psychiatric information, economic considerations and criminological facts. English courts also refer to medical and psychiatric information, but the significant difference is that all the experts called in an American court are seen as participating in a joint exercise, to assist the court, to ascertain the 'best' decision to be made in any individual case. A somewhat wider range of experts may be called in than in a comparable English court.

Finally, legal education in the United States is often conducted not just by law teachers, but jointly with political scientists, sociologists and doctors, which indicates a far more multidisciplinary approach to law.

### *Unifying influences*

Three influences have been identified as unifying factors which have served to preserve the fundamental unity of the laws of the United States. First, the National Conference of Commissioners on Uniform State Laws (NCCUSL); secondly, the American Law Institute; and, thirdly, the legal scholars or doctrinal writers.

The NCCUSL has specialist commissioners who prepare draft statutes which, when approved by the Conference, are then recommended for adoption by all States. These commissioners are appointed by the governors of all the States in pursuance of the original objective of the American Bar Association, to promote 'uniformity of legislation throughout the Union'. This organisation can only recommend adoption to national legislatures, which they may or may not adopt, with or without amendment. It has been most successful in the area of commercial law where, in conjunction with the American Law Institute, it produced a Uniform Commercial Code which was adopted in 1967 by all States, except Louisiana, which has only adopted parts thereof. Revision of the Code has also been effected. The Code has 400 sections, is divided into nine major substantive Articles which correspond to the 'Books' of the civil law, and these are divided into 'Parts' which correspond to 'Titles' in civil law codes, and these are further divided into 'Sections' which correspond to 'Articles'. It fills over 700 pages containing comments and took over a decade to prepare. It is perhaps the most modern collection of commercial law concepts currently available.

The second organisation which assists in unifying American law is the American Law Institute, which was organised in 1923 to overcome the uncertainty of American law, and consists of a group of about 1,800 lawyers, judges and law teachers. They have worked on a wide variety of projects, each under the supervision of a prominent scholar in the field, but their most outstanding achievement has been the Restatement of Law, which is an extensive collection of laws covering the following fields: agency, conflict of laws, contracts, foreign relations of the United States, judgments, property,

restitution, security, torts and trusts. The Restatement also resembles civil law type codes. The common law rules are stated in a systematic and precise style. Each section is followed by explanatory comments and illustrations. The drafts of these laws were subjected to scrutiny by several bodies before being published under the name and auspices of the Institute.

The Restatement does not possess official authority and does not have the status of legislation. On questions on which there is no universally accepted legal principle or rule, the Restaters selected the one which they considered most accurate in reflecting the common law tradition and current policy. Nevertheless, it has been cited to many judges over many years who, in accepting the validity of many of its rules, have contributed to the unification of 'American principles'. It is regarded as representing the considered opinion of some of the leading American scholars and, although it is not followed as a code, it appears to enjoy a stronger 'weighting' than a doctrinal treatise. The American Codes now far outnumber the civil law codes. Nevertheless, it is still true to say that despite superficial similarity, the American Code cannot be equated with civil law codes and really represents a half way house between a full blown authoritative and binding source of law, and a mere source of reference. They are certainly closer to English style legislation in their intention to clarify and consolidate the law. The rate of citation of the Restatements to appellate courts – 4,000 times a year – suggests that they exercise an appreciable influence towards unification of the law.

These Restatements are guides to the law, particularly for foreign lawyers, but there is no guarantee that a stated legal principle is the current principle governing an area of law. The usual recourse to case law and statutes still needs to be made to ensure its accuracy.

The final unifying influence is that of legal scholars who have stamped their academic influence of the shape of American law in its formative years. It is well known that Professor Christopher Columbus Langdell (1826–96), a New York lawyer, introduced, through his casebooks, the case method of instruction into American Law Schools and it is clear that brilliant scholars, such as Corbin, Williston, Kent and Story, have played a major part in unifying the law and guiding the courts in its application. Unlike the English tradition, treatises and articles of the leading professors of law are often cited with approval in American appellate courts.

On a comparative note, we may reiterate the powerful influence of doctrinal writers in the civil law and their continued influence in the modern continental setting.

### *The American judge v the English judge*

Atiyah and Summers (1991) (Chapter 12) have noted certain divergences and similarities between English judges and their American counterparts and this section is based on their main observations. First, apart from their different

backgrounds and mode of training and selection, they note that the system of written briefs and more 'office' like procedures of American appellate courts, makes an American appellate judge more politically and socially orientated than his English colleague, which he needs to be able to perform satisfactorily within the American system. Secondly, as a result of different pay scales, English judges are invariably drawn from the leaders of the practising profession, whereas American judges are not, being far less well paid than their colleagues in private practice. Thirdly, English judges may be characterised by their formal, pragmatic and professional attitude to the resolution of disputes, born of many years' experience as a barrister in writing briefs which tend to identify the law and apply it to fact, expressed in neutral terms. American judgeships are far more politically based; they usually have to attract attention in some way, often have to align themselves with a political party and are not seen as lifelong jobs unless they become Federal judges, so that the 'American lawyer is sometimes less interested in impressing other judges or practising lawyers, and more interested in impressing scholars, law reviews and the academic community generally' (Atiyah and Summers (1991) p 351). Fourthly, the English judge is far more homogeneous than his American counterpart, with the vast majority coming from the same upper middle class background. All English professional full time judges come from the Bar, whereas there is a wide range of ethnic and educational backgrounds represented in the American judiciary. There is no such thing as a single legal culture in America. Accordingly, Atiyah and Summers also make the important point that, contrary to the opinion in certain quarters, the 'indeterminacy of rules' in the English legal system is far less pronounced than it is in the United States. There is, in fact, 'wider agreement about the criteria for determining the validity of rules'. English law is formulated in terms of formal rules which are usually applied strictly in accord with their terms, giving them a 'high mandatory formality'.

The 'background factor' appears to explain the greater willingness of the American judge, when compared to the English judge, to cite academic literature in his opinions and to pursue theoretical and intellectual issues.

Finally, the American judge appears to be dealing with a different set of sources, different types of legislation and cases. As Atiyah and Summers point out, among the many questions an American State Supreme Court judge may have to face is whether his or her court should follow a prior decision when most of the State Supreme Courts have pursued a different line. This is the sort of question which no English judge has to consider (see Atiyah and Summers (1991) p 358). Despite all these differences, the basic American judicial approach most closely resembles the English common law tradition than any other.

## Comparative overview

Both England and America had similar sources of law in their formative phases of development and both use similar divisions of law and approaches to law, but, as Atiyah and Summers put it, 'these two legal systems embrace very different conceptions of law' (Atiyah and Summers (1991) p 417). This also applies to legislation, where it is not surprising that the American conceptions of legislation as a form of law are also different from the English conception.

Certain fundamental American approaches in terms of legal vocabulary, basic philosophy and principles and concepts, have generally not deviated greatly from their original English roots. Farnsworth isolates three main English law ideas which, he argues, still dominate American legal thought:

(a) the concept of supremacy of law, best illustrated by the notion that the State is subject to judicial review;

(b) the tradition of precedent; and

(c) the notion of a trial as an adversarial, contentious proceeding, in the American context, usually before the jury, 'in which the adversarial parties take the initiative and in which the role of the judge is that of umpire rather than that of inquisitor' (see Farnsworth (1987) pp 11–12). It should be noted that the American version of judicial precedent is very different from the English notion (see Farnsworth (1987) pp 45–52).

Differences between the American legal scenario and the English one may be explained by divergences in their historical experience, in their constitutional structure, the different political and social conditions, the diverse geographical and climatic conditions, in their remarkable technological advancement, and by the distinctive judicial and academic personnel, who have played a major role in shaping the destiny and substantive content of its current legal scenario. However, in Rheinstein's view:

> ... in spite of all its local variations and differences, the United States constitutes one single nation, economically, politically and socially. Everyone regards himself as an American first, an Illinoisian or New Yorker, Californian or Louisianan second.

It is, perhaps, this nationalist fervour that best unites the vast American continent.

# THE COMMON LAW TRADITION IN SOUTH EAST ASIA

The countries covered by the term 'South East Asia' (SE Asia) include Burma, Thailand, Cambodia, Laos and Vietnam, the Philippines, Malaysia, Singapore and Indonesia. However, since our discussion is concerned only with the

countries that may be classified as predominantly 'common law countries', we shall be here looking in detail only at the representative legal systems of Malaysia and Singapore, which are within the group of countries Professor Hooker has labelled as the 'English legal world'. A brief reference will, however, be made to India, which is part of the common law family but has several differentiating features.

## Historical introduction to the English legal world in South East Asia

The colonial territories in which English law eventually became the general law of application were the Straits Settlements, the Federated and Unfederated Malay States, the British Borneo Territories and Burma. The Straits Settlements comprised Penang, Malacca and Singapore. The last of these has been an independent republic since 1965. Penang and Malacca were incorporated into the Federated and Unfederated Malay States and the Borneo Territories (British North Borneo and Sarawak) and became part of the State of Malaysia. Burma is now an independent republic. These countries all share a common reception (see, further, 'Reception of English law in Singapore and Malaysia', p 121, below) of English law in which all had the following features: English law was made the general applicable law and the English courts were courts of general jurisdiction. Hence, once reception of English law had taken place, even when native courts had been established, native law was applied, subject to English legal principles and to the overriding jurisdiction of the general courts. Reception of English law did not, however, take place at the same time, and general reception in Malaya only occurred in 1951–56.

As Hooker puts it:

> ... the history of the English legal world in South East Asia is a history of the accommodation between English principles and the indigenous laws, resulting in the latter being absorbed within the English legal system by way of both statute and case law. [Hooker (1978) p 123.]

The term 'indigenous' as applied in older works refers to native, religious, customary or tribal laws. Hooker continues: 'The legal history of the area is not so much a history of institutions as of the formation of special precedents giving effect to local laws' (Hooker (1978)). These special precedents, therefore, became part of the whole body of the English common law which was applicable in the territories concerned.

The prevalent and characteristic legal methodology in this English legal world in South East Asia, from about the 18th century, was a case law method, and the substantive law consisted of the English common law as it

existed at the time (that is, English court decisions and statutes) and local customs were usually given effect, but not without inevitable uncertainty and confusion in all quarters.

In 1807, a Charter of Justice was granted by the Crown establishing a Court of Judicature in Penang, with the jurisdiction and powers of an English superior court, which had several justices and judges, and the powers of an ecclesiastical court, so far as the several religions, manners and customs of the inhabitants would admit. The law which the court was to apply was the law of England with the necessary modifications, that is, subject to local customs, religions and local legislation.

British colonisation of the Malay Peninsula began in 1786 when the English East India Company acquired the virtually uninhabited island of Penang from the Sultan of Kedah. The British had occupied Dutch Malacca since 1795, but returned it to the Dutch in 1818, under the Treaty of Vienna of 1814. Having lost Malacca, the British turned to Singapore, which was also virtually uninhabited except for 150 Malay fishermen and a few Chinese. Under a treaty of friendship and alliance, concluded with an official of the Malay Sultanate, the English East India Company obtained permission to establish a trading post on the island and, in 1819, the British Crown acquired full sovereignty over the island of Singapore. In 1824, Malacca was ceded to the British under the Anglo-Dutch Treaty of the same year.

The Dutch later formally transferred Malacca to the English East India Company in 1825, following the cession of Malacca. Subsequently, the courts were required to apply English law to all three Straits Settlements, with due regard for 'native customs, usages and law' under their Charters (the Charter of Justice 1826) which applied to Penang, Malacca and Singapore. It was generally accepted that the Charter of Justice of 1826 introduced English law into the Straits Settlements, but doubts existed over the definitive extent of the modifications necessary to take into account religion and local custom. In 1858, *R v Willans* (1858) 3 KY 16 defined a local custom within the meaning of the Charter as excluding a pre-existing European law. The rule was eventually settled that the Charter did not sanction local law, but merely admitted it as an exception (see, also, *In the Goods of Abdullah* (1835) 2 KY Ecc Rs 8 and *R v Willans* (1858)).

The subsequent history of English law in the Straits Settlements is predominantly a history of an accommodation of the law to local circumstances, given the variety of races (Malay, Chinese, Indian) and of religions (Islam, Hinduism and a potpourri of Chinese religious customs). A regime of 'personal laws' sprang up, rather in the way it did in the interregnum between the First and Second Life of Roman law. Laws were applied to persons of a named religion or race as part of the general common law of the territories. From 1942 to 1945, British Malaya was occupied by the Japanese in the course of the Second World War, but after the Japanese

surrender, the British resumed control. By then, the spirit of nationalism had begun to grow and, indeed, after the war, the movement for independence started to grow in European colonies throughout the region.

In 1957, independence was proclaimed and what was then the Federation of Malaya became a sovereign State within the British Commonwealth. Singapore won internal self-government in 1959, and was briefly merged with Malaysia in 1963, but, in 1965, political differences between the two countries led to her secession and she remains an independent republic.

## Reception of English law in Singapore and Malaysia

### *Meaning of 'reception' of law*

The phenomenon of reception appears to be a universal one. It appears to have been used as a technical term in connection with the introduction of Roman law into Western Europe and also refers to the spread of law of the metropolitan countries into their colonies.

The common law interpretation of the term appears to date from the early 17th century (*Calvin's Case* (1608) 7 Co Rep 1a; 77 ER 377), acknowledged through the 18th century and reaffirmed in the classic case of *Campbell v Hall* (1774) 1 Cowp 204; 98 ER 1045.

A distinction was drawn between settled and ceded (or conquered) colonies. For settled colonies which were either uninhabited prior to the settlement, or only inhabited by a nomadic population without the arts of cultivation, the settlers carried with them, as their birthright, the law of England (see Bartholomew (1985) p 6). In the case of ceded (or conquered) colonies, the law existing prior to the conquest continued in force 'until the royal pleasure was known' (Bartholomew (1985)).

The effect of subsequent Letters Patent was to declare that, to a lesser or greater extent, English law should be applied. English law thereby spread throughout the territories of the British Empire, but was subject to a number of qualifications and restrictions. Blackstone, in writing of settled colonies, agreed that, in uninhabited territory which was discovered by English subjects, all the English laws, which are then in being, are immediately there in force but added:

> This must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to the condition of an infant colony ... The artificial requirements and distinctions incident to the property of a great and commercial people ... are neither necessary nor convenient for them, and therefore are not in force ... [See Blackstone, *Commentaries on the Laws of England* (1765–69) vi, p 107].

The accepted view is that the same restriction applies to ceded (or conquered) colonies in which English law applies by virtue of the royal will.

However, stating the rule did not settle the question of which laws were applicable to the various colonies, and to what extent.

## Reception of English law in Singapore

The reception of English law in Singapore appears to have been settled in the following way. Despite the passing of a Third Charter of Justice in 1855, this was not regarded as effecting a re-introduction of English law as it stood at that date. Unlike the Second Charter of 1826, which created a new court for Singapore, the Third Charter had been passed to reorganise the structure of the existing court (see Sir Benson Maxwell CJ, in *R v Willans* (1858) 3 KY 16, p 37). Thus, through the Second Charter of Justice 1826, Singapore received:

(a) a court system based on the prevailing English structure; and

(b) as a result of judicial interpretation of the language of the Second Charter of Justice 1826, it received English law 'as it existed in England' on the date of the Charter, 27 November 1826.

So, any English statute passed after that date is not applicable in Singapore. Arguably, there was no 'cut off' point, but the matter has never been definitively resolved. This dual reception is known as the 'general reception of English law'. Hence, the foundations of the infant Singapore legal system were laid, which place it unequivocally within the English common law family or tradition.

Moreover, only English law of general policy and application was to be received (*Choa Choon Neo v Spottiswoode* (1869) 12 KY 216, p 221, *per* Sir Benson Maxwell CJ and *Yeap Cheah Neo v Ong Cheong Neo* (1875) LR 6 PC 381, p 384), and such English law was to be applied subject to local customs and religions and local legislation.

The Singapore Parliament has now enacted the Application of English Law Act 1993 (AELA) which 'seeks to remove the uncertainty as to the extent of the applicability of English law to Singapore, particularly in regard to statute law'. The AELA repeals s 5 of the Civil Law Act 1985, so as to abolish the continuing reception of English law under the section. However, the new statute declares (in lists contained in its annexed schedules) those English statutes which continue to be applicable in Singapore, and the English common law (including principles and rules of equity), which was in force before the commencement of the 1993 Act, continues to be in force and part of the law of Singapore. Hence, the AELA's prime contribution is to clarify the applicability of English statute law to Singapore. It is therefore now possible to make a compilation of all the English statutes which are made applicable via this Act. (For a full account of the 1993 Act, see Yeo (1994) 4 Asia Business

L Rev 69.) Singapore therefore continues to remove some of the trappings of its colonial past while retaining elements which it considers necessary to its future progress, prosperity and development.

## Reception of English law in Malaysia

Malaysia was initially divided into the Federated and Unfederated Malay States. A feudal system existed in Malaysia and, in a purely formalistic sense, still does. Each of the States had a king (the Sultan) who was an independent monarch in his own right. When Malaya became a federation, all these sultans retained their sovereignty except to the extent that they would owe primary obedience to the Head of State, the Yang di-Pertuan Agong, the Chief Sultan, who by tradition resides in the capital, Kuala Lumpur.

Unlike the Straits Settlements, the Malay States were not colonies in the formal sense, but really protectorates whose rulers continued to exercise power in most formal matters of administration, but effective and ultimate power was exercised by the British Resident, a sort of governor, who was a representative of the British Government.

The position, established by a number of cases, is that the Sultan retains his independent sovereign status, despite the fact that they had bound themselves by treaty not to exercise some of the attributes of sovereignty (see *Mighell v Sultan of Johore* [1894] 1 QB 149; *Duff Development Company v Kelantan Government* [1924] AC 797 and *Pahang Consolidated Co Ltd v State of Pahang* [1933] MLJ 247).

Even after the residency system had taken effect, and up to the early 20th century, English law was not applicable *simpliciter* in these Malay States. As far as Malays were concerned, they were subject to Islamic law and Malay *adat*, a form of customary law. Islamic law was not a foreign law, but a local law of which the courts were obliged to take judicial notice (*Ramah v Laton* (1927) 6 FMSLR 128). Each of the Federal Malay States (FMS) had legislation regulating the administration of Islamic law.

There was also legislative recognition of Chinese family law, and Hindu law was considered on a par with Chinese law since the courts recognised Hindu law, and local variations thereof, on substantially the same grounds as Chinese law. Since the higher ranks of the judicial hierarchy were filled with English lawyers trained in English common law, some English rules were certainly starting to appear in the 19th century. Recourse to English law appeared to be necessary to fill lacunae that appeared since, in certain cases, it was not possible to ascertain what law, if any, applied.

In 1937, English law was legislatively introduced into the FMS by the Civil Law Enactment No 3 of 1937, and extended to the Unfederated Malay States by the Civil Law (Extension) Ordinance of 1951. This was later repealed in

1956 by the Civil Law Ordinance of the same year (s 3(1)) which repeats the provision, appearing in the earlier Acts, providing for the application of English law 'subject to such qualification as local circumstances render necessary'. This was, therefore, merely according legislative recognition to *de jure* judicial practice. Judicial precedent from each State jurisdiction may be freely cited in modern Malaysia and this can only be subject to later legislative amendment.

Malaya is now known as West Malaysia, and the law that applies to all its States is a mixture of English common law, English rules of equity, local legislation, imperial legislation and group personal (customary/religious) law (that is, the law that is applicable by virtue of membership of a defined racial, religious or ethnic group).

Unlike England, both Singapore and Malaysia have written constitutions but, in Singapore in particular, the Constitution does not dominate the availability of legal rights and remedies in the way that it does, to a great extent, in the United States, France and Germany. The Privy Council remains the highest Court of Appeal for Singapore, but not for Malaysia. This refers to the judicial committee of the English Privy Council, and the origin of this practice is traceable to the days when the English Sovereign ruled by, and with, the advice of the Privy Council. Appeals to the Privy Council from courts in Singapore were radically curtailed, in 1989, by the Internal Security (Amendment) Act 1989 and the Judicial Committee (Amendment) Act 1989. It is expected that, as a result, there will now be very few appeals to the Privy Council, although it remains nominally the highest appellate tribunal within Singapore. The eventual abolition of all appeals to the Privy Council for both criminal and civil cases is now on the cards.

By virtue of the Judicial Committee Act 1833 (as amended in 1844), a committee was set up within the Privy Council to hear appeals from overseas either under the Act or under the customary jurisdiction of the Privy Council. Until 1966, only single opinions were given, but dissenting opinions are now permissible.

In criminal cases, the jury system was abolished in Singapore by the Criminal Procedure Code (Amendment) Act 1969. This is certainly not in keeping with other major common law jurisdictions.

It can be seen, therefore, that where Portuguese and Dutch influence centred on Malacca for predominantly trade motives, English influence eventually extended over the whole peninsula and was to leave a permanent legacy to the political and legal institutions of the country. Of course, Indian culture and religion were transplanted through the Indian immigrants who settled in Malaya, bringing with them Hindu law and Hindu customs, as was the Islamic religion and the law of the Muslims. However, the *adat*, or native Malay customary law, prevailed and, indeed, has a direct link with the feudal set up. Thus, the influence of customary law was allowed to flourish despite

the 'general applicability' of the English common law, but the ethos of English law, and its culture, traditions and philosophy, is still very much in evidence in Singapore and Malaysia.

## THE COMMON LAW IN INDIA

The vast majority of people who are natives of the Indian sub-continent are Hindus, but this does not mean that Hindu law, which is a law based on a religion and particular way of life, governs India. It is worth bearing in mind that, although the Indians themselves were either Hindus or Muslims by religion, neither Hindu nor Muslim laws were the laws that governed the country from the 16th century onwards. On the contrary, India is traditionally classified as a common law jurisdiction. The history of the current Indo-British jurisprudence originates from the formation of the London East India Company in 1600, in the reign of Elizabeth I. The charters of Queen Elizabeth and James I granted to the company the power to make laws which were necessary, so long as these were not contrary to the laws, statutes and customs of England. The Dutch, Portuguese, French and English who came to India, however, were, as in the case of the Straits Settlements, primarily interested in establishing strong trade links with India rather than attempting to colonise it. Eventually, the British gained a legal, political and even cultural foothold in the country through the making of numerous treaties between Indian princes and the East India Company, and intermittent military ventures.

Vast territories were governed by the East India Company and the British Crown then created special royal courts, applying English law, which were later replaced by Supreme Courts staffed by English judges, which also applied English law except in inappropriate cases involving inheritance, marriage, caste and religious disputes. By the end of the 19th century, English common law became the law which applied to most of India. The judicial norm, in cases other than those mentioned above, was to determine them in accordance with 'justice, equity and good conscience'. Reception of English law (see, also, p 121, above), therefore, took place through the many laws drawn up by English jurists, such as Macaulay who was the originator of the Indian Criminal Code, and the codes that were formulated and applied. A veritable host of such codes were drawn up including a Code of Civil Procedure and Criminal Procedure. Other statutes which codified the common law of India included the Evidence Act 1872, Contract Act 1872, Transfer of Property Act 1882 (amended 1929) and Succession Act 1865. In fact, by 1861, the administration of justice in India was regularly carried out in the country by judges trained in the English common law. Codifications were, however, used to reform and clarify the law and not merely to consolidate existing laws. New rules were created and enacted without inhibition in the

spirit of improving on the existing English common law, for example, in the law of contract and wills.

Nevertheless, the law of India, prior to independence in 1947, would certainly have conformed to the English common law prototype in its juristic style, ideology, sources of law, judicial and administrative hierarchy, and fundamental concepts. The doctrine of binding precedent was not merely recognised, but officially endorsed and promulgated. The judge is given a high profile, as in other common law jurisdictions, and dissenting opinions are part and parcel of this approach, as are publications of law reports, which were first published privately.

Procedure in legal issues, and the primacy of the rule of law are other distinctive common law features. Unlike England, however, no centralised system for the administration of justice has been set up and, apart from the Federal Supreme Court, there exist only State or territorial courts. The Federal Supreme Court itself is headed by a chief justice and 13 judges.

The gaining of independence, in 1947, did not radically alter the basic characteristics of Indian law, but there are some distinguishing features from common law. For example, Indian courts try to establish precedents which are tailored to the particular local facts of a case and might, therefore, deviate from a blanket acceptance of an English precedent, if appropriate. There is no distinction between common law and equity in India. The English legal terminology for the law of property is used purely in a technical sense, and applied to regulate a land tenure system that differs markedly from the English system. India has a written Constitution which created a union of States, another feature which distinguish it from the English position. This Constitution contains a list of basic rights rather like the Russian Federation Constitution (see, further, 'The new Russian Federation Constitution', p 195, below), the infringement of which may be held void by the High Court, which is the highest court of the Member States, or by the Federal Supreme Court of India, the highest tribunal in the country. The Supreme Court has the power to decide appeals against judgments of the High Court, in cases involving more than a designated monetary limit, and may also hear an appeal where permission has been given to do so by a High Court or by the Supreme Court itself. The Supreme Court seeks to ensure respect for the Constitution and it will hear cases where a breach of a 'fundamental right' has been alleged.

In view of the great diversity of Indian society, such as its 15 officially recognised languages, and the uneasy co-existence of Hindus and Muslims, which led to the creation of Pakistan in 1947, the English common law can be seen to have united the country in a way that appeared intrinsically impossible, even to the native population. However, as a former Attorney General of India put it: 'The massive structure of Indian law and jurisprudence resembles the height, the symmetry and the grandeur of the common and statute law of England.' This is because: 'The English brought

into India not only the mass of legal rules strictly known as "the common law", but also their traditions, outlook and techniques in establishing, maintaining and developing the judicial system' (see Setalvad (1960)).

However, one needs only to read about Indian culture and literature to obtain a firm impression of the legacy of the English tradition in India extending far beyond the law and the administration of justice. It appears true, even today, that the legacy of the English in India can still be seen in their fundamental approach to many aspects of life but, predominantly, only among the more privileged and 'educated' classes. Its unique culture and customs have survived, but its legal and political ethos still bears strong imprints of the English common law traditions.

## THE COMMON LAW IN THE FAR EAST: HONG KONG

In early times, the island of Hong Kong was apparently inhabited by some peasants and fishermen who lived there under Chinese rule and custom. The law to which they were subject at the time was that of the Qing dynasty, partly codified by the Qing Codes. The colony of Hong Kong was acquired by the British in three stages; in 1842, 1860 and 1898. Hong Kong was not, however, acquired for settlement or territorial expansion, but as a base in the Far East to advance the commercial, diplomatic and military interests of Great Britain (see Endacott, *A History of Hong Kong* (1973) p 38).

The legal system (such as it was) that existed in Hong Kong in the 1840s, was not suitable for these purposes. On 5 April 1843, Hong Kong received a local legislature and English law was to be received into the colony, but not in cases where it was considered not suitable for its inhabitants or to the circumstances of Hong Kong. Although there was no differentiation in the types of English law, there was, in practice, a distinction drawn between statutes and cases. The 'cut off date' for Acts was 5 April 1843: all Acts contained in the English statute book on that day, provided they were general and not purely local in character, and not unsuitable to the circumstances of Hong Kong or its inhabitants, were automatically applicable to Hong Kong. All English Acts passed after that date were not applicable to the colony unless they necessarily applied by their own terms, or were specifically imported by prerogative legislation or local ordinance. Common law, in the sense of case law, was considered unchanging and, therefore, remained applicable even after the cut off date, since these cases were seen as merely declaratory of the law that had always been applicable. This quaint concept has been discarded, but the continued reception of contemporaneous judicial decisions meant that there was possibility of Hong Kong being left with a set of ossified legal decisions.

However, it became increasingly problematic to ascertain which English Acts were in force in 1843 and to discover accurate texts. Hong Kong's own legislature, nevertheless, continued to produce statute law specifically adapted to the colony, so that a voluminous collection of English law was rendered nugatory.

## New legislative formula

In 1966, a new legislative formula was introduced through the Application of English Law Ordinance 1966. It divided English law into two types: (a) enactments; and (b) common law and equity, dealt with each separately and abolished the cut off date.

Under s 3(1) thereof, English common law and the rules of equity shall be in force, so far as they are applicable to the circumstances of Hong Kong or its inhabitants, and subject to such modifications as such circumstances may require. Common law and equity may be amended by legislation, but their operation in the territory is only to be affected by statutes which themselves have effect in Hong Kong. Thus, Acts of Parliament apply if extended by their own terms, or by other legislation including the schedule of the Application of English Law Ordinance itself (s 4).

Various anomalies resulted from this Ordinance, since it applies some English Acts to Hong Kong (for example, the Justices of the Peace Act 1361 and the Distress of Rent Act 1689), but not others. Case law then established that the effect of the Ordinance would seem to be that, if a common law rule was affected by English legislation, it was the amended common law which applied, irrespective of whether the amending Act of Parliament took effect in Hong Kong or not. Hence, an Act passed in England, though without reference to conditions in Hong Kong, or the wishes of the Hong Kong Government, and not itself directly in force in Hong Kong, would, if it impinged upon the common law, indirectly affect the law that was applicable in the colony (see Wesley-Smith, *An Introduction to the Hong Kong Legal System* (1987) p 37).

The local legislature, therefore, amended the Ordinance, so that it was made clear that the common law and equity are to be applicable in the colony, notwithstanding amendment of them as part of the law of England made at any time by legislation not in force in Hong Kong. This did not resolve other potential anomalies, but the current position appears to be that 'the common law imported into Hong Kong can be affected by legislation made as part of the law of England which does not apply to Hong Kong, provided that such legislation was formerly in force under the old formula' (Wesley-Smith (1987) p 38). Ironically, therefore, the cut off date retains its significance because all statutes which were part of English law on 5 April 1843, and which abolished common law or equity, will still have that effect. Section 3 will only apply to

English legislation passed after 5 April 1843, or to earlier legislation which did not previously apply to the colony.

## Hong Kong after 1997

In 1997, Hong Kong once again came within the sphere of China's control. In order to ensure that, by then, Hong Kong would possess a comprehensive body of law which owes its authority to the legislature of Hong Kong, it was necessary to replace British legislation by local legislation on the same topics. A legislative programme has been adopted to achieve this. The Hong Kong Act 1985 provides for the Hong Kong legislature in specified fields with Hong Kong ordinances, and the Hong Kong (Legislative Powers) Order 1986 specified the fields of civil aviation, merchant shipping and admiralty jurisdiction. A further order was made in 1989 which confers similar powers to enact legislation, to give effect to international agreements which are applicable to Hong Kong. At the basic level of compatibility of laws, Hong Kong's case law will have to be codified if there is to be any hope of the two systems being harmonised with each other.

At midnight on 30 June 1997, Hong Kong became a Special Administrative Region (SAR) under the direct authority of the Central People's Government (CPG) of the People's Republic of China (PRC) and, according to the promise of Deng Xiaoping in 1982, there was then 'one country, two systems'. The National People's Congress (NPC) of the PRC enacted a basic law for the Hong Kong SAR pursuant to Art 31 of the Constitution of the PRC. The Basic Law is a sort of mini-constitution for the future Hong Kong SAR, designed to provide a constitutional framework for the maintenance of Hong Kong's present legal and economic system post-1997.

Article 5 of the basic law draft states that:

> The socialist system and policies shall not be practised in the Hong Kong Special Administrative Region and the previous capitalist system and way of life shall remain unchanged for 50 years.

Article 8 goes on to provide:

> The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for those that are inconsistent with this law, or have been amended by the legislature of the Hong Kong Special Administrative Region.

Thus, problems of integration of policy, culture, ideology and politics apart, Hong Kong will continue to receive, for 50 years after 1997, the English common law. Hence, it will continue to apply the doctrine of precedent and appeals from its Court of Appeal will still lie to the Privy Council. Article 83 allows the courts to refer to precedents from other common law jurisdictions. Hong Kong's Court of Appeal held in 1973 that any relevant decision of the

Privy Council is binding on the Hong Kong courts. Hence, decisions of Chinese courts will have no impact on Hong Kong until 2047.

Judges are meant to be appointed from within Hong Kong, and Arts 81 and 91 of the draft basic law permit the appointment of judges from other common law jurisdictions to sit on the Court of Final Appeal and other courts respectively. A continuing problem has been the difficulty in procuring judges of sufficient calibre and experience to sit on the Bench.

It must be appreciated that the Hong Kong transition is unique because, under paras 1 and 2 of the *Joint Declaration (*JD*) of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China*, there is no transfer of sovereignty as such. The Government of the People's Republic of China declares that 'it has decided to resume the exercise of sovereignty over Hong Kong' with effect from 1 July 1997 (see *Joint Declaration of the Government of the UK of Great Britain and Northern Ireland and the Government of the People's Republic of China on the question of Hong Kong with Annexes*, Cmnd 9543, 1985, London: HMSO). Thus, that document, which the British Government described as the highest form of commitment between two sovereign States, merely prescribed the timing and modalities of the resumption of Chinese rule over Hong Kong, subject to certain transitional arrangements for the next 50 years. In a sense, therefore, China recognised the legitimacy of British administration which lasted for 12 years. As far as implementation of the JD is concerned, there is no dispute settlement provision and the UK would, therefore, not be able to respond militarily to any forcible occupation of Hong Kong by China. China does not recognise the compulsory jurisdiction of the International Court of Justice.

However, until 1 January 2000, a formal mechanism for bilateral consultation will exist in the 'Joint Liaison Group' (JLG) which was established under the Joint Declaration. This will be of some utility because Annex II of the JD makes it clear that the functions of the JG are limited to liaison, so it is not intended to operate as an organ of power, and plays no role in the administration of Hong Kong or the Hong Kong SAR. It also has no supervisory role over the administration of the former colony.

However, there are several factors which suggest that China will abide by the terms of the Joint Declaration, most of which could be said to be public policy grounds (see Slinn (1997)):

(a) The JD is a freely negotiated international agreement. There is, thus, an obligation to observe such an agreement in good faith, which is a fundamental principle of international law. China has a reasonably good record of observing such agreements.

(b) The 'object and purpose' of the JD is clearly stated in the preamble as 'the maintenance of the prosperity and stability' of Hong Kong, which China has identified as a vital Chinese interest to be satisfied by respect for the autonomy and for the 'capitalist lifestyle' of the Hong Kong SAR.

(c) Since the agreement came into force, the practice of the parties has been to accept the existence of a binding agreement.

(d) Serious breaches of the JD would endanger the already delicate relationship between China and Taiwan, and China's relations with third States and with international organisations. Efforts to end the separation between Taiwan and the mainland are still very much on China's agenda. Indeed, the 'one country, two systems' formula was seen as a slogan for unity between China and Taiwan. As far as relations with third States and international organisations are concerned, any breach of China's undertakings towards Hong Kong's status would affect adversely an extensive multilateral and bilateral network of treaties in areas such as extradition, investment protection and air services.

(e) The Chinese leader has underlined the importance China has placed on maintaining Hong Kong's stability and prosperity.

(f) Arrangements have also been made for the Hong Kong SAR to continue to participate in a wide range of international organisations, and these arrangements assume the SAR's autonomy.

*The United States Hong Kong Policy Act 1992*

In addition, the USA has enacted the United States Hong Kong Policy Act 1992 which gave legislative effect to US policy, which is predicated on Hong Kong remaining a fully autonomous territory from 1 July 1997, in respect of economic and trade matters. This agreement will mean that the US will continue to expand trade and economic relations, which will include entering into bilateral economic and air services agreements. They will also support Hong Kong's participation in multilateral agreements and organisations in which Hong Kong is eligible to participate. If the SAR does not retain sufficient autonomy to discharge its international obligations under the JD, Hong Kong will lose any benefits which are available under the Act. This Act apparently elicited protests from China which claimed that it was tantamount to interference with China's exercise of sovereignty in domestic affairs. The Act gives sanction to US support for compliance with the JD.

## Can socialism and capitalism co-exist?

The study of Puerto Rico's legal history by JA Morales, which illustrated how American common law transformed the fragmented Puerto Rico's Spanish civil law tradition, has suggested that the domination of a law in a country which already had an indigenous law, or which has already been ruled by another law for many years, may be due to several factors: the choice of legal language; the content and style of legal education; and the type of legal personnel it produced (Morales, 'Puerto Rico: two roads to justice' (1981) 79

Revista de Derecho Puertorriqueno 293, cited by Epstein, in 'China and Hong Kong', in Wacks (ed), *The Future of the Law in Hong Kong,* pp 60–61). If common law and socialist law begin to co-exist after 2047, experience in other jurisdictions suggests that one of the systems will prevail. Given the obvious military might of China, that system might arguably be imposed from across the sea from the Mainland.

China falls into the category of a socialist legal system since it shares with the few remaining socialist countries common economic, ideological and political foundations. China has primarily looked to civil law codes and, indeed, codification as a preferred style of legalism, but socialist law was not created in a vacuum. It was in 1927, when the 'Chinese Soviets' were established in Jiangxi and Hunan, that Soviet law began to make a lasting impression on China and the Mainland Chinese leaders. The policy of the Chinese Communist Party (CCP) at the time clearly played no small part in China's eventual 'conversion'. True to Marxist/Leninist ideology, Chinese Marxist orthodoxy views all law as an extension of the economic system and the system of ownership which determines the mode of production. Law is an integral part of the political structure, but is also merely the instrument of the political will of the ruling class.

A new form of 'preliminary socialism' has entered into China's official ideology relatively recently and this argues that, because socialist China emerged from a semi-colonial, semi-feudal period, without passing through a stage of highly developed capitalism, its productive forces have lagged far behind those of developed capitalist countries. China would first have to undergo a long period of preliminary socialism, wherein the private economy will be allowed to co-exist with the socialist public economy and, by allowing mixed economic forms, the CCP has been given the latitude and discretion to reform China's economic and social systems without undermining their leadership or their socialist ideology. The capitalist productive forces of Hong Kong are seen as a means to an end of 'preliminary socialism'. The question that must lurk in the back of one's mind, therefore, is when will the period be seen to have served its purpose so that the socialist State can move on to the next stage of development? Can China's economic and ideological systems co-exist with Hong Kong's capitalist system?

## The future of the common law in Hong Kong

As far as Hong Kong and China are concerned, there are fundamental ideological, institutional, philosophical and economic differences between them which need to be resolved before any sort of successful integration and co-existence will be possible. It should be remembered that the system proposed for the post-1997 Hong Kong is not a Federal system of power sharing, and that Hong Kong's law making competence will derive from the

NPC and, ultimately, from Art 31 of the Constitution. Hence, the basic law is not really a mini constitution in the way that one would expect. It will be an NPC law which can extend or restrict the application of the Chinese legal system to Hong Kong as the NPC thinks fit, subject to amendment or repeal like any other NPC legislation. However, as long as it remains in force, it will constitute a fetter, or check, on the application of Chinese law in Hong Kong.

In essence, China's legal system remains incompatible with that of Hong Kong. Mainland China's historical roots are overwhelmingly rooted in civil law and their predominant socialist law ideology means that they give very little recognition to private rights, since everything is generally geared to the State plan, and the best economic interests of the State. Mainland China retains a legislative jurisdiction in defence, foreign affairs and other matters outside the limits of Hong Kong's 'high degree of autonomy'. Other factors which will influence the shape of things to come will be the Mainland's control of legal language, personnel, and the weight and popular appeal accorded to public policy and morality, counterbalanced by Hong Kong's devotion not just to the money market and prosperity, but also to its own sense of justice, human rights and democracy. At present, most legal proceedings in Hong Kong are conducted in, and nearly all law is published in, English – a language which is not the mother tongue of 98% of the inhabitants. Its District and Supreme Courts, and Lands Tribunal function only in English. Interpreters are provided for non-English speakers. However, the government has committed large resources to translating the entire statute book into Chinese and to draft new ordinances and subsidiary legislation into both languages, with both languages to be equally authentic. Legal education, on the other hand, will continue to be in English only, but some secondary literature in Chinese is beginning to emerge. These elements may all be irrelevant if Mainland China were to exercise their military powers, or play their public order card, and simply take over the island and rule it as they deem fit. When Chris Patten took over as Governor of Hong Kong, there was something of a 'roller coaster' relationship between himself and Chinese representatives from Mainland China. In his capacity as representative of the British Government, Patten continued to insist that, even after the British handover in 1997, certain fundamental civil liberties would be constitutionally protected in the former colony. This met with a cool reception from the Chinese leaders, not as a matter of principle, but because of the implications of actually spelling out such laws. Negotiations continued for some time and it is believed that some sort of compromise was eventually achieved. Only time will tell whether the terms of such a compromise were effective in maintaining civil liberties in the Hong Kong of the 21st century.

The process of implementing the JD, over the period 1985–97, proved to be a highly rigorous exercise in scrutiny of an international treaty to 'exhaustive textual exegesis' (Slinn). It provides a memorable example of international

legal co-operation, which was necessary to ensure the Hong Kong SAR's international status as an autonomous trading and economic entity.

### *The Hong Kong Bill of Rights Ordinance*

The Hong Kong Bill of Rights Ordinance entered into force on 8 June 1991 (Cap 383, Laws of Hong Kong). Its purpose is to incorporate into the law of Hong Kong, the provisions of the International Covenant on Civil and Political Rights (ICCPR) as applied to Hong Kong (see Chan (1998)). The Bill consists of three parts: (a) Pt I provides for the commencement of the Ordinance, the principles of interpretation, the scope of application, permissible derogation in times of emergency, and remedies and jurisdiction of the courts; (b) Pt II contains the Hong Kong Bill of Rights, consisting of 23 Articles, which replicate the substantive rights provisions of the ICCPR; (c) Pt III sets out certain restrictions and limitations on the scope of the Bill, replicating the reservations entered by the United Kingdom when it ratified the ICCPR. It also contains s 14, which freezes the operation of the Bill in relation to six specified ordinances, for a period of one year. The Ordinance is not entrenched, but retains the status of an ordinary ordinance. Section 3 provides that all pre-existing legislation shall be construed in a manner consistent with the Bill of Rights and if it cannot be so construed, be repealed to the extent of the inconsistency. Section 4 provides that all subsequent legislation shall be construed consistently, not with the Bill of Rights, but with the ICCPR as applied to Hong Kong. If it cannot be so construed, the Bill of Rights Ordinance says nothing about its validity. However, the Letters Patent, which was the constitution of Hong Kong, shall be *ultra vires* the legislation and, hence, null and void.

So far, the Hong Kong courts have been quite prepared to look beyond the ICCPR to examine established law and practice, and seek to evaluate them against contemporary international human rights standards. It is envisaged that there will be a fresh jurisprudential approach (see the leading case of *R v Sin Yau Ming* [1992] HK CLR 127). However, the Privy Council (the highest Court of Appeal for Hong Kong) in *AG v Lee Kwong-Kut* (1993) 3 HKPLR 72 has not been enthusiastic about the Hong Kong Court of Appeal's approach. Although conceding that international and comparative jurisprudence may give valuable guidance to the interpretation of the Bill of Rights Ordinance, Lord Woolf also pointed out that these materials, such as Canadian cases, were limited when it came to interpretation of domestic legislation. The court believed that the common law was quite able to provide its own judicial guidelines for interpretation of legislation. In the light of this cool reception from the Privy Council, international and comparative jurisprudence has played only a minor part in the interpretation of the Hong Kong Bill of Rights. The Privy Council also cast doubt on the relevance of European jurisprudence, in *AG v Ming Pao Newspapers Ltd* (1996) 6 HKPLR 103. Lord Jauncey

emphasised that the role of the European Court of Justice, in relation to the domestic legislation of contracting States, differed markedly from the role of the Hong Kong courts in legislation, which is claimed to contravene the entrenched provisions of the Bill. The Hong Kong courts are more supportive of reference to international and comparative jurisprudence as aids to legislative interpretation, if these sources reach a similar conclusion to the common law position. Up to mid-1997, the Hong Kong courts have delivered approximately 300 judgments on the Bill of Rights (see Chan (1998)) and, apart from the observations already made, the common law notion of '*Wednesbury* unreasonableness' tends to creep in (see *Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1 KB 223). This is partly due to the uncertainty of wandering into unknown territory located within international law. The mood of the courts has been described as 'conservative, inward looking and parochial, showing excessive deference to executive policies and legislative sovereignty, and demonstrating only half hearted commitment to fundamental human rights' (Chan (1998) p 335) and, most worryingly, this writer argues that the general outlook of the Hong Kong courts is that 'Human rights are regarded as a necessary evil, which have to be kept in close control'.

In the first few judgments on the basic law, there is no suggestion that this approach will change, as far as the courts of the SAR are concerned. In *HKSAR v David Ma* [1997] 2 HKC 315, the Court of Appeal held that the Hong Kong courts had no jurisdiction to question whether a decision of the Standing Committee of the National People's Congress, setting up the provisional legislative council, was consistent with the Basic Law. Further, in *Cheung Lai Wah v Director of Immigration* [1997] HKLRD 1081, the Court of First Instance upheld an amendment to the Immigration Ordinance depriving retrospectively children, born in Mainland China to parents who are Hong Kong Permanent Residents, of their right of abode in Hong Kong saying that, although this right is conferred on them by the basic law, it is also justifiable under the basic law.

In a very practical sense, the survival of the common law and concomitant Western principles regarding human rights and civil liberties in Hong Kong, might also ensure the survival of a democratic society and greater freedom for the citizen of Hong Kong in the 21st century. Indeed, it is expected that Hong Kong will continue to function pretty much as before the handover in 1997, right up to 2047 – a free market will only really thrive in a free society. For the foreseeable future, China appears to wish to preserve the Hong Kong phenomenon.

## COMPARATIVE OVERVIEW

As with the civil law system, the common law tradition has inevitably undergone notable changes over its nine centuries of existence. In its parent country, where legislation was once regarded as a necessary evil and occasional inconvenience, a remarkable proliferation of legislation has taken place, particularly, in the latter half of the 20th century. Its basic philosophy has remained the resolution of disputes, rather than the provider of, or vehicle for, universal truths and general solutions. However, it has both explicitly and implicitly been ready to posit principles, based on standards of morality, social policy and commercial probity. In this, it has many parallels with civil law systems.

Its basic legal technique remains firmly rooted in a process of abstraction, operating at different levels of generality, and reasoning by analogy and by precedent, in reliance on decisional law or judicial precedent, rather than primarily in applying and interpreting statutes. A crucial difference with the civil law approach is that, with some exceptions, in order to determine a point of law, instead of consulting a code or statute, the common lawyer and judge will consult cases and textbooks of cases before looking at statutes and, primarily, in order to resolve a dispute or an alleged breach of legally enforceable rights.

The vast proportion of cases in more recent times have been decided by the lower courts and specialist tribunals, the latter presided over by judges and arbitrators outside the ordinary courts' structure. But, the appeal courts and the House of Lords continue to exercise control and influence over the shape and progress of legal development. There is still very little evidence of English law being subsumed within, or markedly influenced by, European Community law, although the highest Court of Appeal for English domestic courts is now the European Court of Justice of the European Communities, and EC law is applicable to Britain under the European Communities Act 1972.

The doctrine of precedent, despite its flaws, potential rigidity and inability to play a pro-active role in law reform, has, at least in England, been assisted by the expedient of legislation, particularly in the area of company law, commercial law and family law. In countries to which the common law has spread, it has been adapted considerably, so as to acquire different characteristics and features; in countries like America, it has had to accommodate rapidly changing social, political and economic conditions. It has thrived in the former colonies of Britain, and has managed to co-exist quite successfully alongside indigenous customary law, primarily because of its potential for flexibility.

In England, there has been a remarkable increase in the number of cases of judicial review, especially over the last decade, and questions must be raised

over the efficacy of the ancient prerogative writs to secure for the citizen, acceptable standards of justice and to provide sufficiently strong protection against governmental power and control. There appears to be a discernible trend, in common law jurisprudence, to broaden the juristic base for the articulation and enforceability of the rights of the individual, particularly against the State and State interests, and the potential removal of any remaining distinction between public and private law in England, except in a small proportion of cases.

Judges remain in the forefront of the common law legal tradition, both at home and abroad, and it is their role and function that is currently undergoing closer scrutiny than ever before.

Case law has also been steadily acquiring a higher profile in civil law countries, like France and Germany, whereas, in England, the so called law making function has been carried out in far greater measure in the last decade by the legislature than in the past. But, as far as convergence of legal systems is concerned, judgment has to be reserved. The preceding survey will have at least indicated that, although several similarities exist between common and civil law countries, several more ideological, jurisprudential, institutional and procedural dissimilarities will first have to be reconciled before any sort of true 'harmonisation of laws' can occur.

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