



# *Session 9*

## *Sources of law 2*

# *British Law*



## *Features*

- 1 English law is distinctive in that unlike other judicial systems it is based on the practice of precedent and thus written texts are not always necessary
  - Example: absence of constitution.
- 2 The following particular features:
  - *Continuity*: developed since the 11th century without any major changes.
  - *Absence of codification*: no written codes – except for consolidations.
  - *Precedent*: apply rules of law formulated in earlier cases.
  - *Judiciary*: independent from both the Parliament and civil service.

## *Features*

- *Common law and equity*: a blend of rigid rules (common law – judge-made law or unwritten law) and more flexible rules based on good conscience and equality (equity).
- *Accusatorial procedure*: the court remains neutral and hears all the arguments presented.

## *Sources*

### 3 Custom comprises:

- ways of doing: common law, trade usage, county or parish.
- if it is to be incorporated into the law it must be proved to exist in court by satisfying the following criteria:
  - antiquity (time immemorial),
  - continuity (no interruption),
  - peaceable enjoyment (common consent),
  - obligatory force (compulsory duty arising and not voluntary),
  - certainty (valid each time considered),
  - consistency (different from other existing customs),
  - reasonableness (cannot conflict with a fundamental principle of common law).

## Sources

### 4 Precedent:

#### Principle:

- it is not the function of a judge to make law, but to decide cases in accordance with existing generally accepted rules

#### Requirements:

- the statement based on a reason for deciding, i.e. the facts to ground a decision (*ratio decidendi* statements; if not, they are *obiter dicta* statements based on facts found not to exist).
- the court must have equal or superior status than that having considered the statement.

## *Sources*

### 5 Legislation:

- Statutes passed by Parliament, which is the supreme law making body;
- Statutes amend, abolish established rules, overrule decisions of courts or make entirely new law.

## 5 Legislation (cont):

There are three approaches to statutory interpretation by a judge:

Literal rule: words given in their literal or usual meaning

Example: where it is an offence to offer weapons for sale it is not when displayed in a window as they are an invitation to treat

Golden rule: literal meaning must be used unless to do so produces an absurd result

Example: sidestepping from existing act: preventing a murderer from inheriting

Mischief rule: adopt an interpretation to remedy a mischief

Example: amending act: referring to 'single woman' to include any woman with no husband to support her



# *Classification*

6 English law comprises

- Criminal law: wrong done to the state
- Civil law: wrong done to another person (contract, tort, property, company, commerce, employment, family)
- Cases: criminal; civil; appeal

*Swiss law*



## *Sources*

### 7 Federal statutes:

- foreign affairs, federal taxes, defense, and cantonal coordination relative to education;
- federal law in these areas takes precedence over cantonal laws (hence a hierarchy: Federal Constitution > international conventions and treaties > federal statutes > administrative regulations and ordinances).

### 8 Cantonal statutes:

- regulate issues concerning education, tax regimes and collection (*praenumerando* or *postnumerando*), infrastructural works, insurance.

# *Classification*

## 9 Swiss law comprises

- Public law: concerned with the organization of the State and other public bodies: constitutional law, administrative law, taxes, criminal law, criminal procedure, public international law, civil procedure, debts and bankruptcy.
- Private law: civil codes to regulate the relations between individuals: civil code, code of obligations, private international law.

## 10 Recognition of:

- Customary law: it is to be recognized in all parts of Switzerland.
- Case law: to supplement statutory provision and customary law.

# *European law*



## *Sources*

11 Treaties of Paris, Rome and Maastricht; concerned with economic matters such as free trade, agriculture, and transport

12 Three instruments for their application:

- regulations (with immediate binding force),
- directives (whose force is binding when the directive is implemented by the national parliament),
- decisions (addressed to member state);

ACTIVITY: to recap, draw a table to highlight the main differences between case and civil law practice.

Case law practice:

Based on cases

Emphasis on the similarity of facts (*stare decisis*)

Not written in codes – unless consolidated

E.g. British law

Civil law practice:

Based on legislative decision

Emphasis on the generality of application

Written in codes

E.g. Swiss law

However: nowadays there is a convergence.