2 Sources of modern law

Historical and political background

In order to understand why a particular country has a particular legal system, it is necessary to look at its history, political structure and social values. When there is political and social upheaval, one of the main concerns of a new government is to revise the legal system. Britain has had an unusual degree of political continuity. Despite civil wars in the fifteenth and seventeenth centuries and enormous social changes associated with industrialization, England and Wales have retained many laws and legal principles that originated eight centuries ago. On the other hand, most of the law of Japan, which experienced the rapid upheaval of the Meiji Restoration and foreign occupation after the Second World War, was developed within the last century.

Each country in the world, even each state of the United States, has its own system of law. However, for the purposes of this book it is generally true to say that there are two main traditions of law in the world. One is based on English **Common law**, and has been adopted by many Commonwealth countries and most of the United States. The other tradition, sometimes known as **Continental**, or **Roman law**, has developed in most of continental Europe, Latin America and many countries in Asia and Africa which have been strongly influenced by Europe. Continental law has also influenced Japan and several socialist countries.

Common law systems

Common law, or case law systems, particularly that of England, differ from Continental law in having developed gradually throughout history, not as the result of government attempts to define or codify every legal relation. Customs and court rulings have been as important as statutes (government legislation). Judges do not merely apply the law, in some cases they make law, since their interpretations may become precedents for other courts to follow.

Before William of Normandy invaded England in 1066, law was administered by a series of local courts and no law was common to the whole kingdom. The Norman Kings sent traveling judges around the country and gradually a "common law" developed, under the authority of three common law courts in London. Judges dealt with both criminal cases and civil disputes between individuals. Although local and ancient customs

played their part, uniform application of the law throughout the country was promoted by the gradual development of the **doctrine of precedent**.

By this principle, judges attempted to apply existing customs and laws to each new case, rather than looking to the government to write new laws. If the essential elements of a case were the same as those of previous recorded cases, then the judge was bound to reach the same decision regarding guilt or innocence. If no precedent could be found, then the judge made a decision based upon existing legal principles, and his decision would become a precedent for other courts to follow when a similar case arose. The doctrine of precedent is still a central feature of modern common law systems. Courts are bound by the decisions of previous courts unless it can be shown that the facts differ from previous cases. Sometimes governments make new laws—statutes—to modify or clarify the common law, or to make rules where none existed before. But even statutes often need to be interrupted by the courts in order to fit particular cases, and these interpretations become new precedents. In common law systems, the law is, thus, found not only in government statutes, but also in the historical records of cases.

Another important feature of the common law tradition is **equity**. By the fourteenth century many people in England were dissatisfied with the inflexibility of the common law, and a practice developed of appealing directly to the king or to his chief legal administrator, the lord chancellor. As the lord chancellor's court became more willing to modify existing common law in order to solve disputes; a new system of law developed alongside the common law. This system recognized rights that were not enforced as common law but which were considered "equitable," or just, such as the right to force someone to fulfill a contract rather than simply pay damages for breaking it (see specific performance, Chapter 6), or the rights of a beneficiary of a trust (see Chapter 9). The courts of common law and of equity existed alongside each other for centuries. If an equitable principle would bring a different result from a common law ruling on the same case, then the general rule was that equity should prevail.

One problem resulting from the existence of two systems of justice was that a person often had to begin actions in different courts in order to get a satisfactory solution. For example, in a breach (breaking) of contract claim, a person had to seek **specific performance** (an order forcing the other party to do something) in court of equity, and damages (monetary compensation for his loss) in a common law court. In 1873, the two systems were unified, and nowadays a lawyer can pursue common law and equitable claims in the same court.

Although courts continually have to find ways of interpreting existing common law for new cases, legislation has become the most important source of new law. When the government feels that existing common law, equity, or statutes are in need of revision or clarification, it passes new legislation. In this way courts avoid the obligation to follow precedent. Parliament passes hundreds of new laws every year on matters that need to be regulated more precisely than the common law has been able to do and on matters that never arose when the common law was developed. For example, modern society has produced crimes such as business fraud and computer theft which require complex and precise definitions. Some modern legislation is so precise and comprehensive it is rather like a code in the Continental system.

The spread of common law in the world is due both to the once widespread influence of Britain in the world and the growth of its former colony, the United States. Although judges in one common law country cannot directly support their decisions by cases from another, it is permissible for a judge to note such evidence in giving an explanation. Nevertheless, political divergence has produced legal divergence from England. Unified federal law is only a small part of American law. Most of it is produced by individual states and reflects various traditions. The state of Louisiana, for example, has a Roman civil form of law which derives from its days as a French colony. California has a case law tradition, but its laws are codified as extensively as many Continental systems. Quebec is an island of French law in the Canadian sea of case law. In India, English common law has been codified and adopted alongside a Hindu tradition of law. Sri Lanka has inherited a criminal code from the Russian law introduced by the Dutch, and an uncodified civil law introduced by the British.

Continental systems

Continental systems are sometimes known as codified legal systems. They have resulted from attempts by governments to produce a set of codes to govern every legal aspect of a citizen's life. Thus it was necessary for the legislators to speculate quite comprehensively about human behavior rather than simply looking at previous cases. In codifying their legal systems, many countries have looked to the examples of Revolutionary and Napoleonic France, whose legislators wanted to break with previous case law, which had often produced corrupt and biased judgments, and to apply new egalitarian social theories to the law. Nineteenth century

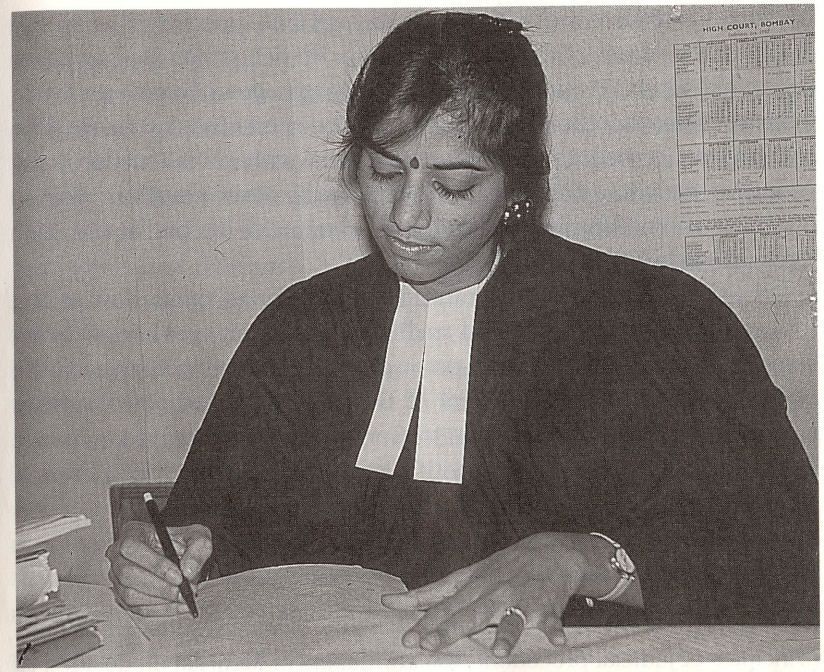

Figure 2.1 *A lawyer at work in Sri Lanka, one of the countries with a common law system.*

Europe also saw the decline of several multi-ethnic empires and the rise of nationalism. The lawmakers of new nations sometimes wanted to show that the legal rights of their citizens originated in the state, not in local customs, and thus it was the state that was to make law, not the courts. In order to separate the roles of the legislature and judiciary, it was necessary to make laws that were clear and comprehensive. The lawmakers were often influenced by the model of the canon law of the Roman Catholic Church, but the most important models were the codes produced in the seventh century under the direction of the Roman Emperor Justinian. His aim had been to eliminate the confusion of centuries of inconsistent lawmaking by formulating a comprehensive system that would entirely replace existing law. Versions of Roman law had long influenced many parts of Europe, including the case law traditions of Scotland, but had little impact on English law.

It is important not to exaggerate the differences between these two traditions of law. For one thing, many case law systems, such as California's, have areas of law that have been comprehensively codified. For another, many countries can be said to have belonged to the Roman

tradition long before codifying their laws, and large uncodified—perhaps uncodifiable—areas of the law still remain. French public law has never been codified, and French courts have produced a great deal of case law in interpreting codes that become out of date because of social change. The clear distinction between legislature and judiciary has weakened in many countries, including Germany, France and Italy, where courts are able to challenge the constitutional legality of a law made by parliament (see **judicial review**, Chapter 17).

Despite this, it is also important not to exaggerate similarities among systems within the Continental tradition. For example, while adopting some French ideas, such as separation of the legislature and judiciary, the late nineteenth century codifiers of German law aimed at conserving customs and traditions peculiar to German history. Canon law had a stronger influence in countries with a less secular ideology than France, such as Spain.