2 The nature of English law

2.1 Different jurisdictions

The legal systems of different countries vary, not just in detail but sometimes in their basic nature. For historical reasons, the legal system of the USA is very similar to that of England and Wales, while the legal systems of the main Continental European countries, including most of our EU partners, are rather different from the English legal system.

When a business transaction takes place between organizations and/or people in different countries, in principle there is a question about *jurisdiction* – which country's laws apply to the transaction? That can be a real issue in one area of IT, namely e-commerce. When an individual uses the internet to buy something from a seller in another country, the buyer is unlikely to know what rights he has if the transaction goes wrong. But (contrary to what some readers perhaps expect), within the field of IT law as a whole jurisdiction questions do not loom large. When a business needs to think about legal issues, normally there will be no doubt about which country's law is relevant (though there may be plenty of doubt about what that body of law actually says about the matter in question). If firms make contracts across national boundaries, they will usually settle which legal system is to apply through an explicit clause in the contract.

I have discussed problems about jurisdiction for e-commerce in my *Electronic Business* textbook, but that issue is not significant enough to discuss further in this book. However, the legal consequences of Britain's EU membership mean that we shall certainly need to look at differences between English and Continental styles of law.

2.2 Is IT law special?

The phrase "information technology law" sounds as though, within the entire body of English law, there is a special subset of laws about computing and those are the only laws relevant to our profession. But it is not like that. What the phrase really means is "those parts of law in general which are often relevant to IT activities, or which have specially serious implications for IT activities". The particular laws in question usually will not have been introduced in response to IT in particular; they may be centuries old, but now computers have been invented it turns out that those laws have important consequences for the new technology.

Some new laws have been "purpose-built" in response to the rise of IT. The *Data Protection Act 1998*, already mentioned, is a good example. But "information technology law" is not concerned only (or even mainly) with those laws.

This is not to say that, from a legal point of view, information technology is just one more area of human life along with all the others that the law has to consider. IT does create special problems for law.

One problem is speed of change. The law has always needed to adapt to new developments in society and technology, but law changes slowly. With earlier innovative technologies, the law may have been just about able to keep up, but the pace at which IT is innovating and mutating is possibly unparallelled in history. There is a real question whether the mechanisms by which law evolves are equal to the challenge of a technology that has become central to much of human life, but which comes up with significant new developments on an almost weekly basis.

The issue is not only about changes in the law, but about the speed at which established legal procedures operate. For instance, we shall see in chapter 4 that there is an increasing tendency for those who develop valuable new software techniques to use patent law to protect their intellectual property. One problem there is that taking out a patent is a time-consuming process. If the inventor of a new machine expects the market for it to last for decades, it may not matter that it takes a few years to secure patent rights. But with computer technology it can happen that an innovation is marketable for only two or three years before being superseded by an even newer and superior alternative – in which case the patent system may not be much use in practice.

Another feature of IT which is arguably "special" from a legal point of view is that crucial issues are often highly technical. Any technology has esoteric details that take extended study to master, but often there is no need for lawyers to go deeply into technicalities. A rough everyday understanding will often be enough. Cases about buying and selling cars, motor accidents, and so forth come before the courts every day, but the judges and the barristers arguing before them will not normally need to know anything in detail about the engineering issues involved in fuel injection, gear ratios, or the like. For computing, comparable technicalities are often crucial.

In consequence, we sometimes encounter cases where the judge's decision is based on flat misunderstanding of our technology. Consider for instance the 2002 case *SAM Business Systems* versus *Hedley & Co*. SAM supplied a firm of stockbrokers with a software package which the purchasers were unable to get working satisfactorily; SAM argued that the problem lay with the purchasers rather than with the package, pointing out that the latter was in use without problems at other sites. Explaining the reasons for his decision, the judge treated that argument dismissively:

> I am no more impressed by it than if I were told by a garage that there were 1,000 other cars of the same type as the one I had bought where there was no complaint of the defect that I was complaining of so why should I be complaining…? We have all heard of Monday cars, so maybe this was a Monday software programme.

As readers will realize, this analogy is wholly misleading. Two cars may be the same model, yet one could have defects while the other runs perfectly. With a digital product such as a computer program, two copies should be not just very similar but precisely identical. Unless the judge was suggesting that the package sold to Hedleys was a corrupted copy (in which case it would have been a trivial matter for SAM to replace it with a good copy), his remarks about Monday cars, with due respect, were senseless. Yet his decision not only resolved that particular case, but (through the legal system of precedent which we shall look at shortly) has the potential to affect the decisions in an indefinite number of future cases – the reason why I know about this case is that it is widely cited as setting a legal precedent. It may be that there are few areas where limited technical knowledge creates as many difficulties for the law as IT.

Thus it perhaps is fair to see IT law as "special" in some respects, though it is not a separate kind of law. But there are "kinds of law"; the next thing to look at is how law can be classified. There are three important ways of categorizing different areas of English law:

- by the nature of the adversaries
- by source
- by the basis of authority.

2.3 The nature of the adversaries

Here the distinction is between *civil* (or "private") and *criminal* law.

All English law consists of rules for resolving disputes between two sides – it is *adversarial*. (An English court never does anything on its own initiative, but only resolves conflicts that are brought to it.) In criminal law, one side is the state – nominally, the Queen.

It is worth taking a moment to consider what we mean by the word "state". Fundamentally, a state (in our case the United Kingdom) is an organization which maintains a *monopoly of force* in a territory. We recognise the UK as a state because we accept that it reserves to itself the right to make people and organizations in our country behave, by force if necessary, where "behaving" means among other things not using force on one another.

If A murders B, then B cannot as an individual prosecute A; but the state does not want murder happening in its territory, so it prosecutes A (and, if A resists arrest, the state is quite prepared to use force to compel A into court and later into prison). If A maims or defrauds B, then B could prosecute A privately; but the state does not want maiming or fraud occurring, so it prosecutes A on its own behalf. Modern states do many other things too, but the fundamental functions without which we would not recognize an organization as constituting a "state" are defence (protecting the population from external force) and keeping the peace (forcing the population to behave among themselves). Criminal law is the body of rules of behaviour which the state requires individuals and organizations in its territory to conform to.

One might query whether it is correct to think of criminal justice as a system for resolving conflicts between "two sides", when the state both sets the rules of criminal law and also forces everyone to obey them. The reason it is correct is that our system makes a sharp separation between the organs of state which bring cases against criminals (including the Crown Prosecution Service, and regulatory agencies such as the Office of Fair Trading), and the system of courts and judges which resolves cases. Judges are intended to be neutral between prosecution and defence. Continental legal systems are sometimes called *inquisitorial* rather than adversarial, because there is less separation in their criminal law between the prosecuting and judging roles.

Civil law, on the other hand, is about rules for resolving conflicts between particular individuals and/or organizations, where the state commonly has no interest of its own in who wins, but simply provides a dispute-resolution service. The role of the state as monopolist of force is still relevant, though, since it means that this dispute-resolution service can require the losers to accept its decisions, even if they disagree with them.

Clearly, in practice the ultimate threat of state force commonly remains so far in the background that people do not think about it. Someone arrested for a crime will usually recognise the inevitable and "go quietly". And certainly a business which loses a civil case against another business (and which has exhausted the appeal possibilities which the legal system offers) will comply with the resulting court order, for instance by paying compensation to the winning side. The directors will not sit round the boardroom table saying "If that's what you expect us to do, Queen, just you try and make us!" – it would be absurd. But, if they *did*, and if they persisted in the absurdity, then in the end the state would make them obey, by force if unavoidable. Otherwise, the UK would not be a "state".

For completeness I should mention that the contrast I have drawn between civil and criminal law is a little too neat in one respect: there are many regulations imposed by the state which are enforced through the machinery of civil rather than criminal law. For instance, someone who employs an illegal immigrant, or who fails to produce information needed to set his council tax, faces a civil fine. In this way, respectable individuals can be given a motive for making sure that they obey regulations, without being criminalized if they sometimes fail.

Most law considered in this book will be civil rather than criminal law. That is not because there is no criminal law specially relevant to IT – there is. We have laws relating to downloading or possessing online child pornography, for instance, and laws attempting to control new computer-mediated techniques of fraud, such as phishing. But most of these laws are not very relevant to a textbook like this one.[3] Few computing students plan careers as online fraudsters – and if any do, it is not part of my job as a university teacher to offer them advice! A few computing graduates will go in for careers related to enforcing this area of criminal law, but those students will need a deeper knowledge of law than this book can offer. On the other hand, many computing graduates will work in business, where it will be important to grasp what rights and obligations their organization has vis-à-vis suppliers, customers, and competitors. Some law applying to business IT is criminal law, but the majority is civil law.

Having considered the links which ultimately exist between law, states, and force, it is important to appreciate that law is about rights and obligations, far more than about courtroom battles. In the ideal situation – which most of the time is the actual situation – both parties to a potential conflict of interest know and agree what the law says about their respective entitlements, so they have no reason to go to court. One business might wish that its rights were a bit larger than they are in some particular respect, but it will not be so foolish as to start a lawsuit about it if it knows in advance that it will lose.

Textbooks about law like this one tend to contain a lot of discussion of court cases, which can give the reader the impression that law is all about fighting. That is because courtrooms are where law is visible in action – and also because English law is specially dependent on individual court cases, in a way that we shall examine shortly. But most of the time when a manager needs to look into some aspect of law it is simply in order to check where his business stands. Having found out the position, he will accept it and run the business accordingly, without considering litigation.

2.4 Sources of law

Here, the categories to be distinguished are:

- Common Law
- case law
- Equity
- statute law
- judge-made law

2.4.1 Common Law

For most of English history, most of our law was essentially a body of customs which had evolved among the population from a very early period. It certainly traced back before the Norman Conquest, and perhaps to a time when the tribes which migrated to this country in the Dark Ages had not yet learned to read and write. Different local areas had slightly different customary law; during the Middle Ages, after England had become a unitary state, the differences were ironed out to produce a consistent national system of laws which was consequently called the "Common Law". Much of the Common Law is still our law today. Disputes relating to information technology often depend on Common Law rules for their resolution.

To grasp how the Common Law works, it is important to understand that its rules evolved in a "bottom-up" fashion among the people, and that they were established as custom before being written down. Since the rules evolved through decisions made in specific disputes, they are often rather un-general – "rules of thumb" rather than abstract logical principles. The Common Law has of course long ago been reduced to writing – the classic written exposition was a four-volume treatise by Sir William Blackstone in the eighteenth century; but such documents are more like summaries of past decisions than plans for how decisions should be made in the future.

English Common Law contrasts in this respect with the legal systems of Continental countries such as France. Continental legal systems are modelled on Roman law, which was formulated as a comprehensive written code. Modern Continental nations naturally have laws which differ in their detailed contents from those of the sixth-century Code of Justinian, but they retain the idea that individual cases are resolved by reference to a written code that aims to anticipate and lay down a logical rule for any debatable issue that may crop up. Modern French law, for instance, is based on the 200-year-old *Code Napoléon* and its sister Codes.

The term used for legal systems modelled on Roman-style written codes is "Civil Law". England and the USA (which inherited its law from England) are said to have "Common Law systems", while France and Germany, for instance, have "Civil Law systems".

Earlier in this chapter, "civil law" was contrasted with "criminal law", to refer to law governing private disputes as opposed to disputes where the state is one of the parties. This is a confusing ambiguity in the language of law. "Civil Law" as opposed to "Common Law" has nothing to do with "civil law" as opposed to "criminal law".

Because the double usage would certainly lead to confusion in an introductory textbook, from now on I shall use the term "Continental-style law" rather than "Civil Law" in the sense opposed to "Common Law". But unfortunately that is just my own coinage; readers who consult other books about law will find that "Civil Law" is the standard term (and one cannot even rely on capital letters being used to distinguish the two senses).[4]

2.4.2 Case law

Human life is so immensely complex that there is no end to the variety of circumstances surrounding individual disputes. When a body of rules of thumb have been worked out through judges settling past disputes, they are sure to leave many questions open about how to apply the rules to cases that come along in the future. One way in which the Common Law achieves a measure of predictability is through the principle "follow precedents". If some debatable issue has been settled one way in a particular case, then whenever a new case crops up that turns on the same issue, it is required to be decided the same way.

For instance, if I help myself to something in your possession, you are entitled to get it back from me – that is age-old law. But what if I can show that the thing was not actually your property but belonged to a third party: does that make a difference? It is not obvious what the answer ought to be. But in a case heard in 1856, *Jeffries* v. *Great Western Railway Co.*, the court decided that the answer was no. Jeffries had some railway trucks which he claimed to have obtained fairly from their previous owner Owen, but the railway company tried to retain them; it knew that Owen had gone bankrupt so that the trucks were no longer his to sell to Jeffries, and it was afraid that Owen's creditors would demand the trucks from the railway company. The court decided that whether or not the trucks belonged to Jeffries, he was entitled to repossess them. Consequently, since 1856 it has been the law that you can reclaim something that was taken out of your control, from anyone other than its true owner.

Courts form a hierarchy, with the House of Lords (that is, the law lords sitting as the supreme court of the UK) at the apex,[5] and it is open to a higher court to decide that a lower court has made a mistake. At a given level, though, courts must follow previous decisions. In this manner, the issues left open by the law as it has evolved up to a given time are settled and closed one after another (though the process will never terminate, because the supply of open questions will never dry up).

The traditional theory was that the Common Law embodied underlying principles which were not spelled out explicitly, but for which an experienced judge would develop a feeling, so that he could see how to apply them to a new case. Judges "discovered" the law case by case. No-one would describe the situation in those terms with a straight face today; we recognise that, when a case has novel features, often it might quite reasonably be decided either way, depending on which analogies with past cases weigh heavier in the judge's mind. But even though the first case of its kind might have gone either way, after it has been decided one way then every future case which resembles it in the relevant respect must be decided the same way.[6]

This means that English law depends heavily on citing particular lawsuits which happened to establish important precedents. As we look at specific areas of IT law, we shall often find ourselves considering details of individual cases. Much of the total body of English law is in essence an accumulation of numerous individual precedents.

This forms another difference between English and Continental law. Because Continental law is based on systematic written codes, the concept of precedent is less important. The theory is that the abstract provisions of the code should be comprehensive enough to yield a definite answer to any question that might arise; a judge ought not to need to look at past cases, because he only needs to read the code.

Of course, that theory is as much a fiction as the English theory that judges "discover" law by reference to unwritten but unambiguous principles. In real life no written code can anticipate every issue that will arise. But because that is the theory, Continental-style legal systems do not have the rule about following precedents. In practice, Continental courts do often take precedents into account in deciding how to resolve awkward cases, but they are not rigidly bound by precedent as English courts are.

The significance of precedent for English law has led to conventions for citing cases which enable lawyers to locate the detailed judgements in the various standard series of published law reports. (The *judgement* in a court case is the document, often many pages long, in which the judge(s) spell out the reasoning which led to his/their decision. Precedents for later cases are distilled from the judgements in earlier cases.) For instance, a full citation of the *Jeffries* case would be "*Jeffries v. Great Western Railway Company* (1856) 5 E & B 802", meaning that the report of this case begins on page 802 of volume 5 of "Ellis and Blackburn's Queen's Bench Reports".

For our purposes, full citations would be unduly cumbersome. To keep things simple, cases will be identified by just the names of the contending parties and the date. (The cases mentioned in this book are well-known ones, so a reader who does want fuller information should easily find them in detailed legal textbooks like those listed in chapter 1. Judgements for recent cases are published on the Web.) When one side of a case involves multiple parties, rather than spelling them all out we shall give the first name followed by *& anor* or *& ors* (legal shorthand for "and another/others"). If a date is given as a span of years, say 1980–82, that will mean that an initial decision in 1980 was appealed, and the appeal was decided in 1982.

2.4.3 Equity

The distinction between Equity and Common Law is nowadays only of historical relevance. But it is worth looking briefly at this piece of legal history as an illustration of principles which affect rapidly-changing areas of law, such as IT law, today.

After the Norman Conquest, the Common Law became a settled, nationwide system. But it was a limited system: it provided solutions to some kinds of dispute but not others. One example is that the only remedy it offered to a successful litigant was money compensation. If a defendant failed to meet his obligations under a contract, the plaintiff might want "specific performance" – that is, rather than money he might want the defendant to be made to do what he had actually contracted to do, perhaps to hand over a particular plot of land. Common Law had no mechanism to achieve that.

In consequence, when it was useless to take a dispute to a lawcourt, people would petition the King to redress their various grievances, and the Chancellor (the officer to whom the King delegated this aspect of his work) would decide the cases in terms of what seemed to him fair – not by reference to specific laws, but in the light of his moral intuitions.

That provided a cure for blatant injustices which the law of the time could not deal with. But it was problematic, because people's ideas of what is fair differ. It was said that legal decisions "varied with the length of the Chancellor's foot" – that is, there were no clear settled principles underlying them, different holders of the office would make decisions in unpredictably different ways.

Because this was unsatisfactory, in due course the practice of successive Chancellors crystallized into a set of rules of Equity (i.e. "fairness") which are nowadays just as fixed and explicit as the rules of the Common Law – and which, consequently, do not inevitably yield results in individual cases that everyone would recognise as "fair".

Equity and Common Law are still separate bodies of law, but in modern times the distinction matters only to professional lawyers. The reason why it is worth mentioning is that it illustrates the tension that exists between fair rules and predictable rules. Many of us as individuals tend to feel instinctively that fairness must be the overriding test of good law. If an existing law gives a result in a particular case that seems manifestly unjust (particularly if we ourselves are on the losing side!) then we may feel that the law is obviously bad and ought unquestionably to be changed. The trouble is, we also want the law to give predictability. We want the rules to be fixed and clear, so that we can make our plans knowing where we stand. It is in the nature of fixed rules that there will be individual cases where they give unfortunate results; we cannot have predictability *and* perfect fairness in all cases.

People who run businesses often say that, for business purposes, predictability matters *more* than fairness. The suggestion is that, however arbitrary the rules might be, so long as a well-run business knows what the rules are and knows that they will be applied impartially, then it can find some way to succeed – whereas if laws are applied capriciously there is just no way to manage a business rationally. We shall notice this tension between fairness and predictability when we look at various areas of IT law. It may be that our instinctive preference for fairness above all, while natural and understandable, is not altogether appropriate for this business-oriented area of law.

2.4.4 Statute law

When people say "there ought to be a law about it", they mean that Parliament ought to enact a statute which forbids or requires whatever it is that concerns them. Parliament can introduce Acts on any topic it pleases, and if an Act of Parliament contradicts something in the Common Law then the Act – the "statute" – overrides the Common Law rule.

For most of English history, statute law was a minor component of the total body of law. Acts were passed infrequently, and those that were brought in tended to be for specialist purposes not affecting the population as a whole. For instance, in the eighteenth century, divorces were individual acts of parliament.

That situation has changed dramatically over the past hundred years or so. During that period there has been an explosion of legislation; governments nowadays tend to be assessed by voters (or at least to assess themselves) in terms of the laws they introduce, so they introduce many. As a result, much of the original content of the Common Law has by now been replaced by statute law. Calling England a "Common Law country" nowadays does not mean that the content of our law remains what it was when Blackstone wrote his compendium 250 years ago – that is true only to a limited extent. Rather, it means that the system by which our law adapts to new circumstances is through accumulation of precedents created by decisions in specific cases.

The system of developing law through precedents applies to statute law as much as to the original rules of Common Law. An Act of Parliament is professionally drafted to be as precise and unambiguous as possible, but quite inevitably situations arise after it is passed which were not foreseen by the parliamentary draftsmen, so that it is debatable how the Act applies. In the IT domain this happens particularly frequently, because statutes make assumptions about technology which are overtaken by technological innovation almost before the ink on the Act is dry. When a debatable case comes before a court, the judge decides it as best he can on the basis of the wording of the Act and the need to interpret it consistently with the rest of our law – and then his decision becomes a precedent, so that however ambiguous the relevant wording in the Act may have been before, it ceases to be ambiguous and in future means what that judge decided it meant. The process by which English law becomes increasingly precise through accumulation of precedents is essentially the same process, whether the rule round which precedents accrue is an Act of Parliament or a custom inherited from our Anglo-Saxon forebears.

2.4.5 Judge-made law

In one sense, all case law is "judge-made": judges make the decisions which become precedents. The phrase "judge-made law" is sometimes used in that broad sense. But, here, it is intended in a narrower sense, referring to instances where judges consciously introduce new law.

In the traditional theory of English law, judges were not supposed to do that. They presided over courts and "discovered" rules which (so the theory went) had been latent within the existing body of law; they did not invent new rules on their own initiative. That is Parliament's job; judges are not elected, so they do not have a democratic mandate to impose laws on the population.

However, in recent years there has been a trend – *judicial activism* – of judges openly creating new law.

One well-known example concerns "marital rape". Under the Common Law, a husband could not be convicted of raping his own wife. What is effectively rape could be prosecuted under other legal categories, such as indecent assault, but if the couple were married then there could be no charge for the specific offence of rape. This had been an established Common Law rule for centuries and was quite clear and unambiguous. A parliamentary committee had in fact considered in 1984 whether the rule should be changed by statute, but decided that the balance of arguments was against the change. However, in 1991 the House of Lords announced that they were changing the rule. Since then it has been open to courts to convict a husband of raping his wife.

Many readers may well feel that this was a good change. What is not so clear, to some observers, is whether it is a good idea for law to be made in this way, independently of democratic control. (Once a judge is appointed, he or she is virtually unsackable; things are set up that way deliberately, so that judges can make impartial decisions without fear or favour.) Whether it is desirable or not, judicial activism is becoming increasingly significant as a source of law.

2.5 Bases of legal authority

Here we need to consider the difference between indigenous English law and EU law; and we shall also look at the "Law Merchant", which until recently was a half-forgotten piece of mediaeval history, but has become newly relevant in the context of information technology.

2.5.1 Indigenous v. European law

Until a generation ago, the Westminster Parliament was the supreme authority over British society. Laws applying in Britain could only be made or unmade by Parliament, or by the subordinate bodies (for instance local authorities, or government departments) to which Parliament delegated certain limited law-making powers.

All that changed when the UK joined what is now the European Union in 1973. EU membership entailed giving the European Commission and Council the authority to make laws applicable EU-wide, including in Britain. If a European law conflicts with an indigenous one, as they often do, the EU law takes precedence. By now a large proportion of all new legislation is European rather than indigenous in origin.

This does not mean that the British Parliament is completely out of the picture in connexion with European legislation. Some EU law does have "direct effect" – British courts apply it independently of any action by the UK Parliament, ignoring any indigenous law which contradicts the European rule. But for the areas of law we are concerned with in this book, that is not the usual situation. When a new law is made for a complex area of life such as business, in order to make sense and function effectively it needs to take account of the large existing body of legal tradition in that area, and must be worded in ways that relate to that tradition. The EU comprises many nations with their own legal traditions, so a statute in a single form of words could not do this. Instead, the EU issues *Directives*, which are instructions to the national legislatures to implement whatever legal effect the EU wants to achieve, by introducing laws that make sense in terms of the respective national legal traditions. So the European laws we encounter in this book will be Acts of the Westminster Parliament, but Acts introduced in response to EU Directives rather than on Parliament's own initiative.

Because of the weight and complexity of existing legal traditions, it is not always easy for a national legislature to devise a way of implementing a European directive that succeeds in giving full force to its intention. What is more, sometimes the national legislature does not agree with the directive, and implements it in a grudging, minimalist fashion. On occasion the European Commission comes back and objects that their directive has not been implemented adequately by some national legislature, so it must try again.

For our Parliament, implementing EU directives can be specially difficult, in view of the difference between Common Law and Continental-style law. The two legal systems lead to statutes of different types. Because Continental law aims to settle debatable questions in advance rather than leaving it to judges to create precedents in individual cases, Continental statutes are drafted in more general, abstract terms than would be normal in English law; and Continental courts are encouraged to consider the motives of the legislators when interpreting statutes – "they passed the law in order to address problem X, so they must have meant to say so-and-so". In the English tradition, that was entirely excluded. A barrier was maintained between the legislature which makes laws, and the judiciary which applies laws, so that whatever motives Parliament might have had for passing a new Act were no concern of the judges – what they worked from was just the actual wording of the Act, together with a general understanding of what words mean in English and familiarity with the existing body of law.

Now that IT-related statutes originating in Brussels are coming into English law, we shall see that this contrast sometimes leads to practical difficulties for English courts, which have to interpret legislation in a manner that conflicts with their training. The European dimension is leading to compromises in legal "styles" (on both sides – the English approach is influencing the European legal régime, as well as the other way round). Where different systems have to compromise with one another, it can be difficult to guess which way particular issues will go. Europe is a factor making currently for more unpredictability in our business law than it might otherwise contain.

As the English legal profession becomes more accustomed to EU legislation, it may be that some areas of our law will lose their national distinctiveness. Already, the idea that everything must be rewritten into English terms is beginning to wear thin. Bainbridge comments (p. 149):

> Where provisions in Directives are required to be implemented without variation, judges in the UK now tend to go straight to the text of the Directive rather than the UK implementing legislation.

But it will be many years, if ever, before English law feels like just a local variant of European law.

2.5.2 Law Merchant

We normally think of law as imposed on society by authority. The English Common Law may have its ultimate origin long ago in tribal customs, but it was a mediaeval king who ordered the local variations to be assimilated into one consistent system and imposed that system as the law of the land. Statute law is decreed by Parliament or by the European Commission.

However, historically, much commercial law was not imposed from above. What was known in the Middle Ages as Law Merchant (often the Latin term *Lex Mercatoria* is used) was created and applied by merchants themselves, without reference to authority. This might sound like a quaint but irrelevant echo of the past; however, some commentators are beginning to argue that the global nature of IT and the internet is leading to the creation of a new digital Law Merchant.[7]

In the Middle Ages, most people stayed put, but merchants travelled from town to town to trade. In many parts of the Continent, jurisdictions were geographically small: each petty principality or duchy might have its own separate laws and courts. If a dispute arose between merchants, they could not hang around for it to be heard by the official court in that place; their livelihood required them to keep on the move. In any case, in societies that were still feudal there had been little development of commercial law. (Mediaeval law contained a mass of detail about land tenure, but not much at all about buying and selling.)

Consequently the merchant community developed its own system of law for settling commercial disputes among themselves. They ran their own courts which came up with instant verdicts, rather than making the parties wait weeks or months for the king's court to stir into action. (In England these rapid-response merchants' courts were called Courts of Pie Powder, from French *pieds poudreux*, dusty feet.) The origins of the law of contract, for business one of the most significant areas of law, lie to a large extent in this "Law Merchant" system, which comprised ranges of explicit legal rules just as ordinary state-backed legal systems do. One might wonder how judgements could be enforced on losing parties if the Law Merchant was not imposed by authority; but merchants needed to go on doing business with each other in the future, so perhaps someone who lost a case would know that any immediate gain from ignoring the decision would be far outweighed by other merchants' future reluctance to trade with him. The fact is that the Law Merchant worked.

In England, which was a large unitary state from an early period, the need for separate merchant law was less than on the Continent, and by the seventeenth century the Law Merchant was absorbed into the ordinary state-backed legal system. Until recently it was little discussed. But the spread of the internet has reawakened interest in it. In later chapters we shall encounter problems that arguably will only be solved satisfactorily through new law developed by the international community of "netizens".

This concludes our survey of the general nature of the legal system. In the chapters which follow, we shall look one by one at the areas of law that matter most to IT professionals.