1989

Aspects of the English Legal System

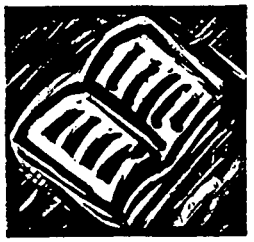
Geoffrey J. Bennett
University of Leeds

ARTICLES

EDUCATION AND THE LAW

Aspects of the English legal system

Geoffrey Bennett, MA, Barrister, Lecturer in Law, University of Leeds



Before embarking upon a journey into unknown territory, or at least an area which is not entirely familiar, it is not a bad idea to have a map. Failing that, the ability to recognize a few landmarks will help. What follows is not designed to help the legal professional who already knows the landscape. The object of this article is rather to point out some of the more obvious features of the English legal system for the benefit of people with no legal training. Teachers, school governors and parents are all increasingly called upon to have some insight into the way the law affects their activities, but the natural tendency is perhaps to concentrate only on those discrete areas which are of immediate concern. Sometimes, however, a broader perspective on how the parts articulate with the whole is essential to understand what can be done with the system or why a certain result or procedure develops. Anything like a comprehensive treatment of this theme would of course fill several volumes. Within the limits of a journal article it is only possible to touch upon a few areas, and often then it is not possible to indulge in the requisite degree of elaboration and qualification so beloved of lawyers.[1] The particular areas which are dealt with in this article are the sources of law, the court structure and the personnel of the law.

Where does law come from?

The traditional sources of English law have been statute and the common law made by the judges. In modern times, especially in the field of education, the former is by far the most important although the judiciary inevitably become involved in the process of interpreting that legislation. More recently, membership of the European Economic Community (EEC) has introduced a third primary of law, although because of the limited impact of this direct legislation on domestic education issues it is not dealt with in this article. Nevertheless, the importance of the European dimension is often disguised by the fact that much domestic legislation in the United Kingdom hos been enacted to ensure that we comply with directives emanating from Brussels. This is particularly so in, for example, the areas of company law, product liability and some aspects of employment and sex discrimination which potentially affect anyone in employment.

Legislation

The traditional doctrine of parliamentary sovereignty lays down that legislation is the supreme law in the United Kingdom. Once a bill has been duly passed by both Houses of Parliament and received the Royal Assent it becomes an Act which is capable of repealing all previous law on any matter. In theory the Queen could decline to give her assent to a bill, but by convention this has not been done in modern times. The House of Lords can, and often does, defeat a government on a clause within a bill, but ultimately the effect of this may only be to slow down the legislative process and perhaps embarrass the Government of the day. Often an amendment made in the House of Lords will be accepted by the House of Commons, but the Parliament Acts of 1911 and 1949 ensure that the House of Lords has no final power of veto.

What is the practical relevance of this theory? One result is that the content of a valid Act of Parliament cannot be challenged in the courts.[2] The ultimate restraint on gov-

Education and the Law 1989 **1** (1) 27–34 0953–9964/89/01104027/$03.50

ernmental action is political rather than judicial. This provides a contrast with, for example, the United States where the Supreme Court can hold a law to be unconstitutional and therefore invalid. It can now be seen that one of the problems with adopting a so-called Bill of Rights to safeguard individual liberties is that Parliament, as the ultimate sovereign authority, would under this theory be empowered to repeal such an enactment at will, and to the extent that a subsequent Act conflicted with such a measure it could be taken to have simply repealed it by implication. The law of education is accordingly at the mercy of Parliament, which in turn effectively means the Government of the day.

Although what is stated above represents traditional doctrine, the United Kingdom's entry into the EEC represents one area where this approach may already have broken down. Section 2 (1) of the European Communities Act, which makes community law effective in the United Kingdom without further legislation, is silent on what is to happen if there is a conflict between national and community law. The European Court, which is the final arbiter on matters of community law, has consistently stated that the latter would prevail. As our legal system becomes more 'Europeanized' it seems that this principle has been generally accepted by the judiciary, although not without qualification. Lord Denning in *MacCarthys* v. *Smith*[3] observed: '... if the time should come that our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of our courts to follow the statute of our Parliament'. No doubt judges would in the first instance try to construe an Act so as not to produce a conflict. What would happen in the extreme case envisaged by Lord Denning remains to be seen.

A further European influence on our domestic law has been brought into play by the United Kingdom's ratification of the European Convention on Human Rights. It is nevertheless important to realize that this machinery is quite separate and distinct from community law. Britain was the first state to ratify this treaty in 1951, some 20 years before our joining the EEC. The broadly drafted protection this treaty gives to fundamental rights such as respect for private and family life and the right to freedom of thought and expression is implemented by the European Commission of Human Rights and the Court of Human Rights. The United Kingdom has not infrequently fallen foul of the convention. In the field of education a conspicuous example was provided by the case of *Campbell and Cosans* v. *UK*[4] where parents alleged that corporal punishment in Scottish state schools was a breach of their children's fundamental rights. The court upheld their claim on the basis that under Article 2 the state should respect parents' rights to have the child taught in conformity with their own philosophical and religious convictions. As a result the United Kingdom enacted s. 47 of the Education (No. 2) Act 1986 which restricts the right to use corporal punishment. The decision of the court, however, does not itself have the effect of altering domestic law. The generally held view is that until Parliament decides to honour its treaty obligations by enacting legislation in conformity with the court's ruling there is no direct impact on domestic law.[5] In practice Parliament does respond by passing the appropriate legislation, although of course it may only come into force some considerable time after the court's ruling. There have no doubt been other occasions when the fear of being taken before the court has motivated a legislative change even before an aggrieved party has raised a breach of the convention.

Legislation in the courts

The image of the lawyer as someone who contorts or dissects the meaning of words so as to produce a result devoid of any connection with sensible every-day usage is notorious but arguably unfair. Ambiguity is inherent in the nature of language. Harold Macmillan once pointed out to the House of Commons that the apparently simple statement – A met B and he raised his hat – was capable of four different interpretations. Even the most careful parliamentary drafting is unlikely to produce language that does not require elucidation or

construction. Moreover, drafting which even attempted to explore every permutation which might arise in a given situation could produce an unwieldy and indigestible whole. For example, burglary involves entry of a 'building'. In most cases this is not in issue, but what if the accused was charged in relation to a telephone kiosk? Is that a building for the purposes of the Theft Act 1968? Of course few people believe that judges, perhaps like most human beings, are capable of a value-free clinical analysis of legislation without any reference to their personal or political biases.[6] On the other hand, Parliament may always pass legislation to reverse a line of judicial reasoning. Sometimes, moreover, it is difficult to resist the suspicion that Parliament may find it politically expedient to use ambiguous language in the knowledge that it will then be the courts who will be faced with the problem of enforcement and interpretation.

In construing a statute the judges are not of course permitted merely to follow their subjective whims. There are various conventional assumptions and presumptions about how words are used. In the first place the judges will apply a statute literally if on its face it appears to be entirely clear. As we have seen from the discussion of parliamentary sovereignty a court cannot decline to follow a statutory provision merely because it is absurd, immoral or even just not quite what one suspects the draftsman had in mind.[7] One rule of construction that might seem surprising is that it is not possible to cite parliamentary debates in construing a provision. Reasons for this are said to include that it would involve every court in extensive perusals of *Hansard* where in any event the opinions expressed during debate are often conflicting and unhelpful. In the event of ambiguity judges will fall back on the so-called 'golden rule' which seeks in effect to give a sensible interpretation to an ambiguous provision which might otherwise lead to absurd results. For example in *Adler* v. *George*[8] a defendant was found on a military base and charged under the Official Secrets Act with being 'in the vicinity of' a prohibited place. His ingenious argument that he was not guilty because he was actually 'in' not 'in the vicinity of' such a place was rejected. The court held that the expression must be read to mean 'in or in the vicinity of' because the wording was ambiguous and it was absurd to suppose that Parliament intended to proscribe conduct outside but not inside the prohibited place. Similarly, if a statute has plainly been passed to remedy a certain mischief the courts will have regard to this purpose in construing the provision. All of this may go to show that sometimes lawyers are less literal in construing statutory language than might be a casual reader who simply examines a provision out of its context. Another example of this tendency is the so-called '*ejusdem generis* (of the same kind) rule'. This is held to mean that where words follow specific words the meaning of the general words will be limited by the former. For example, suppose a statute makes it an offence to do an act in 'any classroom, hallway, assembly hall or any other place'. What if the offending act took place in the playground? A casual reading of the provision might suggest that it would be within the wide general words at the end of the clause. A court would probably hold otherwise. In so far as the specific words belong to the genus of indoor places, the general words might also be so limited. The result is nothing more than an illustration of the wider rule that a statute must be read as a whole and words placed in their context. It also serves as a reminder that statutes sometimes need to be approached with some care.

Judicial review

One of the great legal growth areas of the post-war period has been in the willingness of the courts to challenge what are perceived as abuses of power by public bodies, local authorities and particularly government ministers. The courts, because they are limited to implementing the will of Parliament, cannot nakedly usurp the power of these bodies. What they can do is declare that a person given power under a statute to issue rules or make decisions has acted *ultra vires* (beyond the powers) of a statute, or else in breach of the rules of natural justice. These have evolved out of the principles *nemo iudex in sua causa* (nobody should be a judge in his own cause)

and *audi alteram partem* (in effect, people must be given an opportunity to deal with the case against them). More recently judges have felt able to dispense with the Latin tags and speak more generally of a duty to act fairly. Although it may be simple to state the general principles involved, the working out by the courts of how they are to be applied has generated, and continues to generate, a large body of case-law.

The way in which review is instigated is by way of the Order 53 procedure, so called after the Supreme Court rule which provides the machinery. In effect the High Court is invited to review a decision on the basis that it has not been reached in accordance with law, and this is what is generally meant by lawyers and the press when it is said that an application has been made to the court for judicial review. The decision may, for example, be that of a disciplinary tribunal, local authority, government minister or even another court. If the High Court is of the opinion that the procedure for reaching that decision was defective then the decision may be quashed. This does not necessarily mean that the person or body aggrieved will ultimately be victorious. The courts are not substituting their opinion on the merits of the case; they are merely invalidating the decision on a procedural defect. If therefore the body against whom the order has been made repeats the procedure but this time does it correctly, the same conclusion on the same issue might still be reached.

Education law has thrown up numerous examples, but a particularly dramatic application of judicial review of ministerial action was shown in the case of *Secretary of State for Education and Science* v. *Metropolitan Borough of Tameside.*[9] In 1975 a Labour-controlled local education authority submitted proposals for introducing comprehensive education which entailed the abolition of five grammar schools. The Secretary for Education approved these proposals, but before implementation the control of the education authority had passed to the Conservatives. They submitted fresh proposals which retained the grammar schools. These the Secretary of State rejected on the grounds that the authority was acting unreasonably and required them to implement the original proposals. The House of Lords held that the Minister had acted *ultra vires* the Education Act of 1944. Even though the Minister might take the view that the later proposals were misguided, there were no grounds on which he could find them to be unreasonable because, given the expected willingness of the teachers to co-operate, the plan could work satisfactorily. A decision based upon a failure to take into account factors which should be taken into account under the Act, or indeed based upon factors which should not be taken into account, is not a decision reached in compliance with the law and is therefore invalid.

The situations in which judicial review might arise are numerous even in the field of education, but a particularly interesting recent example was *R.* v. *London Borough Council, ex parte Gunning And Others.*[10] In a case concerning a local education authority's closure and amalgamation of schools, the authority's decision was quashed by the court after an application for judicial review. One of the grounds for this judgment was that parents, even though they had no statutory right to be consulted, had a legitimate expectation tantamount to a legal right to be properly consulted before proposals were made. Insufficient consultation had taken place with the parents which therefore provided a ground for rendering the decision void.

In the *Tameside* and *Gunning* cases, and many others like them, the courts do not see themselves as defying Parliament or the Executive. Rather they are claiming to uphold the rule of law by holding invalid the actions of persons who have, albeit perhaps inadvertently, acted outside it. Even so the courts now show a boldness in reviewing decisions which would once have been unthinkable. In *Council of Civil Service Unions* v. *Minister for the Civil Service,*[11] better known as the Government Communications Headquarters (GCHQ) case, the House of Lords even declared that powers exercised under the Royal Prerogative were not necessarily immune from judicial review. At a more mundane level the availability of judicial review has an

impact on the procedure of disciplinary bodies, trade unions and potentially many bodies that are in a position to make decisions which may deprive people of their legitimate expectations. This applies, of course, to schools and colleges.[12] Although, as yet, it is not a point which seems to have surfaced in the law reports, have we reached the stage at which a school expelling a pupil will risk an action for judicial review if it has failed to act fairly?

Case-law

Important areas of the law, such as the general law of contract, are dominated not by legislation but the law as it has emerged from judicial decisions. In the field of education, for example, anyone seeking to discover what is the law relating to corporal punishment in a non-state school to which the 1986 Act does not apply needs to refer to the case-law as laid down by the judges, the so-called common law. The obvious questions are therefore, how does this system work and how can one find out what a decision says?

The press reporting of a case does not always make clear that not everything said by the judge or judges represents 'the law'. Most judgments contain a statement of the facts, a review of the legal authorities applicable to those facts and the reasons given for deciding the case. The only element of the decision which may bind a lower court is the principle of law applicable to the legal problems disclosed by the facts, the so-called *ratio decidendi*. What a judge may say by way of illustration or opinion is not strictly speaking binding on other courts, and is known as an *obiter dictum*. Nevertheless, these *dicta* may be a helpful guide in divining what the court's attitude would be in a future case, and depending on the court and the judge, may be of considerable persuasive value.

The distinction between the *ratio decidendi* and *obiter dicta* is often easier to state in theory than apply in practice. It is generally agreed that the *ratio* of a case is the proposition of law necessary to the legally relevant facts of the case, but judges do not always expressly signal where the *ratio* ends and the *dicta* begin. It not infrequently happens in cases dealt with on appeal that a majority of judges will come to the same conclusion but for slightly different legal reasons. It is not then always easy to disentangle *ratio* from *dicta* or even *ratio* from *ratio*. Were this a constant problem the whole system of judge-made law would be unworkable. In practice it often is tolerably clear what the court is deciding, but in important and complex cases where the authorities undergo detailed examination it explains some of the legitimate, or at least plausible, grounds for argument. More will be said about the related concept of the doctrine of precedent in the discussion of the court structure.

Where can one find cases? A strange quirk of the English legal system is that there has never been an official government publication reporting the decisions of the courts. It has historically been a matter of private enterprise which in the last century spawned dozens of different series of reports. Even now there are numerous sets of reports, many of which overlap with each other in the sense that the same case may be reported in several different places. For example, cases from widely different areas are reported in the All England Reports or the Weekly Law Reports (conventionally abbreviated to All ER or WLR), both of which can be subscribed to and are available in some public libraries. The citation for the GCHQ case in note 10 is here given as [1984] 3 All ER 935. This signifies that a full report of the case can be found in the third volume of All England Law Reports for the year 1984 at page 935. It could also be found in [1984] 3 WLR 1174, that is, volume 3 of the Weekly Law Reports for 1984 at page 1174. As yet, there is no series of law reports given over exclusively to reporting education cases in the same way as exists in the United States in the form of West's Education Law Reporter. Because of the wide range of legal problems thrown up by education, relevant cases are likely to appear not only in general law reports such as the All England and Weekly series but also in more specialized reports such as Knight's Local Government Reports or Industrial Cases Reports. The latest addition to law-reporting technology is the advent of

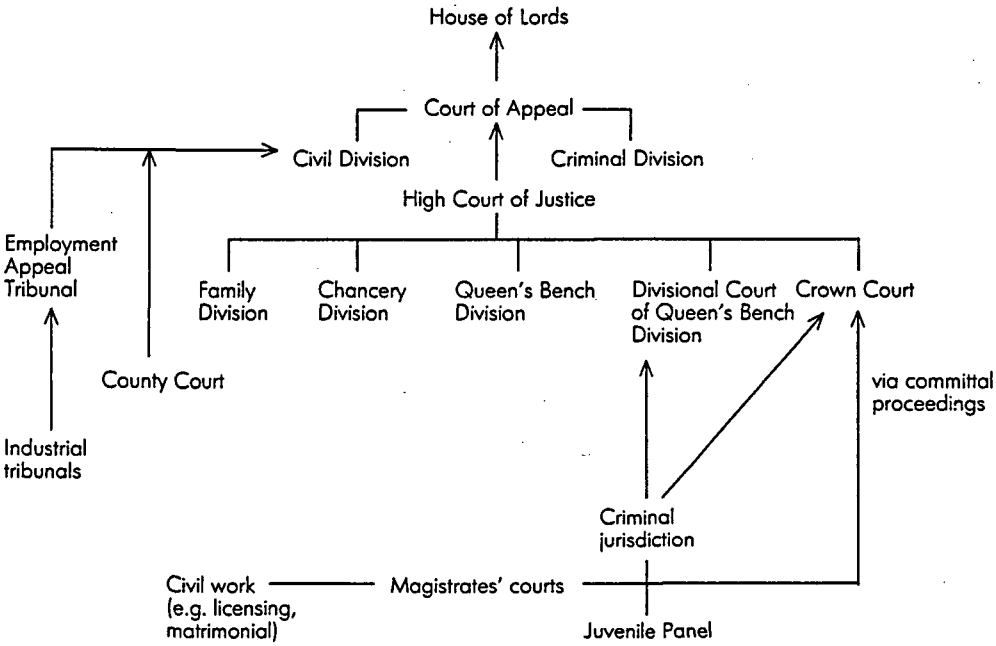


Fig. 1. Hierarchy of the courts (arrows show main routes of appeal).

computer-based systems such as 'Lexis'. This carries an enormous range of law reports, both from the United Kingdom, United States and Commonwealth countries and is particularly valuable for practitioners in rapidly locating cases which may not yet have been reported in the law reports.

The court system

It is something of an over-simplification to say that judges follow the reasoning of previous cases. The extent to which a decision binds other courts is in turn dependent upon where in the hierarchy of the courts the decision was made. How this works is best understood from a diagram (Fig. 1).

At the pinnacle of the court structure sits the House of Lords. Their decisions are binding on all lower courts. What is more, they claim a right which they are unwilling to concede to the Court of Appeal, namely to go back on their earlier decisions.[13] This is a power which has been used sparingly since it would clearly destabilize the system if the highest appellate tribunal in the land were prone to change its mind too often. One goal of any legal system is a degree of certainty which will enable the parties to forecast accurately the consequences of any action and so facilitate settlement. Even so, in one important area of criminal law their lordships completely altered their views in the space of some 12 months.[14] This is, however, unusual and there will normally be compelling reasons before the House of Lords will overrule one of their own earlier decisions.

Next in authority is the Court of Appeal which is divided into criminal and civil divisions. In practice the judges of the Court of Appeal are likely to have more influence on the day-to-day development of the law since the majority of cases are not pursued beyond this level and their decisions bind all lower courts. To reach the House of Lords a case must not only contain a contentious point of law but also be of general public importance,

and this requirement will not as frequently be satisfied.

The most important courts to which litigants have direct access for adjudication of their disputes are the High Court and the County Court. The High Court is in turn divided into three administrative divisions, the Family Division, Chancery Division and Queen's Bench Division. This does not reflect any difference in authority but is simply an administrative device to parcel out the work to judges with particular expertise in those areas. The majority of actions for matters such as breach of contract or tort law will be heard in the Queen's Bench courts. On the other hand, a matter which turned upon the construction of, say, a trust instrument would most likely be heard in the Chancery Division. Of great importance to the area of public law, and so education, is the somewhat confusingly named Divisional Court of the Queen's Bench Division. It is this court to which a party will apply for judicial review, and from which an appeal then lies to the Court of Appeal and thence to the House of Lords.

The County Court differs from the High Court in that its jurisdiction is limited. Without the consent of the parties it cannot, for example, deal with actions for libel or slander or claims in contact or tort which exceed £5,000, although this financial limit seems likely to be increased before too long. It is therefore likely to be the court where most reasonably modest disputes begin and end. For example, a civil action for assault and battery of a minor kind is likely to be commenced by a summons in the County Court rather than the High Court. The atmosphere of the court, as befits a structure originally designed to give the public better access to the courts for the settlement of ordinary disputes, is also somewhat less formal and imposing than the High Court.

As regards the doctrine of precedent, a County Court judge will follow a High Court decision. High Court judgments are not strictly binding on other High Court judges who are, so to speak, of equal authority in the hierarchy. In practice a judge will not depart from a brother High Court judge's decision without a substantial reason, but this is by no means uncommon. The result can then be two or more streams of authority which will only be resolved by a decision of a higher appellate court.

Of more recent vintage is the system of industrial tribunals which deal with matters such as unfair dismissal or sex-discrimination cases. The advantage of these tribunals to the layman is that they provide a relatively quick remedy in more informal surroundings than are to be found in a traditional law court. For example the formal rules of evidence do not apply and the tribunal will have two non-lawyers on the panel. A further advantage to a prospective plaintiff is that, unless the tribunal takes the unusual view that the application was simply frivolous or vexatious, there will be no order for costs against the losing party. This removes one of the greatest disincentives to pursuing a legal claim: that the losing party will frequently be obliged to pay all the costs of the proceedings. An appeal from an industrial tribunal lies to the Employment Appeal Tribunal which sits in London, and from there to the Court of Appeal and ultimately to the House of Lords.

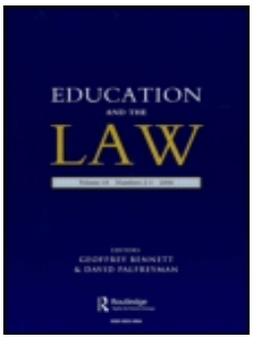
It is perhaps less often that those concerned with education law will have recourse to the criminal courts, although many unlawful acts straddle the boundary between civil and criminal law. For example, an assault is both a crime which may be prosecuted in the magistrates' court or, if serious enough, in the Crown Court, as well as a civil injury which may give rise to an action for damages. Assault is, however, a little unusual in one respect. Sections 44 and 45 of the Offences Against the Persons Act 1861 state that after criminal proceedings for certain assaults which have been tried by magistrates have been concluded, a certificate shall be issued which bars further civil proceedings. Accordingly, a teacher who, for example, was acquitted of common assault upon a pupil could not then be sued by the parents in tort for battery. If, however, no criminal proceedings had ever been instituted this would be a possibility. Indeed it may be tactically a tempting route to take since the standard of proof is lower in civil than criminal proceedings. In the former, it is stated to be 'beyond reasonable doubt'. In the latter it is upon the

balance of probabilities. In other words, is it more likely than not that the fact in issue occurred? If at the end of the day the court is unable to determine which of two possibilities is the more likely, the loser will be the party who has the burden of proving the issue.

There is one final point to be made about the court structure which is a consequence of the United Kingdom's membership of the EEC. Although it has been said that the House of Lords is the highest domestic tribunal this requires qualification in one respect. In matters involving the interpretation of community law the Court of Justice of the European Communities has the last word. For example, under Article 177 of the Treaty of Rome the European Court is empowered to give preliminary rulings concerning the interpretation of the treaty or community law. This is a procedure which is likely to delay matters but is useful where a decision on the relevant piece of community law will effectively dispose of the case. The United Kingdom has so far made considerable use of this procedure. It seems unlikely that it will be less important in the future and is another example of the way membership of the EEC is likely subtly to influence the development of the English legal system in the future.

Endnotes

1. A reader who wishes to know more could usefully consult such works as, Walker, R J and Walker, M G, *The English Legal System* (Butterworths, London 1985) or Smith, P F and Bailey, S H, *The Modern English Legal System* (Sweet & Maxwell, London 1984). A briefer treatment is also to be found in Hogan, B, Seago, P J and Bennett, G J, *'A' Level Law* (Sweet & Maxwell, London 1988).
2. See, for example, *British Railways Board* v. *Pickin* [1974] AC 765.
3. [1981] QB 180.
4. 4 EHRR 293.
5. *R.* v. *Chief Immigration Officer, ex parte Bibi* [1976] 1 WLR 979.
6. For a penetrating analysis of this issue see Griffith, J A G, *The Politics of the Judiciary* (3rd edn, Fontana Press, London 1985).
7. As perhaps in *Fisher* v. *Bell* [1961] 1 QB 394.
8. [1964] 2 QB 7.
9. [1976] 3 WLR 641.
10. (1985) 84 LGR 168.
11. [1984] 3 WLR 1174.
12. See, for example, *Ward* v. *Bradford Corporation* (1971) 70 LGR 27.
13. Practice Statement (Judicial Precedent) [1966] 1 WLR 1234.
14. In the area of 'attempting the impossible', *R.* v. *Shivpuri* [1987] AC 1 overruled *Anderton* v. *Ryan* [1985] AC 560.



Routledge
Taylor & Francis Group

Education and the Law

ISSN: 0953-9964 (Print) 1469-5774 (Online) Journal homepage: https://www.tandfonline.com/loi/cetl20

Aspects of the English legal system

Geoffrey Bennett Barrister, Lecturer in Law MA

To cite this article: Geoffrey Bennett Barrister, Lecturer in Law MA (1989) Aspects of the English legal system, Education and the Law, 1:1, 27-34, DOI: 10.1080/0953996890010105

To link to this article: https://doi.org/10.1080/0953996890010105