

1 LAW AND GOVERNMENT

After studying this chapter, you should:

- *understand the nature of the law and the difference between criminal law and civil law;*
- *understand what is meant by the terms legislature, judiciary and executive and appreciate the variety of ways in which these concepts are implemented in different countries;*
- *understand the ways in which law comes into existence.*

1.1 WHAT IS THE LAW?

There are many ways of defining the law. For the purpose of this book we shall take a very straightforward definition. We shall define law as 'a set of rules that can be enforced in a court'. These rules are different in different countries. The best known examples of such differences are probably in the rules governing things like divorce or the sale of alcohol. From the point of view of the IT professional, however, differences in the rules governing data protection, the rights of access to information and the misuse of computers are much more significant.

As well as having different laws, different countries have different legal systems, that is, different systems of courts, different rules for court procedure, different procedures for appealing against a court decision and so on. The word **jurisdiction** is used to mean the area covered by a single legal system and set of laws.

Even within a single country, the law and the legal system may be different in different areas. This is most obviously the case in large countries with a federal system of government, where the country is divided into a number of states each of which can make its own laws in certain areas. Obvious examples are India and the United States.

In the UK, for historical reasons, Scotland, Northern Ireland and the Isle of Man each have different legal systems and different laws. However, as far as the topics covered in this book are concerned, their laws are, in almost all cases, the same as those of England and Wales. When we refer to British law or UK law, we shall be referring to laws that apply across the UK. Sometimes we shall refer to the law of England and Wales, indicating that there are differences elsewhere in the UK.

1.2 CRIMINAL LAW AND CIVIL LAW

The popular image of the law sees it as the set of mechanisms that tries to punish wrongdoers by fines or imprisonment. This aspect of the law is known as the criminal law. It can be considered to represent society's view of the minimum standard of acceptable behaviour. It defines what constitutes a crime, lays down the mechanisms for deciding whether a person accused of a crime is guilty or innocent and specifies the range of punishments applicable to different categories of crime.

In general, the police are responsible for discovering who has carried out a specific criminal offence and for collecting evidence that will convince a court that the person in question really did commit the offence. The state, in the form of the Crown Prosecution Service in England and Wales, will then start proceedings by prosecuting the person concerned (who is known as the **accused** or the **defendant**) in a criminal court. The court will decide whether or not the case against the person has been proved and, if it finds the case proved, will sentence the offender to a suitable punishment.

We shall not be very concerned with the criminal law in this book. We shall be much more occupied with the **civil law**. The purpose of the civil law is to provide rules for settling disputes between people.

Notice that we have referred to disputes between people. Does this mean that the civil law doesn't apply if one or both sides in a dispute are companies, or organisations of some other kind? It doesn't mean this, of course, but, in order to overcome the difficulty, we need the idea of a **legal person**. A legal person is an organisation that has gone through a process called **incorporation** that gives it the same legal status, so far as the civil law is concerned, as a **natural person**, that is, a human being. There are several different ways in which an organisation can be incorporated. In Britain, an organisation can be incorporated by an Act of Parliament, by registering as a company or by the grant of a royal charter. We shall discuss this process in Chapters 2 and 3.

Court action under the civil law is known as litigation. It must be initiated by one of the **parties to the dispute**, that is, by the person, legal or natural, who feels they have been wronged. The person who initiates the court action is known as the **claimant**, although in the United States and some other countries the older term **plaintiff** is still preferred.

Two important differences between British civil law and criminal law relate to the **standard** of proof and the **burden** of proof.

For a person to be found guilty of a criminal offence, the prosecution must demonstrate that he or she is guilty beyond all reasonable doubt. For a claimant to win his case under civil law, he only has to show that his claim is correct on the balance of probabilities. In other words, the standard of proof required in criminal cases is higher than that required in civil cases.

In a criminal case, the burden of proof lies on the prosecution. This means that it is up to the prosecution to prove its case. Defendants do not need to prove their innocence. They are assumed to be innocent until they are proven guilty. In a civil case, on the other hand, both parties present their arguments and must convince the court of their correctness.

1.3 WHERE DOES THE LAW COME FROM?

The two main sources of law in England and Wales are the **common law** and **statute law**. The common law is essentially traditional law that is not written down but which depends on the judgement of judges over the centuries. When deciding the rights and wrongs of a case, a court will look at the way in which similar cases have been decided in the past; such cases are known as **precedents**.

The common law tradition is shared by many other countries. Almost all the countries of the Commonwealth share the tradition; so, most importantly, does the United States of America. This means that a judgement made by a judge in the United States can be used as a precedent in, for example, a court in Singapore, or vice versa.

The tradition of common law is not found in the countries of continental Europe, such as France and Germany. Their law is based entirely on written codes, one for the criminal law and one for the civil law. Those parts of the world that were once colonised by such countries have generally kept such a system of written codes. Confusingly, this system of written codes is often also referred to as civil law. However, in this book, we shall always use the term civil law in the sense described in the previous section, that is, the law used for settling disputes between people.

Statute law is law laid down by Acts of Parliament. It is often referred to as **legislation**. Two hundred years ago, most cases that came to trial would have been tried under the common law. There was comparatively little statute law. Over the past two hundred years the position has changed a lot. On the one hand, technical developments and social changes make new laws urgently necessary. Laws to regulate child labour and laws to prevent the misuse of computers are just two examples of Parliament creating new laws for such reasons. On the other hand, in some areas the millions of common law judgements from the past make it increasingly difficult for courts to apply the common law and Parliament has passed legislation to bring together the common law in these areas into a single statute. A good example of this is the Theft Act 1968, which consolidated the common law provisions regarding crimes involving stealing.

1.4 THE LEGISLATIVE PROCESS IN THE UK

Like many other democratic countries, the UK has what is known as a **two-chamber** or **bicameral legislature**. This means that the law-making body (the legislature) is made up of two chambers or groups of people.

The British legislature is known as **Parliament**. One of the chambers is called the House of Commons; its members are elected and everyone over the age of 18 has a vote. The country is currently divided into 659 constituencies, each of which elects one member of parliament, who is the person who gets the most votes in the election. This is known as the 'first past the post' system.

The other chamber in the UK Parliament is known as the House of Lords; most of its members are appointed but a significant number are chosen from amongst the hereditary peers, although this situation may not last very much longer. (Reform of the House of Lords has been an active political issue in Britain for over a hundred years but,

although most people agree that reform is needed, it has proved possible to get agreement only on some very limited reforms.)

The British government is made up of members from both the House of Commons and the House of Lords. Members of the House of Lords are never more than a small proportion and the Prime Minister, the Chancellor of the Exchequer, the Foreign Secretary and the Home Secretary are now always members of the House of Commons.

Most new legislation is initiated by the government although it is possible for individual members of parliament to initiate legislation in certain circumstances. It is introduced in the form of a **bill**; this is a set of proposals that parliament is invited to discuss, possibly modify and then approve. The bill is usually introduced first in the House of Commons. It will be discussed and possibly amended there, a process that includes a number of stages. If it is approved by the House of Commons, it is passed to the House of Lords. If the House of Lords approves the bill, it becomes an Act of Parliament. It is then passed to the Queen for her formal approval (the **royal assent**), after which it becomes law. (The Queen cannot refuse to give her approval when parliament has approved a bill.) Acts of Parliament are usually referred to by their title, followed by the year in which they received the royal assent, e.g. Computer Misuse Act 1990.

If the House of Lords rejects a bill or modifies it, the bill is returned to the House of Commons for further consideration. The House of Commons has the power to override any changes that may have been made by the House of Lords or even to insist that a bill rejected by the House of Lords should, nevertheless, be passed and proceed to receive the royal assent. The justification for this is that the House of Commons is democratically elected and so represents the will of the people in a way that the members of the House of Lords, not being elected, cannot do.

In many cases, the government may want to canvass opinion before asking Parliament to approve legislation. It may publish a **green paper**, which typically explains why the government wants to create new laws in a certain area and discusses a number of possible approaches. The green paper will be discussed by Parliament and comments on it will be invited from the public and from bodies that have an interest in the area. Thus BCS, along with many other bodies, was specifically asked for its views when the question of legislation to address the problem of computer misuse was raised.

Once the government has decided on its general approach, it may publish a **white paper**, which describes the proposed legislation and will be used as the basis for discussing and possibly modifying the details of what is proposed. At the end of this process the government will take into account these discussions and produce a bill.

Acts of Parliament constitute what is known as **primary** legislation. The complexity of modern society makes it impossible for all laws to be examined in detail by parliament. To overcome this difficulty, an Act of Parliament will often make provision for **secondary** legislation to be introduced. This means that detailed regulations can be introduced without full discussion in parliament. Instead, the proposed regulations are placed in the library of the House of Commons so that members of either house can look at them. If no objections are raised within a fixed time period, the regulations become law. An example of secondary legislation in the computer field are the regulations that were

produced to apply the Copyright, Designs and Patents Act 1988 to protect the design of semi-conductor chips.

The UK is a member of the European Union (EU). This is a grouping of 28 European countries which are working towards a high level of economic and social integration involving the harmonisation of many of their laws. The EU has its own parliament, elected by individual voters in all the member countries. The EU is run by a Commission that has the power to issue directives that require member countries to modify their own legislation, if necessary, to meet a common standard. These directives must be discussed by the European Parliament and approved by the member states before they come into effect. Several of these directives relate to topics, such as data protection and the protection of software, that are particularly important for IT professionals and we shall be referring to many of them later in the book.

In addition to the British national parliament, there are separate elected assemblies in Wales and Northern Ireland and a Scottish parliament. These have certain limited powers but they do not affect the topics covered in this book.

1.5 THE LEGISLATIVE PROCESS IN OTHER COUNTRIES

Although this book is concerned primarily with the UK, the influence and power of the United States in the world of information technology is so great that IT professionals need to know something of how government in the USA works.

In the US, the legislature is known as Congress. It consists of two houses, the Senate and the House of Representatives. Both houses are elected but on very different terms. Members of the House of Representatives (representatives) are elected for a period of two years. Each congressman represents a district and each district contains (roughly) the same number of people. The Senate contains two members (senators) for each state; senators are elected for seven years.

Legislation must be approved by both the Senate and the House of Representatives before it can become law; neither chamber can override the other. Furthermore, the President must also give his assent before an Act of Congress becomes law. Unlike the Queen, who cannot withhold her assent to legislation passed by Parliament, the President is allowed to veto legislation passed by Congress and this regularly happens. As in other countries with a written constitution, there is also a Supreme Court, which can strike out legislation approved by Congress and the President, on the grounds that it is unconstitutional. As we shall see in Chapter 14, this has happened with legislation concerned with pornography on the internet. This is in contrast to the situation in the UK, where the doctrine of the **sovereignty of Parliament** means that the courts cannot override primary legislation made by Parliament, although they can override secondary legislation.

The members of the government of the US are not members of Congress. The President is, in practice though not in theory, directly elected by the people. The members of the government are individuals chosen by the President and their appointment must be approved by Congress. The founders of the United States believed that it was very important to separate three functions, that of:

- the legislature, that is, Congress, which makes laws;
- the judiciary, that is, the judges and other legal officials, which applies and enforces these laws in particular cases; and
- the executive, that is, the President and the other members of the government, which carries on the actual business of government.

The separation of these functions is recognised in many other countries. Historically, they have not been separated in the UK but recent reforms, embodied in the Constitutional Reform Act 2005, have moved the UK much further in this direction by establishing a Supreme Court.

The legislative situation in the US is made more complicated by the fact that the country is a federation of 50 states. Each state has its own legislature, most of them modelled on the federal legislature, and its own government. On some topics each state can make its own laws but in other areas the law is made at federal level. For example, as we shall see in the next chapter, each state has its own laws regarding who can call themselves an engineer. The issue of states' rights, that is, the extent to which federal law can override laws made by individual states, has been a live political issue throughout the existence of the US and remains so today. Most recently, this has led the Federal Supreme Court to declare unconstitutional laws passed by individual states to regulate use of the internet. This issue of states' rights also arises in other countries with a federal constitution, such as India or Australia.

Smaller countries such as Singapore, Sri Lanka and Mauritius often have a **unicameral** legislature, that is, a parliament that consists of a single chamber. Where there is a historical connection with Britain, much of the legislation may be based on British legislation, as a way of avoiding the expense of law-making on a large scale.

1.6 THE LAW ACROSS BORDERS

What are the geographical limits of the jurisdiction of a country's courts? The immediate reaction is likely to be that a country's courts can only deal with crimes committed within the country's boundaries. This is not in fact true. Most countries would claim that their courts have the power, for example, to deal with a spy who passed on secrets to an enemy country, even though the passing on of the secrets took place on foreign soil. And many countries, including the UK, have legislation intended to combat sex tourism, that is, legislation that enables criminal charges to be brought in their courts against their citizens who have engaged in sexual activity with underage partners in foreign countries.

The development of the web and other innovations in the field of telecommunications has, however, created further problems. The very notion of the place where a crime is committed has ceased to be well defined. If a hacker sitting in an apartment in New York hacks into a European air traffic control computer located in the Netherlands so as to cause a mid-air collision over Denmark, where was the crime committed and which country's laws and legal procedures should be used in prosecuting the crime? What happens about an action that is criminal in some of the countries it affects but not in others – publishing obscene material over the internet is a case in point?

Closely related to these questions is the issue of extradition. Under what circumstances can a person be extradited, that is, sent from one country to another in order to face trial for an alleged offence?

Some recent cases have turned these questions into very live issues and we shall have more to say about them in later chapters. However, they are immensely complex questions and anything like a complete answer is well beyond the scope of this book.

Jurisdiction in civil cases that cross borders is in some ways a much simpler matter in that it is up to the claimant to decide in which country to initiate action. That decision will depend very much on the circumstances of the case but may well also be influenced by the reputation of a country's courts and how favourable its laws will be to the claimant's case.

FURTHER READING

Twenty years ago, it was difficult to get information about the legislative process in countries other than the one in which you were living. It meant going to specialist libraries or to the embassies of the countries concerned. The development of the web has changed all this and it is now very easy to obtain this material from websites.

The following pages explain how the legislative process works in the UK and in the US.

United Kingdom
www.parliament.uk

United States of America
www.house.gov/content/learn
www.senate.gov
<http://bensguide.gpo.gov/9-12/lawmaking/index.html>

Copies of acts of Parliament and acts of Congress for the past 30 years or so are available on the web.

In the US, most of the individual states have similar sites describing the legislative process in the state and, in many cases, most of the statutes of the state are available on the web.

Most other countries have similar sites, although the quality is variable.