

Introduction

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NOTES

Introduction to Legal system and method

This is a foundational module which provides you with some essential building blocks for the study of law. Learning about law and legal systems is endlessly fascinating and the material in this module provides a basis for your understanding of the other modules you will tackle as part of your University of London programme. This module will help you to become familiar with some of the special vocabulary of the law; it will introduce you to the essential skills of the lawyer – such as how to read legal cases and statutes (Acts of Parliament); and it will provide an overview of some of the key institutions and processes that make up what we understand as the legal ‘system’.

This module is different from other law subjects

The material in this module is somewhat different from many of your other modules. While, for example, criminal law and contract law focus on detailed legal rules (what we refer to as ‘substantive law’), this subject looks more broadly at the machinery of the legal system which is necessary to make the law **work** – so that disputes are resolved peacefully and so that those who have broken the law may be brought to justice. You will need to have an understanding of what law is and its role in society as well as the meaning and significance of the concept of the ‘rule of law’. You need to understand some basic constitutional principles – such as the relationship between the government, law makers and judges – as well as how various parts of the legal system work together. You will also need to be familiar with some of the guiding principles of legal procedure in relation to dealing with civil disputes (such as disputes over contracts or property) and in relation to the detection, prosecution and punishment of criminal offences (such as theft or murder).

Purpose and content of the module guide

This guide is designed to help you through the material that you need to learn, understand and apply. It is not a textbook, but the chapters introduce you to the factual information, ideas, policy issues and debates that form the subject matter of the module. It guides your further reading and provides a framework for understanding. Each chapter starts with an introduction to the topic and summarises the key issues that you need to know and understand. The sections of the guide direct you to Essential reading, comprising the set textbook, material in the accompanying study pack and relevant legal cases which can be found on the virtual learning environment (VLE) or in the Online Library. At the end of each chapter of the module guide there is a summary of key points and some questions for reflection, to test how well you understand the material you have read and to encourage you to undertake further reading and research, to develop your knowledge and understanding of the legal system and legal reasoning.

Module aim

The aim of the module is to achieve an overview of the central institutions and processes of the English legal system and to introduce students to techniques of legal reasoning and interpretation.

Learning outcomes

On successful completion of the module, you should be able to:

- 1.1 Understand the structure and operation of the central institutions and processes of the English legal system and have a basic facility with techniques of legal interpretation
- 1.2 Conduct legal research using primary and secondary resources

- 1.3 Understand techniques of legal reasoning covering precedent and statutory interpretation
- 1.4 Describe the role of judges; in particular the Law Lords and the Supreme Court
- 1.5 Explain the basic structures of civil and criminal justice
- 1.6 Understand the role of due Process and the importance of Article 6 (ECHR) in Civil and Criminal Justice
- 1.7 Explain the key concepts of Legal Aid.

Assessment

Formative assessment is conducted through interactive online activities. Summative assessment is through a three-hour unseen examination.

Textbook and other reading material

Each chapter in this module guide contains Essential and suggested Further reading that is specific to the material in that chapter. In addition, there are textbooks which you may want to consult. Several of these are available electronically.

ESSENTIAL READING

- Holland, J. and J. Webb *Learning legal rules*. (Oxford: Oxford University Press, 2016) ninth edition [ISBN 9780198728436].

FURTHER READING

Introductory texts which give a concise overview of this subject:

- Rivlin, G. *First steps in the law*. (Oxford: Oxford University Press, 2015) seventh edition [ISBN 9780198735892].
- Slapper, G. *How the law works*. (Oxford: Routledge, 2016) fourth edition [ISBN 9781138914971].
- Wacks, R. *Law: a very short introduction*. (Oxford: Oxford University Press, 2015) second edition [ISBN 9780198745624].

Substantial legal system texts providing detailed material on module topics:

- Cownie, F., A. Bradney and M. Burton *English legal system in context*. (Oxford: Oxford University Press, 2013) sixth edition [ISBN 9780199656561].
- Partington, M. *Introduction to the English legal system 2016–2017*. (Oxford: Oxford University Press, 2016) [ISBN 9780198758808].
- Slapper, G. and D. Kelly *The English legal system 2016–2017*. (Oxford: Routledge, 2016) [ISBN 9780198758808].
- Slorach, S., J. Embley, P. Goodchild and C. Shephard *Legal systems and skills*. (Oxford: Oxford University Press, 2015) second edition [ISBN 9780198727453].
- Stychin, C.F. and L. Mulcahy *Legal methods and systems: text and materials*. (London: Sweet & Maxwell, 2010) fourth edition [ISBN 9780414041837].

Relevant websites

Website of the judiciary of England and Wales

This is a very useful site for accessing recent speeches by the senior judiciary, for information about courts and the judiciary and for news about important changes to procedure.

www.judiciary.gov.uk

Website of the Ministry of Justice

Useful for research publications, for information about government policy on the courts and judiciary.

www.gov.uk/government/organisations/ministry-of-justice

Website of the UK Parliament

Useful for accessing legislation, reports of committees, and Hansard – the official record of debates in Parliament.

www.parliament.uk

Other websites that may be useful**Law Society**

Useful for developments on legal aid and access to justice. Also may have information about the judiciary and important new cases.

www.lawsociety.org.uk

Bar Council

Useful for developments on legal aid and access to justice, judiciary and leading cases.

www.barcouncil.org.uk

You could also look for other resources on the internet; for example, reputable legal blogs or follow Twitter accounts about the law.

One useful resource is the blog by Martin Partington, the author of *Introduction to the English Legal System* at <https://martinpartington.com/>

If you use Twitter, you could follow the Law Society, the Bar Council, the Ministry of Justice, the UK Parliament, the UK Supreme Court and many others.

Essential information for the new law student

This module deals with legal system and method principally as applied to the system of law of England and Wales. The legal system of England and Wales is a 'common law' system which means that much of the law is to be found in the decisions of judges in individual legal cases. In your reading you will constantly be referred to legal cases or what are sometimes referred to as 'legal authorities'. These are the reports of cases heard and decided in different courts within the legal system. You will be expected to read some of these cases; and to be able to refer to cases as 'authority' for various legal rules and principles. Case reports are published in a number of different series of law reports and organised according to the year in which they were decided or reported. The operation of the common law system of precedent depends on lawyers being able to find out what the courts have said about any particular question. This requires that we have a record of court decisions in individual cases. These records are referred to as 'law reports'.

This section introduces you to some important information that will help you to understand how legal cases and statutes are referred to or 'cited' in legal documents and texts. This is information that you can keep coming back to as you progress with your studies and find different styles of referencing cases.

Citation of legal cases

Refer to the helpful guides at:

<http://ox.libguides.com/c.php?g=422832&p=2887383> or

<https://ilrb.cf.ac.uk/citingreferences/oscola/tutorial/index.html>

Citation is the accepted way of referring to the 'primary' sources of law, cases, legislation and also books and journal articles. It follows a standard format which makes it possible for anyone to find the cited item. This is essential information for being able to locate relevant legal material and for being able accurately to refer to legal cases or cite them in writing or in legal argument.

Civil cases

Davis v Johnson [1979] 2 WLR 553 (pronounced Davis 'and' Johnson, not Davis 'v' Johnson or Davis 'versus' Johnson).

'Davis' is the name of the person bringing the claim (the claimant). 'Johnson' is the name of the person defending the claim (the defendant). [1979] is the year in which the case was printed in the law reports. '2' is the volume number of the reports in which the case appears. 'WLR' stands for Weekly Law Reports, which is the law report series containing all formally reported legal cases. '553' is the page number of volume 2 of the Weekly Law Reports in 1979 where you will find the reported case of *Davis v Johnson*.

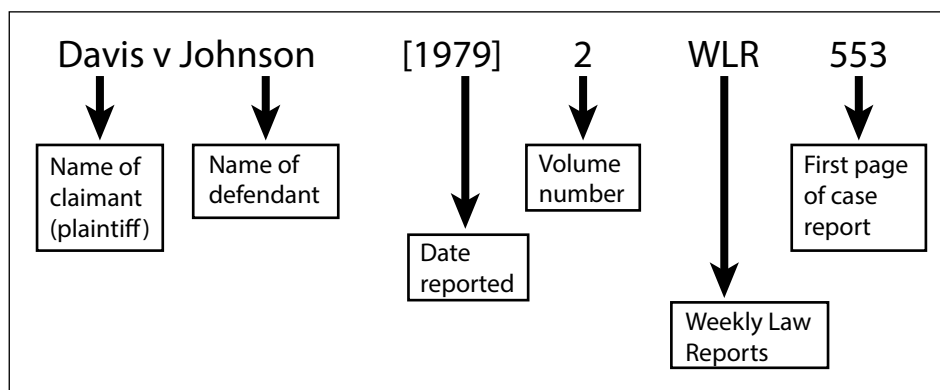


Figure1: Example of case citation from Weekly Law Reports

Square and round brackets in case citation

Square brackets are used where one needs the year of the case in order to be able to identify the relevant volume, and round brackets are used where the enclosed date is just a courtesy because one could identify the relevant book of law reports by its volume number alone. For example, to find *Attorney-General v Associated Newspapers Ltd* [1994] 1 All ER 556, you need to go to the 1994 volumes of the All England Law Reports, choose volume 1, and turn to page 556. By contrast, to find *Montriou v Jeffreys* (1825) 2 C&P 113, you would not need to know the year of judgment, you would just need to go to the second volume of the Carrington & Payne reports, and turn to page 113. (Explanation from Slapper, 2016, p.124.)

Criminal cases

Criminal case citations usually take one of the following three forms:

R v Smith [1959] 2 QB 35 (R stands for Regina or Rex) (i.e. 'the Crown and/against Smith').

AG v Punch [2002] UKHL 50, [2003] 1 All ER 289, [2003] 1 AC 1046, [2003] 2 WLR 49 ('Attorney General and/against Punch').

DPP v Camplin [1978] AC 705, [1978] UKHL 2 ('Director of Public Prosecutions and/against Camplin')

Other formulations

Private family case: *P v BW* [2004] Fam 22.

Public family case: *Re B (Refusal to Grant Interim Care Order)* [2012] EWCA Civ 1275.

Judicial review: *R v Lord Chancellor ex parte John Witham* [1997] EWHC Admin 237, [1998] QB 575.

In re or Re (where there is only one party): *Re B (Adult: Refusal of Medical Treatment)* [2002] 2 All ER 449.

Neutral citation

Since the growth of electronic sources unreported transcripts are also available on all the major legal databases. Since 2002 'neutral citations' have been used. These citations give each case an individual number so that it can be identified. The neutral citations comprise the year, the court abbreviation (for example 'EWCA Civ') and then the case number. These look like normal law report citations but they are not. If all that you have is a neutral citation you will need to access the case through an electronic database in order to find the full law report citation. You can do this using Westlaw or Lexis Library, accessible through the VLE, although one of the quickest ways to access a case is to use BAILII, which is a free site on the internet.

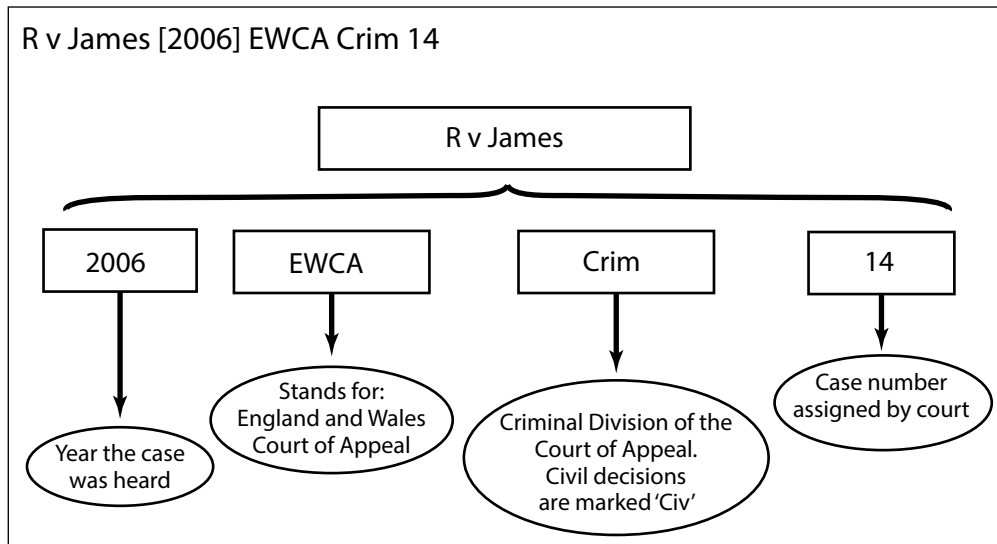


Figure 2: Example of neutral citations

The basic formulation is to give the year of the case, the court in which it was decided and the case number. EW stands for England and Wales, UK for United Kingdom.

[2005] EWCA Civ 101 (this is the 101st case of 2005 in the Court of Appeal Civil Division).

[2006] EWHC 101 (Admin) (101st case of 2006 in the High Court Administrative Division).

[2003] UKHL 5 (5th case of 2003 in the House of Lords (now the Supreme Court)).

[2010] UKSC 48 (48th case of 2010 in the UK Supreme Court).

House of Lords case: *Matthews v Ministry of Justice* [2003] UKHL 4.

UK Supreme Court case: *R v Maxwell* [2010] UKSC 48.

Privy Council cases: *Kelly and others v Fraser* [2012] UKPC 25.

High Court cases: *Salekipour v Parmar* [2016] EWHC 1466 (QB).

The Law Reports series

There are many different series of law reports which are discussed in more detail at the end of Chapter 3 of this module guide. The Incorporated Council of Law Reporting (ICLR) publishes the Official Law Reports including Appeal Cases (AC), Queen's Bench (QB), Family (Fam) and Chancery (Ch). There is a hierarchy of law reports and the Official Law Reports are considered the most authoritative or 'best' reports. The ICLR also publishes the Weekly Law Reports and All England Law Reports. A full list of abbreviations can be found at www.legalabbrevs.cardiff.ac.uk/

The Law Reports series are regarded as the 'official' law reports. In written or oral submissions in court a Practice Direction requires that where a judgment is used as authority and appears in the Law Reports that report must be cited. Their abbreviations are as follows:

AC	Appeal Cases
Ch	Law Reports, Chancery Division
QB	Law Reports, Queen's Bench Division
KB	Law Reports, King's Bench Division
Fam	Law Reports, Family Division
P	Law Reports, Probate Division
Other commercial series	
All ER	All England Reports
Cr App R	Criminal Appeal Reports
Cr App R (S)	Criminal Appeal Reports Sentencing
Lloyd's LR	Lloyd's Law Reports
WLR	Weekly Law Reports
EHRR	European Human Rights Reports

Free database of cases, statutes and other legal materials

The British and Irish Legal Information Institute (BAILII) www.bailii.org/ provides access to primary legal materials on one internet site without charge. Around 200,000 documents are available to search including case law, legislation, law reports and other legal material, alongside links to international law resources and archives. You can search BAILII by database, legislation, case name or case law. Recent decisions, additions and new cases of interest are highlighted, as well as leading case law by subject.

Statutes

To cite an Act of Parliament use its short title and date. For example, Human Rights Act 1998. To refer to a particular section or sections in the Act, use s or ss (section or sections), Pt (Part) or Sch and para (Schedule and paragraph within a schedule).

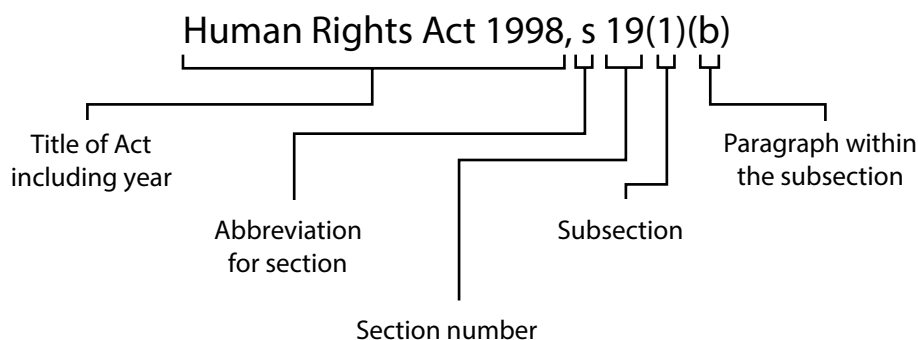


Figure 3: Explanation of statute citation

Glossary of key judicial offices in the English legal system

In order to understand the material in this module you need to become familiar with the name and function of some of the key judicial officers. The seniority of a judge determines how important or authoritative their decisions are in cases and, indeed, the speeches that they make.

For reference visit: www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/

President of the United Kingdom Supreme Court (PSC) – Head of the final court of appeal in the United Kingdom.

Lord Chief Justice (CJ) – Head of the judiciary and President of the Courts of England and Wales. Head of the Criminal Division of the Court of Appeal. Responsible for training, guidance and deployment of judges. Represents the views of judiciary to Ministers.

Master of the Rolls (MR) – Head of the Civil Division of the Court of Appeal and Head of Civil Justice.

Heads of Divisions

The Chancellor – Head of the Chancery Division of the High Court.

President of the Queen's Bench Division (QBD) – Head of Queen's Bench Division of the High Court.

President of the Family Division and Head of Family Justice – Head of the Family Division of the High Court.

Lord Chancellor – Prior to the Constitutional Reform Act 2005 the Lord Chancellor was both the head of the judiciary and a member of the government. Since 2005 the Lord Chancellor is the Minister for Justice in the Ministry of Justice. He has no judicial role and his previous powers have been transferred to the Lord Chief Justice who is now the head of the judiciary. The Lord Chancellor retains power over judicial appointments, although the selection of judges is made by the independent Judicial Appointments Commission.

The Attorney General (AG) – This is a political appointment. The Attorney General is the legal adviser to the government. He appears in court for the Crown in important cases. The AG has power to refer points of law to the Court of Appeal in relation to acquittals in criminal cases and against unduly lenient sentences.

Solicitor General – Deputy to Attorney General.

Director of Public Prosecutions (DPP) – Head of the independent Crown Prosecution Service.

SELF-ASSESSMENT QUESTIONS

1. What does 'R' stand for in the case of *R v Smith*?
2. Who is the Head of the Chancery Division of the High Court?
3. What does the Master of the Rolls do? In which court does he sit?
4. Explain this case citation: [2005] EWCA Civ 106.
5. What change did the Constitutional Reform Act 2005 make to the head of the judiciary of England and Wales?

NOTES

1 Introduction to law and the legal system

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LEARNING OUTCOMES

By the end of this chapter, and having completed the Essential readings and activities, you should be able to:

- ▶ **describe the characteristics of law**
- ▶ **outline the broad social purposes of law**
- ▶ **identify sources of law and law-making processes**
- ▶ **distinguish different types of legal system**
- ▶ **outline the fundamental principles of the constitution**
- ▶ **explain the essential requirements of the rule of law**
- ▶ **distinguish between procedural and substantive law and adversarial and inquisitorial procedures.**

1.1 What is law?

ESSENTIAL READING

- Wacks, Chapter 1 'Law's roots' (in the Legal system and method study pack).
- Holland and Webb, Chapter 1 'Understanding the law'.

FURTHER READING

- Rivlin, Chapter 2 'The law and its importance'.

You might think this is an easy question to answer, but although our lives and behaviour are regulated by a complicated system of rules, norms, and conventions, only some of these are defined as 'law'.

Our first introduction to rules comes from our parents – don't talk with your mouth full, don't run up and down the stairs, don't shout; and then at school – don't speak in class, don't eat in class, do your homework on time and so on. Other rules are 'social norms' or conventions – turn taking in conversation, covering your mouth when you cough.

But the rules that we are concerned with in the study of law are those that can be enforced by the state. Some rules have the force of law while other rules or conventions will simply lead to social disapproval. If you break the rule 'don't take someone else's property' you may be liable to pay a penalty that will be imposed by the state. If you drive carelessly and injure someone you may be required to pay them compensation. On the other hand, if you push to the front of a queue in the supermarket in England you are likely to be subject to serious social disapproval, but no formal penalty will be applied. There are significant differences between societies when it comes to which kinds of behaviour will lead to disapproval and which kinds of behaviour will lead to a formal penalty being imposed by the state. For example, while adultery is disapproved of in England and Wales it will not lead to formal punishment although it may be grounds for divorce. By contrast, in Islamic law adultery will lead to a criminal penalty being imposed.

There is considerable philosophical debate about the nature of law and why some rules are enforced by the state and others are not, but for present purposes a practical answer to the question 'what is law' could be given as 'the rules by which societies agree to live, which are enforceable by the coercive power of the state'.

1.2 What is law for?

ESSENTIAL READING

- Partington, Chapter 2 'Law and society: the purposes and functions of law' (in the Legal system and method study pack).

Law performs critical social functions. It has a broad important role in helping to maintain order in society. When we talk of 'society' we are referring to humans living together in relatively peaceful harmony and law is central to the notion of 'social order'. Partington argues that the broad or 'macro' functions of law are to maintain public, political, social, economic, international and moral order (Partington, pp.8–18). So, for example, laws relating to ownership of property, or laws relating to business transactions support economic activity by ensuring that commercial transactions are carried out in an orderly way and that rights and duties are respected and enforceable. Law in this context can also protect weaker parties involved in commercial transactions to ensure that bargains are fair.

Partington goes on to argue that the 'micro' functions of law are to achieve more specific social objectives. So, for example, one of the micro functions of law is to define the limits of acceptable behaviour by specifying action that is so morally reprehensible that it will attract a criminal penalty – like murder or theft of property. This can be contrasted with behaviour that is deemed morally wrong but not criminally wrong,

such as careless driving that causes damage, and which will attract a civil penalty rather than a criminal penalty. Another important micro function of law is to ensure that those in public office do not abuse their power.

Partington points out that one of the problems of the many functions of law is that sometimes functions can be in conflict. So, for example, the objective of preserving social order may conflict with the protection of civil liberties or the right to expression. This conflict occurs when citizens want to take to the streets to demonstrate to express their dissatisfaction about some issue and the police are concerned that such a demonstration might lead to violent disorder. Which objective should prevail? Freedom of expression or social order? Similarly, when governments are facing terrorist threats they must balance the desire to protect society through enlarging the power of the police and courts against the danger to civil liberties and infringement of human rights.

1.3 Sources of law

ESSENTIAL READING

- Holland and Webb, Chapter 1 'Understanding the law'.

FURTHER READING

- Partington, Chapter 3 'Law-making: authority and process'.
- Rivlin, Chapter 3 'The invisible palace I: common law and equity'.

In studying the operation of the legal system, we need to be able to recognise which rules are regarded as 'law' and how important any particular rule is in relation to other rules. In the English legal tradition the **source** of a rule is relevant in determining both its significance and whether it might take precedence over a rule that comes from another source. In the English common law system, there are four principal **sources of law**:

1. **Law made by Parliament** – referred to as 'legislation', 'statute law' or 'Acts of Parliament'. Written laws that express the will of the legislature.
2. **Law decided in the courts** – referred to as 'common law' or 'case law'. Decisions of judges in particular cases applied by other judges in later cases through the process of precedent (combined common law and equity).
3. **European Union law** – referred to as 'EU law' comprising law emanating from the European Commission, Council of Ministers and Court of Justice of the European Union.
4. **European Convention on Human Rights** – referred to as Human Rights Law or ECHR, emanating from the European Court of Human Rights (ECtHR) and now incorporated into UK law through the Human Rights Act 1998.

1. Parliament and statutes

In England and Wales the supreme law-making body is Parliament. Parliament has two 'chambers': the House of Commons comprising democratically elected Members of Parliament (MPs); and the House of Lords comprising members who are appointed and some who have inherited the right to serve in the House (not to be confused with the Judicial Committee of the House of Lords which until 2009 was the final court of appeal for the UK). A valid 'Act of Parliament' is written law and is the end product of a long process following the introduction of a draft 'Bill' in Parliament. Before a Bill is introduced to Parliament, the government will normally go through a process of consultation. They will publish what is called a '**Green Paper**' which sets out the tentative proposals for changes to the law and invite comments. Green Papers were first used in 1967 and are now usually used as part of the legislative process. This will be followed by a '**White Paper**' which contains the government's firm proposals for new law and may have the draft Bill attached. Following consultation, the draft Bill is introduced in Parliament and then debated, discussed and amended. Once a Bill has gone through all of the necessary Parliamentary processes it will be signed

by the Queen (Royal Assent) and then published as an Act. A valid Act of Parliament takes precedence over common law or case law. Indeed, it takes precedence over everything except EU law.

The distinction between primary and secondary legislation

In discussion about legislation, or law emanating from Parliament, there is a distinction between 'primary legislation' and 'secondary legislation'. Primary legislation refers to Acts of Parliament or statutes. Because it often takes a long time for primary legislation to get through all of the various stages in the Parliamentary process, the drafting of Acts may contain only broad provisions or rules and then the detailed rules are produced later under the authority of the Act. These detailed rules are known as secondary legislation or 'statutory instruments' and take the form of 'regulations', 'rules' or 'orders'. They have the force of law, but can be implemented with less scrutiny than primary legislation.

2. The courts and common law or 'judge-made law'

In contrast to statute law, when we refer to the 'common law' we are referring to the law contained in decisions of the courts rather than legal rules contained in Acts of Parliament. England and Wales is a common law system, meaning that many of our most fundamental legal rules and principles have been established by judges deciding individual cases, rather than these rules being laid down by Parliament. So, for example, most of the law relating to the formation of binding contracts is to be found in the common law rather than in statutes. When a lawyer or judge is looking for the rules on the formation of contract they will refer to important legal cases which set out the legal principles. In other words, they will be looking at case law or 'legal precedents' which establish the relevant legal principles.

As we will see later in the chapter, the body of court decisions that comprises the English common law has developed over many years, dating back to its origins in the 12th century. In the 18th century, a famous judge and legal commentator, Sir William Blackstone, explained the source of English common law as follows:

The Common Law is to be found in the records of our several courts of justice in books of reports and judicial decisions, and in treatises of learned sages of the profession, prescribed and handed down to us from the times of ancient antiquity. They are the laws which gave rise and origin to that collection of maxims and customs which is now known by the name of common law.

Sir William Blackstone 1723–1780, *Commentaries on the laws of England*.

We will look at the development of English common law later in the chapter. In the meantime, it is important to note that the term 'common law' may also be used in two other contexts. This can be confusing for students new to law, but gradually the meaning in different contexts will become very familiar and cause no difficulty.

As well as the contrast between common law and statute law, the term 'common law' is also used to distinguish law emanating from common law courts from law emanating from courts of 'equity' (this is discussed in detail later in this chapter).

The third context in which the term common law is used is to distinguish 'common law' legal systems or jurisdictions such as England and Wales, Canada, USA and Australia from 'civil law' legal systems or jurisdictions such as Germany or France where the law is almost entirely 'codified' (i.e. contained within written codes). The differences between common law and civil law jurisdictions are discussed later in this chapter.

3. European Union law

The European Union (EU) is an economic and political partnership between 28 European countries, created after the Second World War. The initial approach was to encourage economic cooperation on the assumption that economic interdependence might avoid future conflict. The EU now encompasses both economic and political union. It is based on the rule of law and its laws are based on treaties that have been democratically agreed by all member countries.

One of the EU's main goals is to promote human rights. Since the Treaty of Lisbon in 2009, the EU's Charter of Fundamental Rights has placed all these rights in a single document. The EU's institutions are legally bound to uphold them, as are EU governments whenever they apply EU law.

Since the UK joined the EU in 1973, law emanating from the European Parliament, European Council and European Commission governs certain activities and practices in the UK. Since the enactment of the European Communities Act 1972, European Law takes precedence over domestic law. If there is a conflict between English domestic law and European law, for example in the field of equal pay, the English courts must apply European law. Matters concerning the interpretation and implementation of European law are dealt with by the Court of Justice of the European Union (CJEU) which sits in Luxembourg (see Chapter 2). Section 2(4) of the European Communities Act 1972 provides that English law is to be interpreted and have effect subject to the principle that European law takes precedence over all sources of domestic law.

An important case establishing the supremacy of European law over UK law is *R v Secretary of State for Transport, ex p Factortame (No 2)* [1991] 1 All ER 70, HL/ECJ and *R v Secretary of State for Transport, ex p Factortame (No 3)* [1991] 3 All ER 769, ECJ. A statute passed by the UK Parliament – the Merchant Shipping Act 1988 – provided that fishing licences should be granted only to boats whose owners and crews were predominantly British. Some Spanish fishermen, who could not be granted fishing licences as a result of these provisions, claimed that the 1988 Act was contrary to EU law. The case was referred to the CJEU. The Court of Appeal and the House of Lords held that no national court had the power to suspend the operation of an Act of Parliament, but the CJEU disagreed, holding that a rule of national (domestic) law which conflicts with EU law should be set aside. The CJEU also said the 1988 Act breached Article 43 of the EU Treaty, which guaranteed citizens of any member state the freedom to establish their businesses anywhere in the Community, and the UK Government was obliged to amend the legislation accordingly. Another case in which European law was deemed to take precedence over English domestic law is the case of *R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1995] 1 AC 1 which can be accessed online at www.bailii.org/uk/cases/UKHL/1994/2.html

On 23 June 2016, the UK held a referendum on whether to leave or remain in the EU. The majority voted to leave the EU. Although the British Prime Minister started the formal process of leaving the EU at the end of March 2017, at the time of writing, it is not clear what the timetable or outcome of the process will be. The government has said that it will enact what it calls a 'Great Repeal Bill' as soon as the UK leaves the EU. The effect of this would be to end the authority of EU law by converting all its provisions into British law, while at the same time repealing the European Communities Act 1972 and the sovereignty of EU law. The intention is that Parliament would then be able to decide whether to retain, amend or repeal aspects of EU law in the future. However, at the time of writing this module guide, the position of EU law as a source of law in England and Wales has not changed.

4. European Convention on Human Rights (ECHR)

The European Convention on Human Rights (www.echr.coe.int/Documents/Convention_ENG.pdf) is an international treaty which was drafted in 1950 and came into effect in 1953 having been signed by European nations who were members of the Council of Europe, a body set up in Strasbourg in France after the Second World War. The UK signed up to the Convention in 1953 and was one of the first countries to do so. Some 47 countries have now signed up to the Convention including most of the east European, and former communist countries, and several countries that were once part of the Soviet Union. The countries that have signed up to the Convention make up the Council of Europe. The Council of Europe is quite separate from the European Union. The operation of the European Convention in the UK is therefore not affected by the referendum decision to leave the European Union.

The ECHR was a reaction to the experience of the horrors of the Second World War and reflected the hope and belief that if nations joined together to agree to protect

human rights, the likelihood of a recurrence would be reduced. The ECHR provides for individuals to bring proceedings in the European Court of Human Rights in Strasbourg, France, if they believe that a government is in breach of its obligations under the ECHR.

In 1998 the UK passed the Human Rights Act 1998 (www.legislation.gov.uk/ukpga/1998/42/contents) which incorporated directly into English law the main provisions of the ECHR. This means that if a UK citizen believes that the UK Government is in breach of its human rights obligations, a case can be pursued in the English courts. This is discussed further in Chapters 2, 3 and 5.

Certain fundamental rights and freedoms have been protected in English common law since the signing of the Magna Carta ('Great Charter') by King John of England in 1215. The Magna Carta sets out many rights that are now referred to as 'human rights' or fundamental principles of good government. For example, it established principles of due process and equality before the law. It contained provisions forbidding bribery and official misconduct. Despite the provisions of Magna Carta and other rights protected under English common law, since the passing of the Human Rights Act 1998 a wide range of fundamental rights and freedoms are now positively protected by the Act and the jurisprudence of the European Court of Human Rights has had a significant impact on English substantive law and on legal process. The protection of human rights is now regarded as fundamental to the rule of law (discussed later in this chapter). For this reason we will deal with the ECHR in some detail here and throughout this module guide we will refer to the influence of human rights legislation on the institutions and processes of the English legal system, as well as on some areas of substantive law.

The protected rights and freedoms

The purpose of the ECHR is the protection of fundamental rights and freedoms. The Convention is divided into 'articles'. Articles 2 to 14 set out the rights that are protected by the Convention. Over the years the Convention has been supplemented by a number of 'protocols' that have been agreed by the Council of Europe. Some of the protocols just deal with procedural issues but some guarantee rights in addition to those included in the Convention. Some of the most important rights and freedoms protected under the ECHR are:

- ▶ right to life (Article 2)
- ▶ prohibition of torture (Article 3) ('No one shall be subjected to torture or to inhuman or degrading treatment or punishment')
- ▶ prohibition of slavery and forced labour (Article 4)
- ▶ right to liberty and security (Article 5)
- ▶ right to a fair trial (Article 6) ('everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law')
- ▶ no punishment without law (Article 7)
- ▶ right to respect for family and private life (Article 8)
- ▶ freedom of thought, conscience and religion (Article 9)
- ▶ freedom of expression (Article 10)
- ▶ freedom of assembly and association (Article 11)
- ▶ prohibition of discrimination (Article 14)
- ▶ right not to be subjected to the death penalty (Articles 1 and 2 of Protocol 6)
- ▶ right to free elections (Article 3 of Protocol 1) (free elections at reasonable intervals by secret ballot ensuring free expression of the opinion of the people in the choice of the legislature).

The ECHR rights incorporated into English law under the Human Rights Act 1998 appear as a Schedule to the Act. See www.legislation.gov.uk/ukpga/1998/42/schedule/1

'Derogation'

These fundamental rights and freedoms are not all seen in the same way. Some are **absolute** and **inalienable** and cannot be interfered with by the state. Others are merely **contingent** and are subject to '**derogation**'. That means that a signatory state can opt out of them in particular circumstances. The absolute rights are those provided for in Articles 2, 3, 4, 7 and 14. All the others are subject to potential limitations.

Margin of appreciation

ESSENTIAL READING

- **The Open Society Brief 2012**
www.opensocietyfoundations.org/sites/default/files/echr-reform-margin-of-appreciation.pdf
- **Greer, S. 'The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation?' (2010) UCL Human Rights Review**
www.ucl.ac.uk/human-rights/research/ucl-hrr/docs/hrreviewissue3/greer

One of the difficulties in ensuring compliance with the ECHR by the 47 member states of the Council of Europe is the diverse cultural and legal traditions of the various states. To accommodate this, the European Court of Human Rights (ECtHR) has developed the doctrine of a '**margin of appreciation**' when considering whether a member state has breached the Convention. It means that a member state is permitted a degree of discretion, subject to Strasbourg supervision, when it takes legislative, administrative or judicial action in the area of a Convention right. The doctrine allows the Court to take into account the fact that the Convention will be interpreted differently in different member states, given their divergent legal and cultural traditions. The margin of appreciation gives the ECtHR the necessary flexibility to balance the sovereignty of member states with their obligations under the Convention. In some circumstances – for example, national emergency or security issues – member states may be permitted a '**wide**' margin of appreciation by the ECtHR. In other cases, for example in relation to discrimination, the court will permit only the narrowest margin of appreciation.

A case dealing with the margin of appreciation and one that received much publicity is the case of *Lautsi v Italy* (Application no. 30814/06) (<http://hudoc.echr.coe.int/eng/?i=001-104040>) heard by the Grand Chamber of the ECtHR in 2011. The applicant (an Italian citizen of Finnish origin) brought a complaint against Italy on behalf of her two children. She alleged that the display of the crucifix in classrooms of public schools interfered with her children's freedom of belief as well as their right to education and teaching consistent with her philosophical convictions under Article 9 (protection of freedom of religion and belief). The ECtHR ruled that the presence of crucifixes in Italian public schools does not infringe states' obligations in relation to Article 9. Highlighting the importance of the margin of appreciation principles, the Court confirmed that religious matters fall within the sovereignty of member states in order to respect the culture and traditions of each particular country.

Proportionality

ESSENTIAL READING

- *R v A* [2001] UKHL 25, [2001] 3 All ER 1 (www.bailii.org/uk/cases/UKHL/2001/25.html).
- **Lord Justice Laws 'The common law and Europe' Hamlyn Lectures 2013**
www.judiciary.gov.uk/announcements/speech-lj-laws-hamlyn-lecture-2013/

Closely linked to the concept of the margin of appreciation is the principle of '**proportionality**'. This concept is the means by which state interference with human rights is to be judged. While it is accepted that sometimes the state may need to restrict or interfere with a fundamental human right or freedom, the principle of proportionality requires that such interference should be necessary and that it goes

no further than what is essential to achieve the objective. Thus any measure by a public authority that affects a basic human right must be: appropriate in order to achieve the intended objective; necessary in the sense that there is no less severe means of achieving the objective; and reasonable in the circumstances. In his Hamlyn Lectures in 2013 Lord Justice Laws referred to the principle of proportionality as one of 'minimal interference'. He said:

...every intrusion by the State upon the freedom of the individual stands in need of justification. Accordingly, any interference which is greater than required for the State's proper purpose cannot be justified. This is at the core of proportionality; it articulates the discipline which proportionality imposes on decision makers.

In the case of *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 Lord Clyde articulated the criteria that courts should adopt to decide whether legislative interference with some fundamental right is arbitrary or excessive. The court should ask itself whether:

- i. the legislative objective is sufficiently important to justify limiting a fundamental right
- ii. the measures designed to meet the legislative objective are rationally connected to it; and
- iii. the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

Summary

- ▶ Laws are enforceable by the state while norms and social conventions are enforced informally.
- ▶ Law has both broad 'macro' functions and more specific 'micro' functions.
- ▶ A principal social function of law is the maintenance of different kinds of order including social, political and economic order.
- ▶ There are three contexts in which the meaning of common law is different:
 - i. common law jurisdiction as distinct from civil law jurisdiction
 - ii. common law as distinct from statute law
 - iii. common law as distinct from equity.
- ▶ The main sources of law are statutes (primary and secondary legislation), common law, European Union law and the European Convention on Human Rights.
- ▶ The protection of human rights is increasingly important in modern societies and regarded as an essential element in the rule of law.
- ▶ The Human Rights Act 1998 incorporates the ECHR into English law.
- ▶ The rights and freedoms protected by the Human Rights Act 1998 include those that are absolute and those from which states may derogate if necessary.

SELF-ASSESSMENT QUESTIONS

1. What are the different functions of law?
2. How does Partington distinguish between 'macro' and 'micro' functions of law? Do you think these cover all of the functions we can identify for law?
3. How important is law in maintaining social order and economic stability as compared with unwritten rules or behavioural conventions?
4. Think of some important rules of behaviour that are not 'laws' as we have defined them. How are they enforced? How important do you think those non-legal rules are to social order?
5. What is the difference between primary and secondary legislation?

6. What are 'Green Papers' and 'White Papers'?
7. When was the ECHR concluded, and what was its objective?
8. What is the difference between fundamental rights and absolute rights in the ECHR?
9. Explain the principle of 'margin of appreciation' in the interpretation of ECHR rights by the European Court of Human Rights.

1.4 Different types of legal system

FURTHER READING

- Slorach, Chapter 2 'Sources of law in England & Wales'.
- Tetley, W. 'Mixed jurisdictions: common law vs civil law (codified and uncoded)' (Part I) and (Part II) (1999) *Uniform Law Review* 591–618 and 877–907 www.unidroit.org/english/publications/review/articles/1999-3-tetley1-e.pdf

The legal system comprises the law – produced by law-making bodies (legislatures and judiciary) – and the institutions, processes and personnel that contribute to the operation and enforcement of those laws. So, for example, we can say that the English legal system comprises: legislation and common law; courts; judiciary; legal professionals; police; prosecutors; juries; and mechanisms for providing access to justice. In effect, the legal 'system' describes the law and the machinery provided for adjudication and implementation.

1.4.1 Legal traditions or 'families' of legal systems

Around the world there are different traditions in legal systems. As Tetley (1999) explains, a legal tradition reflects deep-rooted, historical attitudes about the nature of law, about the role of law in society and about the way law should be made, applied and studied. Two major 'families' of legal systems are common law and civil law systems.

1.4.2 Civil law or continental legal systems

Civil law is the oldest surviving legal tradition in the world. It had its origin in Roman law and later developed in Continental Europe and around the world. A key distinguishing feature of civil law is that it is a '**codified**' system. Jurisdictions with civil law systems, such as France, Germany and Japan, have comprehensive, continuously updated legal codes that specify all matters capable of being brought before a court, the applicable procedure and the appropriate punishment for each offence. These codes distinguish between different categories of law. In a civil law system, the judge's role is to establish the facts of the case and to apply the provisions of the applicable code. Though the judge often brings the formal charges, investigates the matter, and decides on the case, he or she works within a framework established by a comprehensive, codified set of laws. The judge's decision is consequently less crucial in shaping civil law than the decisions of legislators and legal scholars who draft and interpret the codes.

Some key features of civil law systems are:

- ▶ codified system of law (e.g. civil code, codes covering corporate law, administrative law, tax law)
- ▶ written constitutions based on specific codes
- ▶ only legislative enactments are considered binding for all
- ▶ little scope for judge-made law, although judges generally follow precedent
- ▶ constitutional courts that can nullify laws and the decisions of which are binding.

1.4.3 Common law systems

The common law legal tradition has its roots in developments in England in the 11th century. In common law systems, legal principles are to be found in the decisions of judges adjudicating in individual cases. The common law is usually more detailed than civil law and common law systems operate on the basis of 'binding precedent' so that judges in a particular case must follow the decisions of judges in earlier similar cases (see Chapter 3). These precedents are maintained over time through the records of the courts as well as historically documented in collections of case law known as yearbooks and law reports. The precedents to be applied in the decision of each new case are determined by the presiding judge. The common law tradition of England was transported around the world to countries that were once part of the British Empire. There are common law systems in Australia, USA, Canada and New Zealand – all having connections with England (common law family).

Other countries have a 'mixed system' that include some elements of the common law as well as some elements of civil law – for example parts of Africa, India and parts of the Far East.

Some of the key features of common law systems are:

- ▶ there is not always a written constitution or codified laws
- ▶ judicial decisions are binding and decisions of the highest court can only be overturned by the same court or through legislation
- ▶ everything is permitted that is not expressly prohibited by law.

Historical development of the common law

It is possible to date the modern development of the English common law back to the time of William the Conqueror who invaded England in 1066. Before the Norman Conquest of England in 1066, there was no unitary, national legal system. The English legal system involved a mass of oral customary rules, which varied according to region. Each county or shire had its own **local court** dispensing its own justice in accordance with local customs that varied from community to community and were enforced, sometimes in a rather arbitrary fashion, by local lords or landowners. These local courts are not what we would recognise as courts today.

William, as King of England, laid the foundations of the legal system. He understood that in order to exercise real power over citizens he needed a central system of justice over which the king had control and that had laws that would be obeyed. He did this by creating what was called the *Curia Regis* – King's Court. It was a court of law but also a royal household comprising the King and his advisers who were a mixture of powerful militarised landowners and learned clerics (religious men in holy orders). The King and his court travelled around the country and citizens would bring their grievances to be considered by the King and his advisers after which judgment would be given. This activity was the beginning of the common law system.

Probably the most important contributor to the development of the common law was Henry II who came to the throne in 1154 after a long period of disruption and civil war. Henry took the throne wanting to regain stability, reform land law and deal with rampant crime. He focused on creating a single system of justice for the entire country that would be under the control of the king. At this time there were only 18 judges available to dispense justice. In 1166 Henry ordered five to remain in Westminster in London to deal with the cases that he would previously have decided, and the remaining judges were sent out to travel to different parts of the country. Their responsibility was to decide grievances, complaints and accusations applying the laws that had been developed by judges in Westminster. In this way, local laws were replaced by new national laws. Laws that were common to all – in other words, the **common law**.

In time, the decisions of the judges were written down. As the decisions of these courts came to be recorded and published, so the practice developed where past decisions (**precedents**) would be cited in argument before the courts and would be regarded as being 'authority' for the application of pre-existing legal principles.

Common law courts grew up gradually as offshoots of the authority of the King and, as the very word 'court' indicates, these courts of justice were originally a part of the Royal Court. They were not created by law in order to administer pre-existing laws. They were created, or grew up, in order to solve pressing practical questions – to dispose of arguments, to solve disputes, and to suppress violence and theft. As they developed into what we would today recognise as courts of law, they actually created the law as they went along.

Eventually their decisions began to fall into regular and predictable patterns, people began to take notes of what the judges were deciding, and in due course there emerged the modern 'law reports'.

(Atiyah, P.S. *Law and modern society*. (Oxford: Oxford University Press, 1995))

The contribution of common law to social order: the tranquillity of the state

The content of most of the law at the time that the foundations of the common law were being laid was directed at preventing bloodshed by recognising rights to property and personal freedom. Until the 12th century, the *vendetta* had been an integral part of English life. But the ending of bloody feuds in England roughly coincided with the establishment of the King's Courts in the 12th Century. The courts not only punished criminals, but provided a peaceful means of resolving disputes over land and other property. The courts offered a service to the public. Instead of solving disputes by violence, a judge would rule on rights and wrongs and offer a remedy. In the resolution of disputes over land, contracts and debts, as well as dealing with criminal offences, the courts were supporting social order and the tranquillity of the state. The ability to 'resort' to law is preferable to the ability to 'resort to violence' and this is part of the critical social function of law. As we will see in Chapter 6 and the discussion about the need for access to justice, some will argue that if citizens are denied access to the courts they will 'take the law into their own hands'. Those concerns are similar to the concerns of Henry II some 800 years ago.

The development of equity

The word 'equity' means fair or just in its wider sense, but its legal meaning refers to legal rules that were developed by the courts to overcome some of the inflexibility of the rules and procedures of common law courts.

By the 15th century the procedures of the common law courts had become slow, expensive and very technical. Interestingly, these are problems that people complain of today as will be discussed in Chapter 6. Despite the development of common law courts between the 12th and 15th centuries, the King himself continued to be a source of English law. Citizens petitioned the King to 'redress their grievances' which meant pleading with him directly to hear complaints and provide a remedy. For a time the King dealt with these petitions himself, but as the work increased he passed them to his senior legal adviser, the Chancellor (who was always a cleric), as the 'Keeper of the King's Conscience'. The King, through his Chancellor, eventually set up a special court, the Court of Chancery, to deal with these petitions. The Chancellor dealt with these petitions on the basis of what was **morally** right. The Chancellor would give or withhold relief, not according to any precedent, but according to the effect produced upon his own individual sense of right and wrong by the merits of the particular case before him. In 1474 the Chancellor issued the first decree in his own name, which began the independence of the Court of Chancery from the King's Council and the development of a system of legal principles known as 'equity' which was different from the common law.

Equity created **new rights**, for example by recognising trusts (somebody holding legal title on behalf of another 'beneficiary') and giving beneficiaries rights against trustees. The common law did not recognise such a device and regarded the trustees as owners.

Equity also created **new remedies**. If the Chancellor was convinced that a person had suffered a wrong, the court would grant a remedy (i.e. they would devise some way to ensure that something was done to put right the wrong that had been done to the person). In this way, equity created new remedies that were not available in the common law courts. At common law, the main remedy that a person could obtain

was the remedy of money compensation or damages. However, in equity more flexible remedies were developed such as **specific performance**, which is an order telling a party to perform their part of a contract, or **injunction**, usually an order to stop a person doing a particular act, like acting in breach of contract (a prohibitory injunction).

In time, however, the procedures of the Court of Chancery became expensive and it took a long time for cases to be dealt with by a judge and for a decision to be given. By the 19th century the court was the subject of considerable criticism. It was around this time that the famous English author Charles Dickens wrote his novel *Bleak house* which was deeply critical of the procedures of the Court of Chancery.

This is the Court of Chancery, which has its decaying houses and its blighted lands in every shire, which has its worn-out lunatic in every madhouse and its dead in every churchyard, which has its ruined suitor with his slipshod heels and threadbare dress borrowing and begging through the round of every man's acquaintance, which gives to monied might the means abundantly of wearying out the right, which so exhausts finances, patience, courage, hope, so overthrows the brain and breaks the heart, that there is not an honourable man among its practitioners who would not give – who does not often give – the warning, 'Suffer any wrong that can be done you rather than come here!'

(Extract from Chapter 1 of *Bleak house* by Charles Dickens)

In 1873, the Common Law Courts and Courts of Equity were combined in the Judicature Acts 1873–75. Although one of the divisions of the High Court is still called the Chancery Division, all courts now deal with both common law and equitable principles and remedies. The Chancery Division of the High Court deals with company law, conveyancing, property, wills and probate, all of which are heavily influenced by equity. Equity has added new principles to the body of common law and remedies for those who have suffered an injustice.

SELF-ASSESSMENT QUESTIONS

1. Name three civil law and three common law jurisdictions.
2. Name three mixed law jurisdictions.
3. What are the most important points of difference between civil and common law jurisdictions?
4. In what way did the development of the common law support social order?
5. How did the development of equity mitigate some of the problems that had developed in the common law?
6. Name and explain an equitable remedy.
7. Which areas of law remain heavily influenced by equity?

1.5 Classification of law

ESSENTIAL READING

- Holland and Webb, Chapter 1 'Understanding the law'.

FURTHER READING

- Stolarch, Chapter 2 'Sources of law in England & Wales'.

Lawyers have generally classified the law into several broad areas, although this is complicated by the fact that some of the basic terminology has different meanings depending on the context.

1.5.1 Three different meanings of the term 'common law'

Common law and statute law: when common law is contrasted with statute law, common law is referring to the law found in the decisions of the courts rather than the legal rules contained in Acts of Parliament (statutes).

Common law and equity: in the previous section we described how equity developed as a body of law reflecting principles of 'conscience' and designed to do justice in situations where the common law was not able to do so. Even though the courts of equity were combined with the common law courts in the 19th century, there are still two distinct bodies of case law – common law and equity. Modern courts will refer to certain principles or remedies as equitable, contrasting them with common law principles and remedies.

Common law and civil law: in this context, the distinction being drawn is between the English legal system and the family of common law jurisdictions with civil law jurisdictions whose systems are derived from Roman law – such as Germany, France and Japan. Interestingly, while England and Wales is a common law jurisdiction, the legal system of Scotland is based largely on civil law.

1.5.2 Public law and private law

Private law deals with relations between individuals where the state is not directly involved – such as the enforcement of contracts or ownership of property. Public law, by contrast, deals with the relationship between citizens and the state; for example, where an individual believes that their human rights have been infringed by an action of the state. **Judicial review** is the procedure by which citizens can seek to challenge the decision, action or failure to act of a public body, such as a government department or a local authority or other body exercising a public law function. In an action for judicial review, the judiciary will assess the extent to which a public body or person has acted within their legal powers. This includes actions of government ministers. See, for example, the case of *R v Lord Chancellor ex p Witham* [1997] 2 All ER 779 in which the Divisional Court of the High Court (Queen's Bench Division) held that the Lord Chancellor had exceeded his powers (*ultra vires*) in removing a provision that citizens on low incomes would be exempt from paying court fees to access the courts. It was held that the action denied their right to a fair trial. Mr Justice Laws gave the leading judgment. He said that access to justice at an affordable price was a constitutional right. It was a basic or fundamental right which could not be revoked unless specifically permitted by Parliament.

1.5.3 Civil law and criminal law

There is also another meaning of 'civil law'. When dealing with the law **within** the English legal system, as opposed to contrasting the English legal system with civil law jurisdictions, civil law can be contrasted with criminal law. In this context, civil law is a form of private law and involves the resolution of disputes between citizens or businesses. Criminal law, on the other hand, is an aspect of public law in which the state will prosecute an individual for behaviour that the state wishes to control and which is deemed to be morally reprehensible. In criminal law the state prosecutes an individual in the name of the Crown on behalf of society at large. This is why cases are reported as '*Regina v ...*' which stands for 'the Queen against ...'

Standard of proof: in the English common law system, an important distinction between civil and criminal law is in the 'standard of proof' required for different types of case. The standard of proof relates to the requirement for the facts of cases to be proved by evidence. How sure is the court that the evidence proves the facts? In criminal cases, the prosecution is required to prove the case in court 'beyond reasonable doubt'. This is a demanding standard justified by the fact that the accused is facing the possibility of a criminal penalty being imposed if found guilty. In civil cases, the standard of proof is on 'a balance of probabilities', a less challenging requirement which means that the court merely has to be of the view that it is more likely than not that the defendant is liable.

Some major subdivisions of civil law

Contract law: this deals with legally binding agreements between parties. Contracts are used to cover transactions relating to a wide range of issues such as sale of goods, sale of land, employment relationships, etc. Key areas of court action relate to breach of contract.

Law of tort: a tort is a civil wrong which causes another person to suffer damage or loss. The law of tort covers a body of civil obligations, rights and remedies. Where a person has suffered some sort of personal or financial damage as a result of the wrongful actions of another person they may be liable under the law of tort to claim financial compensation. Key areas of court action relate to negligence (careless behaviour); and defamation (writing or speaking a false statement about someone which damages their reputation).

Family law: family law deals with matters relating to family and domestic relationships. Issues dealt with in family courts include distribution of property on the breakdown of relationships, arrangements relating to children and child support.

Land law: land law is the set of rules that govern the land and anything attached to it, such as trees or buildings; or anything in it; for example, treasure or oil. Key areas of court action relate to disputes over rights to land, rights across land, rights in relation to the use of land and boundaries between neighbouring land.

SELF-ASSESSMENT QUESTIONS

1. Explain the difference between civil and criminal law.
2. Explain the differences within the following statements:
 - ▶ 'England and Australia are common law countries but Japan and China are not.'
 - ▶ 'At common law even an unfair contract term would be enforced, but under the Unfair Contract Terms Act such terms may not be enforced.'
 - ▶ 'At common law the only remedy was damages, but equity has specific remedies such as the injunction.'
3. What is the standard of proof in civil and criminal cases? Why do you think the standard is different?
4. What is a 'tort' and what is the remedy for a tort?

1.6 Constitutional principles and the legal system

FURTHER READING

- Slapper and Kelly, Chapter 2 'The rule of law and human rights'.
- Rivlin, Chapter 4 'The invisible palace II: the constitution'.
- Partington, Chapter 3 'Law-making: authority and process'.

1.6.1 The constitution

When we talk of a country's 'constitution' we are referring to the way a country is governed and the way that power is organised and distributed. Many countries, such as the USA, Germany and more recently South Africa, have **written constitutions** in which the rules for the governance of the country are laid down in a single document and are specially protected so that changes to those rules are virtually impossible to make. In the UK there is no written constitution which explains in one single document how power is divided and exercised. Instead, constitutional rules and principles are scattered over a range of written materials. The Human Rights Act 1998, referred to earlier, is not a written constitution, but is a single set of rules guaranteeing fundamental freedoms and rights.

The unwritten constitution in the UK has developed over many hundreds of years and the rules relating to governance can be found in statutes, common law, custom and what are known as **constitutional conventions**, which are longstanding practices that are so widely recognised that essentially they have become unwritten rules. So when it is said that the UK does not have a written constitution, it is perhaps more accurate to say that the UK constitution is partly written (in statutes and common law precedents), but that it is largely 'uncodified'.

1.6.2 Constitutional principles

In the UK constitutional arrangements, three of the most important principles are:

1. the separation of powers
2. the sovereignty of Parliament
3. the rule of law.

1. The separation of powers

ESSENTIAL READING

- **Parliamentary briefing on separation of powers (2011)**
www.parliament.uk/briefing-papers/sno6053.pdf

Within the modern state there are three main centres of power:

- a. the legislature – which is responsible for making new laws (in the UK this is Parliament)
- b. the executive – which is responsible for implementing the law and running the country
- c. the judiciary – which is responsible for determining legal disputes and interpreting legislation passed by the legislature.

The separation of powers between the three branches of the state rests on the idea that a division of power prevents the accumulation of too much power in the hands of one body or person and provides a system of 'checks and balances'. One of the earliest statements of the separation of powers was given by the French political thinker Montesquieu in 1748:

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty ... there is no liberty if the powers of judging is not separated from the legislative and executive ... there would be an end to everything, if the same man or the same body ... were to exercise those three powers.

Montesquieu, *The spirit of laws*. (c.1748)

Thus, for example, the judiciary have responsibility for checking that the executive governs according to law – that it does not exceed its lawful powers.

The legislature has responsibility for creating new laws; however, the judiciary are responsible for the interpretation of that law. The judiciary are independent of the legislature and executive and are not subject to interference by the Government.

Recent changes to the English constitution under the **Constitutional Reform Act 2005** (CRA 2005) have been introduced to strengthen the formal separation of powers. The Act created a separate Supreme Court and the Lord Chief Justice replaced the Lord Chancellor as head of the judiciary in England and Wales. It placed a statutory duty on ministers to uphold judicial independence and made provision for the establishment of an independent Judicial Appointments Commission.

The independence of the judiciary

ESSENTIAL READING

- **United Nations Basic Principles on the Independence of the Judiciary**
http://apps.americanbar.org/rol/docs/judicial_reform_un_principles_independence_judiciary_english.pdf
- **Lord Phillips 'Judicial independence' lecture at the Commonwealth Law Conference, Kenya, September 2007**
http://www.americanbar.org/content/dam/aba/directories/roli/misc/judicial_reform_un_principles_independence_judiciary_english.authcheckdam.pdf

An essential element in the operation of the rule of law is an independent judiciary. This means that individual judges and the judiciary as a whole should decide cases according to law, free from interference by the executive and separate from the

legislature. They should be both impartial and independent of all external pressures and of each other. This is important for public confidence in the judiciary and for the proper functioning of the justice system according to law. Improper pressure could be exerted by the executive, the legislature, litigants, pressure groups, the media or, indeed, more senior judges. Judges are required to decide cases only on the evidence presented in court by the parties and in accordance with the law. This is essential for the delivery of fair and impartial justice.

As will become clear in later chapters of this module guide, the constitutional position of the judiciary in relation to both the legislature and executive is a live and often controversial issue. There is considerable scholarly debate about the question of the extent to which the role of the judiciary in interpreting legislation and developing the common law overlaps with the responsibility of the legislature. There is also debate about the extent to which, in exercising their judgment in relation to the Human Rights Act 1998, the judiciary, and in particular the UK Supreme Court, is involving itself in what are essentially political rather than legal issues. This raises the question of the extent to which the judiciary should be **accountable** as well as **independent**. These issues are discussed in detail in Chapters 3 and 5 of the module guide. In recent years the role of the judiciary in disputes between the citizen and the state has increased alongside the growth in governmental functions. The responsibility of the judiciary to protect citizens against unlawful acts of government has thus increased, and with it the need for the judiciary to be independent of government. As Lord Phillips, the first President of the UK Supreme Court noted in 2011:

The citizen must be able to challenge the legitimacy of executive action before an independent judiciary. Because it is the executive that exercises the power of the State and because it is the executive, in one form or another, that is the most frequent litigator in the courts, it is from executive pressure or influence that the judiciary are particularly to be protected.

The importance of an independent judiciary and the need to protect that independence is reflected in the provisions of the CRA 2005. At a time of change in constitutional arrangements, the CRA 2005, for the first time, provided statutory protection for judicial independence. Section 3 states that:

The Lord Chancellor, other ministers of the Crown, and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary.

Particular duties imposed under s.3 of CRA 2005 to ensure judicial independence include:

- ▶ the Lord Chancellor and other ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary
- ▶ the Lord Chancellor must have regard to the need to defend judicial independence and the need for the judiciary to have the support necessary to enable them to exercise their functions.

2. The sovereignty of Parliament

ESSENTIAL READING

- **Parliament website explanation of Parliamentary sovereignty**
www.parliament.uk/about/how/sovereignty/

Parliamentary sovereignty is a fundamental principle of the UK constitution. It makes Parliament the supreme legal authority in the UK, which can create or end any law. Generally, the courts cannot overrule its legislation and no Parliament can pass laws that future Parliaments cannot change. Parliamentary sovereignty is the most important part of the UK constitution. Since the UK joined the EU in 1973, however, EU law takes priority over UK national laws and in those circumstances the UK Parliament is subordinate to EU legislators. But for UK domestic law Parliament remains supreme. Any law passed by Parliament takes precedence over common law and where there is a conflict between statute and common law, 'the statute will prevail'. The statute will be deemed to have overruled the pre-existing common law (see Chapter 4 for a fuller discussion).

3. The rule of law

ESSENTIAL READING

- Lord Bingham 'The rule of law' 6th Sir David Williams Lecture, November 2006
www.cpl.law.cam.ac.uk/sir-david-williams-lectures/rt-hon-lord-bingham-cornhill-kg-rule-law

The rule of law is a critical constitutional concept which is used to describe the factors necessary for a well-functioning or healthy state and, in particular, to constrain the exercise of arbitrary power. At its most basic, the rule of law dictates: (a) that a citizen should only be punished if it is proved in court that they breached a law, so that people cannot be punished arbitrarily; and (b) that no person is above the law, and everyone is equal before the law. This means that the law applies to everyone regardless of social, economic or political status or, indeed, wealth.

The idea of the rule of law was known to philosophers such as Aristotle, writing around 300 years BC, but the British constitutional theorist Albert Venn Dicey, writing in the 19th century, popularised the concept of the rule of law. One of the most influential contemporary formulations of the rule of law was offered in 2006 by Lord Bingham, a famous English judge. Lord Bingham's articulation of the fundamental principle of the rule of law is that:

... all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.

Lord Bingham then set out eight essential 'ingredients' of the rule of law.

1. The law must be accessible, intelligible, clear and predictable.
2. Questions of legal right and liability should normally be resolved by the application of law rather than the exercise of discretion.
3. The laws of the land should apply equally to all, except where objective differences justify differentiation.
4. The law must give adequate protection to human rights.
5. Some means should be provided for the resolution of civil disputes that do not involve excessive cost or delay.
6. Ministers and public officers must exercise their powers reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers.
7. The adjudicative procedures provided by the state should be fair.
8. The state must comply with its obligations in international law.

Judicial independence and the rule of law

ESSENTIAL READING

- 'Commentary on the Bangalore Principles of Judicial Conduct' United Nations Office on Drugs and Crime, 2007
www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf

An essential element in the rule of law, which is implicit in Lord Bingham's eight principles but not spelled out explicitly, is the centrality of the concept of judicial independence to the rule of law. The Bangalore Principles of Judicial Conduct (adopted in 2002) set out a code of judicial conduct which has been accepted widely around the world. The first of the Bangalore Principles states:

Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

In its commentary on the Bangalore Principles, the United Nations Office on Drugs and Crime notes that judicial independence is a responsibility imposed on each judge to enable him or her to adjudicate a dispute honestly and impartially on the basis of the law and evidence, without external pressure or influence and without fear of interference.

The core of the principle of judicial independence is the complete liberty of the judge to hear and decide the cases that come before the court; no outsider – be it government, pressure group, individual or even another judge – should interfere, or attempt to interfere, with the way in which a judge conducts a case and makes a decision.

Individual and institutional independence

Judicial independence refers to both the individual and the institutional independence required for decision-making. 'Individual independence' refers to the state of mind of the judge while 'institutional independence' relates to the relationship between the judiciary as an institution and other branches of government.

Why is the rule of law important?

ESSENTIAL READING

- **World Justice Project** <http://worldjusticeproject.org/what-rule-law>
- **Tamanaha, B.Z. 'The history and elements of the rule of law' Washington University in St. Louis, Legal Studies Research Paper No. 12-02-07.**
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2012845

The **World Justice Project (WJP)** assesses the extent to which different states around the world meet the requirements of the rule of law. The WJP argues that the rule of law matters because:

... it is the underlying framework of rules and rights that make prosperous and fair societies possible. The rule of law is a system in which no one, including government, is above the law; where laws protect fundamental rights; and where justice is accessible to all ... Where the rule of law is weak, medicines fail to reach health facilities, criminal violence goes unchecked, laws are applied unequally across societies, and foreign investments are held back. Effective rule of law helps reduce corruption, improve public health, enhance education, alleviate poverty, and protect people from injustices and dangers large and small. Strengthening the rule of law is a major goal of governments, donors, businesses, and civil society organizations around the world.

(World Justice Project, Introduction to Rule of Law Index 2014
http://worldjusticeproject.org/sites/default/files/files/introduction_key_findings.pdf)

According to the WJP, rule of law systems are those in which four universal principles are upheld:

- (1) The government and its officials and agents as well as individuals and private entities are accountable under the law.
- (2) The laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property.
- (3) The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.
- (4) Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.

(<http://worldjusticeproject.org/what-rule-law>)

The WJP goes on to elaborate essential rule of law 'factors' which should be evident in healthy societies. These factors are as follows:

- ▶ **Limited government powers:** in a society governed by the rule of law, the government and its officials and agents are subject to and held accountable under the law.

- ▶ **Absence of corruption:** the absence of corruption – conventionally defined as the use of public power for private gain – is one of the hallmarks of a society governed by the rule of law.
- ▶ **Order and security:** human security is one of the defining aspects of any rule of law society. Protecting human security, mainly assuring the security of persons and property, is a fundamental function of the state.
- ▶ **Fundamental rights:** under the rule of law, fundamental rights must be effectively guaranteed. A system of positive law that fails to respect core human rights established under international law is at best 'rule by law'.
- ▶ **Open government:** open government is essential to the rule of law. It involves engagement, access, participation and collaboration between the government and its citizens, and plays a crucial role in the promotion of accountability.
- ▶ **Civil justice:** in a rule of law society, ordinary people should be able to resolve their grievances and obtain remedies in conformity with fundamental rights through formal institutions of justice in a peaceful and effective manner, rather than resorting to violence or self-help. Civil justice requires that the system be accessible, affordable, effective, impartial and culturally competent. Accessibility includes general awareness of available remedies, availability and affordability of legal advice and representation, and absence of excessive or unreasonable fees and hurdles. Impartiality includes absence of arbitrary distinctions, such as social and economic status, as well as decisions that are free of improper influence by public officials or private interests. Effective civil justice also implies that court proceedings are conducted in a timely manner and judgments are enforced without unreasonable delay. Finally, in a rule of law society, it is essential that alternative dispute mechanisms provide effective access to justice, while refraining from binding persons who have not consented to be bound by the mechanism.
- ▶ **Criminal justice:** an effective criminal justice system is a key aspect of the rule of law, as it constitutes the natural mechanism to redress grievances and bring action against individuals for offences against society. An effective criminal justice system is capable of investigating and adjudicating criminal offences effectively, impartially and without improper influence, while ensuring that the rights of suspects and victims are protected.

It is arguable that in the **absence** of these rule of law protections, societies may be vulnerable to the use of arbitrary power, totalitarianism and corruption.

On the other hand, some modern legal scholars have argued that the concept of the rule of law has become so vague and all-encompassing that it has lost any real meaning. As Brian Tamanaha (2012) has commented:

It is necessary to maintain a sharp analytical separation between the rule of law, democracy and human rights, as well as other good things we might want, like health and security, because mixing all of these together tends to obscure the essential reality that a society and government may comply with the rule of law, yet still be seriously flawed or wanting in various respects. Or to put the crucial point another way, the rule of law may be a necessary element of good governance and a decent society, but it is certainly not sufficient.

The requirements for the rule of law, as set out by the WJP, are demanding and wide ranging. In addition to constitutional principles, the WJP argues the need for well-functioning civil and criminal justice systems and alternative forms of dispute resolution, which are regarded as evidence of a well-developed legal culture underpinned by rule of law values.

In Chapters 6 and 7 we examine the English civil and criminal justice systems in light of the rule of law standards set out by the WJP. Throughout the study of this module, it is important to consider the extent to which the institutions and processes of the English legal system, and indeed the institutions and processes of other jurisdictions, meet the rule of law requirements set out by Lord Bingham and the WJP. **For many societies and justice systems, these requirements are aspirational.** But although a society may

not yet meet all of the requirements, striving to achieve rule of law objectives and to embed rule of law values is likely to guard against arbitrary government and defective justice systems. As Lord Bingham said in the Epilogue to his book *The rule of law*:

The concept of the rule of law is not fixed for all time. Some countries do not subscribe to it fully, and some subscribe only in name, if that. Even those who do subscribe to it find it difficult to apply all its precepts quite all the time. But in a world divided by differences of nationality, race, colour, religion and wealth it is one of the greatest unifying factors, perhaps the greatest, the nearest we are likely to approach to a universal secular religion. It remains an ideal, but an ideal worth striving for, in the interests of good government and peace, at home and in the world at large.

Summary

- ▶ The constitution comprises the rules for governance of society and distribution of power.
- ▶ The English constitution is uncodified and found in common law, statute and constitutional conventions.
- ▶ Key constitutional principles are the separation of powers, sovereignty of Parliament, and the rule of law.
- ▶ Rule of law principles evident in fair societies include accessible and intelligible laws, accountable government, fair legal processes and protection of fundamental rights.
- ▶ An independent judiciary is an essential element of the rule of law.
- ▶ Access to justice is an essential element in the operation of the rule of law.

SELF-ASSESSMENT QUESTIONS

1. How would you distinguish between 'rule of men' and 'rule of law'?
2. Why is an independent judiciary essential to the rule of law?
3. Why is access to justice an essential element in the rule of law?
4. How does the rule of law protect societies from tyranny?
5. Does the rule of law guarantee a just society?
6. In what sense might we say that the rule of law is an 'aspiration'?

1.7 Doing justice in legal systems

ESSENTIAL READING

- Holland and Webb, Chapter 5 'Law, fact, and language'.

FURTHER READING

- Genn, H. *Judging civil justice (The Hamlyn Lectures)*. (Cambridge: Cambridge University Press, 2009) [ISBN 9780521134392] Chapter 1 'Introduction: what is civil justice for?' (in the Legal system and method study pack).

1.7.1 The essentials of fair justice and fair process

There is no simple, single agreed definition of the nature of 'justice' or the requirements of just process in legal systems. However, in the English common law system there is agreement that there are certain fundamental matters that are essential for legal proceedings to be fair. Procedural fairness is concerned with the procedures used by a decision-maker. It requires that a fair and proper procedure be used when making a decision. Fairness is important for the 'legitimacy' of the justice system (i.e. that citizens recognise the authority of the law, and respect and obey the decisions of judges in courts). The essentials of fair process, long recognised within

English common law, are that: laws should be known; that an individual should know the nature of the case against them; and that they should be given an opportunity to defend themselves. These principles ensure that a fair decision is reached by an objective and impartial decision-maker.

The distinction between law and facts

In both civil law and common law legal systems, when people are in dispute over a legal issue, or where a person is accused of a crime, it is for the courts to decide the outcome of the case according to the **legal merits** of the case. The judge gives a legal determination or ruling which is then enforceable by the state. So if a person is accused of murder and the court finds them guilty, they will be sent to prison. If a car driver has injured a pedestrian and the court finds that they have driven carelessly, they may be ordered to pay compensation to the injured person and they will be forced to do so by the state. In both of these situations, and in all legal systems, the job of the court is to determine the **facts** of the case and apply the relevant **law** in order to reach an accurate legal determination. Although there is sometimes a blurred line between what is a 'question of fact' and what is a 'question of law', for practical purposes we can say that questions of fact are those which attempt to prove what happened in a particular case. Was the driver exceeding the speed limit when he knocked over the pedestrian? Did the pedestrian run into the road without looking? These questions of fact will be determined by various types of evidence such as statements made by witnesses or expert evidence. Questions of law are the legal principles that may be argued in a case and procedural rules determining how the case will be dealt with in a court.

In dealing with legal cases and reaching a legal determination of the case the courts will follow certain rules about what evidence of the facts needs to be provided, how and when the evidence should be provided.

Substantive and procedural law

'Substantive law' is law that defines, regulates and creates the obligations and rights of a particular party. By contrast 'procedural law' or 'adjectival law' deals with the steps that have to be taken in order to enforce the substantive rules, both before cases are brought to court and when they are being heard in court by the judge and in criminal cases by a judge and jury. The system of procedural rules is designed to ensure that judges in adversarial proceedings (see below) have all of the appropriate evidence available so that they can determine the essential or 'material' facts of the case and apply the substantive law to those facts. For example, in criminal trials hearsay evidence is excluded. This is where a witness did not directly see or hear something important but was informed of it by another person. For evidence to be 'admissible' in court, the court must be able to hear a witness who saw or heard something and be able to observe them being cross-questioned, so that their credibility can be tested.

The significance of procedural law is that it is thought to guarantee fairness in legal proceedings and to increase the chance that judges will make an accurate decision on the basis of the facts and the law – a 'substantively just' decision. Jeremy Bentham (a famous 19th-century English legal philosopher) saw the rules of procedure as being central to the machinery of justice. For Bentham, the power of procedure was in the link between evidence and correct decisions (what he called 'rectitude' of decisions).

Procedural justice

Procedure is also important to litigants – the parties involved in legal cases – and their perceptions of fairness. Those involved in legal proceedings want an opportunity to put their case; the opportunity to influence the judge; a judge who is impartial and even-handed; and to be treated with courtesy and respect. So procedural justice is not only important in leading to correct legal decisions or substantive justice, but it is an important influence on citizens' perceptions of the fairness of legal processes.

1.7.2 Inquisitorial and adversarial procedure

ESSENTIAL READING

- Kessler, A.D. 'Our inquisitorial tradition: equity procedure, due process, and the search for an alternative to the adversarial' (2005) 90 *Cornell L Rev* 1181 <http://cornelllawreview.org/files/2013/03/Kesslerfinal.pdf>

One of the differences between common law and civil law jurisdictions is in their approach to legal proceedings. Although the differences can sometimes be overstated, common law court proceedings are generally based on 'adversarial' procedures in which the parties are responsible for preparing their case and collecting their evidence. At the trial of the case in court the parties' advocates will present their clients' respective arguments in a sort of contest before a judge (or judge and jury). Witnesses will be called to give evidence and then cross-examined on their evidence. The role of the judge is to remain relatively passive during proceedings, ensure that procedures are followed and at the end of the hearing or trial give the decision based on a view of the legal merits of the parties in relation to the facts presented. Adversarial processes work best when there is a rough equality between the parties in terms of representation and resources.

By contrast, in civil law jurisdictions, legal cases are determined on the basis of 'inquisitorial' procedures. In inquisitorial proceedings the judge plays a more active role in the investigation of a case. The judge will decide which witnesses should be called and will take responsibility for uncovering the facts of the case. In serious criminal cases in France, judges may be involved as part of the investigation as examining magistrates. At the trial the judge assumes a direct role, conducting the examination of witnesses, often basing his or her questions on the material in the pre-trial dossier. Neither the prosecution nor the defence has the right to cross-examine. The use of juries in civil law jurisdictions is rare although lay assessors frequently sit alongside judges in serious criminal cases. The adversarial and inquisitorial models are distinguished primarily by whether the parties or the court control three key aspects of the litigation: initiating the action; gathering the evidence; and determining the sequence and nature of the proceedings (Kessler, 2005).

SELF-ASSESSMENT QUESTIONS

1. What is the difference between procedural and substantive justice?
2. How do procedural rules contribute to just outcomes?
3. Could a judge reach an accurate decision by an unfair process?
4. Why is it important that citizens perceive court processes to be fair?
5. What are some of the key differences between adversarial and inquisitorial procedures?

NOTES

2 The courts and their work

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LEARNING OUTCOMES

By the end of this chapter, and having completed the Essential readings and activities, you should be able to:

- ▶ describe the hierarchy of the courts
- ▶ understand in broad terms the composition and jurisdiction of the courts
- ▶ understand the relationship between European and English courts.

ESSENTIAL READING

- Holland and Webb, Chapter 1 'Understanding the law'.

FURTHER READING

- Slorach, Chapter 3 'The court system of England & Wales'.
- Cownie, Bradney and Burton, Chapter 3 'Courts in "the English legal system"'.

2.1 Introduction

This chapter introduces you to the names and work of the main courts in the justice system. A basic understanding of the hierarchical relationship of the courts and of the kinds of cases with which different courts deal is necessary before moving on to the discussion of precedent and statutory interpretation in Chapters 3 and 4. Although some of the terms used at this stage will be unfamiliar, as you progress through your reading, and as you begin to read some cases, the terminology will become more familiar. If you are not sure of the meaning of a term as you read through the chapter you should check the meaning by researching it on the VLE or internet.

2.2 Some preliminary distinctions

2.2.1 Civil and criminal courts

Civil courts exist in order to resolve disputes between private citizens or between a citizen and the state. These disputes may involve, for example, breach of contract, liability for injury in the law of tort, property rights, family disputes or the wrongful exercise of power by a public authority. The person bringing the claim is the 'claimant'; and the person defending the claim is the 'defendant'. If the defendant is found liable, the court has the power to order the defendant to pay monetary compensation to the claimant or to order some other remedy.

Criminal courts exist in order to hear and determine cases in which people are accused of breaking the criminal law. The case will be brought by the 'prosecution' against an 'accused' or 'defendant'. If the defendant is found guilty, the criminal court has the power to inflict punishment in the form of a fine or imprisonment. The vast majority of prosecutions are brought by the Crown Prosecution Service or other state agencies.

2.2.2 'First instance' and 'appeal' courts

In both civil and criminal cases, once a decision has been given by the court, it may be possible to appeal against the decision to a higher court. Thus there is a further distinction between 'first instance' or trial courts and 'appellate courts'.

2.2.3 Unanimous, concurring and dissenting judgments

In some of the courts in the hierarchy, judges sit in panels rather than alone (for example, the Supreme Court and the Court of Appeal). In these cases, judges normally sit in panels of 3, 5, 7 or 9 because in the English common law tradition it is permissible and legitimate for a judge to disagree with others on a judicial panel. In such a case the judge will deliver a 'dissenting judgment' and the case will be decided by the majority. Where all of the judges agree, the decision will be unanimous. Even when all of the judges agree, it is quite common for all of the judges hearing a case to write their own decision. Although the judges agree, they may have a slightly different interpretation of some of the issues in the cases or wish to express their view slightly differently from the other judges. Where judges write a decision agreeing with the other members of the panel it is called a 'concurring' judgment.

2.3 The hierarchy of the courts

The courts in the English legal system, shown in the diagram below, are in a **hierarchical relationship**. Courts are organised on the basis of seniority. The more senior the court in the hierarchy, the greater will be the authority of the decisions of the court. So the decisions of the Supreme Court (formerly the House of Lords) are the most important and authoritative decisions of all the courts. The Court of Appeal and High Court are also authoritative, but less so.

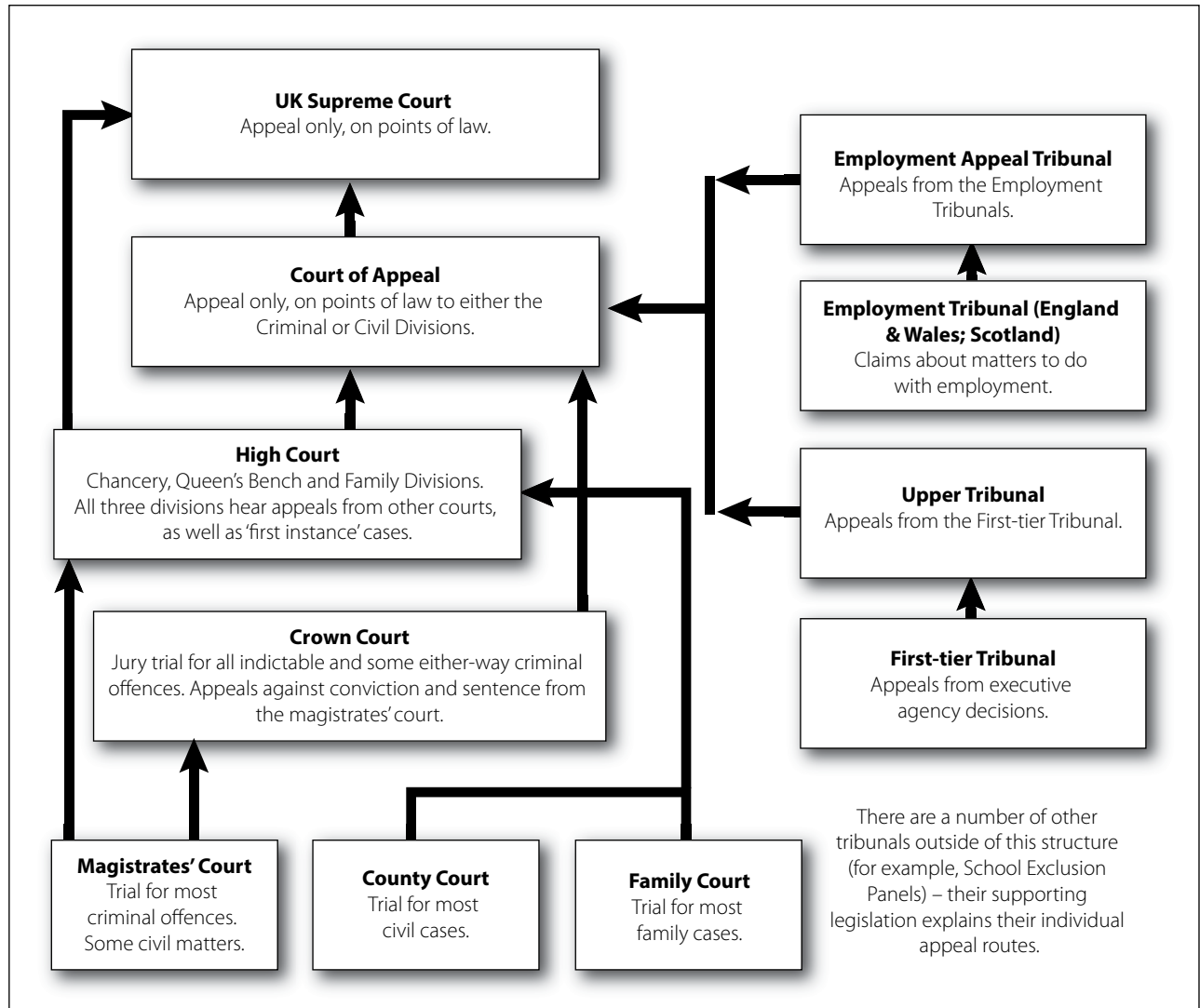


Figure 2.1: The court structure (adapted from www.judiciary.gov.uk/wp-content/uploads/2012/08/courts-structure-0715.pdf)

The courts and tribunals at the lower end of the hierarchy deal with the vast mass of civil disputes and criminal cases (what are known as 'inferior' or 'subordinate' courts and tribunals); while the courts at the top of the hierarchy hear a small number of the most important cases on appeal in order to ensure that the decision of the trial court was correct and to clarify points of law ('superior' courts). The judges who sit in the superior courts are the most senior and distinguished members of the judiciary. Superior courts have unlimited jurisdiction so can hear cases of any value or legal complexity. Inferior courts have a limited jurisdiction. The Court of Appeal, High Court and Crown Courts are now known as the 'senior' courts.

2.3.1 The United Kingdom Supreme Court (UKSC) (Formerly the Appellate Committee of the House of Lords)

ESSENTIAL READING

- Department for Constitutional Affairs 'Constitutional reform: a Supreme Court for the United Kingdom' Consultation Paper, 2003
<http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/consult/supremecourt/supreme.pdf>
- Thomas, C. 'Decision-making by the United Kingdom Supreme Court and Judicial Committee of the Privy Council: 2009–13' (in the Legal system and method study pack).

The UK Supreme Court was established by Part 3 of the Constitutional Reform Act 2005 and officially came into being on 1 October 2009. It replaced the Appellate Committee

of the House of Lords (referred to simply as the House of Lords) in its judicial capacity and assumed the jurisdiction of the House of Lords. The Supreme Court is, with a few exceptions, the final court of appeal in the United Kingdom, although not for criminal cases from Scotland. Most of its work involves hearing appeals on points of law of public importance from the Court of Appeal but it may occasionally hear an appeal directly from the High Court ('leapfrog' procedure). The UKSC comprises the President who is the Head of the Court (at the time of writing this is Lord Neuberger, although he is due to retire in September 2017), a Deputy President (currently Lady Hale) and 10 other Justices of the Supreme Court. It is a superior court and a court of record. Its hearings are filmed, its decisions are regularly reported and all decisions are posted on the Supreme Court website (www.supremecourt.uk/decided-cases/). It hears about 70 cases a year.

The creation of a Supreme Court was a major change both to the justice system of England and Wales and to the constitution. At the time that the change was proposed in 2003, the 12 judges of the Appellate Committee of the House of Lords (known as the Law Lords) sat as the final court of appeal and heard cases within a committee room that was located within Parliament. Although separate from the legislative function of the House of Lords as the upper chamber of Parliament, the co-location of both legislative and judicial activity was capable of causing confusion in the mind of the public. The Government's intention in creating the Supreme Court was to make absolutely clear the separation of the judiciary and executive, especially since the passing of the Human Rights Act 1998. The Government Consultation Paper published by the Department for Constitutional Affairs in 2003, which preceded the creation of the new Supreme Court, states that the purpose of the change was to make clearer the independence of the judiciary:

The intention is that the new Court will put the relationship between the executive, the legislature and the judiciary on a modern footing, which takes account of people's expectations about the independence and transparency of the judicial system ... [the functions of the Court] raise questions about whether there is any longer sufficient transparency of independence from the executive and the legislature to give people the assurance to which they are entitled about the independence of the Judiciary. The considerable growth of judicial review in recent years has inevitably brought the judges more into the political eye. It is essential that our systems do all that they can to minimise the danger that judges' decisions could be perceived to be politically motivated. The Human Rights Act 1998, itself the product of a changing climate of opinion, has made people more sensitive to the issues and more aware of the anomaly of the position whereby the highest court of appeal is situated within one of the chambers of Parliament.

2.3.2 The Judicial Committee of the Privy Council (JCPC)

The Judicial Committee of the Privy Council is the highest court of appeal for a number of Commonwealth countries, as well as the UK's overseas territories, crown dependencies and military sovereign base areas. Although the JCPC is a UK court, the substantive law which it applies is the law of the country or territory from which an appeal comes. The JCPC has been co-located with the Supreme Court since October 2009 and the judges who sit on the JCPC are the Justices of the Supreme Court occasionally sitting together with judges from constituent jurisdictions. It deals with about 40 cases per year.

2.3.3 The Court of Appeal

Although the Court of Appeal is nominally one court, it is divided into the Criminal Division and the Civil Division. The main jurisdiction of both Divisions is appellate, hearing appeals against first instance decisions.

Court of Appeal (Civil Division)

The head of the court is the Master of the Rolls (MR) who is also the Head of Civil Justice. The judges who sit in the Court of Appeal are known as a Lord or Lady Justice of Appeal. Most of the work of the court is dealing with appeals from first instance decisions in the High Court and county courts.

Court of Appeal (Criminal Division)

The Lord Chief Justice is the head of Court of Appeal (Criminal Division), and is also the Head of the Judiciary and the President of the Courts of England and Wales. He sits with Lords Justices of Appeal. The court deals with appeals against conviction or sentence from the Crown Court and also issues guidance on sentencing for the lower courts. Under s.1 of the Criminal Appeal Act 1995 'permission' is required for an appeal from the Crown Court even if it is on a point of law. The principal ground of appeal is that the conviction is 'unsafe'. Under s.9 of the Criminal Appeal Act 1995 cases may be referred to the Criminal Division of the Court of Appeal by the Criminal Cases Review Commission for the correction of a miscarriage of justice.

2.3.4 The High Court of Judicature

Like the Supreme Court and Court of Appeal, the High Court is a superior court of record whose decisions are regularly reported. The High Court deals with both civil and criminal cases at first instance and on appeal. It also has a supervisory function. Although we refer to the High Court as one court, it has three 'divisions': the Queen's Bench Division (QBD); the Chancery Division (ChD); and the Family Division (Fam).

The Queen's Bench Division (QBD)

This is the largest of the three Divisions of the High Court. The Head of the QBD is the Lord Chief Justice (LCJ). There are about 70 judges who sit in the QBD (known as High Court judges or *puisne* judges). The QBD has a wide civil jurisdiction hearing at first instance cases in tort and contract. There are several specialist courts: the Admiralty Court which deals with shipping cases; the Commercial Court which deals with business disputes; and the Technology and Construction Court. The Administrative Court deals with claims for judicial review of administrative action.

The Chancery Division (ChD)

The Head of the ChD is the Chancellor of the High Court (C) and about 18 *puisne* judges sit in this Division. Issues dealt with include bankruptcy, ownership of land, trusts and contentious probate (disputed wills). There is a patents court within the ChD with two specialist judges.

The Family Division (Fam)

The Head of the Family Division is the President (P) and there are currently 18 *puisne* judges in this Division. The court deals with matrimonial matters, issues to do with adoption and other matters concerning children.

2.3.5 The Crown Court

The Crown Court has both appellate and first instance jurisdiction and sits in about 70 different places around England. The number of places in which the Crown Court sits will be reduced as part of the government's reforms of the justice system. The government plans to close 86 court and tribunal buildings overall. The Crown Court largely deals with criminal cases brought on 'indictment' (the most serious criminal offences). It also hears appeals from magistrates' courts. Any judge of the High Court can sit to hear cases in the Crown Court and cases are also heard by circuit judges and recorders (part time circuit judges). For criminal cases heard on indictment the judge will normally sit with a jury – 12 citizens randomly selected from the register of voters. The main functions of the Crown Court are: to try cases on indictment following committal from the magistrates' court; to hear appeals by way of rehearing from summary trials conducted before magistrates; and to hear appeals by way of rehearing from certain civil trials (family proceedings and licensing) heard before magistrates.

2.3.6 The Family Court

Family cases have traditionally been dealt with in the Family Division of the High Court, the county courts and magistrates' courts. Following a review of the family justice system in 2011 a new single Family Court was established by the Crime and Courts Act 2013 and The Family Procedure (Amendment No. 3) Rules 2013/3204. The Family Court deals with virtually all family cases previously dealt with in the High Court, county courts and magistrates' courts. The change streamlines the system for family cases. The judiciary of the Family Court includes all levels of judge from High Court, circuit judges, recorders, district judges and magistrates. There is a single point of entry for the issue of proceedings and a centralised and unified administration.

2.3.7 The county court

Traditionally the county court system model has been based around the geographical dispersion of physical court buildings where access to civil justice is available on a local basis around the country. The judges who sit in the county courts are circuit judges, recorders and district judges. The jurisdiction of the County Court is relatively broad, dealing with civil cases arising from a variety of matters, such as contract, tort, insolvency and probate. The County Court is an inferior court and its decisions are not reported. Whether or not cases are heard by the County Court or by the High Court usually depends on where the dispute was originally lodged and the subsequent exercise of gatekeeping powers of the court to transfer a matter to the High Court. As a general rule, lower value and/or less complex cases are heard by the County Court and higher value and/or more complex cases are heard by the High Court. Until recently 170 county courts provided local access to civil justice in the County Court system.

In April 2014 the Civil Procedure (Amendment) Rules 2014 (SI 2014 / 407) implemented the single County Court, which indicates a move towards the unification of the courts and a practical attempt to make the civil justice system more effective and less costly. The County Court is a single model in that it is a central system which is served nationwide by business units; and the geographically dispersed physical court buildings are only one aspect of the single model system. The single County Court has the new operational features of two business centres, the Northampton Bulk Centre and the County Court Money Claims Centre at Salford; and a Contact Centre for administering telephone calls to the County Court system. The Bulk Centre relies as far as possible on a 'judge free' approach and electronic, digitalised solutions which are designed for the paperless resolution of particular types of disputes, such as Money Claims On Line (MCOL) and Direction Questionnaires; for example, in the resolution of small claims (under £10,000). The Salford Centre carries out similar work but as a paper exercise. Supporting the work of the business centres is the Loughborough Contact Centre, which filters incoming enquiries as a first point of access for incoming telephone calls to the County Court system. These new features support the overarching aim of a more efficient and less costly civil justice system by alleviating individual courthouses from the burden of the types of claims they perform.

The traditional county courts are incorporated into the single County Court model as the County Court Hearing Centres. The immediate impact of the introduction of this new model has been an initial reduction of the original 170 to 145. Further closures are expected as the improvements which the single model should deliver will theoretically continue to reduce the workload of the Hearing Centres. In February 2016, the closure of further county courts was announced as part of the overall reduction in court and tribunal buildings in England and Wales. This is part of the government's overall reform of the justice system, discussed in more detail later in this guide.

2.3.8 Magistrates' courts

Magistrates' courts are local courts dealing mainly with criminal matters. Magistrates' courts are inferior courts. They are not courts of record. The judges who sit in magistrates' courts are generally not lawyers (lay magistrates or Justices of the Peace (JP)). They are unpaid and sit part-time, generally in benches of three, assisted by a legally qualified justices' clerk, who advises the magistrates on the law but does not involve themselves in decision making. There are around 23,000 magistrates in England and Wales. There are also around 140 professionally qualified, paid judges who sit in the magistrates' courts. These are District Judges (Magistrates' Courts) or DJ (MC) (formerly known as Stipendiary Magistrates). Magistrates' courts try minor offences (summary offences) and conduct preliminary hearings of indictable offences before a case is sent to the Crown Court to be tried. Thus all criminal cases begin in the magistrates' courts and over 90 per cent of cases end there. Magistrates also deal with a wide range of civil proceedings.

2.3.9 Tribunals

Tribunals are decision-making bodies established by the state, mostly to deal with disputes between citizens and the state. There are around 70 different tribunals dealing with a wide range of subject-matter ranging across, for example, immigration, welfare benefits, education, tax and parking. Unlike general courts, most tribunals have a relatively restricted jurisdiction. Typically, tribunal panels comprise a legally qualified tribunal judge who will sit together with two non-legally qualified panel members. Tribunals tend to have less complex procedures than ordinary courts and are intended to be accessible and user-friendly so that those challenging decisions of public bodies in tribunals can proceed without legal representation.

2.3.10 Coroners

Coroners' courts are inferior courts, the decisions of which are not reported. Their main function is to inquire into the cause of sudden deaths. Coroners may be lawyers or medical practitioners and they may sit with a jury of between 7 and 11 members if that is considered necessary. Unlike courts, the process adopted in coroners' courts is inquisitorial.

2.4 European courts and relationship with English courts

2.4.1 The Court of Justice of the European Union (CJEU)

Under the European Communities Act 1972 the UK became a member of the European Communities on 1 January 1973. The effect of s.2(1) of the 1972 Act is mandatory incorporation of EU law into English law. The UK is required to give effect to any laws passed by the EU. Since the accession of the UK, the CJEU has stood above the Supreme Court as the ultimate court in disputes concerning European law. This may change in the future following the UK's vote in 2016 to leave the European Union. In internal, domestic cases, the Supreme Court remains the final appeal court in the UK.

The CJEU was established in 1954. It consists of one judge from each member state – together with eight Advocates General – who makes submissions to the court on the relevant law to assist the court. The CJEU sits in Luxembourg and is usually referred to as the European Court, but should not be confused with the European Court of Human Rights, which sits in Strasbourg. The CJEU normally sits in chambers of three or five judges, but may sit in a grand Chamber of 13 judges. An important point of procedural difference between this court and UK courts is that the CJEU always delivers a judgment of the court, without the possibility of dissenting judgments. The CJEU deals with breaches of obligations under European Treaties and the uniform judicial interpretation of European Law by member states of the European Union. Cases are not appealed to the CJEU but instead 'referred' to the CJEU under Article 267 of the Treaty on the Functioning of the European Union. It is thus a 'Court of Reference'. The Court makes the final judgment on the interpretation of EU law. The relationship between the CJEU and the UKSC is important and is discussed in Chapter 3.

2.4.2 European Court of Human Rights (ECtHR)

The European Court of Human Rights (ECtHR) is an international court based in Strasbourg and should not be confused with the CJEU in Luxembourg. The ECtHR hears cases alleging that there has been a breach of the European Convention on Human Rights. Judges of the ECtHR are full-time, elected for six years by the Council of Europe. The Court operates a two-stage procedure beginning with preliminary scrutiny by a panel of three judges who decide if the case is admissible. If a case survives this process it will proceed to a Chamber of seven judges who will normally determine the case. In exceptional circumstances a seven-judge Chamber may refer a case to a Grand Chamber of 17 judges if the case raises a serious question affecting the interpretation of the Convention. The ECtHR does not sit within the English court hierarchy, but since the UK has incorporated the European Convention on Human Rights into its domestic law through the Human Rights Act 1998, the decisions of the ECtHR are highly influential on English courts dealing with human rights issues and the UK Supreme Court generally follows the decisions of the ECtHR. See, for example, the Grand Chamber decision in a case involving the right of prisoners to vote in elections. This decision was considered by the UK Supreme Court in the case of *Chester* [2013] UKSC 63.

Summary

- ▶ The structure of the English court system is hierarchical and courts lower down the court hierarchy are bound to follow decisions of courts higher up the hierarchy.
- ▶ A major distinction is between courts of **first instance** and those with **appellate jurisdiction**.
- ▶ There is no rigid line of demarcation between civil and criminal courts since almost all the courts exercise both types of jurisdiction (except county courts).
- ▶ While not formally part of the English court hierarchy the CJEU in Luxembourg is a Court of Reference and stands above the UK Supreme Court in relation to issues of European Union Law.
- ▶ The European Court of Human Rights (ECtHR) in Strasbourg, France, deals with breaches of the European Convention on Human Rights.
- ▶ Since the Human Rights Act 1998, English courts can deal directly with alleged breaches of human rights, but their decisions are heavily influenced by the jurisprudence of the ECtHR.

SELF-ASSESSMENT QUESTIONS

1. Name the superior courts in the English court hierarchy.
2. Name the inferior courts in the English court hierarchy.
3. Explain the difference between first instance and appellate courts.
4. What kind of cases does the Chancery Division of the High Court deal with?
5. What is a tribunal?
6. Which is the final court of appeal for matters concerning European Law?
7. What does the Grand Chamber of the European Court of Human Rights do?

NOTES

3 The doctrine of judicial precedent

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LEARNING OUTCOMES

By the end of this chapter, and having completed the Essential readings and activities, you should be able to:

- ▶ understand what is meant by the doctrine of judicial precedent and why it is important in the common law
- ▶ recognise and distinguish between *ratio decidendi* and *obiter dicta*
- ▶ explain and apply the rules of binding precedent in relation to each court
- ▶ explain how the Human Rights Act 1998 affects the operation of binding precedent
- ▶ explain the extent to which judges can make law within the system of precedent.

ESSENTIAL READING

- Holland and Webb, Chapter 6 'The doctrine of judicial precedent' and Chapter 7 'How precedent operates: *ratio decidendi* and *obiter dictum*'.
- Lord Dyson MR 'Are the judges too powerful?' Bentham Presidential Address, UCL, 12 March 2014
www.judiciary.gov.uk/announcements/mor-speech-are-judges-too-powerful/
- Lord Justice Etherton 'Liberty, the archetype and diversity: a philosophy of judging' (October 2010) *Public Law* 727 (available in Westlaw through the Online Library).
- Lord Justice Laws 'The common law and Europe' Hamlyn Lecture 2013, Lecture III
www.judiciary.gov.uk/announcements/speech-lj-laws-hamlyn-lecture-2013/

FURTHER READING

- Slapper and Kelly, Chapter 4 'Sources of law: case law'.

3.1 What is the doctrine of judicial precedent?

3.1.1 The basic principles

The doctrine of judicial precedent is fundamental to the operation of common law. In practice it means that a judge deciding a particular case will look for a 'precedent' – a decision in an earlier similar case – to help them reach their decision in the case before them. One of the most important justifications for following precedents is related to the idea of doing justice. Consistency is seen as an essential element in doing justice, in the sense that similar cases coming before the courts for determination should be treated in a similar way. Another practical justification for following precedent is that if judges follow the reasoning and decisions of their judicial colleagues, the common law becomes certain and predictable. This is desirable so that people can organise their affairs knowing what the law is, and to avoid continually litigating legal points. Thus it is regarded as both fair and efficient to follow precedent. Expressed in this way, the practice of precedent is not particularly unusual and is to be found to a greater or lesser degree in most developed legal systems. Indeed, in civil law jurisdictions there is a principle of **non-binding precedent**, sometimes referred to as the doctrine of judicial consistency, according to which it would be thought erratic if the courts significantly varied their approach to similar legal questions.

The concept of binding precedent

However, in the English common law system, we talk of the doctrine of '**binding**' precedent in which the courts are **bound** to follow earlier decisions, even though a judge in a second court might not approve of the earlier precedent. Sometimes this will be referred to as the rule of *stare decisis*, which literally means 'to stand by decisions already made'. The idea of binding precedent in the common law system is to ensure fairness through consistency, to provide predictability in the law and thus to reduce the need for litigation. If people can determine what the law is, there is no need to litigate the case and indeed no point in doing so. Legal advisers can advise clients with confidence about what the legal principles are that a judge would apply in deciding a dispute in court and what the outcome would be. The rule of binding precedent is that the legal rule established in a precedent will continue to be applied in subsequent similar cases until either another court decides that the case was incorrectly decided; or for some other reason cannot be allowed to stand; or until a court higher in the hierarchy overturns the decision; or until Parliament decides to change the law by passing a new Act of Parliament that overrules or alters the rule laid down by the court.

Binding and persuasive precedents

The doctrine of **binding** precedent represents a constraint on judicial decision-making and there is a distinction between precedents which a judge may choose to follow – **persuasive** precedent – and those which a judge is bound to follow – **binding** precedent.

A precedent is **persuasive** where it is not binding, but will still be taken into account by a court. The judge will feel that they are under some obligation to explain why they are not going to follow a persuasive precedent. All serious statements made by judges of the higher courts are treated with respect and may be cited in any court. However, certain classes of especially persuasive precedent may be identified:

- ▶ *ratio* of the Judicial Committee of the Privy Council (JCPC)
- ▶ *ratio* of superior courts in other common law jurisdictions
- ▶ High Court Judges treat the decisions of other High Court Judges as very persuasive, especially where the decision was reserved (i.e. given after time for reflection). See further discussion below.

Vertical and horizontal precedent

In the English common law system, the doctrine of binding precedent means that a judge in a lower court must apply a decision made in a similar case in a higher court or, indeed, in a court at the same level. These are the concepts of **vertical** and **horizontal** precedent.

Vertical precedent – refers to the extent to which a court lower down the hierarchy is bound to follow a decision of a court higher up the hierarchy. For example, is the Court of Appeal bound to follow the decisions of the UK Supreme Court?

Horizontal precedent – refers to the extent to which a court at the same level is bound to follow its own earlier decisions. For example, is the Court of Appeal bound to follow its own earlier decisions?

The distinction between *ratio decidendi* and *obiter dicta*

The decisions of judges in reported cases contain a large amount of material. Decisions normally comprise material about the facts of the case; information about the arguments made in court; and then there is the decision of the case and the reasons for the decision – or the reasoning that leads to the decision. The essential pieces of information in a reported case that will be important for the operation of the system of binding precedent are: the **material facts** of the case; and the **application of legal principles to those facts** that leads to the decision. What constitutes the precedent that must be followed in later cases is the *ratio decidendi* – the ‘reason for deciding’. The *ratio decidendi* is often contrasted with other parts of the judgment which are regarded as *obiter dicta* – things said by the way, but which were not essential for the decision in the case. The *ratio decidendi* is essentially the legal rule that leads to the decision and it is this legal rule that is binding on a later judge. As Sir Rupert Cross explained in his book *Precedent in English law* in 1977:

The *ratio decidendi* of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him...

The ability to read a reported case and to identify its *ratio decidendi* is an essential skill of the lawyer. It is a skill that must be developed in order to make sense of the common law, to understand judicial reasoning and, ultimately, to be in a position to provide advice on legal disputes and problems.

Material facts

The ‘material’ facts of a case are the facts that are important to the decision. Not all facts in a case will be relevant to the decision and the judge will generally make fairly clear which facts are relevant. So, for example, in the famous case of *Donoghue v Stevenson* [1932] AC 562 the court dealt with the question of whether a manufacturer of a food product could be liable for causing injury to the ultimate consumer of the product as a result of negligent manufacture. In this case Mrs Stevenson was made ill as a result of consuming ginger beer poured from a brown bottle which contained a dead snail. The fact that the bottle was brown – and thus the contents could not be examined – was a **material fact**, while the fact that the content of the bottle was ginger beer was not material. The bottle could have contained lemonade or any other drink. The point was that the contents could not be examined. For an excellent account of the background to this famous case read Martin R. Taylor, QC, ‘*Donoghue v Stevenson*: the legal world’s first glimpse of the most famous litigant of all time’ (www.scottishlawreports.org.uk/resources/dvs/most-famous-litigant.html).

Distinguishing

The doctrine of binding precedent requires that a judge follows the decisions of earlier cases unless a similar earlier precedent can be ‘distinguished’. Cases can be distinguished on their material facts or on the point of law involved. This is a device sometimes resorted to by judges in order to avoid the consequences of an inconvenient decision which is, in strict practice, binding on them.

How can cases lose their binding authority?

There are three principal ways in which a case can lose its binding force:

- i. **Express or implied overruling:** a case may be expressly overruled by Parliament if Parliament chooses to do so. Alternatively, if a case has not been expressly overruled but is inconsistent with a later Act of Parliament it will be deemed to have been 'impliedly overruled'.
- ii. **Reversal:** a case is reversed when the loser appeals and the appeal court agrees with them. Sometimes cases are reversed only on some issue of fact. Where this happens the *ratio* does not lose its binding force.
- iii. **Overruling:** a case is overruled when a higher court, dealing with indistinguishable material facts, either expressly overrules the earlier case, or produces a *ratio* which is inconsistent with that of the earlier case.

How do you identify the *ratio decidendi* of a case?

This is the question that all law students ask. There is no simple way. The *ratio* does not appear underlined and in red ink in the judgment. Reported cases may run to 10, 20 or 50 pages and include judgments given by several judges in the case. The only way to identify the *ratio* is through a careful process of analysis and comprehension. Reading through the case, following the analysis of the judge, following the judge's identification of the key legal principles and understanding how they have applied those principles to the facts of the case in order to reach their decision. This is legal method and you will learn it by reading cases together with the explanation of cases that you find in your textbooks and study packs.

SELF-ASSESSMENT QUESTIONS

1. Explain the difference between a binding and a persuasive precedent.
2. Explain the difference between vertical and horizontal precedent.
3. Which part of a binding precedent is a judge bound to follow?
4. In reading a case, how can you distinguish between the *ratio decidendi* and *obiter dicta*?

3.2 The role of the judiciary in the operation of precedent**3.2.1 The doctrine of binding precedent is a judge-made rule**

It is worth noting that the doctrine of binding precedent is a limitation which the judiciary have imposed on themselves. It is not a rule of Parliament but a judicial discipline and if the judiciary were to agree on a change they would, in theory, be free to do so. This is exactly what happened in 1966 when the judges in the House of Lords (what is now the UK Supreme Court) decided to change their practice. They agreed that in the future although they would normally regard themselves as bound by their own earlier decisions, in appropriate cases they would be prepared to overrule an earlier decision. This issue is discussed in detail later in this chapter.

3.2.2 Do judges make or declare the law?

Historically there has been considerable debate about the role of the judiciary in the English common law system. Constitutionally it is for the legislature to make law and for the judiciary to give effect to that law. The judiciary are not elected representatives of the people and therefore lack legitimacy for law-making in a democratic society governed by the rule of law (what is often referred to as a 'democratic deficit'). This strict approach to the role of the judiciary was expounded by William Blackstone and is known as the 'declaratory theory' – that the role of the judge is to declare what the law is, and not to make it. An example of this approach is given by Lord Simonds in the case of *Midland Silicone Ltd v Scruttons Ltd* [1962] AC 446, where he said:

Nor will I easily be led by an undiscerning zeal for some abstract kind of justice to ignore our first duty which is to administer justice according to law, the law which is established for us by an Act of Parliament or the binding authority of precedent.

However, there is ample judicial writing and scholarly discussion to conclude that in the English common law system the judiciary do perform a limited law-making function in incrementally developing the common law to ensure that it keeps pace with changes in social and economic conditions and remains sufficiently flexible to accommodate new situations.

In his memoirs in 1972 after retiring from the House of Lords (what is now the UK Supreme Court) Lord Reid indicated his view in the title of his book *The judge as law maker*. He famously said:

We do not believe in fairy tales any more. So we must accept the fact that for better or worse judges do make law, and tackle the question how do they approach their task and how they should approach it.

More recently a number of judges have reflected on their role in developing the common law. When he was Chairman of the Law Commission of England, Lord Justice Etherton argued that public law and human rights developments have intensified and highlighted the law making role of the judge (July 2009, Institute of Advanced Legal Studies lecture).

In the case of *National Westminster Bank v Spectrum Plus* [2005] 2 AC 680, Lord Nicholls said at para.32:

The common law is judge-made law. For centuries judges have been charged with the responsibility of keeping this law abreast of current social conditions and expectations. That is still the position. Continuing but limited development of the common law in this fashion is an integral part of the constitutional function of the judiciary. Had the judges not discharged this responsibility, the common law would be the same now as it was in the reign of King Henry II. It is because of this that the common law is a living instrument of law, reacting to new events and new ideas, and so capable of providing the citizens of this country with a system of practical justice relevant to the times in which they live.

However, in his essay *The judge as lawmaker* (1997), Lord Bingham identified some situations where judges would or should be reluctant to make new law. For example: where citizens have organised their affairs on the basis of their understanding of the law; where a defective legal rule requires detailed amendments, qualifications and exceptions; where the issue involves a matter of social policy on which there is no consensus; or where the issue is in a field outside of ordinary judicial experience.

The extent to which any judge is prepared to innovate will depend on their view of the balance to be achieved between competing requirements of the common law. These are:

- ▶ the need for stability in the common law
- ▶ the need for certainty in the common law
- ▶ the need for flexibility in the common law
- ▶ the desire to do justice between the parties in the instant case
- ▶ the duty not to usurp (take over) the role of Parliament.

As Lord Dyson concluded in his 2014 speech on the power of the judiciary:

... in deciding whether to develop the common law or to leave any change to Parliament, the courts do not apply some overarching principle ... some judges are more cautious than their colleagues; others are more adventurous. But despite these differences, the common law continues to evolve. What is clear is that the judges have great power in shaping the common law and, therefore, influencing the lives of all of us. The existence of this power is, of course, always subject to Parliament. If Parliament wishes to change the common law, it can do so. But, despite some notable exceptions ... Parliament rarely shows any appetite to change the common law. So far as I am aware, the manner in which the judges develop the common law has not excited much political comment or given rise to a demand to clip the wings of the judges. I would like to think that this is because, on the whole, the judges have done a good job in this area and no-one has suggested a fundamentally different way of doing things that would command popular support.

SELF-ASSESSMENT QUESTIONS

1. What is the 'declaratory theory'?
2. Why are judges reluctant to legislate?
3. What approach does Lord Dyson think judges should take to the development of the common law?

3.3 Precedent in practice**3.3.1 Vertical and horizontal precedent in the court hierarchy**

The UK Supreme Court (formerly House of Lords)

ESSENTIAL READING

- Lord Justice Laws 'Our lady of the common law' ICLR Lecture, 1 March 2012
www.judiciary.gov.uk/announcements/lj-laws-speech-iclr-lecture-01032012/
- Lee, J. 'The doctrine of precedent and the Supreme Court' Inner Temple Academic Fellow's Lecture
www.innertemple.org.uk/downloads/education/lectures/lecture_james_lee.pdf
- *Austin v Mayor and Burgesses of the London Borough of Southwark* [2010] UKSC 28 (extract in the Legal system and method study pack).
- *Jones v Kaney* [2011] UKSC 13.

Vertical precedent

The UK Supreme Court binds all of the courts below it in the court hierarchy. There have been some occasions in the past when the Court of Appeal has challenged this principle (see next section).

Horizontal precedent

Until the mid-19th century the House of Lords took the view that it was not bound by its own decisions, but in 1898 in the case of *London Street Tramways Ltd v London County Council* [1898] AC 375 the House confirmed that they would in future be bound by their own decisions. The reason for this was to bring finality to cases and legal issues so that they would not be continually re-argued. However, in the period that followed the *London Tramways* decision it was felt that the effect of the decision was to constrain the development of the common law and that rather than ensuring predictability and certainty in the law, the effect was rather the opposite.

As a result, in 1966, all of the judges in the House of Lords joined together to issue a **Practice Statement** (a statement by the court of a procedure that it intends to introduce) providing that in future the House would no longer regard itself as bound by its own earlier decisions. The statement was carefully worded to communicate that this new power to depart from decisions would be used sparingly to avoid creating uncertainty in the law.

The Practice Statement (Judicial Precedent) [1966] 3 All ER 77

The Practice Statement set out why the House of Lords was going to change its practice and how it thought it would exercise the new freedom to depart from earlier decisions of its own. It said:

Their Lordships recognise ... that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions ... as normally binding, to depart from a previous decision when it appears right to do so.

Together with the Practice Statement, the House of Lords published a press release which gave more explanation about the new practice. The key points that emerged from the Practice Statement and press release were that:

- ▶ the court would only rarely depart from an earlier decision
- ▶ the court would be most likely to use the new freedom in situations where there had been significant social change so that a precedent was outdated or inappropriate to modern social conditions, values and practices
- ▶ the court would be likely to depart from an earlier decision if there was a need to keep English common law in step with law of other jurisdictions
- ▶ there was a special need for certainty in criminal law and as a result the court would be very reluctant to depart from an earlier decision in a criminal case.

Horizontal precedent in the UK Supreme Court

Soon after the UK Supreme Court was established in 2009, Lord Hope gave a judgment in *Austin v Southwark London Borough Council* [2010] UKSC 28, [2010] 4 All ER 16 in which he made it clear that the prior jurisprudence of the House of Lords had been transferred to the UK Supreme Court and that the UKSC would therefore not regard itself as bound by earlier decisions.

The Supreme Court has not thought it necessary to re-issue the Practice Statement as a fresh statement of practice in the Court's own name. This is because it has as much effect in this Court as it did before the Appellate Committee in the House of Lords. It was part of the established jurisprudence relating to the conduct of appeals in the House of Lords which was transferred to this Court by section 40 of the Constitutional Reform Act 2005. So the question which we must consider is not whether the Court has power to depart from the previous decisions of the House of Lords which have been referred to, but whether in the circumstances of this case it would be right for it to do so.

The use of the Practice Statement in the House of Lords/UK Supreme Court

The Practice Statement and accompanying press release provide a good example of how, within the system of binding precedent, the judiciary have developed sufficient scope for the law to remain flexible and responsive to social change. The freedom of the House of Lords/UK Supreme Court to be less rigidly bound by precedent is a critical feature of the English system of precedent. So long as the power is used cautiously, it provides flexibility while broadly maintaining consistency and predictability in the common law. However, the power to depart from an earlier decision and, effectively, transform the law overnight raises issues about the line between a desirable level of judicial creativity and flexibility on the one hand and crossing a line which trespasses on the role of Parliament as the legislator within the English constitution on the other.

A cautious approach since 1966

The history since 1966 shows that the House of Lords and UKSC have used the power very sparingly. In a study of the House of Lords judiciary published in 1982 called *The law lords*, Professor Alan Paterson reported that between 1966 and 1980 there were 29 cases where the House of Lords was invited by counsel to overrule their own precedents. In eight cases the court did overrule one of their own earlier cases. In a further 10 cases at least one law lord would have been willing to overrule.

Examples of the use of the Practice Statement in criminal cases

***Kneller v DPP* [1973] AC 435** This case was the first time after the publication of the Practice Statement of 1966 that the House of Lords was invited to overrule a decision in a criminal case (i.e. a controversial decision in *Shaw v DPP* [1962] AC 220). In this case Shaw had published a directory of the names and addresses of prostitutes called the Ladies' Directory. Despite having been advised by the police that this would not be unlawful, he was subsequently arrested and convicted of the previously unknown offence of conspiracy to corrupt public morals. The House of Lords referred to an 18th century case which they argued was based on similar principles. Following the

decision there was considerable debate as to whether such an offence existed and many thought that the case would be overruled if the opportunity arose. But the House of Lords in *Knulier* refused to overrule *Shaw*. Interestingly, even though Lord Reid had dissented in the case of *Shaw*, he thought it would be wrong to use the Practice Statement to upset the decision. Lord Reid said: 'however wrong or anomalous a decision may be it must stand ... unless or until it is altered by Parliament'.

***R v Shivpuri* [1986] 2 All ER 334** The first time that the House of Lords overturned one of its own decisions in criminal law was in the case of *Shivpuri* in 1986 – some 20 years after the court issued its Practice Statement of 1966. In the case of *Shivpuri* the House was invited to overturn its decision in the case of *Anderton v Ryan* [1985] 2 All ER 355, perhaps surprising since *Anderton v Ryan* had only been decided one year earlier. Ryan had dishonestly handled a video recorder that she believed was stolen. In fact, it was not stolen. The House of Lords held that Ryan could not be guilty of attempting to steal the goods under s.1 of the Criminal Attempts Act 1981. It was impossible because the goods were not stolen goods. The court's decision was criticised for having misinterpreted s.1 of the Criminal Attempts Act 1981. In the case of *R v Shivpuri* [1986] 2 All ER 334, the defendant believed that he was dealing with a controlled drug when it was in fact harmless and on the question of liability the House was invited to overturn *Anderton v Ryan*. It did so. This was the first time that the House of Lords overruled its own decision in a criminal case and it was regarded as a spectacular decision. In *Shivpuri* Lord Bridge acknowledged that the earlier decision of the House of Lords had been wrong, that there was no valid ground on which it could be distinguished and that it should be overruled notwithstanding the need for certainty in the criminal law. He said:

If a serious error, embodied in a decision of this House has distorted the law, the sooner it is corrected the better.

Another example involving criminal law in which the House of Lords overturned an earlier decision is that of *R v Howe* [1987] 1 All ER 771 concerning duress as a defence to murder. In *Howe* the House of Lords overturned its decision in *DPP for Northern Ireland v Lynch* [1975] AC 653 and held that duress is never a defence to murder.

Examples of the use of the Practice Statement in civil cases

***British Railways Board v Herrington* [1972] AC 877** This case involved the duty of care owed by an occupier of land to people trespassing on the land. The House of Lords in *Herrington* overturned the much earlier case of *Addie v Dumbreck* [1929] AC 358. In *Addie v Dumbreck* the House of Lords had held that an occupier of land would only be liable for harm caused to a trespasser if the harm was caused intentionally. The House of Lords in *Herrington* held that social attitudes had changed in the intervening 50 years and occupiers of land, as a matter of common humanity, should take reasonable steps to deter people from trespassing where they are likely to be injured. The *Addie v Dumbreck* case had impeded the proper development of the common law and should be overruled.

***Murphy v Brentwood District Council* [1990] 2 All ER 908** This is a decision of major importance to the tort of negligence. The House of Lords overruled its own decision in *Anns v Merton London Borough* [1977] 2 All ER 492. The decision in *Anns* had been severely criticised at the time that it was decided and in *Murphy* the House of Lords departed from all of the propositions in *Anns*. Lord Keith of Kinkel said:

I think it must now be recognised that [*Anns*] did not proceed on any basis of principle at all, but constituted a remarkable example of judicial legislation. It has engendered a vast spate of litigation, and each of the cases in the field which have reached this House has been distinguished ... There can be no doubt that to depart from the decision would re-establish a degree of certainty in this field which it has done a remarkable amount to upset.

***Austin v Mayor and Burgesses of the London Borough of Southwark* [2010] UKSC 28** This recent case demonstrates first, that the 1966 Practice Statement applies to the Supreme Court; and second, that the UKSC will be cautious about overturning an earlier decision on statutory interpretation unless there are very strong reasons for doing so. The case concerned the interpretation of s.82(2) of the Housing Act 1985 which had been dealt with by the House of Lords in *Knowsley Housing Trust v White*

[2009] 1 AC 636. Lord Hope in *Austin v Southwark* felt that s.82(2) was capable of being interpreted in different ways, but said that the question was whether it would be 'right' for the Supreme Court to depart from a previous decision of the House of Lords. Lord Hope held that he was not persuaded that the Supreme Court should depart from the decision of the House in *Knowsley* since the effect of reversing such a decision which had stood for so long was incalculable in the circumstances.

SELF-ASSESSMENT QUESTIONS

1. Why did the House of Lords issue the Practice Statement in 1966?
2. What were the circumstances in which the House of Lords envisaged being prepared to overrule earlier decisions?
3. Why has the House of Lords been cautious in using the power to overrule?
4. What was the significance of the *Shivpuri* case?
5. What is the position in relation to horizontal precedent in the UK Supreme Court?

Vertical precedent in the Court of Appeal (Civil Division)

It ought to be absolutely clear that the Court of Appeal is bound by the decisions of the House of Lords/UK Supreme Court. Although this is certainly the case, there have been occasions when the Court of Appeal has sought to argue that it ought not to be bound by decisions of the House of Lords/UKSC. This was particularly so in the years after the 1966 Practice Statement and when Lord Denning, a famously creative and rather unique English judge, was sitting in the Court of Appeal. Lord Denning took the view that in most situations the Court of Appeal was effectively the final court of appeal because so few cases ever proceed for consideration in the House of Lords/UKSC. Lord Denning thought that if the House of Lords could free itself from the constraint of binding precedent, the Court of Appeal should be allowed the same freedom. A clear example is to be found in the case of *Cassell & Co Ltd v Broome* [1972] AC 1027. Lord Denning awarded £25,000 exemplary damages to Captain Broome. The rules for the award of damages had been laid down in the House of Lords case of *Rookes v Barnard* [1964] AC 1129. But Lord Denning said that these rules were 'unworkable' and declined to follow the guidance of the House of Lords. The case was appealed to the House of Lords where Lord Hailsham took the opportunity to disapprove of Lord Denning's approach. He said:

It is not open to the Court of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords ... The fact is, and I hope it will never be necessary to say so again, that in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers.

Thus the position on vertical precedent is that the Court of Appeal is bound by decisions of the House of Lords/UKSC whether or not the Court of Appeal approves of those decisions. Decisions of the Court of Appeal bind courts lower down the court hierarchy.

Horizontal precedent in the Court of Appeal (Civil Division)

ESSENTIAL READING

- *Davis v Johnson* [1978] 1 All ER 841 (CA), [1978] 1 All ER 1132 (HL).

The issue of horizontal precedent below the level of the Supreme Court is very important. The Court of Appeal and the courts below in the hierarchy hear thousands of cases each year. There will be many courts sitting in the Court of Appeal at the same time. That means a large number of reported judgments and if the Court of Appeal was not to follow its own earlier decisions this would inevitably lead to confusion and a degree of uncertainty in the law.

The basic principle of precedent in the Civil Division of the Court of Appeal is that it is bound by its own previous decisions. There are, however, several exceptions to this rule. The exceptions were set out by Lord Green MR in the case of *Young v Bristol Aeroplane Co Ltd* [1944] 2 All ER 293 and are as follows:

- i. **Conflicting decisions:** where the material facts of two Court of Appeal cases are similar but the decisions conflict, then a later Court can choose which case to follow. Although in practice the Court will often follow the later case, it is not bound to do so. Although conflicting decisions in this sense ought to not arise if the system of precedent is observed by judges, in fact there are cases where it has happened. An example of the use of this rule is *National Westminster Bank v Powney* [1990] 2 All ER 416 where the Court was faced with two irreconcilable decisions both decided in 1948: *Lamb v Rider* and *Lough v Donovan*. The Court in *Powney* followed *Lamb v Rider*. See also *Tiverton Estates Ltd v Wearwell Ltd* [1974] 1 All ER 209, where the Court of Appeal refused to follow *Law v Jones* [1973] 2 All ER 437.
- ii. **Conflict with subsequent House of Lords/UKSC decision:** where a previous decision of the Court of Appeal conflicts with a later decision by the House of Lords/UKSC, the Court of Appeal must follow the decision of the House of Lords/UKSC whether or not it approves of that decision. This is sometimes referred to as the doctrine of 'implied overruling'.
- iii. **Decisions 'per incuriam':** where a previous decision of the Court of Appeal was given *per incuriam*, which means, 'in ignorance' or 'without sufficient care', a later court is not bound to follow the decision. A decision of the Court of Appeal will lose its binding force where it was made in ignorance of some rule of law binding upon the Court and which would have affected its decision. The *per incuriam* rule was explained by Sir Raymond Evershed MR in the case of *Morelle v Wakeling* [1955] 2 QB 379, 406 as follows:

Decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account to be demonstrably wrong.

A further possible exception? Conflict with an earlier decision of the House of Lords/UKSC: a further complication arises when a Court of Appeal decision conflicts with an earlier decision of the House of Lords/UKSC. This ought not to occur, but there are instances when it has. The question then for the Court of Appeal is whether to follow its own decision or that of the House of Lords. This situation arose in the case of *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 where the Court of Appeal was faced with a conflict between its own previous decision in *Schorsch Meier GmbH v Hennin* [1975] QB 416 and an earlier (1960) House of Lords decision in *Havanah* which held that judgments in UK courts could only be given in sterling. In *Schorsch* Lord Denning held that he was not bound to follow that decision because when the reason for a legal rule had gone, the law itself should go ('*cessante ratione cessat ipsa lex*'). In *Miliangos*, the conflict between *Havanah* and *Schorsch* was considered. At first instance the judge, Mr Justice Bristow, held that he was obliged to follow the House of Lords in the *Havanah* case and not the Court of Appeal in *Schorsch*. He said that the *Havanah* rule could only be changed by statute or by the House of Lords. *Miliangos* then appealed to the Court of Appeal and Lord Denning held that *Schorsch* was binding on the courts beneath the Court of Appeal and on the Court of Appeal itself, because the exceptions to *Young v Bristol Aeroplane* [1946] 1 AC 163 were confined to inconsistent subsequent decisions of the House of Lords. The case was finally appealed to the House of Lords in 1976. The House of Lords held first, that the Court of Appeal had acted incorrectly in *Schorsch* when it failed to follow *Havanah*; but second, that *Havanah* should be overruled. Lord Cross said that both Bristow J and the Court of Appeal should follow the House of Lords decision, not the later Court of Appeal decision.

This is an area that remains somewhat uncertain and provides an example of the extent to which some judges, within the system of binding precedent, may occasionally depart from the rules when they feel it is right to do so.

Should the Court of Appeal be free to depart from its own earlier decisions?

After the House of Lords Practice Statement in 1966, Lord Denning conducted a campaign to free the Court of Appeal from having to follow its own earlier decisions. He argued in the case of *Gallie v Lee* [1969] 1 All ER 1062 that the Court of Appeal need not be absolutely bound by its own prior decisions. He said that this was a limitation self-imposed by the judiciary and that if the House of Lords could free itself from this constraint there was no principled reason why the Court of Appeal could not do the same thing. Lord Denning's main concern was that if the Court of Appeal had made an error in a case, the rule in *Young v Bristol Aeroplane* would mean that the Court would be bound to continue to apply a bad precedent unless and until an opportunity arose for the precedent to be overruled in the House of Lords. He repeated this view in the case of *Tiverton Estates v Wearwell* [1975] Ch 146, but was unable to persuade all of the Court of Appeal judges to agree with him.

The debate over horizontal precedent in the Court of Appeal was finally settled in the important case of *Davis v Johnson* [1978] 1 All ER 841 (CA), [1978] 1 All ER 1132 (HL). The case concerned the interpretation of s.1 of the then recently passed Domestic Violence and Matrimonial Proceedings Act 1976. Davis and Johnson lived together with their baby daughter in a council flat of which they were joint tenants. Johnson was violent and Davis ran away with her child to a refuge for battered wives. She applied to the court for an order to reinstall her in the flat and have Johnson excluded from the flat. The Court of Appeal had considered the same question on two occasions only a few months earlier in *B v B* [1978] Fam 26 and *Cantliff v Jenkins* [1978] Fam 47. They held that the 1976 Act did not protect a female cohabitee where the parties were joint tenants or joint owners but only where she was the sole tenant or sole owner of the property. In *Davis v Johnson*, Lord Denning called together a 'full' court of five judges, describing it as 'a court of all the talents'. The court held by a majority of three that the 1976 Act does protect a female cohabitee even where she is not a tenant at all or only a joint tenant. They declared *B v B* and *Cantliff v Jenkins* wrong and did not follow them. They granted an injunction to order the man out and reinstall the woman.

Lord Denning was well aware that in doing this he was failing to follow horizontal precedent. He said however:

On principle, it seems to me that, while this court should regard itself as normally bound by a previous decision of the court, nevertheless it should be at liberty to depart from it if it is convinced that the previous decision was wrong. What is the argument to the contrary? It is said that if an error has been made, this court has no option but to continue the error and leave it to be corrected by the House of Lords. The answer is this: the House of Lords may never have an opportunity to correct the error; and thus it may be perpetuated indefinitely, perhaps forever.

The case was eventually appealed to the House of Lords. The decision of the House of Lords was that *B v B* and *Cantliff v Jenkins* should be overruled. However, it took the opportunity to make an unequivocal statement about *stare decisis* in the Court of Appeal. Lord Diplock said:

The rule as it has been laid down in the *Bristol Aeroplane* case had never been questioned thereafter until ... Lord Denning conducted what may be described ... as a one-man crusade with the object of freeing the Court of Appeal from the shackles which the doctrine of *stare decisis* imposed upon its liberty ... In my opinion, this House should take this occasion to reaffirm expressly, unequivocally and unanimously that the rule laid down in the *Bristol Aeroplane* case is still binding on the Court of Appeal.

This was a very explicit disapproval of Lord Denning's approach. In his memoirs after retirement Lord Denning referred to *Davis v Johnson* as his most 'humiliating defeat' and a 'crushing rebuff'.

Horizontal precedent in the Court of Appeal (Criminal Division)

In principle, precedent in the Criminal Division of the Court of Appeal is the same as in the Civil Division. However, a somewhat more flexible approach to precedent is

taken in the criminal division if the court believes that the law has been misapplied in a precedent. This is because of the seriousness of cases dealt with, the fact that they may affect the liberty of citizens, and the serious social consequences of conviction for criminal offences. Guidance on how this flexibility operates was given by Lord Goddard CJ in the case of *R v Taylor* [1950] 2 All ER 170 who said that normally the principles in *Young v Bristol Aeroplane* apply, but that the Court also has wider power to depart; if the Court is to depart from one of its previous decisions then a full Court is essential; and finally that the power should be exercised in favour of the citizen.

Divisional Courts of the High Court

Since the Divisional Courts have mostly appellate jurisdiction, the rules of precedent are similar to those in the Court of Appeal.

Vertical precedent Divisional Courts of the High Court are bound by decisions of the Supreme Court, previous decisions of the House of Lords and the Court of Appeal. Decisions of the Divisional Courts are binding on inferior courts.

Horizontal precedent The Divisional Courts are normally bound by their own previous decisions subject to the exceptions in *Young v Bristol Aeroplane*. When the courts are not exercising appellate powers they are in the same position as the High Court.

The High Court The High Court is bound by the Supreme Court, previous decisions of the House of Lords, the Court of Appeal and Divisional Courts. Its decisions bind all inferior courts and tribunals. However, the High Court does not regard itself as bound by its own previous decisions, although they are regarded as highly persuasive.

Crown Court The Crown Court is bound by decisions of the superior courts and its own decisions are binding on the courts below it in the hierarchy. Decisions on points of law are persuasive but not binding precedents, although inconsistent decisions can lead to uncertainty. An obvious example is the issue of marital rape. Before the case of *R v R* was finally decided in the House of Lords in 1991, cases dealing with marital rape had come before the Crown Court sitting in different parts of England. The courts had reached different decisions. The question for the courts was whether a man could be criminally liable for raping his wife. The law until this point was based on an historic principle set out in Hale's *History of the pleas of the Crown* (1736) that on marriage a woman gave irrevocable consent to sexual intercourse with her husband. In the case of *R v R* [1991] 1 All ER 747 the Crown Court sitting in Leicester accepted that consent to intercourse was implied from the fact of marriage. Some three months later in the case of *R v C* [1991] 1 All ER 755 the Crown Court sitting in Sheffield declined to follow that decision and held that a husband could be guilty of raping his wife. In a third case in the same year *R v J* [1991] 1 All ER 759 the Crown Court sitting in Teesside refused to follow *R v C*.

The case of *R v R* was appealed to the House of Lords [1991] 2 All ER 481 (www.bailii.org/uk/cases/UKHL/1991/12.html) where the House of Lords held that it was unlawful for a man to have sexual intercourse with any woman without her consent. The original proposition no longer reflected the status of wives in modern society where marriage was viewed as a partnership of equals. This case is an interesting example of the judiciary appearing to legislate. (See the discussion of this case in Lord Dyson's 2014 speech on the power of the judiciary.)

The Judicial Committee of the Privy Council ('Privy Council' or 'JCPC')

Under normal rules of precedent, decisions of the Privy Council do not bind English courts, although the decisions have strong persuasive authority because of the seniority of the judges who sit in the Privy Council. However, a recent case casts a new light on this established principle. In the case of *Willers v Joyce* [2016] UKSC 44, the Supreme Court gave an important clarification on the precedent value of decisions of the Privy Council. In this case the judge at first instance had had to consider a House of Lords case which would lead her to strike out the claim in question, and also a more recent Privy Council case which would lead to a different legal result.

The Supreme Court made it clear in its judgment that the courts should normally follow the usual rules of precedent, and therefore not follow a decision of the Privy Council if it conflicted with the decision of a court that did set precedents (e.g. the Supreme Court). However, as the Privy Council is in practice often made up of Justices of the Supreme Court, it is open to them to say that decisions of other courts (e.g. the Court of Appeal or the Supreme Court) are wrong, and that the Privy Council decision should be treated as representing the law of England and Wales.

If the Privy Council has made this statement that a decision is to be treated as being the law, then its decision would be binding as a matter of precedent.

The Supreme Court sat in a panel of nine Justices, rather than the more usual five, recognising that this was an important case. Although the judgment to a large extent set out the accepted rules of precedent, the decision that the Privy Council could in some circumstances overrule the Supreme Court or Court of Appeal was seen as controversial by some.

SELF-ASSESSMENT QUESTIONS

1. How many exceptions are there to the rule in *Young v Bristol Aeroplane*?
2. Why did Lord Denning think that the Court of Appeal should be allowed to overrule its own earlier decisions?
3. What principle did the House of Lords in *Davis v Johnson* confirm?

3.4 The European Court of Human Rights and the UK Supreme Court

ESSENTIAL READING

- Lord Irvine of Lairg 'A British interpretation of Convention rights' speech December 2011
www.ucl.ac.uk/laws/judicial-institute/files/British_Interpretation_of_Convention_Rights_-_Irvine.pdf
- Lord Mance 'Destruction or metamorphosis of the legal order?' speech at the World Policy Conference, Monaco, December 2013
www.supremecourt.uk/docs/speech-131214.pdf
- Lord Sumption 'The limits of law' 27th Sultan Azlan Shah Lecture, Kuala Lumpur, November 2013
www.supremecourt.uk/docs/speech-131120.pdf

The ECtHR is an international court sitting in Strasbourg and does not fit neatly into the system of precedent. The relationship between the ECtHR and the House of Lords/Supreme Court has been the subject of some debate in England in recent years and the subject of a number of judicial speeches. In several Supreme Court cases the judiciary have commented on the extent to which the UK Supreme Court is, or is not, bound by decisions of the ECtHR.

The basic relationship between the English courts and the ECtHR is set out in s.2 of the Human Rights Act (HRA) 1998. Section 2(1) provides that a court or tribunal determining a question which has arisen in connection with a convention right must '**take into account**' any judgment, decision, declaration or advisory opinion of the ECtHR. This suggests that the decisions of the ECtHR are not completely binding on UK courts. It is clear, however, that there are different views among commentators and the senior judiciary as to the extent to which English courts are bound to follow the jurisprudence of the ECtHR. While some feel that to 'take into account' requires due consideration of ECtHR jurisprudence, rather than being bound by it, other judges feel that it would require very exceptional circumstances for the English courts to depart from a ECtHR decision. In a lecture in December 2011 Lord Irvine, the Lord Chancellor responsible for introducing the HRA 1998, argued that Supreme Court judges have a 'constitutional duty' to reject ECtHR decisions they consider flawed and 'should not abstain from deciding the case for themselves'.

Case law provides examples of different standpoints. In *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, the House of Lords held that in the absence of some special circumstances ‘the court should follow any clear and constant jurisprudence of the European Court of Human Rights’. This decision was followed in *Ullah* [2004] UKHL 26 in which Lord Bingham said that the duty of national courts is ‘to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less’.

A rather different approach was taken by the UKSC in the leading case of *R v Horncastle* [2009] UKSC 14 in which the question was whether the English common law rule on the use of hearsay evidence in criminal trials breached Article 6 of the ECHR (right to a fair trial). In this case the court declined to follow a decision of the Grand Chamber in the case of *Al-Khawaja v UK* [2009] 49 EHRR 1 which held that Article 6 requires as an absolute rule that no conviction can be based solely or to a decisive extent on hearsay evidence. Lord Phillips said that a domestic court would normally apply the principles established by the ECtHR, but where there was a failure of the Strasbourg court to appreciate and accommodate ‘our domestic process’, then the UKSC could decline to follow a ruling of the ECtHR. Interestingly, following the *Horncastle* decision, the ECtHR reconsidered the case of *Al Khawaja v UK* (2011). They made some concession to the reasoning of the UKSC and accepted that hearsay evidence could be relied upon under certain circumstances. The ECtHR held that the use of hearsay was not inevitably a breach of Article 6. This is an example of the way in which there can be a constructive dialogue between the ECtHR and domestic courts. It suggests that there is some flexibility in the approach to precedent between the UKSC and ECtHR although the UKSC continues to hold to the view that it normally follows the ECtHR unless there is a very strong reason for departing from a Strasbourg decision.

This flexible approach was again articulated in the case of *Manchester City Council v Pinnock* [2010] 3 WLR 1441. Lord Neuberger said that:

This court is not bound to follow every decision of the European court. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the court to engage in the constructive dialogue with the European court which is of value to the development of Convention law ... Of course, we should usually follow a clear and constant line of decisions by the European court (*Ullah*) ... But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber. As Lord Mance pointed out in *Doherty* ... section 2 of the 1998 Act requires our courts to ‘take into account’ European court decisions, not necessarily to follow them. Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this court not to follow that line.

More recently, in the controversial case of *Chester* [2013] UKSC 63 the UK Supreme Court was faced with a decision of the Grand Chamber of the ECtHR that UK domestic legislation which provided for an automatic ban on convicted prisoners’ voting in UK elections was incompatible with Article 3 of Protocol 1 of the ECHR which guarantees ‘free elections ... under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature’. Prisoners serving a custodial sentence in the UK do not have the right to vote. This ban was enshrined in s.3 of the Representation of the People Act 1983 as amended by the Representation of the People Act 1985.

In 2004 the ECtHR gave a ruling in the case of *Hirst v UK* on the question of whether this legislation was in breach of the ECHR. Seven judges at the ECtHR ruled that the UK’s ban on prisoners’ voting breached Article 3 of Protocol 1 of the ECHR. The UK Government subsequently appealed the decision and in October 2005 the Grand Chamber of the ECtHR held, by a majority of 12 to five, that the UK ban on prisoners’ voting rights was a violation of Article 3 Protocol 1 (right to free elections) – *Hirst v UK (No 2)* Application no. 74025/01 [2005] ECHR 681 (www.bailii.org/eu/cases/ECHR/2005/681.html). The decision in *Hirst* was followed by *Greens v UK* and *Scoppola v Italy* in which the ECtHR confirmed its decision that a blanket prohibition of this nature is an indiscriminate restriction on a vitally important right and, as such, incompatible with Article 3 of

Protocol 1. This issue was politically very controversial and the Government undertook two consultations in order to consider how it might modify legislation to ensure that the UK was not in breach of the ECHR. The Government has prepared legislation to modify the automatic ban in the Draft Voting Eligibility (Prisoners) Bill 2012.

When the issue was raised again before the Supreme Court in *Chester* in 2013 the Court held that the HRA 1998 requires the Court to 'take into account' decisions of the ECtHR, not necessarily to follow them. This enables the national courts to engage in a constructive dialogue with the ECtHR. However, the UKSC held that the prohibition on prisoner voting in the UK had twice been considered by the Grand Chamber of the ECtHR and each time it was found to be incompatible with the ECHR. Lord Mance held that in these circumstances:

It would have then to involve some truly fundamental principle of our law or some most egregious oversight or misunderstanding before it could be appropriate for this Court to contemplate an outright refusal to follow Strasbourg authority at the Grand Chamber level.

In the same case Lord Sumption seemed to echo Lord Mance's view saying that:

A decision of the European Court of Human Rights ... is an adjudication by the tribunal which the United Kingdom has by treaty agreed should give definitive rulings on the subject. The courts are therefore bound to treat them as the authoritative expositions of the Convention ...

The case of *Chester* confirms that the current dominant approach of the UKSC is that it normally expects to follow the jurisprudence of the ECtHR unless the matter in issue involves some fundamental principle of English law.

3.4.1 Possible changes to the HRA?

In October 2014 the Conservative Party published controversial proposals for reform of the relationship between the UK courts and the ECtHR: *Protecting Human Rights in the UK*, October 2014 www.conservatives.com/~media/Files/Downloadable%20Files/HUMAN_RIGHTS.pdf

This brief document stated that if re-elected the Conservative Party proposed to break the formal link between British courts and the ECtHR and that in future Britain's courts would no longer be required to take into account rulings from the Court in Strasbourg: 'The UK Courts, not Strasbourg, will have the final say in interpreting Convention Rights, as clarified by Parliament.' They also proposed to change the effect of a declaration of incompatibility (see Chapter 4) so that such a ruling by the UK Supreme Court would be advisory only. It is also suggested that the Government might leave the ECHR if it is not possible to achieve a 'looser' relationship with Strasbourg.

In a speech at UCL in December 2014 entitled 'Why it matters that Conservatives should support the European Convention on Human Rights', the former Conservative Attorney General, Dominic Grieve QC, argued that opting out of the ECHR would undermine respect for international human rights law and would have 'potentially devastating' consequences for the UK: www.ucl.ac.uk/constitution-unit/constitution-unit-news/031214a

In the General Election in May 2015 the Conservative Party was re-elected to Government. Following the election the then Prime Minister, David Cameron, announced that he intended to repeal the Human Rights Act and replace it with a British Bill of Rights. This is likely to face considerable opposition from politicians, the legal profession and human rights organisations. Whether or not any changes are introduced, the Conservative Government proposals highlight the inherent tensions and political interest in the relationship between the UK courts and the ECtHR.

On 20 October 2015 the EU Justice Sub-Committee announced the commencement on the Potential impact of repealing the Human Rights Act on EU Law Inquiry. The Inquiry Report was published on 9 May 2016: www.parliament.uk/business/committees/committees-a-z/lords-select/eu-justice-subcommittee/inquiries/parliament-2015/potential-impact-of-repealing-the-human-rights-act-on-eu-law/

SELF-ASSESSMENT QUESTIONS

1. To what extent is the UK Supreme Court bound by the jurisprudence of the ECtHR under the provisions of the HRA 1998?
2. How does Lord Irvine's view of the meaning of s.2 of the HRA 1998 differ from the view of Lord Slynn as expressed in the *Alconbury* case and Lord Bingham as expressed in the *Ullah* case?
3. Did Lord Neuberger take a different view in the *Pinnock* case?
4. What view did Lord Mance and Lord Sumption take in the *Chester* case to the question of following the jurisprudence of the ECtHR?

3.5 Judges as law-makers**ESSENTIAL READING**

- McLeod, I. *Legal method*. (Basingstoke: Palgrave Macmillan, 2013) ninth edition [ISBN 9781137027689] Chapter 14 'Arguments for and against judicial law-making' (in the Legal system and method study pack).
- *R v R (Marital Exemption)* [1992] 1 AC 599.
- *Nicklinson and Lamb v Ministry of Justice* [2013] EWCA Civ 961.

FURTHER READING

- Slorach, S. *et al.*, Chapter 5 'Case law'.

As we have seen, the principle of *stare decisis* or binding precedent serves the objectives of predictability, consistency and fairness within a common law system. Without binding precedent, there is a risk of conflicting decisions and uncertainty. On the other hand, too rigid adherence to precedent can lead to rigidity in the law. The English common law approach to precedent provides a balance between predictability and flexibility. While most judges see themselves constrained by binding precedent, there is scope within the rules for the development of common law principles, for correction of errors and for the making of new law – albeit in a measured and incremental way (Etherton, 2010; Dyson, 2014). The UK Supreme Court, while largely free from the constraint of precedent, nonetheless adopts a cautious approach to the making of new law. The Supreme Court does not have the democratic legitimacy to introduce major changes to English law and it is mindful of its proper constitutional position and relationship with the legislature.

The main argument in favour of some degree of judicial law-making (called judicial 'activism' in the USA) is that of speed. Courts can rapidly develop or change the law (by overruling) if it is necessary. Parliamentary processes are lengthy and with a heavy legislative agenda Parliament may not give priority to dealing with areas of law that require updating or correction. Thus within the constraints of precedent the judiciary are able rapidly to correct mistakes or to keep the law up to date.

The principal argument against the judiciary making new law is that of the 'democratic deficit'. The judiciary are appointed not elected. Thus in a Parliamentary democracy under the rule of law, it is not for the judiciary to legislate but for Parliament. In his speech on law making by the ECtHR Lord Sumption argues that the HRA gives the judiciary power to make new law in politically controversial areas and that this is essentially undemocratic. He argues that 'law made in Europe by unelected judges is changing the law in the UK in a way that is democratically unaccountable'.

The case law provides examples of the House of Lords/Supreme Court being willing to develop or change the law and also refraining from making decisions where there was a need for Parliament to legislate.

A case in which the House of Lords was prepared to introduce a major change to the law was that of *R v R (Marital Exemption)* [1992] 1 AC 599 discussed earlier in this chapter. The House of Lords justified the abolition of a 250-year-old rule that a man

could not be criminally liable for raping his wife on the ground that it was not creating a new offence. It was, instead, removing an assumption that was no longer acceptable in current social conditions (i.e. that on marriage a woman irrevocably consents to intercourse). As Lord Dyson commented in a speech in March 2014, this was a change to the law that the judiciary felt confident in making:

This change did not require any difficult policy choices to be made. It was uncontroversial, widely welcomed and long overdue ... It is and was inconceivable that Parliament would reverse this decision. Parliament had had plenty of opportunity to legislate for an amendment of the law. It seems that the political call for change was not sufficiently compelling. The judges were surely right to step in.

Another case where the House of Lords appeared to create new law was the case of *R v Brown* [1993] 2 All ER 75. Here the House held that homosexual sado-masochists who inflicted harm on others with their consent could be convicted of assault occasioning actual bodily harm contrary to the Offences Against the Person Act 1861, despite the fact that this sort of situation had not previously come before the courts.

However, there have been other recent cases where the judiciary have refused to step in, even though they perceived the argument for a change in the law. An important example is that concerning the legal ban on voluntary euthanasia in the case of *Nicklinson and Lamb v Ministry of Justice* [2013] EWCA Civ 961 (www.bailii.org/ew/cases/EWCA/Civ/2013/961.html). The appellants, both suffering from permanent and catastrophic disabilities, wanted to be helped to die at a time of their choosing. Neither was physically capable of ending their own lives without help and both argued that as a matter of common law and the ECHR anyone helping them to end their life should not be subject to criminal consequences. However, the current law is that those providing such assistance will be committing the offence of assisted suicide contrary to s.2(1) of the Suicide Act 1961 ('the 1961 Act') if they merely assist a person to take their own life, and murder if they actually terminate life themselves. The case was heard in the Court of Appeal by the Lord Chief Justice, the Master of the Rolls and Elias LJ. The Court declined to rule in the appellants' favour. The Lord Chief Justice made clear that he felt this was an issue on which the courts should not be legislating.

The short answer must be, and always has been, that the law relating to assisting suicide cannot be changed by judicial decision. The repeated mantra that, if the law is to be changed, it must be changed by Parliament, does not demonstrate judicial abnegation of our responsibilities, but rather highlights fundamental constitutional principles ... The circumstances in which life may be deliberately ended before it has completed its natural course, and if so in what circumstances, and by whom, raises profoundly sensitive questions about the nature of our society, and its values and standards, on which passionate but contradictory opinions are held ... For these purposes Parliament represents the conscience of the nation. Judges, however eminent, do not: our responsibility is to discover the relevant legal principles, and apply the law as we find it. We cannot suspend or dispense with primary legislation. In our constitutional arrangements such powers do not exist.
(paras 154–55)

This case was then considered by the Supreme Court in *Nicklinson* [2014] UKSC 38. The UKSC unanimously held that the question whether the current law on assisted suicide is incompatible with Article 8 of the ECHR lies within the UK's margin of appreciation. The majority held that the UKSC has the constitutional authority to make a declaration that the general prohibition in s.2 is incompatible with Article 8. But four Justices held that the question whether the current law on assisting suicide is compatible with Article 8 involves a consideration of issues which Parliament is inherently better qualified than the courts to assess, and that under present circumstances the courts should respect Parliament's assessment.

The case clearly demonstrates differing views among the most senior judiciary about whether and when to intervene in an area that requires a significant change in the law.

SELF-ASSESSMENT QUESTIONS

1. In the English common law system is it inevitable that judges will be making law?
2. Why are judges cautious about changing the law dramatically?
3. Are there areas of law where they are especially cautious about changing the law?
4. Did the House of Lords in *R v R* create a new law?
5. Does Lord Dyson believe that judges should always refrain from creating new law?

3.6 Postscript: the history of law reporting

The doctrine of precedent is of great antiquity, but only became truly binding in the 19th century when the system of law reporting had become comprehensive.

There have been three periods of law reporting:

1. **The Year Books** These were the first available law reports compiled during the 13th century. Year Book reports were not intended for use by the judges as precedents, but were probably simply notes compiled by students and junior advocates for use by advocates.
2. **The Private Reports** The compilation of Year Books ceased in about 1535 after which private sets of reports were produced, printed and published under the name of the law reporter (e.g. Coke's Reports (Co Rep) which are so well known that they are sometimes cited merely as 'reports' (Rep)). Published between 1600 and 1658.

The private reports are cited by the name of the reporter (usually abbreviated) and a volume and page number. The date of the report is not part of the reference but is usually inserted in ordinary round (not square) brackets. *Ashford v Thornton* (1818) 1 B&Ald 405 (i.e. volume 1 of Barnewall and Alderson's Reports at page 405); *Pillans v Van Mierop* (1765) 3 Burr 1664 (i.e. the third volume of Burrow's Reports at page 1664).

In practice most law libraries have the reports of the private reporters in the reprinted edition known as 'the English Reports' (ER or Eng Rep). These are published in 176 volumes and contain all the available reports of the private reporters. With the English Reports is published a reference chart showing in which volume the reports of any individual reporter are contained.

3. **The Law Reports** This is the current system of published law reports which began towards the end of the 19th century. In 1865 private reporting ended. A Council was established to publish reports of decisions of senior courts. The Council was under professional control with a representative from the Bar and the Law Society. In 1870 it became the Incorporated Council of Law Reporting for England and Wales. The Council produces the Law Reports, the Weekly Law Reports (WLR), the Industrial Cases Reports (IC) and the Law Reports Statutes.

The Weekly Law Reports include a report of every decision which will appear in the Law Reports and others which are not intended to be included later in the Law Reports. The cases are reported in full. Volume 1 of the Weekly Law Reports contains cases not intended to be included in the Law Reports. Volumes 2 and 3 of the Weekly Law Reports contain cases which will eventually be included in the Law Reports.

3.7 Citation of the Law Reports and the Weekly Law Reports

Prior to 1875

Irving v Askew (1870) LR 5 QB 208

Fifth volume of Reports of cases in the Court of Queen's Bench at page 208 (the date is not part of the reference).

1875–90

Symons v Rees (1876) 1 Ex D 416.

Citation by abbreviation of the division of the High Court (e.g. Ch D, QBD or App Cas for an appeal case). Date still not part of the reference and prefix LR was dropped.

1891

Date made part of the reference and letter D for division dropped. Date now included in square brackets. Separate volume of Reports for each division of the High Court (QB, Ch, Fam) and a separate volume for House of Lords and Privy Council cases (AC).

Court of Appeal decisions are reported in the volume for the division of the High Court from which the appeal came. There is thus nothing in the reference to show that a case is an appeal case.

Weekly Law Reports

1 WLR, 2 WLR or 3 WLR

The All England Law Reports are commercially published law reports published weekly and abbreviated as All ER.

4 Statutory interpretation

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LEARNING OUTCOMES

By the end of this chapter, and having completed the Essential readings and activities, you should be able to:

- ▶ understand why statutory interpretation presents challenges to the judiciary
- ▶ understand the constitutional responsibility of the judiciary in relation to statutory interpretation
- ▶ understand the difficulty of determining the 'legislative intent' of Parliament
- ▶ explain historic and modern judicial 'approaches' to statutory interpretation
- ▶ understand how different approaches may lead to different outcomes
- ▶ appreciate the influence of EU law and the Human Rights Act 1998 on statutory interpretation.

ESSENTIAL READING

- Holland and Webb, Chapters 8 'Making sense of statutes', 9 'Interpreting statutes' and 10 "'Bringing rights home": legal method and Convention rights'.
- Bennion, F. *Statute law*. (London: Longman, 1990) [ISBN 9780851215808] Chapter 13 'Difficulties of the statute user', available at: www.francisbennion.com/pdfs/fb/1990/1990-002-209-statute-law-pt3-ch13.pdf
- *R v Maginnis* [1987] 1 All ER 907 (HL).
- *Davis v Johnson* [1978] 1 All ER 841 (CA), [1978] 1 All ER 1132 (HL).

FURTHER READING

- McLeod, I. *Legal method*. (Basingstoke: Palgrave Macmillan, 2013) ninth edition [ISBN 9781137027689] Chapter 18 'Plain meanings, mischiefs, purposes and legislative intentions'.
- Stychin and Mulcahy, Chapters 5 'Statutory interpretation: introduction to legislation', 6 'Statutory interpretation: the search for legislative intention' and 7 'Statutory interpretation: the impact of the law of the European Union and European human rights law'.
- Dworkin, R. *Law's empire*. (Oxford: Hart Publishing, 1998) [ISBN 9781841130415] Chapter 1 'What is law?'.

4.1 Introduction

Once Parliament has passed legislation it is for the judiciary to make sense of the provisions in statutes – to interpret or construe the meaning of the words used. The interpretation of statutes is, in fact, a critical function of the judiciary. Despite England and Wales being a common law jurisdiction, in the modern legal system there is a large and growing volume of legislation as government seeks greater regulation of social and economic activity.

As we saw in Chapter 1, the role of the judiciary in relation to the legislature is to ‘give effect’ to Parliament’s intention. This means that in dealing with statutory provisions the judiciary must interpret or construe the meaning of words in a statute in a way that is consistent with what Parliament intended. As Tindal CJ in the *Sussex Peerage Claim* (1844) expressed the approach:

The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act.

However, there are two fundamental complexities in this simple statement. First, the natural limitations of language mean that interpreting the meaning of words can sometimes be fraught. Words may have several different meanings depending on the context, and the meaning of words changes over time. Different judges in the same case may interpret words differently and it is necessary to understand the approach that the judiciary take to this difficult task.

The second challenge for the judiciary in giving effect to Parliament’s intention is that it is not always clear precisely what Parliament did intend when they used a particular word or phrase in an Act of Parliament.

4.2 Why is the interpretation of statutes so difficult?

Interpretation is an essential step in human communication. We all interpret the meaning of spoken and written words to ‘make sense’ of what is being read or heard. However, there are special challenges in interpreting statutes. As explained by Francis Bennion in his famous book *Statute law* (1990) there are a number of features of statutes that make interpretation difficult. These include:

- ▶ Ellipsis – when the draftsman refrains from using certain words that they regard as implied automatically.
- ▶ Use of broad terms (wide meaning); for example, ‘vehicle’ clearly includes motor cars, buses – but what else does it include? Also the meaning of broad terms may change over time, for example does the word ‘family’ include a common-law spouse?
- ▶ Unforeseeable developments – when there have been social or economic changes that influence the meaning of words.
- ▶ Inadequate use of words – printing errors, drafting errors.

4.3 Why does interpretation matter so much?

The way in which a judge interprets the meaning of a particular word may make the difference between a defendant in a criminal trial being found innocent or guilty. The judge must decide the meaning, scope and applicability of legislation to a particular fact situation. The distinguished jurist A.V. Dicey noted how important the interpretative work of the judges is:

Statutes themselves, though manifestly the work of Parliament, often receive more than half their meaning from judicial decisions.

(Lectures on the relation between law and public opinion in England during the nineteenth century. (1905, 2001 edn) p.486)

Some of the cases included in this chapter demonstrate clearly the practical impact of differing judicial interpretations of statutory provisions.

4.4 The basic approaches to interpretation

Francis Bennion (1990) explains that the duty of the interpreter is to arrive at what he calls the 'legal meaning' of the enactment, which is not necessarily the same as its grammatical (or literal) meaning. He says,

There is a clear conceptual difference between grammatical meaning apart from legal considerations and the overall meaning taking those considerations into account. While it may sometimes be difficult to draw in practice, this distinction is basic in statutory interpretation.

So in seeking to find the 'legal meaning' of a statutory provision, there is no rule of law that dictates which approach a judge must take. It is largely up to the discretion of the individual judge. Historically, judges have tended to adopt one of a number of approaches, sometimes referred to as 'three rules of interpretation'. These so called 'rules' are not rules at all, but it is worth briefly noting the differences between the approaches and the impact that a different approach to interpretation might have on the outcome of a case.

4.4.1 The literal rule or 'literalism'

This approach requires the court to apply the ordinary English meaning of words used by Parliament. The approach was explained by Lord Esher MR in the case of *R v The Judge of the City of London Court* [1892] 1 QB 273,

If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The court has nothing to do with the question whether the legislature has committed an absurdity.

An ancient example of the use of the literal rule is the case of *R v Harris* (1836) 7 Car & P 446, 173 ER 198 which involved interpreting an offence to 'unlawfully and maliciously stab, cut or wound any person'. The court decided that a defendant who bit off the end of the victim's nose had not committed the offence. The court held that the words in the statute indicated that for the offence to be committed some form of instrument had to be used.

A more modern case demonstrates how different judges in the same case can interpret the meaning of a single word differently, thus leading to different outcomes. The case of *R v Maginnis* [1987] 1 All ER 907 (HL) concerned the interpretation of s.5(3) of the Misuse of Drugs Act 1971 which provides that:

It is an offence for a person to have a controlled drug in his possession, whether lawfully or not, with **intent to supply** it to another ...

The police found a package of cannabis resin in the defendant's car. The defendant said that the package did not belong to him, but that it had been left in his car by a friend for collection later. The defendant was convicted at first instance and appealed against conviction on the ground that an intention to return the drug to its owner did not amount to an intention to 'supply' the drug within the meaning of the statute. In the House of Lords the majority, adopting a 'literal' approach, held that a person left with drugs intending to return them did have the necessary intent to 'supply'. However, a dissenting judgment was given by Lord Goff. He held that the offence was aimed at drug pushers. The defendant was not a pusher and should have been charged with a lesser offence of unlawful possession.

... I do not feel able to say that either the delivery of goods by a depositor to a deposittee, or the redelivery of goods by a deposittee to a depositor, can sensibly be described as an act of supplying goods to another. I certainly cannot conceive of myself using the word 'supply' in this context in ordinary speech. In ordinary language the cloakroom attendant, the left luggage officer, the warehouseman and the shoe mender do not 'supply' to their customers the articles which those customers have left with them.

Another case which led to a difference of view between judges on the interpretation of the statute is that of *R v Brown* [1996] 1 All ER 545 (HL). This case concerned s.5(2)(b) of the Data Protection Act 1984 which provides that:

It is an offence knowingly or recklessly **to use** personal data other than for the purpose described in the relevant entry in the register of data users ...

A police officer twice used the police national computer to check the registration numbers of vehicles owned by debtors of clients of his friend's debt collection company. There was no evidence that he passed on the data to his friend, merely that he had accessed the data. A majority of the House of Lords, adopting a literal approach held that the offence was not committed by a person who merely accesses information. Data are only 'used', and the offence committed if the defendant goes on to make unauthorised use of it, for example by passing it on to someone else. The court held that they had reached this conclusion by giving the word 'use' its ordinary meaning. However, the dissenting minority adopting a more 'purposive' approach (i.e. looking behind the words to the intention of the legislation) held that the word 'use' should be given a broad construction in order to achieve the purpose of Act, which was the protection of citizens against invasions of privacy.

4.4.2 The golden rule

This is a modification of the literal rule. The judge begins by adopting a literal interpretation but if this leads to an 'absurd' result the judge may modify the words to some extent. This approach was explained by Lord Wensleydale in the case of *Grey v Pearson* (1857) 6 HL Cas 106:

... the grammatical and ordinary sense of words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid the absurdity and inconsistency, but no further.

An example of the use of the rule is the case of *Adler v George* [1964] 2 QB 7. Under s.3 of the Official Secrets Act 1920, it was an offence to obstruct Her Majesty's Forces in the vicinity of a prohibited place. Adler was arrested for obstructing forces within a prohibited place. He argued that he was not in the vicinity of a prohibited place since he was actually **in** a prohibited place (an air base). The court applied the golden rule to extend the literal wording of the statute to cover the action committed by the defendant. Had the literal rule been applied, it would have produced absurdity, since someone protesting **near** the base would be committing an offence whereas someone protesting **in** the base would not. See also the case of *Re Sigsworth* [1935] Ch 89.

4.4.3 The mischief rule

This is the oldest approach to statutory interpretation. As set out in *Heydon's Case* (1584) 3 Co Rep 7a, 76 ER 637 the approach involves the judge taking several steps in order to reach an interpretation. The first step is to consider the state of the common law before the Act was passed. The second is to consider the 'mischief' or shortcoming that the Act was intended to cover. The judge then interprets the Act in a way that achieves the intended purpose. To this extent the approach of the mischief rule is very similar to the modern purposive approach discussed below. A classic example of the use of the mischief rule is the case of *Smith v Hughes* [1960] 2 All ER 859. This case involved interpretation of s.1 of the Street Offences Act 1959. The provision provided:

(1) It shall be an offence for a common prostitute to loiter or solicit in a street or public place for the purposes of prostitution.

The accused was in a house, tapping on the window to attract the attention of passers-by. She argued that she was not 'in the street'. Instead of adopting a literal approach, the court considered what 'mischief' the Act was aimed at. Lord Parker CJ said:

For my part I approach the matter by considering what is the mischief aimed at by this Act. Everybody knows that it was an Act intended to clean up the streets, to enable people to walk along the streets without being molested by common prostitutes.

Lord Parker found a secondary meaning in the words. It was the 'solicitation' which must take place in the street, not the person who does the soliciting.

4.4.4 Purposive interpretation

Although similar to the mischief rule, judges adopting a purposive approach to interpretation are taking a wider view and essentially trying to decide what Parliament intended to achieve in passing an Act. This approach encourages the judge to look for the 'spirit of the Act', and to read words into or out of the Act when this is necessary. A clear statement of this approach comes from the judgment of Denning LJ in *Magor & St Mellons RDC v Newport Corporation* [1950] 2 All ER 1226 (CA); [1952] AC 189 (HL). He said:

We do not sit here to pull the language of Parliament to pieces and to make nonsense of it. That is an easy thing to do and a thing to which lawyers are too often prone. We sit here to find out the intention of Parliament and of ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis.

This view was somewhat ahead of the interpretive curve and the approach of Denning LJ was severely criticised when the case was appealed to the House of Lords on the ground that Lord Denning had gone beyond the proper role of the judge. The concern is that the further judges move away from the language of the Act, the more likely they are to be engaging in a legislative or quasi-legislative function. As Lord Simonds commented in the *Magor* case in the House of Lords, '[Denning LJ's views are] a naked usurpation of the legislative function.'

In recent years the judiciary appear to be more comfortable using a purposive approach to interpretation. To some extent this may reflect the effect of dealing with European legislation, considered later in this chapter. In the case of *Pepper v Hart* [1993] 1 All ER 42 the House of Lords accepted that the courts are now ready to adopt an approach that seeks to give effect to the 'true purpose' of legislation and as a result will consider extraneous material that has a bearing on the background to the legislation (see below on the use of *Hansard*). Another important case in which the court adopted a purposive interpretation was *R (on the application of Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 concerning research on human embryos.

4.4.5 Giving effect to Parliament's intention

Whatever approach judges take to statutory interpretation they are always seeking to give effect to Parliament's intention. That is their constitutional role and judges take that responsibility seriously. However, as this discussion has shown, different judges approach the task in various ways. Some may think that the best way to give effect to Parliament's intention is to stay very close to the words that Parliament actually used via a literal approach to interpretation. Other judges might feel that they are better able to give effect to Parliament's intention by seeking to understand the purpose of the legislation and then reading words in or out in order to achieve that aim.

SELF-ASSESSMENT QUESTIONS

1. Why is it necessary to interpret statutes?
2. What are the special challenges in dealing with statutory material?
3. What are judges seeking to do in interpreting statutes?
4. What practical difference might it make if judges differ in their approach to interpretation?

4.5 Aids to interpretation

4.5.1 Presumptions of interpretation

Presumptions are a sort of judicial bias, a preference which a judge has for coming to one conclusion rather than another. Many of them are used in order to save Parliament the trouble of saying what it is not trying to achieve. All presumptions can be displaced if Parliament so wishes. Parliament's wish to displace a presumption can be shown explicitly or implicitly.

Examples of presumptions

Statutes do not have retrospective effect Statutes are presumed to be prospective (i.e. to operate only in relation to events which take place after the act comes into force). This presumption is especially strong in the area of criminal law. An exception to this presumption is s.58(8) of the Criminal Justice Act 2003 which allows the prosecution in a criminal case to appeal against acquittal.

Changes to basic rules of common law must be clear If Parliament means to alter some principle which the common law considers to be important, it must make its intention to do so clear, or else the common law principle will survive. An example is the case of *Leach v R* [1912] AC 305.

4.5.2 Rules of language

These language rules are similar to presumptions, and like presumptions they can always be displaced expressly or by implication. They are different from presumptions in that they are not exclusively legal in nature. Any sort of text can be subjected to these rules.

Ejusdem generis rule

General words which follow specific words must be read in the light of those specific words, provided that the specific words are examples of some particular class ('genus'). An example is the

Sunday Observance Act 1677 which provides that:

... no tradesman, artificer, workman, labourer **or other person whatsoever**, [shall work on Sundays].

Many cases exist on the question of what occupations are *ejusdem generis* with the list. Parliament cannot have intended **all** occupations to be covered by the Act, because it would have been easier to say, 'No person whatsoever shall work on a Sunday.' This is the justification for the *ejusdem generis* rule.

Noscitur a sociis (a word is known by the company it keeps)

This rule is similar to *ejusdem generis*. It states that all words derive their meaning from their immediate context. The rule is very useful when dealing with ambiguities in individual words where the ambiguous word is used in close proximity to other similar words. An example is the case of *Pengelly v Bell Punch Co Ltd* [1964] 2 All ER 945 concerning s.28 of the Factories Act 1961 which provided that: 'Floors, steps, stairs passageways and gangways [must be kept free from obstruction].' The court held that 'floors' did not include areas designed and used for the storage of goods.

4.5.3 Intrinsic material

All of the components of an Act of Parliament can be used to assist in the process of interpretation. These include: the long title of the Act (containing a brief description of the purposes of the Act); the short title (a short name given by Parliament so that the Act can be easily cited, e.g. The Theft Act 1968); a preamble if it exists (rare in modern Acts). They are used to set out in detail the reasons for the existence of an Act. They always begin with the word 'WHEREAS ...'; the enacting sections which are the substance of the Act with their subdivisions into sections and subsections; marginal notes which give a brief explanation of the contents of a section; and headings which give clues as to the contents.

4.5.4 Extrinsic material

While the internal context is concerned simply with other parts of the Act under consideration, the wider context is concerned with all other matters which a court might wish to take into account in interpreting an Act.

Reports of debates in Parliament (Hansard)

Until 1992 courts were not permitted to look at reports of parliamentary debates to help with statutory interpretation, either for the purposes of understanding the mischief or of construing the words in question. The reason for this prohibition was set out by Lord Reid in the case of *Beswick v Beswick* [1968] AC 58,

For purely practical reasons we do not permit debates in either House to be cited. It would add greatly to the time and expense involved in preparing cases ... moreover, in a very large proportion of cases [Hansard] would throw no light on the question before the court.

Despite the prohibition on the use of Hansard, in the case of *Davis v Johnson* [1978] 1 All ER 841 (CA) Lord Denning confessed that he had reached his view on the interpretation of the relevant statute by reading what had been said in Parliament when the Act was being debated.

However, in the case of *Pepper v Hart* [1993] 1 All ER 42, the House of Lords ruled that having regard to the purposive approach to construction of legislation the courts had adopted in order to give effect to the true intention of the legislature, the rule prohibiting courts from referring to parliamentary material as an aid to statutory construction should be relaxed so as to permit reference to parliamentary materials where:

1. the legislation was ambiguous or obscure or the literal meaning led to an absurdity
2. the material relied on or consisted of statements by a minister or other promoter of the Bill, and
3. the statements relied on were clear.

Reports of Royal Commissions and similar bodies

These may be used to understand the nature of any problem that Parliament may have intended to solve by its legislation, but not so as to understand the nature of the solution to the problem that Parliament has adopted.

Other materials

The court may look at international treaties, and other Acts of Parliament. Judges also regularly refer to dictionaries to establish the ordinary meanings of English words, either at the present day or at the time when the Act was passed.

SELF-ASSESSMENT QUESTIONS

1. Why might reports of debates in Parliament (Hansard) be useful to judges in interpreting statutes?
2. What might the limitations of Hansard be?
3. Why did Lord Denning look at Hansard in the case of *Davis v Johnson*?
4. What was the significance of *Pepper v Hart* in terms of modern approaches to statutory interpretation?

4.6 European influence on statutory interpretation

4.6.1 The continental approach to interpretation

ESSENTIAL READING

- Holland and Webb, Chapters 9 'Interpreting statutes' and 11 'European legal method'.

In Chapter 1 we discussed some of the differences between common law systems and civil law systems. One of the key differences is in the way that legislation is drafted and the role of the judiciary in the different systems in giving effect to that legislation.

Within the continental legal tradition there are often different constitutional structures involving written constitutions and constitutional courts. The substantive law is to be found in comprehensive written codes and the role of the judiciary in these systems is 'quasi-legislative' in interpreting codes that are drafted in broad general language. By comparison, English statutes tend to be detailed and relatively precise in their language. Moreover, because judges in states with written constitutions are regarded as guardians of the constitutions they generally feel relatively free to depart from the wording of the code to ensure that it accords with constitutional principles. Judges in civil law jurisdictions are used to 'filling in gaps' in the codes or elaborating on the use of general words. They tend to adopt an approach to interpretation that focuses on the underlying objectives of provisions rather than seeking the meaning of particular words.

The CJEU draws on a different legal tradition from the common law. Judges within the continental tradition tend to use what is referred to as the 'teleological' approach. This involves the court attempting to give a legislative provision an interpretation that fits in with the general scheme of the legislation rather than seeking to establish the subjective intention of the drafters of the text.

4.6.2 Interpreting the law of the European Union

ESSENTIAL READING

- Fennelly, N. 'Legal interpretation at the European Court of Justice' (1996) 20(3) *Fordham International Law Journal*
<http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1526&context=ilj>

As we saw in Chapter 1, s.2(4) of the European Communities Act 1972 (unless and until it is repealed as a result of the UK's referendum decision to leave the EU) provides that English law should be interpreted and have effect subject to the principle that European law is supreme. Where an English statute cannot be interpreted in a way that is consistent with EU law, the inconsistent law should not be applied (*R v Secretary of State for Transport, ex p Factortame (No 2)* [1991] 1 All ER 70, HL/ECJ).

The CJEU has shown that in its approach to legislative interpretation, it is more likely to be influenced by the context and purposes of a legislative provision than its precise wording. In the case of *Van Gend en Loos* [1963] the CJEU stated:

To ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions.

In interpreting EU legislation, the English courts have to take a somewhat different approach to the traditional approach used in domestic legislation. As Fennelly (1996) points out, while all judges are seeking to give effect to legislation, judges from different legal traditions vary in their approach:

The object of all interpretation lies in the true intention of the lawmakers, whether they be framers of a constitution or a treaty, legislators, or drafters of secondary legislation. Its pursuit at the Court [CJEU] demands of the common lawyer a readiness to set sail from the secure anchorage and protected haven of 'plain words' and to explore the wider seas of purpose and context.

Lord Denning signalled this change in the case of *H P Bulmer Ltd v J Bollinger SA* [1974] Ch 401 (CA). The case involved an action which had been brought over use of the word 'champagne' in champagne cider and champagne perry. There was a request for the case to be transferred to the European Court for a ruling as to whether such use of the word infringed Community regulations. The court refused to make a reference and this point was then appealed. In the course of refusing the appeal, Lord Denning spoke of the nature of Community law:

- ▶ All courts must attempt to interpret EC law in the same way and all apply the same principles.
- ▶ English statutes are drafted quite precisely and the courts have been used to giving a literal interpretation to the words.

- ▶ The EC Treaty is very different. It lays down general principles and expresses its aims and purposes. However, it lacks precision and uses words and phrases without defining what they mean. There are numerous gaps which have to be filled in by the judges.
- ▶ Given these differences, when English courts are faced with a problem of interpretation they must follow the European pattern and look for the purpose or intent rather than examining the words in meticulous detail. They must deduce from the wording and the spirit of the Treaty the meaning of the Community rules. If they find a gap they must fill it as best they can.

In a case a few years later, Lord Denning provided further explanations of the differences between English and European approaches to interpretation. In *Buchanan and Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1977] 2 WLR 107 (CA) Lord Denning argued that it was necessary to move away from traditional rules of interpretation that stress the literal meaning of words and adopt the European method (i.e. look for the design or purpose that lies behind the words). He said that when European judges come upon a situation which is to their minds within the spirit, but not the letter, of the legislation, they solve the problem by looking at the design and purpose of the legislature – at the effect which it sought to achieve. They then interpret the legislation so as to produce the desired effect. This means that they fill in gaps, quite unashamedly, without hesitation. They are giving effect to what the legislature intended, or may be presumed to have intended.

I see nothing wrong in this. Quite the contrary. It is a method of interpretation which I advocated long ago ...

Lord Denning's view, while ahead of its time in the 1970s, has largely been accepted by the English judiciary in interpreting European legislation.

Although some suggest that the approach of the CJEU is completely different from the English common law approaches to interpretation, it is clear that the more modern 'purposive' approach adopted by English courts has much in common with the European approach. Moreover, it has been argued that the influence of the EU has begun to affect the way that judges interpret domestic legislation. It is arguable that the greater willingness of the English judiciary to adopt a purposive approach – for example in cases like *Pepper v Hart* – is a manifestation of greater experience of interpreting EU legislation.

SELF-ASSESSMENT QUESTIONS

1. In what ways is the continental approach to the interpretation of legislation different from that in England?
2. What is it about the drafting of EU legislation that requires English judges to adopt a different approach when interpreting EU legislation?
3. In what way is it thought that experience in interpreting EU legislation has affected the approach of the English judiciary to the interpretation of domestic legislation?

4.7 The impact of the Human Rights Act 1998 on statutory interpretation

ESSENTIAL READING

- Holland and Webb, Chapters 9 'Interpreting statutes' and 11 'European legal method'.
- *R v Lord Chancellor, ex p Witham* [1998] 2 WLR 849, [1998] QB 575.

4.7.1 Background

As discussed in Chapter 1, English common law has provided protection for human rights since the 12th century, although the approach has been one of negative rather

than positive protection. This is what is referred to as the 'negative theory of rights' which says that citizens can do whatever they like unless it is specifically prohibited by non-retrospective laws which are clear and accessible to the governed. The common law also constrained the power of government, ensuring that it acted according to law and not in excess of its powers. An example of protection of human rights prior to the implementation of the HRA 1998 is the case of *R v Lord Chancellor ex p Witham* [1998] QB 575. In this case the Lord Chancellor had significantly increased the fees that litigants were required to pay in order to issue proceedings in the civil courts to have a dispute decided by a judge. Previously, there had been an exemption for people on low incomes to ensure that all people would be able to have access to the courts. The new rules issued by the Lord Chancellor removed this exemption for people suffering financial hardship and on an action for judicial review brought by Mr Witham the High Court granted a declaration that the Lord Chancellor had exceeded his statutory powers, because the effect of the increase would be to exclude many people from access to the courts. In his decision Laws J said that the right of access to the courts is a 'constitutional right' that cannot be displaced except by Parliament:

It seems to me, from all the authorities to which I have referred, that the common law has clearly given special weight to the citizen's right of access to the courts. It has been described as a constitutional right, though the cases do not explain what that means. In this whole argument, nothing to my mind has been shown to displace the proposition that the executive cannot in law abrogate the right of access to justice, unless it is specifically so permitted by Parliament; and this is the meaning of the constitutional right.

4.7.2 The interpretation of domestic legislation after the Human Rights Act 1998

ESSENTIAL READING

- Holland and Webb, Chapter 10 "'Bringing rights home": legal method and Convention rights'.
- Rights Brought Home: The Human Rights Bill, October 1997 www.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf
- *R v A (No 2)* [2001] UKHL 25, [2002] AC 45.
- Feldman, D. *The impact of the Human Rights Act 1998 on English Public Law* (2005) http://resources.law.cam.ac.uk/documents/the_impact_of_the_human_rights_act_david_feldman.pdf

When the Government introduced the HRA 1998 it intended that both Acts of Parliament and secondary legislation should be interpreted, so far as possible, to be compatible with the Convention. Previously, the English courts were merely required to take the Convention into account in resolving any ambiguity in a legislative provision. Under the HRA 1998 the English courts must interpret legislation so as to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so. This 'rule of construction' applies to past as well as to future legislation. To the extent that it affects the meaning of a legislative provision, the courts are not bound by previous interpretations. This approach to interpretation is contained within s.3(1) of the HRA 1998 (known as the interpretive obligation) which provides that:

So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

Section 3(2) provides that s.3(1) does not affect the validity, continuing operation or enforcement of any incompatible primary or delegated legislation.

Two strong promoters of the HRA, Lord Lester and Lord Pannick, writing about the responsibility of the courts under s.3, have said that:

the role of the court is not (as in traditional statutory interpretation) to find the true meaning of the provision, but to find (if possible) the meaning which best accords with Convention rights.

4.7.3 Declarations of incompatibility

So the court must seek to read and give effect to domestic legislation in a way which is compatible with the ECHR. If that proves to be impossible, the court can issue a declaration of incompatibility. Section 4(2) of the HRA 1998 provides that:

If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

Declarations of incompatibility are intended to be used as a **last resort**. Declarations of incompatibility have no effect on the cases in which they are made, nor do they affect the validity or continuing operation of the legislation. Thus, although the HRA 1998 gives the English courts the power to declare Acts of Parliament incompatible with the ECHR, they do not have the power of, for example, the US Supreme Court or continental constitutional courts to rule that legislation is unconstitutional and therefore invalid. But under s.10 of the Act, a declaration of incompatibility may lead to the provision being amended or repealed by Parliament.

In a recent case, *Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2015] NIQB 102, the court considered arguments as related to the law on abortion. As a devolved government and in contrast to England and Wales, the Abortion Act 1967 does not extend to Northern Ireland. Abortion falls within the devolved matter of Criminal Justice and Policing and is only permitted under very strict guidelines. It is governed under the Offences against the Persons Act 1861. The applicant Commission applied for a declaration that the law on termination of pregnancy in Northern Ireland was incompatible with the ECHR, with particular regard to the criminalisation of abortion in the circumstances of serious malformation of the foetus, including fatal foetal abnormality, and the termination of pregnancies which have resulted as the consequence of serious sexual crime, and the failure to provide exceptions to the law in such circumstances.

Following consideration of the interpretative obligation of s.3 HRA 1998 and the discussions in *Ghaidan* (2004), *Anderson* (2002) and *Bellinger* (2003), Horner J at [5] concluded that 'there is near unanimity among the parties in this judicial review, and that includes the Commission, that for this court to try and read the impugned provisions in a Convention-compliant way would be a step too far.' A declaration of incompatibility was granted.

The provisions of the HRA 1998 on the interpretation of statutes show that when Parliament incorporated the ECHR into UK domestic law, it did so in a way that preserved Parliamentary sovereignty. It was agreed that the courts should not be able to strike down primary legislation passed by Parliament because that would give the judiciary a power over legislation which under UK constitutional arrangements they did not possess and which would not be acceptable.

On this issue, when the Human Rights Bill was introduced to Parliament in 1997 the Government made clear its intentions:

The Government has considered very carefully whether it would be right for the Bill to go further, and give to courts in the United Kingdom the power to set aside an Act of Parliament which they believe is incompatible with the Convention rights ... The Government has reached the conclusion that courts should not have the power to set aside primary legislation, past or future, on the ground of incompatibility with the Convention. This conclusion arises from the importance which the Government attaches to Parliamentary sovereignty. In this context, Parliamentary sovereignty means that Parliament is competent to make any law on any matter of its choosing and no court may question the validity of any Act that it passes. In enacting legislation, Parliament is making decisions about important matters of public policy. The authority to make those decisions derives from a democratic mandate. Members of Parliament in the House of Commons possess such a mandate because they are elected, accountable and representative. To make provision in the Bill for the courts to set aside Acts of Parliament would confer on the judiciary a general power over the decisions of Parliament which under our present constitutional arrangements they do not possess, and would be likely on occasions to draw the judiciary into serious conflict with Parliament. There is no evidence to suggest that they desire this power, nor that the public wish them to have it. Certainly, this Government has no mandate for any such change.

(Rights Brought Home, 1997)

4.7.4 The approach of the courts to interpretation and HRA 1998 compatibility

Initially, in dealing with legislation the judiciary will seek to interpret a provision in the normal way using one of the traditional approaches to interpretation. It is only if this does not achieve an interpretation that is compatible with the ECHR that the courts will adopt a different approach. Aside from the traditional approaches to interpretation, the judiciary have three other general techniques. These are known as reading 'down' or 'in' or 'out'.

- ▶ Reading down involves limiting the meaning of words in the legislation so as to achieve an outcome compatible with Convention rights.
- ▶ Reading in allows the judge to introduce words or meanings which create safeguards to ensure compatibility.
- ▶ Reading out allows the court to remove or refuse to enforce provisions which would otherwise make the legislation incompatible.

The approach to interpretation of English law was illustrated in the case of *R v A*, decided by the House of Lords in 2001.

4.7.5 *R v A (No 2)* [2001] UKHL 25

This was an appeal by a defendant to a criminal charge of rape and concerned the question of whether certain evidence concerning the sexual behaviour of the complainant would be admissible at trial. The defendant wanted to adduce evidence of the complainant's sexual behaviour in the three weeks prior to the alleged rape. However, s.41 of the Youth Justice and Criminal Evidence Act 1999 prohibits the admission of evidence as to the complainant's sexual behaviour unless certain conditions were fulfilled. The House of Lords held that an accused's Convention right to a fair trial might be violated if relevant evidence of the kind sought to be addressed by the appellant was excluded. The question then arose whether s.41 could be construed so as to prevent any violation of the defendant's rights. Lord Steyn's discussion of the approach to interpretation under s.3 of the HRA 1998 indicates the extent to which the judiciary are prepared to strain the meaning of words in order to construe provisions in legislation as compatible with the ECHR. He said:

[T]he interpretative obligation under section 3 of the 1998 Act is a strong one. It applies even if there is no ambiguity in the language in the sense of the language being capable of two different meanings ... Section 3 places a duty on the court to strive to find a possible interpretation compatible with Convention rights. Under ordinary methods of interpretation a court may depart from the language of the statute to avoid absurd consequences; section 3 goes much further ... In accordance with the will of Parliament as reflected in section 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions. A declaration of incompatibility is a measure of last resort. It must be avoided unless it is plainly impossible to do so ... In my view section 3 requires the court to subordinate the niceties of the language of section 41(3)(c), and in particular the touchstone of coincidence, to broader considerations of relevance judged by logical and common sense criteria of time and circumstances. After all, it is realistic to proceed on the basis that the legislature would not, if alerted to the problem, have wished to deny the right to an accused to put forward a full and complete defence by advancing truly probative material. It is therefore possible under section 3 to read section 41, and in particular section 41(3)(c) as subject to the implied provision that evidence or questioning which is required to ensure a fair trial under article 6 of the Convention should not be treated as inadmissible. The result of such a reading would be that sometimes logically relevant sexual experiences between a complainant and an accused may be admitted under section 41(3)(c). On the other hand, there will be cases where previous sexual experience between a complainant and an accused will be irrelevant, e.g. an isolated episode distant in time and circumstances. Where the line is to be drawn must be left to the judgment of trial judges. On this basis a declaration of incompatibility can be avoided. If this approach is adopted, section 41 will have achieved a major part of its objective but its excessive reach will have been attenuated in accordance with the will of Parliament as reflected in section 3 of the 1998 Act. That is the approach which I would adopt.

In *Ghaidan v Mendoza* [2004] UKHL 30, [2004] 3 All ER 41 the House of Lords was faced with the issue of whether a surviving homosexual partner could be the spouse of a deceased tenant, for the purposes of succeeding to a statutory tenancy under the provisions of the Rent Act 1977. In *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 the House of Lords had recognised the rights of such individuals to inherit an assured tenancy by including them within the deceased person's family. But it declined to allow them to inherit statutory tenancies on the grounds that they could not be considered to be the wife or husband of the deceased as the Act required.

When the *Ghaidan* case was heard in the Court of Appeal the court held that the Rent Act, as it had been construed by the House of Lords in *Fitzpatrick*, was incompatible with Article 14 of the ECHR on the grounds of its discriminatory treatment of surviving same-sex partners. The House of Lords in *Ghaidan* held that it was possible to 'read down' the 1977 Rent Act under the HRA 1998 s.3 so that it was compliant with the rights in the Convention. The court decided that the failing could be remedied by reading the words 'as his or her wife or husband' in the Act as meaning 'as if they were his or her wife or husband'. Given that there was no objective and reasonable justification for the discrimination, the relevant passages in the Rent Act 1977 should be construed (in accordance with the HRA 1998) so as to give equal succession rights to a homosexual couple living 'as if' they were husband and wife.

4.7.6 Declarations of incompatibility and the Government response

ESSENTIAL READING

- Ministry of Justice 'Responding to human rights judgment: Report to the Joint Committee on Human Rights on the Government response to human rights judgments 2014-16'
www.gov.uk/government/uploads/system/uploads/attachment_data/file/570753/responding-to-human-rights-judgments-2014-to-2016.pdf

Where the courts are unable to interpret domestic legislation in a way that is compatible with the ECHR, the senior courts may make a declaration that the legislation in question is not compatible with the rights provided by the ECHR. Since the HRA 1998 came into force on 2 October 2000, there have been 34 declarations of incompatibility of which 22 have become final (in whole or in part). As previously mentioned, a declaration of incompatibility neither affects the continuing operation or enforcement of the Act it relates to, nor binds the parties to the case in which the declaration is made. This respects the supremacy of Parliament in the making of the law.

Although there is no legal obligation on the Government to take remedial action following a declaration of incompatibility, or upon Parliament to accept any remedial measures the Government may propose, such a declaration creates pressure for action to be taken. In most cases where there has been a declaration of incompatibility, the Government has brought forward amending legislation by way of a remedial order under s.10 of the HRA 1998 or through ordinary legislation.

The first declaration of incompatibility was issued in *R v (1) Mental Health Review Tribunal, North & East London Region (2) Secretary of State for Health ex p H* in March 2001. In that case, the Court of Appeal held that ss.72 and 73 of the Mental Health Act 1983 were incompatible with Articles 5(1) and (4) of the ECHR because they reversed the normal burden of proof, by requiring a detained person to show that they should not be detained rather than the authorities to show that they should be detained. The legislation was amended by the Mental Health Act 1983 (Remedial) Order 2001 (SI 2001/3712), which came into force on 26 November 2001.

In the case of *Bellinger v Bellinger* [2003] UKHL 21 a post-operative male to female transsexual appealed against a decision that she was not validly married to her husband, by virtue of the fact that at law she was a man. Section 11(c) of the Matrimonial Causes Act 1973 was declared incompatible with Articles 8 and 12 in so far as it made no provision for the recognition of gender reassignment. In *Goodwin v UK* (Application no. 28957/95; 11 July

2002) the ECtHR had already identified the absence of any system for legal recognition of gender change as a breach of Articles 8 and 12. This was remedied by the Gender Recognition Act 2004, which came into force on 4 April 2005.

The leading case of *A v Secretary of State for the Home Department* [2004] UKHL 56 (discussed in detail in Chapter 5) concerned the detention under the Anti-terrorism, Crime and Security Act 2001 of foreign nationals who had been certified by the Secretary of State as suspected international terrorists, and who could not be deported without breaching Article 3. They were detained without charge or trial in accordance with a derogation from Article 5(1) provided by the HRA 1998. The Derogation Order was quashed because it was not a proportionate means of achieving the aim sought and could not therefore fall within Article 15. Section 23 of the Anti-terrorism, Crime and Security Act 2001 was declared incompatible with Articles 5 and 14, as it was disproportionate and permitted the detention of suspected international terrorists in a way that discriminated on the ground of nationality or immigration status. The provisions were repealed by the Prevention of Terrorism Act 2005, which put in place a new regime of control orders; it came into force on 11 March 2005.

4.8 Human rights: interpretation or legislation?

ESSENTIAL READING

- Kavanagh, A. 'The elusive divide between interpretation and legislation under the Human Rights Act 1998' (2004) 24(2) *Oxford J Legal Studies* 259–85 (available in LexisNexis through the Online Library).

It appears from the decided cases that the courts will strain to achieve compatibility with the ECHR using s.3 of the HRA 1998. There is, however, a fine line between straining to achieve compatibility and crossing the line between interpretation and legislation. It is arguable that in reading down, in and out, the judiciary are taken very close to that line. While it is now commonly accepted that the judiciary are involved in a limited law-making function in operating the doctrine of precedent and developing common law principles, there is, perhaps, another question about the extent to which they are involved in law-making when interpreting statutes. As Kavanagh (2004) argues, interpretation is regarded as an activity that goes beyond the mechanical task of discovering and then declaring legal meaning. It is a limited, but important, form of law-making.

SELF-ASSESSMENT QUESTIONS

1. What is the effect of s.3 of the HRA 1998 on the approach of English judges to the interpretation of English law?
2. What techniques can judges use in meeting the requirements to interpret domestic legislation in a way that is compatible with the ECHR?
3. In what way is s.4 of the HRA 1998 seen as a 'last resort'?
4. What is the effect of a declaration of incompatibility under s.4 of the HRA 1998 on the immediate case and on the legislation?
5. Is the UK Government required to respond to declarations of incompatibility under s.4 of the HRA 1998?
6. To what extent did the decision in *Ghaidan* make new law?

SAMPLE EXAMINATION QUESTION

'The Human Rights Act 1998 has fundamentally changed the rules of statutory interpretation.'

Do you agree with this statement?

ADVICE ON ANSWERING THE QUESTION

There are three key elements to the question that should be addressed:

1. What are the rules (approaches) of statutory interpretation?
2. How does the Human Rights Act 1998 affect these approaches to the interpretation of statutes?
3. Does this constitute a fundamental change to the rules/approaches?

1. The fundamental purpose of interpretation is to give effect to Parliament's intention. There are no strict rules that judges must follow. Historically the judiciary have adopted a variety of approaches. Briefly describe with examples. Discuss development of the purposive approach with examples.

2. How does the Human Rights Act affect interpretation?

Describe the operation of s.3(1) and s.4 of the HRA 1998.

Describe the approach taken by the judiciary to s.3 and s.4 using examples.

A s.4 declaration of incompatibility is viewed as last resort.

Straining interpretation (e.g. *R v A Lord Steyn*).

Reading down (e.g. *Ghaidan v Mendoza*).

Reluctance where it is a controversial area of law (e.g. *Nicklinson*).

Examples of declarations of incompatibility (e.g. *A v Secretary of State for the Home Department*).

3. Is this a fundamental change?

Judges continue to adopt a literal and purposive approach to interpretation. They also continue to use traditional aids in seeking to give effect to Parliament's intention. The HRA does not radically change that, but there are ways in which the ECHR changes the approach and the balance between judiciary and legislature.

Straining to avoid a declaration of incompatibility means judges going further in reading in and out words in statutory provisions. Does this occasionally mean that they are, in fact, doing violence to the intention of Parliament? This is the argument currently being made by the Conservative Party.

While this doesn't produce a fundamental change to the rules of statutory interpretation, the emphasis on finding a way of reading provisions as compatible with the ECHR has led to a difference in approach (e.g. Feldman, 2005) and a subtle shift in the relations between judiciary, legislature and executive.