

ELLIOTT & QUINN'S ENGLISH LEGAL SYSTEM

Emily Allbon & Sanmeet Kaur Dua



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ELLIOTT AND QUINN'S ENGLISH LEGAL SYSTEM

Emily Allbon and Sanmeet Kaur Dua

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In loving memory of Catherine Elliott, creator and author of numerous best-selling law titles, whose writing has inspired generations of law students across the world.

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Companion website

To access additional resources to support your study, including multiple choice questions and answers to the end of chapter questions, please visit go.pearson.com/uk/he/resources.

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Preface

As with the previous edition, we hope that this edition does justice to the work done by both Catherine and Francis over many years. We have continued to employ our signature style of writing by engaging students via topical and current examples in order to help them understand how the law, processes and procedures that are discussed in this book relate to their everyday lives.

The key updates to this edition can be found in Parts 1, 2 and 5, although other necessary updates appear throughout. Some updates were more challenging than others. For example, with Brexit we had hoped that matters may have moved on since the previous edition but alas matters have simply got more complicated and Brexit has still not been delivered. The material on Brexit in this edition only reflects the state of affairs up to the point of writing and it is hoped that a significant update on Brexit can be provided in the edition that will follow this. It is thanks to Brexit that once in a lifetime constitutional questions have been raised. The landmark ruling from the Supreme Court in *Miller v Prime Minister* [2019] UKSC 41 has had the whole world gripped and talking about constitutional affairs like never before. It is largely down to Brexit that so many young people are now talking about law and politics. While the writers in no way express their own views as to whether Brexit should or should not go ahead, an upshot of Brexit is that it has engaged the public's interest, in legal, political and constitutional matters on an unprecedented scale. Developments on Brexit can be found in the introduction and Chapter 5.

Some key updates have been made to Chapter 9 on law reform. In particular, there is discussion of the Upskirting Act and how that was brought about through a Private Members' Bill and the #MeToo movement. This movement has courted much publicity in recent times but actually the action does not require there to be reform of the law but rather reliance on existing law to deal with such issues. A further important update to Chapter 9 relates to the series of cases that have been heard on the so called 'gig' economy involving the likes of Uber and Deliveroo and the status of those who work for them. Are they employees or workers with better rights than are afforded to those who are self-employed? Chapter 23 has been significantly updated with explanations and references to the modernisation of the administration of the civil justice system. Notable cases are discussed, such as *Owens v Owens* [2018] UKSC 41 and its resonance through our legal system. As a result of this case, which involved a wife in an unhappy marriage prevented from obtaining a divorce, we now have the Divorce, Dissolution and Separation Bill. This Bill will allow people in the position of Mrs Owens to obtain a divorce without having to find a way to demonstrate fault or blame on their spouse which is the principle method of obtaining a divorce under the current law.

Chapter 15 has also seen some updates in order to incorporate the Ministry of Justice's long-awaited review of LASPO 2012. This edition also includes more detailed discussion of the issues surrounding exceptional cases and inquests, and greater coverage of the means test.

We have been grateful for the guidance of Paul Keleher QC (25 Bedford Row) on Chapter 19 and are happy to once again have our academic colleague (and criminal law practitioner) Ffyon Reilly involved, this time editing Chapters 20–22.

The ethos of the book remains the same in that this text is designed to provide a clear explanation of the English legal system and how it works in practice today. As ever, the legal system and its operation are currently the subject of heated public debate, and we hope that the material here will allow you to enter into some of that debate and develop your own views as to how the system should develop.

A priority in writing this text has been to explain the material clearly, so that it is easy to understand, without lowering the quality of the content. Too often, law is avoided as a difficult subject, when the real difficulty is the vocabulary and style of legal textbooks. For that reason, we have aimed to use ‘plain English’ as far as possible and explain the more complex legal terminology where it arises. There is also a glossary of difficult words at the back of the text. In addition, chapters are structured so that material is in a systematic order for the purposes of both learning and revision, and clear subheadings make specific points easy to locate.

Although we hope that many readers will use this text to satisfy a general interest in law and the legal system, we recognise that the majority will be those who have to sit an examination on the subject. Therefore, each chapter features typical examination questions (with detailed guidance on answering them, using the material in the text, available on the companion website at go.pearson.com/uk/he/resources). This is obviously useful at revision time, but we recommend that when first reading the text, you take the opportunity offered by the question sections to think through the material that you have just read and look at it from different angles. This will help you both to understand and to remember it. You will also find a section at the end of the text which gives useful general advice on answering examination questions on the English legal system.

We would like to thank our families for their continuing encouragement, support and, most of all, patience when writing this edition.

We have endeavoured to state the law as at 1 October 2019.

Emily Allbon and Sanmeet Kaur Dua

City, University of London & Queen Mary, University of London
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Cases, law reports and case references: a guide

In order to understand the table of cases and the reference to cases in this text generally, you need to know about the naming of cases, law reports and case references.

Case names

Each legal case that is taken to court is given a name. The name of the case is usually based on the family name of the parties involved. Where there are more than two parties on each side, the case name tends to be shortened to just include one name for each side. In essays, the name of the case should normally be put into italics or underlined, though in this text we have chosen to put them in bold italics. The exact case names in civil law and criminal law are slightly different so we will consider each in turn.

Criminal law case names

If Ms Smith steals Mr Brown's car, then a criminal action is likely to be brought by the state against her. The written name of the case would then be ***R v Smith***. The letter 'R' stands for the Latin *Rex* (King) or *Regina* (Queen) depending on whether there was a king or queen on the throne at the time of the decision. Sometimes the full Latin terms are used rather than the simple abbreviation R, so that the case ***R v Smith*** if brought in 2004 while Queen Elizabeth is on the throne could also be called ***Regina v Smith***. The idea is that the action is ultimately being brought by the state against Ms Smith.

The 'v' separating the two parties' names is short for 'versus', in the same way as one might write ***Nottingham Forest Football Club v Arsenal Football Club*** when the two teams are going to play a match against each other. When speaking, instead of saying 'R versus Smith' one should really say 'The Crown against Smith'.

If Ms Smith is only 13, and therefore still a minor, the courts cannot reveal the identity of the child to the public and therefore the case will be referred to by her initial rather than her full name: ***R v S***.

Occasionally, criminal prosecutions are brought by the Government's law officers. If an action was brought by the Attorney General against Ms Smith it would be called ***AG v Smith***. If it was brought by the Director of Public Prosecutions it would be called ***DPP v Smith***. Should the state fail to bring an action at all, Mr Brown might choose to bring a private prosecution himself and the case would then be called ***Brown v Smith***.

Civil law case names

In civil law, if Mr Brown is in a neighbour dispute with Ms Smith and decides to bring an action against Ms Smith, the name of the case will be ***Brown v Smith***. This is orally expressed

as ‘Brown and Smith’, rather than ‘Brown versus Smith’. At the original trial, the first name used is the name of the person bringing the action (the claimant) and the second name used is that of the defendant. If there is an appeal against the original decision, then the first name will usually be the name of the appellant and the second name that of the respondent, though there are some exceptions to this.

In civil law, the state can have an interest in what are described as judicial review cases. For example, Mr Brown may be unhappy with his local council, Hardfordshire City Council, for failing to take action against his neighbour. He may bring an action against the council and the action would be called *R v Hardfordshire City Council, ex parte Brown*.

In certain family and property actions, a slightly different format may be used. For example, if Ms Smith’s child, James Smith, is out of control and needs to be taken into care, a resulting legal action might be called *Re Smith* or *In re Smith*. ‘Re’ is Latin and simply means ‘in the matter of’ or ‘concerning’. So the name *Re Smith* really means ‘in the matter of James Smith’.

As with civil cases, there is sometimes a need to prevent the public from knowing the name of the parties, particularly where children are involved. The initials of the child are then used rather than his or her full name. So the above case might be called *Re S* rather than *Re Smith* to protect James.

The Law Reports

Because some cases lay down important legal principles, over 2,000 each year are published in law reports. Some of these law reports date back over 700 years. Perhaps the most respected series of law reports are those called *The Law Reports*, because before publication the report of each case included in them is checked for accuracy by the judge who tried it. It is this series that should be cited before a court in preference to any other. The series is divided into several sub-series depending on the court which heard the case, as follows:

Appeal Cases (containing decisions of the Court of Appeal, the former House of Lords, the Supreme Court and the Privy Council).

Chancery Division (decisions of the Chancery Division of the High Court and their appeals to the Court of Appeal).

Family Division (decisions of the Family Division of the High Court and their appeals to the Court of Appeal).

Queen’s Bench (decisions of the Queen’s Bench Division of the High Court and their appeals to the Court of Appeal).

Neutral citation

Following the Practice Direction (Judgments: Form and Citation), a system of neutral citation was introduced in 2001 in the Court of Appeal and the High Court. This form of citation was introduced to facilitate reference to cases reported on the internet and on

electronic databases. Unlike reports in books, these reports do not have fixed page numbers and volumes. A unique number is now given to each approved judgment and the paragraphs in each judgment are numbered. The system of neutral citation is as follows:

Civil Division of the Court of Appeal:	[2018] EWCA Civ 1, 2, 3, etc.
Criminal Division of the Court of Appeal:	[2018] EWCA Crim 1, 2, 3, etc.
Administrative Court:	[2018] EWHC Admin 1, 2, 3, etc.

The letters ‘EW’ stand for England and Wales. For example, if *Brown v Smith* is the fifth numbered judgment of 2018 in the Civil Division of the Court of Appeal, it would be cited: *Brown v Smith* [2018] EWCA Civ 5. If you wished to refer to the fourth paragraph of the judgment, the correct citation is [2018] EWCA Civ 5 at [4]. The neutral citation must always be used on at least one occasion when the judgment is cited before a court.

Case reference

Each case is given a reference(s) to explain exactly where it can be found in a law report(s). This reference consists of a series of letters and numbers that follow the case name. The pattern of this reference varies depending on the law report being referred to. The usual format is to follow the name of the case by:

A year. Where the date reference tells you the year in which the case was decided, the date is normally enclosed in round brackets (often where the reference includes a volume number). If the date is the year in which the case is reported, it is given in square brackets. The most common law reports tend to use square brackets.

A volume number. Not all law reports have a volume number; sometimes they simply identify their volumes by year.

The law report abbreviation. Each series of law reports has an abbreviation for its title so that the whole name does not need to be written out in full. The main law reports and their abbreviations are as follows:

All England Law Reports	(All ER)
Appeal Cases	(AC)
Chancery Division	(Ch D)
Criminal Appeal Reports	(Cr App R)
Family Division	(Fam)
King’s Bench Division	(KB)
Queen’s Bench Division	(QB)
Weekly Law Reports	(WLR)

A page number. This is the page at which the report of the case commences. For example, *Cozens v Brutus* [1973] AC 854 means that the case was reported in the Appeal Cases law report in 1973 at page 854; *DPP v Hawkins* [1988] 1 WLR 1166 means that the case was reported in the first volume of the Weekly Law Reports of 1988 at page 1166; and *R v Angel* (1968) 52 Cr App R 280 means that the case was reported in the 52nd volume of the Criminal Appeal Reports at page 280.

These references can be used to go to find and read the case in a law library which stocks the relevant law reports. This is important as a textbook can only provide a summary of the case and has no legal status in itself – it is the actual case which contains the law.

Where a case has been decided after the Practice Direction of 2001 introducing neutral citations for the Court of Appeal and Administrative Court, the neutral citation will appear in front of the law report citation. For example: *Brown v Smith* [2004] EWCA Civ 5, [2004] QB 432, [2004] 3 All ER 21.

Introduction

This introduction discusses:

- the principle that too much power should not be invested in the hands of a single person or body (known as the separation of powers);
- the supremacy of Parliament; and
- the rule of law, which means that the state should govern according to agreed rules.

The legal system in context

This book examines the legal system of England and Wales, looking at how our law is made and applied. This introduction will make many references to the inescapable *R (Miller) v The Prime Minister* [2019] UKSC 41 judgment delivered by the Supreme Court in 2019, which has helpfully demonstrated the application of many principles that will be addressed here. We start with a quote from paragraph 1 of *Miller* about the strength of the judicial system, which speaks volumes:

It arises in circumstances which have never arisen before and are unlikely ever to arise again. It is a 'one off'. But our law is used to rising to such challenges and supplies us with the legal tools to enable us to reason to a solution.

To understand the legal system, however, you first need to know something about the context in which this legal system is operating: the constitution. A constitution is a set of rules which details a country's system of government; in most cases it will be a written document, but in some countries, including Britain, the constitution cannot be found written down in one document, and is known as an unwritten constitution.

Constitutions essentially set out broad principles concerning who makes law and how, and allocate power between the main institutions of the state – Government, Parliament and the judiciary. They may also indicate the basic values on which the country should expect to be governed, such as the idea that citizens should not be punished unless they have broken the law, or that certain rights and freedoms should be guaranteed, and the state prevented from overriding them.

The unwritten constitution

Britain is very unusual in not having a written constitution – every other Western democracy has one. In many cases, the document was written after a major political change, such as a revolution or securing independence from a colonial power. The fact that the British constitution is not to be found in a specific document does not mean that we do not have a constitution: if a country has rules about who holds the power to govern, what they can and cannot do with that power, and how that power is to be passed on or transferred, it has a constitution, even though there is no single constitutional document.

In the *Miller* judgment at paragraph 38, Lady Hale summarises the position that:

[a]lthough the United Kingdom does not have a single document entitled "The Constitution", it nevertheless possesses a Constitution, established over the course of our history by common law, statutes, conventions and practice. Since it has not been codified, it has developed pragmatically, and remains sufficiently flexible to be capable of further development. Nevertheless, it includes numerous principles of law, which are enforceable by the courts in the same way as other legal principles. In giving them effect, the courts have the responsibility of upholding the values and principles of our constitution and making them effective.

In other words, that we do not have a single document containing all the vast principles does not matter as we still have a Constitution which has been built upon over a number of years and is practical as a result of being formed in this way and indeed flexible to be responsive to modern problems such as the attempt to prorogue Parliament in 2019.

Having said that, the exact details of some areas of our constitution are subject to debate. This is because its sources include not only Acts of Parliament and judicial decisions, which are of course written down (although not together in one document), but also what are known as conventions. Conventions are not law, but are long-established traditions which tend to be followed, not because there would be any legal sanction if they were not, but because they have simply become the right way to behave. In this respect they are a bit like the kind of social rules that most people follow – for example, it is not against the law to pick your nose in public, but doing so usually invites social disapproval, so we generally avoid it. In the same way, failing to observe a constitutional convention is not against the law, but provokes so much political disapproval that conventions generally are followed, and most people concerned would see them as binding.

An example of this source of law can be found in the 2019 *Miller* judgment at paragraph 30:

First, the power to order the prorogation of Parliament is a prerogative power: that is to say, a power recognised by the common law and exercised by the Crown, in this instance by the sovereign in person, acting on advice, in accordance with modern constitutional practice. It is not suggested in these appeals that Her Majesty was other than obliged by constitutional convention to accept that advice.

Some other well-established examples of conventions are that the Queen does not refuse to give her consent to Acts of Parliament; judges do not undertake activities associated with a political party; and the Speaker of the House of Commons does his or her job impartially, despite being a member of one of the parties represented in the House.

Because conventions are not law, they are not enforced by the courts; but someone who has broken a convention may end up being forced to resign as a result of the disapproval it causes.

Three basic principles underlying the British constitution are the separation of powers, the supremacy of Parliament and the rule of law.

The separation of powers

One of the fundamental principles underlying our constitution is that of the separation of powers. According to this principle, developed by the eighteenth-century French philosopher, Montesquieu (see Cohler *et al.*, 1989), all state power can be divided into three types: executive, legislative and judicial. The executive represents what we would call the Government and its servants, such as the police and civil servants; the legislative power is Parliament; and judicial authority is exercised by the judges.

The basis of Montesquieu's theory was that these three types of power should not be concentrated in the hands of one person or group, since this would give them absolute control, with no one to check that the power was exercised for the good of the country. Instead, Montesquieu argued, each type of power should be exercised by a different body, so that they can each keep an eye on the activities of the other and make sure that they do not behave unacceptably.

The executive's role (in other words the Government) is to enact the legislation made by the legislature (Parliament), and the judiciary's role (the courts) is to interpret the legislation as produced by the legislature and implemented by the executive.

Montesquieu believed that England, at the time when he was writing, was an excellent example of this principle being applied in practice. The heavy weight attached to this very

fundamental principle has been prominently highlighted at paragraph 34 in the 2019 *Miller* judgment:

[I]f the issue before the court is justiciable, deciding it will not offend against the separation of powers. As we have just indicated, the court will be performing its proper function under our constitution. Indeed, by ensuring that the Government does not use the power of prorogation unlawfully with the effect of preventing Parliament from carrying out its proper functions, the court will be giving effect to the separation of powers.

The world's attention was on the outcome of the *Miller* judgment and the Supreme Court was not afraid to discuss the application of the separation of powers at work in modern times and offer a very public proclamation of observance and relevance of the separation of powers in this instance.

The supremacy of Parliament

A second fundamental principle of our constitution has traditionally been the supremacy of Parliament (also called parliamentary sovereignty). Now the profile of this principle has been considerably raised in recent times due to Brexit. It is clear that it has different meanings to different people and that it is misunderstood in many quarters.

Helpfully the most recent and public iteration of it has been set out in paragraph 41 of the *Miller* judgment, explaining this fundamental principle of our constitutional law:

[T]he principle of Parliamentary sovereignty: that laws enacted by the Crown in Parliament are the supreme form of law in our legal system, with which everyone, including the Government, must comply. However, the effect which the courts have given to Parliamentary sovereignty is not confined to recognising the status of the legislation enacted by the Crown in Parliament as our highest form of law. Time and again, in a series of cases since the 17th century, the courts have protected Parliamentary sovereignty from threats posed to it by the use of prerogative powers, and in doing so have demonstrated that prerogative powers are limited by the principle of Parliamentary sovereignty.

What it means is that Parliament is the highest source of English law; so long as a law has been passed according to the rules of parliamentary procedure, it must be applied by the courts. The legal philosopher, Dicey (1982), famously explained that according to the principle of parliamentary sovereignty Parliament has ‘under the English Constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament’. So if, for example, Parliament had passed a law stating that all newborn boys had to be killed, or that all dog owners had to keep a cat as well, there might well be an enormous public outcry, but the laws would still be valid and the courts would, in theory at least, be obliged to uphold them. The reasoning behind this approach is that Parliament, unlike the judiciary, is democratically elected, and therefore ought to have the upper hand when making the laws that every citizen has to live by.

Parliament is the supreme legal authority which can create and end any law; any law that it creates must be applied by the courts. Parliament has however passed laws that to some degree impact on its sovereignty, such as devolution, the Human Rights Act, the UK's entry into the EU and the decision to establish a UK Supreme Court in 2009. These developments should not be understood in a way that undermines parliamentary sovereignty as Parliament could repeal these laws when it decides.

This approach of parliamentary sovereignty is unusual in democratic countries. Most comparable nations have what is known as a Bill of Rights. This is a statement of the basic rights which citizens can expect to have protected from state interference; it may form part of a written constitution, or be a separate document. In many countries, the job of a Bill of Rights is done by incorporating into national law the European Convention on Human Rights, an international treaty which was agreed after the Second World War, and seeks to protect basic human rights such as freedom of expression, of religion and of movement. A Bill of Rights takes precedence over other laws, and the courts are able to refuse to apply legislation which infringes any of the rights protected by it.

Although Britain is one of the original signatories of the European Convention on Human Rights, for many years it was not incorporated into English law. Parliament has since passed the Human Rights Act 1998, which came into force in October 2000. This Act at last incorporates the Convention into domestic law, but it does not give the Convention superiority over English law. It requires that, wherever possible, legislation should be interpreted in line with the principles of the Convention, but it does not allow the courts to override statutes that are incompatible with it, nor does it prevent Parliament from making laws that are in conflict with it.

Section 19 of the Act requires that when new legislation is made, a Government Minister must make a statement before the second reading of the Bill in Parliament, saying either that in their view the provisions of the Bill are compatible with the Convention or that, even if they are not, the Government wishes to proceed with the Bill anyway. Although the implication is obviously that, in most cases, Ministers will be able to say that a Bill conforms with the Convention, the Act's provision for the alternative statement confirms that parliamentary supremacy is not intended to be overridden. The Act does make one impact on parliamentary supremacy, though a small one: s. 10 allows a Minister of the Crown to amend by order any Act which has been found by the courts to be incompatible with the Convention, whereas normally an Act of Parliament could only be changed by another Act. However, there is no obligation to do this and a piece of legislation which has been found to be incompatible with the Convention would remain valid if the Government chose not to amend it.

An interesting and unusual view of the present constitutional position has been put forward by John Laws (1998), writing in the academic journal *Public Law*. He suggests that, even without a Bill of Rights, it can be argued that Parliament is not quite so all-powerful as traditional constitutional doctrine would suggest. His point is that Parliament draws its power from the fact that it is democratically elected: we accept its authority to make law because we all have a say in who makes up Parliament. Therefore, says Laws J, it must follow that Parliament's power is restricted to making laws which are consistent with democracy, and with the idea that if we are all entitled to a vote, we must also be entitled to a certain minimum level of treatment. That would mean that our example of a law that all newborn boys had to be killed, which would clearly conflict with this entitlement, might actually be beyond Parliament's law-making powers and, according to Laws J, the courts, therefore, would be constitutionally entitled to refuse to uphold it. This view has not been tested by the courts, but it certainly provides an interesting contribution to the debate.

In 1998, some important constitutional changes were made which passed some of the powers of the Westminster Parliament to new bodies in Scotland and Northern Ireland. The new Scottish Parliament, created by the Scotland Act 1998, can make laws affecting Scotland only, on many important areas, including health, education, local government, criminal justice, food standards and agriculture, though legislation on foreign affairs, defence, national security, trade and industry and a number of other areas will still be made for the whole of the UK by the Westminster Parliament. In September 2014 a referendum was held in

Scotland, asking its populace whether they would want to remain part of the UK or declare independence. Following a vote to remain part of the UK, further powers were promised to the Scottish Parliament, including full control over taxation. The Northern Ireland Act 1998 similarly gives the Northern Ireland Assembly power to make legislation for Northern Ireland in some areas, though again, foreign policy, defence and certain other areas are still to be covered by Westminster.

In the same year, the Government of Wales Act established a new body for Wales, the Welsh Assembly but, unlike the other two bodies, the Welsh Assembly has only limited powers to make primary legislation; legislation made in Westminster will continue to cover Wales. However, the Welsh Assembly is able to make what is called delegated legislation (discussed in Chapter 4).

Membership of the European Union is the arena in which parliamentary sovereignty seems to be most confusing and/or misunderstood. The UK's membership of the EU left the fundamental principle of parliamentary sovereignty intact. This was the conclusion of the Supreme Court in *R (on the application of Miller and Dos Santos v Secretary of State for Exiting the European Union)* (2017). The Supreme Court ruled that Government Ministers could only withdraw the United Kingdom from the European Union after Parliament had passed an Act of Parliament giving the Ministers the authority to do so. In March 2017, the European (Notification of Withdrawal) Act 2017 was passed allowing the UK to formally trigger the withdrawal process through Article 50.

Nevertheless, it has become quite commonplace to hear from 'Brexiters' that they would like the UK to have its sovereignty back. This is to say that, the UK should be governed by UK law. This statement needs to be juxtaposed with the contention that, even if it can be said that sovereignty has been limited by the UK's accession to the EU, has this been to the UK's detriment and is the discussion about sovereignty mere propaganda to stir up publicity?

When the UK acceded to the EU in 1973, Parliament agreed to limit its sovereignty in matters governed by EU law whereas all other matters continued to be governed by national law unless this would present a conflict in which case, EU law should take precedence.

The Court of Justice of the European Union in *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (1978) made clear that:

Every national court must . . . apply community law in its entirety . . . and must accordingly set aside any provision of national law which may conflict with it . . . [A]ccordingly any provision of a national legal system which might impair the effectiveness of community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent community rules from having full force and effect are incompatible with those requirements which are the very essence of community law.

This means that wherever there is a conflict between EU and national law, EU law must take priority.

While there are divergent views on the position of the UK's sovereignty, it is the case that EU law has force only because an Act of Parliament, namely the European Communities Act 1972, has deemed it so. Therefore, only another Act of Parliament can change this position. Presently this is being done through the enactment of The European Union (Withdrawal) Act 2018 which sets out that the European Communities Act 1972 will be repealed on exit day. The UK just needs to determine when exit day will be! At the time of writing, exit day will be 31 January 2020 unless matters change and a further extension to Brexit needs to be negotiated. The Prime Minister of the day has remained steadfast that Brexit will happen.

Looking back, the decision to join the EU was a conscious one and not something that was imposed upon the UK. It was not something taken from us but rather something that the UK determined would be beneficial for the whole nation. At any rate, we are where we are today and the UK has shown its supremacy by determining that only by an Act of Parliament can it leave the UK. That is what was determined by the decision in *Miller*; the Government of the day could not by itself, make such a determination.

Further unprecedented times from a constitutional point of view continue. Rather extraordinary constitutional circumstances have arisen thanks to Brexit. Three of the most recent ones are: prorogation, the implementation of the Fixed Term Parliaments Act and the Standing Order No. 24 (SO24) that allows MPs to take control of the Parliamentary timetable.

Prorogation

Prorogation is the term for the formal end of a parliamentary session. Parliament stands ‘prorogued’ between the end of one session and the State Opening of Parliament which marks the beginning of a new session.

In the distant past, prorogation was used to control Parliament so that it was *summoned* for when it was needed to pass certain laws such as in relation to taxes, and *prorogued* to limit its powers and activities. One may argue that this was an abuse of the separation of powers. In modern times, prorogation has been something of a perfunctory nature, which sees a parliamentary session prorogued but then opened a few days later. The important point to note is that when a parliamentary session closes, any Government business ceases. In 2019, Parliament was unlawfully prorogued on the evening of 9 September and was due to be reopened on 14 October when the new Queen’s Speech was scheduled to be held. The timing of this move could not have been more controversial. Gina Miller once again took to the courts to contest the Prime Minister’s decision to prorogue Parliament in a time that she described as being one of acute political crisis.

There are many important facets of this legal challenge, which include the fact that the challenge was crowdfunded through ‘Gina Miller’s Legal Battle to stop Johnson Proroguing Parliament’. This was an extraordinarily high-profile case and the level and speed at which support was given by the public demonstrates how interested and invested the public is in its legal and political system. But one may doubt why she funded the action through such means when she has the means to fund such legal action personally. Why did she bother to go through the crowdfunding as a means of funding this legal action? The reason: gathering funds in this way engages with the public’s interest in the outcome of the action. It gives them a sense of ownership of the outcome. It brings with it publicity on the widest scale. The outcome of the Brexit negotiations and any subsequent deal will unequivocally impact on us all, so in one way or another funding the action in this way must be appropriate.

Gina Miller’s challenge was initially rejected and she amended her crowdfunding campaign to ‘Gina Miller’s Supreme Court battle against Boris Johnson in order to appeal the matter to the Supreme Court’ for which leave was granted given how important this matter is. Proroguing of the Parliament on 9 September was announced on 28 August and the case was heard before the High Court on 6 September. This is an incredibly short space of time to produce an outcome of this level. The High Court gave leave to appeal directly to the Supreme Court, which once again happened by use of the leap-frog procedure so that the matter could speedily reach the highest court of the land.

It has been difficult to avoid the 2019 *Miller* judgment in which all 11 Justices of the Supreme Court sat to hear the case and reached a unanimous decision that the Prime Minister's prorogation of Parliament was unlawful and therefore the decision to do so was null and of no effect. It was held (at paragraph 33) that:

... the effect of prorogation is to prevent the operation of ministerial accountability to Parliament during the period when Parliament stands prorogued. Indeed, if Parliament were to be prorogued with immediate effect, there would be no possibility of the Prime Minister's being held accountable by Parliament until after a new session of Parliament had commenced, by which time the Government's purpose in having Parliament prorogued might have been accomplished. In such circumstances, the most that Parliament could do would amount to closing the stable door after the horse had bolted.

While it is in the gift of the Prime Minister to prorogue Parliament and consistent with the principle of parliamentary sovereignty, the Supreme Court in *Miller* explained at paragraph 42 that the:

... sovereignty of Parliament would, however, be undermined as the foundational principle of our constitution if the executive [government] could, through the use of the prerogative, prevent Parliament from exercising its legislative authority for as long as it pleased. That, however, would be the position if there was no legal limit upon the power to prorogue Parliament. . . . An unlimited power of prorogation would therefore be incompatible with the legal principle of Parliamentary sovereignty.

Another fundamental principle of our constitution is one of Parliamentary Accountability. This describes the notion that the Government and its policies are subjected to consideration by MPs in Parliament who have been elected, and it is required to explain and defend its actions so that citizens are protected from the arbitrary exercise of government power. This is without question fundamental to our democracy.

That principle is placed in jeopardy if Parliament stands prorogued for the length of time proposed by the Prime Minister in 2019, which was for 34 days as opposed to just a few days which is customary. Government would effectively be moving to a position where it could be unaccountable government, which the Supreme Court describes as 'the antithesis of the democratic model'. It certainly felt like the timing and the length of the prorogation – which is the longest in recent history – had been deliberate to move the agenda of what this Prime Minister wants forward without being accountable and under the scrutiny of Parliament. Further, for all of the argument surrounding reclaiming parliamentary sovereignty through Brexit, this type of prorogation is a sure way of impeding Parliament in exercising its sovereign power. If this prorogation were to have been held lawful, our conventional understanding of and familiarity with the separation of powers would be turned on its head with the potential to cause chaos and tyranny.

In a time of high political crisis, through the process of prorogation and its timing, we are faced with the situation whereby the executive has attempted to silence and side-line the legislature; but with reverence to the fundamental principle of the separation of powers, the judiciary may review, and indeed has reviewed, whether the executive has exercised its power lawfully, and consequently determined that it has not. Prorogation of this nature felt like a very deliberate move in very frustrating times when there is an air of desperation to move forward with the Brexit deal. Offending fundamental constitutional principles is not the way to achieve Brexit.



Source: Christopher Furlong/Getty Images

Fixed-term Parliaments Act 2011

The Fixed-term Parliaments Act came into force on 15 September 2011. This act removed the prerogative power of the Queen, on the advice of the Prime Minister, to dissolve Parliament and trigger a general election. At the time that the Act was passed, the date of the then general election was to be held on 7 May 2015 and the Act provided that thereafter, general elections are scheduled to take place on the first Thursday in May in every fifth year. This would mean that the next election would be held on 7 May 2020. As we know, however, that schedule was not adhered to and a general election was held in 2017. How is this possible, following on from the Fixed-term Parliaments Act? Section 2 of the 2011 Act specifies that early elections can be held only:

- if a motion for an early general election is agreed either by at least two-thirds of the whole House or without section; or
- if a motion of no confidence is passed and no alternative government is confirmed by the Commons within 14 days.

Prior to this Act, Prime Ministers could more or less dictate when to call a general election. Through this Act of Parliament, the legislature has been able to control this power by the above mentioned two conditions. Again, on one hand this is separation of powers at its best, but on the other hand it is an attempt to limit and control power.

In 2019, the Prime Minister following a move by rebel MPs in September pursuant to the Standing Order 24 as discussed below, said that he would table a motion under the Fixed-term Parliament Act to hold a snap general election. The Prime Minister did indeed do this but he required under s. 2, a two-thirds majority of the House of Commons, which was not forthcoming. Therefore, while this Act could have been incredibly powerful in one sense, it is written in such balanced terms that it does not lead to frivolous elections in retaliation to an unfavourable outcome in their core business of governing.

Standing Order 24 – MPs taking control

It is indeed very unusual times when members of the Government are unhappy with the decisions of their Prime Minister and gather opposition MPs to invoke Standing Order Number 24. This triggers emergency debates within the House of Commons. In other words, there are rebel MPs (rebels because they are rebelling against their own party) and opposition MPs (members of the opposing parties) who have a shared interest that they want to present to Parliament for debate.

On 3 September 2019, the House of Commons was presented with and passed a motion led by rebel Tory MP Sir Oliver Letwin and Hilary Benn MP, that MPs should take control of the agenda – in other words, decide for themselves what business they would transact. Through this process, on 4 September what became the European Union (Withdrawal) (No 2) Act 2019 passed all its stages in the House of Commons. This then led to the House of Lords suspending its usual rules on 6 September so that the Bill could be passed. It received Royal Assent on Monday 9 September. This Act required the Prime Minister on 19 October to seek, by a letter in the form scheduled to the Act, an extension of three months from the European Council, unless by then Parliament had either approved a withdrawal agreement or approved leaving without one. In other words, the Prime Minister cannot agree to leave the EU without a deal unless Parliament agrees that there shall be no deal. Again this is a great demonstration of the separation of powers at work at full force.

From all angles, whatever may be one's political views on the current crisis, we see here and experience the three powers checking and pushing each of the others to do what it is meant to. It is only in such extreme and unusual circumstances that we can see some excellent constitutional debates arising over the use of power. In one sense, this is highly exciting and thrilling as history is being made, but at the other end of the spectrum, it is tiresome, tedious and testing.

The rule of law

The third basic principle of our constitution is known as the rule of law. It is developed from the writings of the nineteenth-century writer Dicey. According to Dicey, the rule of law had three elements. First, that there should be no sanction without breach, meaning that nobody should be punished by the state unless they had broken a law. Secondly, that one law should govern everyone, including both ordinary citizens and state officials. Thirdly, that the rights of the individual were not secured by a written constitution, but by the decisions of judges in ordinary law.

The real importance of the rule of law today lies in the basic idea underlying all three of Dicey's points (but especially the first) that the state should use its power according to agreed rules, and not arbitrarily. The issue has arisen frequently in the context of the state's response to terrorism. For example, opposition to an alleged shoot to kill policy by the armed forces in Northern Ireland against suspected terrorists was based on the principle that suspected criminals should be fairly tried, according to the law, and punished only if convicted.

The pressure group JUSTICE issued a manifesto for the rule of law in 2007. This suggests that the rule of law can be broken down into a set of values that governments should accept as matters of constitutional principle which should not be breached. Thus JUSTICE suggests that under the rule of law, governments should:

- adhere to international standards of human rights;
- uphold the independence of judges and the legal profession;

- protect the right to a fair trial and due process;
- champion equality before the law;
- ensure access to justice;
- accept rigorous powers of scrutiny by the legislature; and
- ensure that greater cooperation between governments within Europe is matched by increased rights for citizens.

A practice that has come to light which appears to breach the rule of law is that of ‘extraordinary rendition’. This describes the kidnapping of people by state representatives and their subsequent detention, without recourse to established legal procedures (such as a formal request for the extradition of a suspect). The US intelligence service has kidnapped a large number of foreign nationals suspected of involvement with the terrorist organisation, Al Qaeda, from around the world and removed them to secret locations without following any established legal procedures. It has been alleged that the UK has provided the US with some assistance in this practice through, in particular, the provision of information about suspects and the use of UK airports.

The Constitutional Reform Act 2005 introduced some major reforms to the British constitution. This Act expressly states in its first section that it ‘does not adversely affect . . . the existing constitutional principle of the rule of law’.

A written constitution?

There has been much debate about whether the UK should have a written constitution. The main reasons put forward in favour of this are that it would clear up some of the grey areas concerning conventions, make the constitution accessible to citizens, and, some argue, provide greater protection of basic rights and liberties, such as freedom of speech.

Written constitutions can be changed, but usually only by means of a special procedure, more difficult than that for changing ordinary law. Thus, it might be necessary to hold a referendum on the proposed change, or gain a larger than usual majority in Parliament, or both. This contrasts with our unwritten constitution, which can be altered by an ordinary piece of legislation. So, some people have argued that the right of people suspected of committing a crime to remain silent when questioned, without this being taken as evidence of guilt, was part of our constitution; nevertheless, that right was essentially abolished by the Criminal Justice and Public Order Act 1994. If the UK had had a written constitution, then this right would probably have been contained in it and a special procedure would have had to be followed to amend the constitution to remove that right. The integration of the European Convention on Human Rights into domestic law may prove to be the first step towards a fully-fledged written constitution. However, the Conservative Government is considering repealing the Human Rights Act 1998, which incorporated the European Convention on Human Rights into domestic law, and replacing it with a British Bill of Rights. The proposals are short on detail, and it is unclear what difference this would make if it occurred. This possibility underscores the ability of successive governments to change the unwritten constitution as they see fit.

Those in favour of our unwritten constitution argue that it is the product of centuries of gradual development, forming part of our cultural heritage which it would be wrong to destroy. They also point out that the lack of any special procedural requirements for changing it allows flexibility, so that the constitution develops along with the changing needs of society.

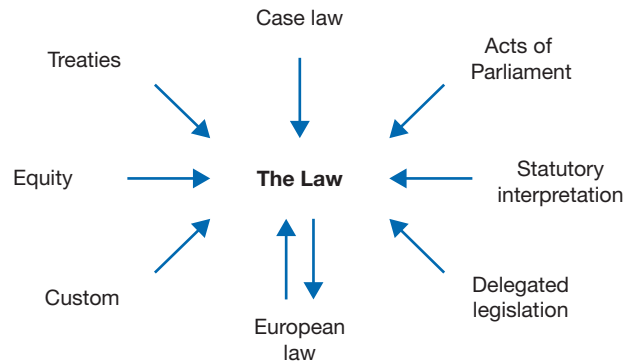
Reading list

General	Cohler, A.M., Miller, B.C. and Stone, H.S. (eds) (1989) <i>Montesquieu: The Spirit of the Laws</i>. Cambridge: Cambridge University Press. Dicey, A. (1982) <i>Introduction to the Study of the Law of the Constitution</i>. Indianapolis: Liberty Classics. Horowitz, M.J. (1977) The rule of law: an unqualified good? <i>Yale Law Journal</i>, 86: 561. Laws, J. (1998) The limitations of human rights. <i>Public Law</i>, 254. Raz, J. (1972) The rule of law and its virtue. <i>Law Quarterly Review</i>, 93: 195.
Media	The manifesto for the rule of law prepared by JUSTICE is available on its website: http://www.justice.org.uk A skeleton argument for <i>Miller</i> can be found at: https://www.mishcon.com/assets/managed/docs/downloads/doc_3179/CO-3385-2019_R_-_Gina_Miller_v_Prime_Minister.pdf Information about prorogation can be found on the web pages of Parliament at: https://www.parliament.uk/about/how/occasions/prorogation/ https://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentwork/offices-and-ceremonies/overview/prorogation1/ The Supreme Court's Practice direction 3, on Applications for Permission to Appeal, is at: https://www.supremecourt.uk/procedures/practice-direction-03.html The parliamentary agenda for 3 September 2019, EUROPEAN UNION (WITHDRAWAL): MOTION SUBMITTED UNDER STANDING ORDER NO. 24, can be found at: https://publications.parliament.uk/pa/cm201719/cmagenda/OP190903so24.pdf Standing Order 24 is explained at: https://www.parliament.uk/about/how/business/debates/application-for-emergency-debates/
Judgments	<i>Amministrazione delle Finanze dello Stato v Simmenthal</i> (1978) <i>R (on the application of Miller and Dos Santos) v Secretary of State for Exiting the European Union</i> (2017) <i>R (Miller) v The Prime Minister</i> (2019)

Part 1

Sources of law

The word 'source' can mean several different things with regard to law, but for our purposes it primarily describes the means by which the law comes into existence. English law stems from eight main sources, though these vary a great deal in importance:



The basis of our law today is case law, a mass of judge-made decisions which lay down rules to be followed in future court cases. For many centuries case law was the main form of law and it is still very important today. However, Acts of Parliament (also known as statutes) are the most important source of law, in the sense that they prevail over most of the other sources. As well as being a source of law in their own right, Acts of Parliament contribute to case law, since the courts occasionally have to interpret the Acts, and such decisions lay down new precedents. Delegated legislation is made by the administration rather than the legislature, and lays down detailed rules to implement the broader provisions of Acts of Parliament. Custom, equity and international treaties are minor sources of law.

Over the years an important source of law has been the legislation of the European Union, which is the only type of law that can take precedence over Acts of Parliament in the UK. Following on from our decision to Brexit, there will be considerable unravelling of our laws in order to separate UK law from European law. It appears that the UK will absorb into its laws many EU laws that currently permeate throughout UK law as it will be difficult to undo so many years of integration of our laws (see Chapter 5).

Part 1 concludes with a discussion of the process of law reform, whereby these sources of law can be changed to reflect the changes taking place in society.

Chapter 1

Case law

This chapter contains:

- an introduction to judicial precedent;
- a description of the hierarchy of the courts and judicial precedent;
- an analysis of how judicial precedent works in practice;
- a discussion of whether judges actually make the law, rather than simply declaring the law;
- consideration of whether judges should be allowed to make law; and
- an overview of the advantages and disadvantages of binding precedent.

1.1 Historical background

Before the Norman Conquest, different areas of England were governed by different systems of law, often adapted from those of the various invaders who had settled there; roughly speaking, Dane law applied in the north, Mercian law around the midlands and Wessex law in the south and west. Each was based largely on local custom and, even within the larger areas, these customs, and hence the law, varied from place to place. The king had little control over the country as a whole, and there was no effective central government.

When William the Conqueror gained the English throne in 1066, he established a strong central government and began, among other things, to standardise the law. Representatives of the king were sent out to the countryside to check local administration, and were given the job of adjudicating in local disputes, according to local law.

When these ‘itinerant justices’ returned to Westminster, they were able to discuss the various customs of different parts of the country and, by a process of sifting, reject unreasonable ones and accept those that seemed rational, to form a consistent body of rules. During this process – which went on for around two centuries – the principle of *stare decisis* (‘let the decision stand’) grew up. Whenever a new problem of law came to be decided, the decision formed a rule to be followed in all similar cases, making the law more predictable.

The result of all this was that by about 1250, a ‘common law’ had been produced, that ruled the whole country, would be applied consistently and could be used to predict what the courts might decide in a particular case. It contained many of what are now basic points of English law – the fact that murder is a crime, for example.

The principles behind this ‘common law’ are still used today in creating case law (which is in fact often known as common law). From the basic idea of *stare decisis*, a hierarchy of precedent grew up, in line with the hierarchy of the modern court system, so that, in general, a judge must follow decisions made in courts which are higher up the hierarchy than his or her own (the detailed rules on precedent are discussed later in this section). This process was made easier by the establishment of a regular system of publication of reports of cases in the higher courts. The body of decisions made by the higher courts, which the lower ones must respect, is known as case law.

The English common law system was exported around the world wherever British influence dominated during the colonial period. These countries, including the US and many Commonwealth countries, are described as having common law systems. They are often contrasted with civil law systems, which can be found in Continental Europe and countries over which European countries have had influence. The best-known civil law system is the French legal system, whose civil code has been highly influential.

1.1.1 The Supreme Court

Rather unexpectedly, the Labour Government announced in June 2003 that it was going to abolish the House of Lords (which had existed since 1876) and replace it with a Supreme Court. It subsequently issued a consultation paper, *Constitutional Reform: A Supreme Court for the United Kingdom*, which considered the shape that this reform should take. The Constitutional Reform Act 2005 was passed, which contained provisions for the creation of the new court. The Supreme Court (Photo 1.1) was established in 2009 and replaced the House of Lords. The term ‘House of Lords’ is slightly confusing because this name was used to describe both the highest court, which sat in the Palace of Westminster, and the upper

Photo 1.1 The Supreme Court in Parliament Square



Source: Justin Kase Zelevenz/Alamy

chamber of Parliament. The upper chamber still remains; it is the Committee of the House of Lords sitting as a court that has been abolished. The last case to be heard by the House of Lords was the high-profile case of Debbie Purdy, who suffered from multiple sclerosis and who was seeking clarification on the criminalisation of individuals who assist the terminally ill to commit suicide.

The Labour Government was anxious to point out that the reform did not imply any dissatisfaction with the performance of the House of Lords as the country's highest court of law:

On the contrary its judges have conducted themselves with the utmost integrity and independence. They are widely and rightly admired, nationally and internationally. The Government believes, however, that the time has come to establish a new court regulated by statute as a body separate from Parliament.

Six of the Law Lords opposed the reform, considering the change to be unnecessary and harmful.

1.1.2 Separation from Parliament

The consultation paper stated that this reform was necessary to enhance the independence of the judiciary from both the legislature and the executive. It pointed to the growth of judicial review cases and the passing of the Human Rights Act 1998 as two key reasons why

this reform was becoming urgent. Article 6 of the European Convention on Human Rights requires not only that the judges should be independent but also that they should be seen to be independent. The fact that the Law Lords sat as a Committee of the House of Lords in Parliament raised issues about whether it appeared to be dependent on the legislature rather than independent.

The new Supreme Court is completely separate from Parliament. Its judges have no rights to sit and vote in the upper chamber. Only the Law Lords who sat in the House of Lords before it was abolished have the right to sit and vote in the House of Lords in its legislative capacity after their retirement from the judiciary.

One advantage of this change is that the court no longer sits in the Palace of Westminster, where there is a shortage of space. The Supreme Court is based in a refurbished Neo-Gothic building opposite Parliament in Parliament Square. A disadvantage is proving to be the financial arrangements for the court. In the past, the House of Lords' running expenses fell within Parliament's budget and did not attract much attention. Now its budget falls within the accounts of the Ministry of Justice and is exposed to the general cuts being made by politicians to reduce the nation's debt.

1.1.3 Jurisdiction

The Supreme Court can hear appeals from the whole of the United Kingdom. It can hear both civil and criminal appeals from England and Wales and Northern Ireland, and civil appeals from Scotland. It is the ultimate arbiter on questions of domestic law. Cases from the Supreme Court raising human rights issues can be heard by the European Court of Human Rights, and cases raising European law issues can be heard by the Court of Justice of the European Union. A case can only be heard by the Supreme Court if the lower court or, more normally, the Supreme Court itself, gives permission to appeal.

In 2019, there were 201 applications to the Supreme Court requesting permission to appeal. Of those, 59 were granted, 133 were refused and 9 had another result. That is to say that 29 per cent of applications for permission to appeal were successful. This is in line with the trend in previous years. Quite often a lot of publicity surrounds such cases, not in relation to a judgment on appeal but rather as to whether permission to appeal should be granted. For example, in 2017, the unfortunate case of terminally ill Charlie Gard courted much public interest, in fact so much so, that supporters of Charlie and his parents became known as 'Charlie's Army'. The case also attracted comment from Donald Trump and the Pope. This was a case in relation to an application for permission to appeal, not in relation to the decision itself. Charlie's parents mounted an appeal against the decision of Great Ormond Street Hospital (GOSH) to withdraw Charlie's life support machine. Charlie's parents did not want GOSH to continue treatment but rather just to continue to keep Charlie alive through artificial ventilation until they could take him to the US for treatment, for which they had raised funds. GOSH denied this as it had determined that such an endeavour would be futile. The Supreme Court agreed with GOSH and with the utmost sympathy, denied permission to appeal this decision.

The Supreme Court does not have the power to overturn legislation, a power enjoyed by the Supreme Court in America. It is not a purely constitutional court (like the *Conseil constitutionnel* in France), partly because we do not have a written constitution so it would be difficult to determine the jurisdiction of a constitutional court for the United Kingdom. The new court does not have the power to give preliminary rulings on difficult points of law because English courts do not traditionally consider issues in the abstract, so giving such a power to the Supreme Court would sit uneasily with our judicial traditions.

1.1.4 Membership

The full-time Law Lords from the former House of Lords are the first judges of the Supreme Court. It has a maximum of 12 full-time judges, but can call on the help of other judges on a part-time basis. Members of the Supreme Court are called ‘Justices of the Supreme Court’. The Lord Chancellor was a member of the Appellate Committee of the House of Lords, but does not have a right to sit in the Supreme Court. The judges no longer automatically become Lords; instead the new male appointments take the title of ‘Sir’ and the female appointments ‘Dame’. Quite a remarkable and long-awaited moment in legal history was marked in October 2018 when a majority of female Justices sat in the Supreme Court (see Chapter 10).

Qualifications for membership have remained the same as for the House of Lords. The Government rejected the idea that changes should be made to make it easier for distinguished academics to be appointed in order to enhance the diversity of the court. This is disappointing, as the Government itself acknowledges that the current pool of candidates for the court is very narrow, and the Government’s statistics show that the current senior judiciary are not representative of society. Candidates are not subjected to confirmation hearings before Parliament as these would risk politicising the appointment process (discussed in Chapter 10).

In the Supreme Court five judges normally hear each case but in important cases seven or nine judges sit together. The rules for permission to appeal have remained largely unchanged, so the range and number of cases heard is just slightly higher than those of the House of Lords – about 90 cases each year.

1.1.5 The Supreme Court at work

In the past, the public was confused as to the identity of the House of Lords and its relationship with Parliament. Increasingly the public understands the role of the Supreme Court. It is open to the public and it is physically easier to visit than the old House of Lords which was hidden inside the long corridors of the Palace of Westminster.

Having moved into separate buildings from Parliament, the Supreme Court has tried to be more open, accessible and media friendly. All of its hearings are open to the public. The judge giving the lead, majority verdict will give a short oral explanation of the judgment in the morning it is released. This is televised and is occasionally shown on a news programme. There is more media interest in its work, particularly with its growing case load involving human rights law. It is gradually getting a higher profile and moving into the role of a constitutional court.

In 2019, 91 appeals were heard, with 64 judgments delivered, of which 28 were allowed, 32 were dismissed, and 8 ended with another result (a judgment can deal with multiple appeals). That is to say that just over a quarter of these appeals were successful. This demonstrates that appealing a decision will be challenging but it also arguably demonstrates that only the most deserving cases are successful.

The physical layout of the Supreme Court building provides more opportunity for the judges to chat with each other informally when they are preparing their judgments than the offices on the long corridor in the House of Lords (Paterson (2013)). Through this process of discussion they can iron out some of their differences, so there are fewer divergent views being expressed in the individual judgments, reducing uncertainty. In 2014, only one-fifth of cases included a dissenting judgment. There is still a role for a minority dissenting judgment as this can help shape the law where the court later decides it got the law wrong.

As mentioned earlier, the Supreme Court sits in panels containing an odd number of judges, normally five, but sometimes they sit in panels of seven or even nine. It is worthy of particular note that in the Article 50 case of *R (on the application of Miller and Dos Santos) v*

The Secretary of State for Exiting the European Union (2017), 11 judges sat to hear the case. On one occasion in 2017, nine judges sat to hear a case and on nine other occasions seven judges decided the case.

Hearings in the Supreme Court are relatively short, lasting an average of two days. In 2016, the longest hearing was with regard to the aforementioned *Miller* case, which lasted four days. From the trial hearing, the Supreme Court takes on average three and a half months to give its decision. Its judgments are on average 30 pages long. In over half of the cases heard by the Supreme Court, one of the parties is a public authority (such as the HM Revenue & Customs, the Crown Prosecution Service and local authorities).

1.2 Judicial precedent

Case law comes from the decisions made by judges in the cases before them (the decisions of juries do not make case law). In deciding a case, there are two basic tasks: first, establishing what the facts are, meaning what actually happened; and, secondly, how the law applies to those facts. It is the second task that can make case law, and the idea is that once a decision has been made on how the law applies to a particular set of facts, similar facts in later cases should be treated in the same way, following the principle of *stare decisis* described earlier. This is obviously fairer than allowing each judge to interpret the law differently, and also provides predictability, which makes it easier for people to live within the law.

The judges listen to the evidence and the legal argument and then prepare a written decision as to which party wins, based on what they believe the facts were, and how the law applies to them. This decision is known as the judgment, and is usually long, containing quite a lot of comment which is not strictly relevant to the case, as well as an explanation of the legal principles on which the judge has made a decision. The explanation of the legal principles on which the decision is made is called the *ratio decidendi* – Latin for the ‘reason for deciding’. It is this part of the judgment, known as binding precedent, which forms case law.

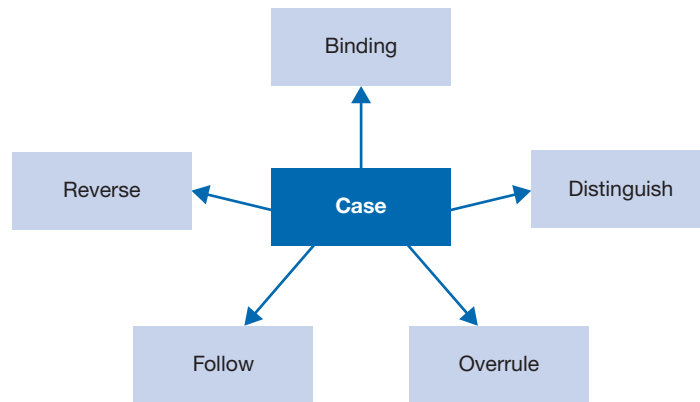
All the parts of the judgment which do not form part of the *ratio decidendi* of the case are called *obiter dicta* – which is Latin for ‘things said by the way’. These are often discussions of hypothetical situations: for example, the judge might say ‘Jones did this, but if she had done that, my decision would have been . . .’. None of the *obiter dicta* forms part of the case law, though judges in later cases may be influenced by it, and it is said to be a persuasive precedent.

In deciding a case, a judge must follow any decision that has been made by a higher court in a case with similar facts. The rules concerning which courts are bound by which are known as the rules of judicial precedent, or *stare decisis*. As well as being bound by the decisions of courts above them, some courts must also follow their own previous decisions; they are said to be bound by themselves.

When faced with a case on which there appears to be a relevant earlier decision, the judges can do any of the following.

Follow. If the facts are sufficiently similar, the precedent set by the earlier case is followed, and the law applied in the same way to produce a decision.

Distinguish. Where the facts of the case before the judge are significantly different from those of the earlier one, then the judge distinguishes the two cases and need not follow the earlier one.

Figure 1.1 How judicial precedent works

Overrule. Where the earlier decision was made in a lower court, the judges can overrule that earlier decision if they disagree with the lower court's statement of the law. The outcome of the earlier decision remains the same, but will not be followed. The power to overrule cases is only used sparingly because it weakens the authority and respect of the lower courts.

Reverse. If the decision of a lower court is appealed to a higher one, the higher court may change it if they feel the lower court has wrongly interpreted the law. Clearly when a decision is reversed, the higher court is usually also overruling the lower court's statement of the law.

In practice, the process is rather more complicated than this, since decisions are not always made on the basis of only one previous case; there are usually several different cases offered in support of each side's view of the question.

Numerous cases are published in law reports, legal databases and online. In *R v Erskine* (2009) the Court of Appeal said lawyers needed to select carefully the cases they referred to in court or the justice system would be 'suffocated'. Only cases which established the principle of law under consideration should be cited. Authorities that merely illustrated the principle, or restated it, should not be cited. The court was thereby seeking to ensure that the doctrine of precedent is not overwhelmed by the sheer number of published judgments.

1.3 The hierarchy of the courts

1.3.1 Court of Justice of the European Union

At present, decisions of the Court of Justice of the European Union (CJEU) on European law are binding on all English courts (European Communities Act 1972, s. 3(1)). Although the European Court tends to follow its own previous decisions, it is not bound to do so, but we need to know what the position will be post-Brexit. Indeed, Lord Neuberger, prior to stepping down as the President of the Supreme Court having presided over the *Miller* judgment, impressed upon the Government to clarify the position. He is mindful of the

separation of powers and has maintained that ‘If [the Government] doesn’t express clearly what the judges should do about decisions of the European Court of Justice after Brexit, or indeed any other topic after Brexit, then the judges will simply have to do their best.’ This would mean that the judges need to be guided by statute otherwise they will be left with little guidance from the Government. Two years later, things are unfortunately not that much clearer and are possibly more convoluted than ever before. At present, the UK will leave the EU on or before 31 January 2020 depending on how negotiations proceed.

Previous guidance that can be garnered from the Government’s White Paper entitled ‘Legislating for the Withdrawal Agreement between the United Kingdom and the European Union’ suggests that there will be a degree of overlap between EU and UK law, allowing the EU to continue to govern, to allow businesses to adjust to the changes. Such an arrangement will only be in place for a limited period for the UK to make all the necessary changes and pass the relevant laws to accommodate the UK’s exit from the EU. The paper also explains that the direct jurisdiction of the CJEU in the UK will come to an end over the period of eight years in relation to the rights of EU citizens who continue to live in the UK following Brexit; the UK will continue to seek guidance from the CJEU through the usual referral procedure. The UK courts will continue to deliver the final judgment in all decisions, not the CJEU.

1.3.2 Supreme Court

Apart from cases concerning European law, the Supreme Court is the highest appeal court on civil and criminal matters, and all other English courts are bound by it. The Supreme Court replaced the long-established House of Lords in 2009 and the rules of precedent are exactly the same for the Supreme Court as they were for the House of Lords before it. The House of Lords was traditionally bound by its own decisions, but in 1966 the Lord Chancellor issued a Practice Statement saying that the House of Lords was no longer bound by its previous decisions. In practice, the House of Lords only rarely overruled one of its earlier decisions, and this reluctance is illustrated by the case of *R v Kansal (No. 2)* (2001). In that case the House of Lords held that it had probably got the law wrong in its earlier decision of *R v Lambert* (2001). The latter case had ruled that the Human Rights Act 1998 would not have retrospective effect in relation to appeals heard by the House of Lords after the Act came into force, but which had been decided by the lower courts before the Act came into force. Despite the fact that the majority thought the earlier judgment of *Lambert* was wrong, the House decided in *Kansal* to follow it. This was because *Lambert* was a recent decision, it represented a possible interpretation of the statute that was not unworkable and it only concerned a temporary transitional period.

There is, however, a range of cases where the House of Lords had been prepared to apply the 1966 Practice Direction. In *Hall v Simons* (2000), the House of Lords refused to follow the earlier case of *Rondel v Worsley* (1969), which had given barristers immunity against claims for negligence in their presentation of cases.

In *R v G and another* (2003), the House of Lords overruled an established criminal case of *R v Caldwell* (1981). Under *R v Caldwell*, the House had been prepared to convict people for criminal offences where the prosecution had not proved that the defendant personally had intended, or seen the risk of causing, the relevant harm, but had simply shown that a reasonable person would have had this state of mind on the facts. This was particularly harsh where the actual defendant was incapable of seeing the risk of harm, because, for example,

they were very young or of low intelligence. *Caldwell* had been heavily criticised by academics over the years, but when the House of Lords originally reconsidered the matter, in *R v Reid* (1992), it confirmed its original decision. However, when the matter again came to the House of Lords in 2003, the House dramatically admitted that it had got the law wrong. It stated:

The surest test of a new legal rule is not whether it satisfies a team of logicians but how it performs in the real world. With the benefit of hindsight the verdict must be that the rule laid down by the majority in *Caldwell* failed this test. It was severely criticised by academic lawyers of distinction. It did not command respect among practitioners and judges. Jurors found it difficult to understand; it also sometimes offended their sense of justice. Experience suggests that in *Caldwell* the law took a wrong turn.

In *R v Jogee* (2016), the Supreme Court was looking at the law on accomplice liability. The law on this subject had been developed by the House of Lords in *R v Powell and English* (1999). The Supreme Court decided that the House of Lords had got the law wrong on this area and that it was appropriate to change back the law to how it had been before *Powell and English*. It was justified in making this change because when the House of Lords had decided *Powell and English* not all relevant authorities were considered; the law laid down in *Powell and English* was not satisfactory and caused problems leading to a large number of appeals; and it was wrong for accomplice liability to be imposed when the accomplice had less culpability than the murderer. A change in the law did not need to be left to Parliament because accomplice liability is governed by the common law and should be corrected by the courts. This change in the law would also bring the common law into line with legislation made by Parliament (the Serious Crime Act 2007) in an overlapping area of criminal liability. The law was therefore changed even though the Supreme Court was mindful of the fact that this change was likely to lead to a number of appeals by people who had been convicted as accomplices in earlier cases under *Powell and English*.

In *Re Pinochet Ugarte* (1999), the House of Lords stated that it had the power to reopen an appeal where, through no fault of his or her own, one of the parties has been subjected to an unfair procedure. The case was part of the litigation concerning General Augusto Pinochet, the former Chilean head of state. The Lords reopened the appeal because one of the Law Lords who heard the original appeal, Lord Hoffmann, was connected with the human rights organisation Amnesty International, which had been a party to the appeal. This meant that there was a possibility of bias and so the proceedings could be viewed as unfair. The Lords stressed, however, that there was no question of them being able to reopen an appeal because the decision made originally was thought to be wrong; the Pinochet appeal was reopened because it could be said that there had not been a fair hearing, and not because the decision reached was wrong (although at the second hearing of the appeal, the Lords did in fact come to a slightly different decision).

Assange v Swedish Prosecution Authority (2012) concerned an application by the Swedish authorities for Julian Assange (involved in the Wikileaks scandal) to be extradited to Sweden to face charges concerning accusations of sexual assault. The Supreme Court allowed this application but Assange's lawyer argued that the case should be reopened because the Supreme Court had decided the case on the basis of the Vienna Convention, which had not been discussed during the hearing. This argument to reopen the case was subsequently rejected.

1.3.3 Privy Council

The Privy Council was established by the Judicial Committee Act 1833. It is the final appeal court for outlying British or formerly British territories, such as Jamaica, Gibraltar and the Isle of Man. The judges of the Supreme Court sit in the Privy Council. It is based in the buildings of the Supreme Court but remains a separate entity. In 2019, it heard 50 appeals, disposing of 40.

Under the traditional rules of precedent, the decisions of the Privy Council do not bind English courts, but have strong persuasive authority because of the seniority of the judges who sit in the Privy Council (*de Lasala v de Lasala* (1980)). A national court will therefore usually follow a Privy Council decision (unless there is a decision of a superior court to the contrary), but it is not bound by precedent to do so. A judge of the Courts of England and Wales should not follow a decision of the Privy Council if it is inconsistent with the decision of a court by which the judge is otherwise bound, because the Privy Council is not part of the hierarchy of the national court structure.

Some recent cases, particularly in the context of criminal law, had thrown doubt on this limited role of the Privy Council in developing judicial precedent in England, but the traditional approach has been confirmed by the Supreme Court in *Willers v Joyce* (2016). The Supreme Court stated that a first instance judge or the Court of Appeal cannot decide to ignore this rule of precedent simply because they consider it a ‘foregone conclusion’ that the Privy Council view will be accepted by the Supreme Court in the future. Judges should never follow a decision of the Privy Council, if it is inconsistent with the decision of a court which is binding on them.

However, in *Willers v Joyce* the Supreme Court did state that, while a first instance judge or Court of Appeal judge cannot themselves ignore the traditional rules of precedent, the Privy Council itself can state its decision should be followed by the lower domestic courts. In an appeal to the Privy Council involving an issue of English law on which a previous decision of the House of Lords, Supreme Court or Court of Appeal is challenged, the Privy Council can expressly direct that the previous decision was wrong and that domestic courts should treat the Privy Council’s decision as representing English law. The Supreme Court remarked that such an approach ‘is plainly sensible in practice and justified by experience’. It takes advantage of the fact that the Privy Council judges normally consist of Justices of the Supreme Court.

In 2016 the Supreme Court and the Privy Council sat together for the first time. In *R v Jogee and Ruddock* (2016) the two courts heard two appeals jointly so that a united approach was taken to the legal issues that arose in the cases. *R v Jogee* was a domestic appeal to the Supreme Court and *R v Ruddock* was a Jamaican case on appeal to the Privy Council. The same panel of judges gave a joint judgment in the cases.

Willers v Joyce lays down as a matter of principle what effectively happened in practice in *Jersey v Holley* (2005). That case concerned the old defence of provocation in criminal law which if successful reduced a defendant’s liability from murder to manslaughter.

The defence was laid down in s. 3 of the Homicide Act 1957. This section was interpreted as laying down a two-part test. The first part of the test required the defendant to have suffered from a sudden and temporary loss of self-control when he or she killed the victim. The second part of the test provided that the defence would only be available if a reasonable person would have reacted as the defendant did. This was described as an objective test, because it was judging the defendant’s conduct according to objective standards, rather than their own standards. However, in practice, reasonable people almost never kill, so if this second requirement was interpreted strictly, the defence would rarely have succeeded. As a result, in *R v Smith (Morgan James)* (2000) the House of Lords

held that, in determining whether a reasonable person would have reacted in this way, a court could take into account the actual characteristics of the defendant. So if the defendant had been depressed and was of low intelligence, then the test would become whether a reasonable person suffering from depression and of low intelligence would have reacted by killing the victim.

In an appeal from Jersey on the defence of provocation, *Attorney General for Jersey v Holley* (2005), the Privy Council refused to follow the case of *Smith (Morgan James)*, stating the case misinterpreted Parliament's intention when it passed the Homicide Act 1957. It considered the only characteristics that should be taken into account when considering whether the defendant had reacted reasonably were characteristics that were directly relevant to the provocation itself, but not general characteristics which simply affected a person's ability to control him- or herself.

The Court of Appeal in *James and Karimi* (2006) decided to apply the Privy Council's judgment in *Holley* rather than the House of Lords' judgment in *Smith (Morgan James)*. The Court of Appeal acknowledged this went against the established rules of judicial precedent. It gave various justifications for treating this as an exceptional case in which those established rules should not apply. It pointed out that the Privy Council had realised the importance of its judgment and had chosen to have an enlarged sitting of nine judges, all drawn from the House of Lords:

The procedure adopted and the comments of members of the Board in *Holley* suggest that a decision must have been taken by those responsible for the constitution of the Board in *Holley* . . . to use the appeal as a vehicle for reconsidering the decision of the House of Lords in *Morgan Smith*, not just as representing the law of Jersey but as representing the law of England. A decision was taken that the Board hearing the appeal to the Privy Council should consist of nine of the twelve Lords of Appeal in Ordinary.

The judges in *Holley* were divided in their verdict six to three. The start of the first judgment of the majority stated:

This appeal, being heard by an enlarged board of nine members, is concerned to resolve this conflict [between the House of Lords and the Privy Council] and clarify definitively the present state of English law, and hence Jersey law, on this important subject.

The dissenting judges stated:

We must however accept that the effect of the majority decision is as stated in paragraph 1 of the majority judgment.

Thus, even the dissenting judges appear to accept that the majority decision laid down the law in England. The Court of Appeal also considered that if an appeal was taken to the House of Lords, the outcome was 'a foregone conclusion' and the House would take the same approach as *Holley*:

Half of the Law Lords were party to the majority decision in *Holley*. Three more in that case accepted that the majority decision represented a definitive statement of English law on the issue in question. The choice of those to sit on the appeal might raise some nice questions, but we cannot conceive that, whatever the precise composition of the Committee, it would do other than rule that the majority decision in *Holley* represented the law of England. In effect, in the long term at least, *Holley* has overruled *Morgan Smith*.

This argument would be more convincing if the *Holley* case had been decided by a unanimous verdict. In fact, there were still potentially six House of Lords judges who preferred the

Smith (Morgan James) approach: the three dissenting judges and the three House of Lords judges who did not hear the *Holley* case. The ‘foregone conclusion’ test has been rejected by the Supreme Court in *Willers v Joyce*. What matters is whether the Privy Council has expressly stated that it is laying down the law for England and Wales.

Lord Woolf recognised in *R v Simpson* (2003) that the rules of judicial precedent must provide certainty but at the same time they themselves must be able to evolve in order to do justice:

The rules as to precedent reflect the practice of the courts and have to be applied bearing in mind that their objective is to assist in the administration of justice. They are of considerable importance because of their role in achieving the appropriate degree of certainty as to the law. This is an important requirement of any system of justice. The principles should not, however, be regarded as so rigid that they cannot develop in order to meet contemporary needs.

The Court of Appeal presumably concluded in *James and Karimi* that this was a situation where justice could only be achieved by shifting the established rules of judicial precedent. The actual outcome of the case made it more difficult for a partial defence to murder, reducing liability to manslaughter, to succeed. This may be considered to achieve justice for victims’ families, but it may be an injustice to the mentally ill defendant.

1.3.4 Court of Appeal

This is split into Civil and Criminal Divisions; they do not bind each other. Both are bound by decisions of the old House of Lords, and the new Supreme Court.

Key case

In *Young v Bristol Aeroplane Co Ltd* (1946) the Court of Appeal stated that the Civil Division is usually bound by its own previous decisions. There are four exceptions to this general rule.

- 1 The previous decision was made in ignorance of a relevant law (it is said to have been made *per incuriam*). This *per incuriam* rule was interpreted in *R v Cooper* (2011) as extending beyond decisions made in ignorance of legal authorities, to include decisions made in ignorance of relevant ‘material and argument’. On the facts of that case, the material and arguments concerned the history of legislation banning sex offenders from working with children. Without this information the Court of Appeal had misinterpreted the legislation in an earlier case and this interpretation was corrected in the present case.
- 2 There are two previous conflicting decisions.
- 3 There is a House of Lords (or Supreme Court) decision which conflicts with the earlier Court of Appeal decision.
- 4 A proposition of law was assumed to exist by an earlier court and was not subject to argument or consideration by that court.

The last of these exceptions was added by *R (on the application of Kadhim) v Brent London Borough Housing Benefit Review Board* (2001).

Legal principle

The Civil Division of the Court of Appeal is usually bound by its own previous decisions.

In the Criminal Division, the results of cases heard may decide whether or not an individual goes to prison, so the Criminal Division takes a more flexible approach to its previous decisions and does not follow them where doing so could cause injustice. In *R v Simpson* (2003) the Court of Appeal stated that it had a degree of discretion to decide whether one of its earlier decisions should be treated as binding on itself when there were grounds for saying the earlier decision was wrong. This *dicta* was narrowly interpreted in *R v Magro* (2010), where the Court of Appeal held that its earlier decision in *R v Clarke* (2009) was wrong, but it was still not able to overrule it because the earlier decision had benefited from full argument of the relevant legislation and case law and the judges closely analysed the point. Thus *R v Simpson* was interpreted as simply referring to the *per incuriam* rule that an earlier case would not be binding if it was made in ignorance of a relevant law (at least when the earlier case benefits the defendant).

1.3.5 High Court

This court is divided between the Divisional Courts and the ordinary High Court. All are bound by the Court of Appeal, the old House of Lords and the new Supreme Court.

The Divisional Courts are the Queen's Bench Division, which deals with criminal appeals and judicial review, the Chancery Division and the Family Division, which both deal with civil appeals. The two civil Divisional Courts are bound by their previous decisions, but the Divisional Court of the Queen's Bench is more flexible about this, for the same reason as the Criminal Division of the Court of Appeal. The Divisional Courts bind the ordinary High Court.

The ordinary High Court is not bound by its own previous decisions. It can produce precedents for courts below it, but these are of a lower status than those produced by the Court of Appeal, the old House of Lords or the new Supreme Court.

1.3.6 Crown Court

The Crown Court is bound by all the courts above it. Its decisions do not form binding precedents, though when High Court judges sit in the Crown Court, their judgments form persuasive precedents, which must be given serious consideration in successive cases, though it is not obligatory to follow them. When a circuit or district judge is sitting, no precedents are formed. Since the Crown Court cannot form binding precedents, it is obviously not bound by its own decisions.

1.3.7 Magistrates' Courts

The magistrates' courts hear mainly summary criminal cases. They are bound by the High Court, the Court of Appeal and the Supreme Court. Their own decisions are not reported, and cannot produce binding precedents, or even persuasive ones. Like the Crown Court, they are therefore not bound by their own decisions.

1.3.8 County Court

The County Court hears low-value civil cases. It is a court of record so it can set precedents for itself, but not for higher courts. It is bound by the High Court, the Court of Appeal and the Supreme Court.

1.3.9 European Court of Human Rights

The European Court of Human Rights (ECtHR) is an international court based in Strasbourg. It hears cases alleging that there has been a breach of the European Convention on Human Rights. This court does not fit neatly within the hierarchy of the courts. Under s. 2 of the Human Rights Act 1998, an English court ‘must take account of’ the cases decided by the ECtHR. This would suggest that the decisions of the ECtHR are not completely binding on UK courts. Usually the jurisprudence of the ECtHR, having been taken into account, would be followed, but the domestic courts are not bound to do so. There is considerable debate about how s. 2 should be interpreted which is linked to a broader debate about how much influence the ECtHR should have in the United Kingdom. Under what has become known as the ‘mirror principle’, it has been suggested that the domestic courts should seek to mirror the interpretation of Convention rights to the interpretation given by the ECtHR. In *Manchester City Council v Pinnock (No. 2)* (2011) the Supreme Court stated:

Where . . . 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.

Despite this, the Supreme Court (and the House of Lords before it) has, on occasion, refused to follow an earlier decision of the ECtHR on the basis that the ECtHR has not fully understood the UK common law on this subject. In *Morris v UK* (2002), the ECtHR ruled that the courts martial system (which is the courts system used by the army) breached the European Convention on Human Rights as it did not guarantee a fair trial within the meaning of Art. 6 of the Convention. Subsequently, in *R v Boyd* (2002), three soldiers who had been convicted of assault by a court martial argued before the House of Lords that the court martial had violated their right to a fair trial under the Convention. This argument was rejected and the House of Lords refused to follow the earlier decision of the ECtHR. It stated:

While the decision in *Morris* is not binding on the House, it is of course a matter which the House must take into account [s. 2(1)(a) of the Human Rights Act 1998] and which demands careful attention, not least because it is a recent expression of the European Court’s view on these matters.

The House considered that the European Court was given ‘rather less information than the House’ about the courts martial system, and in the light of this additional information it concluded that there had been no violation of the Convention.

In *R v Horncastle* (2009), two appeals were heard together by the Supreme Court where defendants had been convicted using witness statements and the witness was not available to be cross-examined. In one case, the defendant was on trial for causing grievous bodily harm and the victim was a key witness but had died of natural causes before the trial. In the other case, the trial was for kidnapping and the victim had run away the day before the trial because she was too frightened to give evidence. The defendants appealed against their convictions, arguing that they had not received a fair trial in breach of Art. 6 of the European Convention. They referred, in particular, to the case of *Al-Khawaja and Tahery v UK* (2009) where the ECtHR had stated that convictions could not be based ‘solely or to a decisive extent’ on the evidence of a witness who could not be cross-examined (known as hearsay evidence). The defendants’ appeals were rejected by the Supreme Court, which refused to follow the *Al-Khawaja* case. It commented that the ECtHR had developed its case law without giving

full consideration to the safeguards against an unfair trial that existed under the common law. The Supreme Court stated:

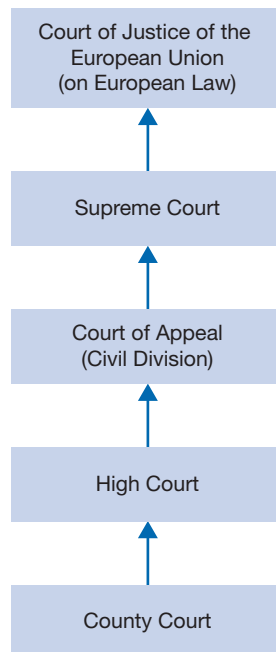
The requirement to 'take into account' the Strasbourg jurisprudence will normally result in this court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg court.

The original *Al-Khawaja and Tahery v UK* decision was given in Chamber and the UK Government requested that the case be reheard by the Grand Chamber (see pp. 408–9). The Grand Chamber accepted in 2001 that hearsay evidence could be admissible provided there were sufficient counterbalancing safeguards. Thus, a healthy dialogue between the ECtHR and the national court resulted in modification of the European Court's position.

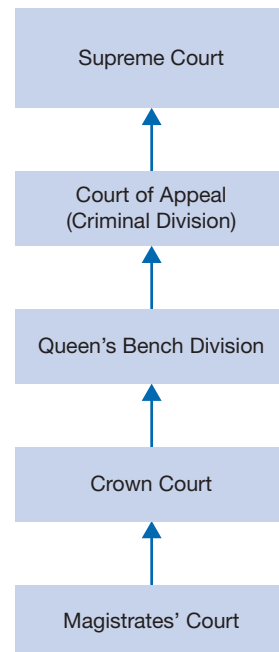
Where there is a conflict between a decision of the ECtHR and a national court which binds a lower court, the lower court should usually follow the decision of the binding higher national court, but give permission to appeal. Thus, in *Kay v Lambeth London Borough Council* (2006) the Court of Appeal had been faced with a binding precedent of the House of Lords which conflicted with a decision of the ECtHR. The Court of Appeal had applied the House of Lords' decision but gave permission to appeal. In the subsequent appeal the

Figure 1.2 The routes for civil and criminal cases

Hierarchy of the main civil courts



Hierarchy of the criminal courts



House had agreed that this was the appropriate course of action. We can expect to see similar tensions in the relationship between the Supreme Court and the ECtHR.

There is one exception where the usual English rules of precedent will not apply and the decision of the ECtHR will be followed rather than the decision of the House of Lords. This exception was identified in the case of *D v East Berkshire Community NHS Trust* (2003). In that case the Court of Appeal did not follow a decision of the House of Lords which was incompatible with the Convention because:

- the Strasbourg court had disagreed with the earlier House of Lords decision in an application made in the same case;
- the House of Lords' decision had been given before the Human Rights Act 1998;
- there had been no reference in the House of Lords' decision to the Convention;
- the policy considerations underlying the earlier House of Lords decision had been largely eroded.

1.4 How do judges really decide cases?

The independence of the judiciary was ensured by the Act of Settlement 1700, which transferred the power to sack judges from the Crown to Parliament. Consequently, judges should theoretically make their decisions based purely on the logical deductions of precedent, uninfluenced by political or career considerations.

The eighteenth-century legal commentator, William Blackstone, introduced the declaratory theory of law, stating that judges do not make law, but merely, by the rules of precedent, discover and declare the law that has always been: '[the judge] being sworn to determine, not according to his private sentiments . . . not according to his own private judgment, but according to the known laws and customs of the land: not delegated to pronounce a new law, but to maintain and expound the old one'. Blackstone does not accept that precedent ever offers a choice between two or more interpretations of the law: where a bad decision is made, he states, the new one that reverses or overrules it is not a new law, nor a statement that the old decision was bad law, but a declaration that the previous decision was 'not law', in other words that it was the wrong answer. His view presupposes that there is always one right answer, to be deduced from an objective study of precedent.

Today, however, this position is considered somewhat unrealistic. If the operation of precedent is the precise science Blackstone suggests, a large majority of cases in the higher courts would never come to court at all. The lawyers concerned could simply look up the relevant case law and predict what the decision would be, then advise whichever of the clients would be bound to lose not to bother bringing or fighting the case. In a civil case, or any appeal case, no good lawyer would advise a client to bring or defend a case that they had no chance of winning. Therefore, where such a case is contested, it can be assumed that, unless one of the lawyers has made a mistake, it could go either way, and still be in accordance with the law. Further evidence of this is provided by the fact that one can read a judgment of the Court of Appeal, argued as though it were the only possible decision in the light of the cases that had gone before, and then discover that this apparently inevitable decision has promptly been reversed by the House of Lords.

In practice, then, judges' decisions may not be as neutral as Blackstone's declaratory theory suggests: they have to make choices which are by no means spelled out by precedents. Yet, rather than openly stating that they are choosing between two or more equally

relevant precedents, the courts find ways to avoid awkward ones, which give the impression that the precedents they do choose to follow are the only ones that could possibly apply. In theory, only the Supreme Court, which can overrule its own decisions as well as those of other courts, can depart from precedent: all the other courts must follow the precedent that applies in a particular case, however much they dislike it. In fact, there are a number of ways in which judges may avoid awkward precedents that at first sight might appear binding:

- By distinguishing the awkward precedent on its facts – arguing that the facts of the case under consideration are different in some important way from those of the previous case, and therefore the rule laid down does not apply to them. Since the facts are unlikely to be identical, this is the simplest way to avoid an awkward precedent, and the courts have made some extremely narrow distinctions in this way.
- By distinguishing the point of law – arguing that the legal question answered by the precedent is not the same as that asked in the present case.
- By stating that the precedent has been superseded by more recent decisions, and is therefore outdated.
- By giving the precedent a very narrow *ratio decidendi*. The only part of a decision that forms binding precedent is the *ratio*, the legal principle on which the decision is based. Since judges never state ‘this is the *ratio decidendi*’, it is possible to argue at some length about which bits of the judgment actually form the *ratio* and therefore bind courts in later cases. Judges wishing to avoid an awkward precedent may reason that those parts of the judgment which seem to apply to their case are not part of the *ratio*, and are only *obiter dicta*, which they are not obliged to follow.
- By arguing that the precedent has no clear *ratio decidendi*. There are usually three judges sitting in Court of Appeal cases, and five in the Supreme Court. Where each judge in the former case has given a different reason for coming to the same decision, or where, for example, two judges of the Supreme Court take one view, two more another, and the fifth agrees with none of them, it can be argued that there is no one clear *ratio decidendi* for the decision.
- By claiming that the precedent is inconsistent with a later decision of a higher court, and has been overruled by implication.
- By stating that the previous decision was made *per incuriam*, meaning that the court failed to consider some relevant statute or precedent. This method is used only rarely, since it clearly undermines the status of the court below.
- By arguing that the precedent is outdated, and no longer in step with modern thinking.

We can see that there is considerable room for manoeuvre within the doctrine of precedent, so what factors guide judicial decisions, and to what extent? The following are some of the answers that have been suggested.

1.4.1 Dworkin: a seamless web of principles

Ronald Dworkin argues that judges have no real discretion in making case law. He sees law as a seamless web of principles, which supply a right answer – and only one – to every possible problem. Dworkin reasons that although stated legal rules may ‘run out’ (in the sense of not being directly applicable to a new case) legal principles never do, and therefore judges never need to use their own discretion.

In his book *Law's Empire* (1986), Professor Dworkin claims that judges first look at previous cases, and from those deduce which principles could be said to apply to the case before them. Then they consult their own sense of justice as to which to apply, and also consider what the community's view of justice dictates. Where the judge's view and that of the community coincide, there is no problem, but if they conflict, the judges then ask themselves whether or not it would be fair to impose their own sense of justice over that of the community. Dworkin calls this the interpretive approach and, although it may appear to involve a series of choices, he considers that the legal principles underlying the decisions mean that in the end only one result could possibly surface from any one case.

Dworkin's approach has been heavily criticised as being unrealistic: opponents believe that judges do not consider principles of justice but take a much more pragmatic approach, looking at the facts of the case, not the principles.

1.4.2 Critical theorists: precedent as legitimation

Critical legal theorists, such as David Kairys (1998), take a quite different view. They argue that judges have considerable freedom within the doctrine of precedent. Kairys suggests that there is no such thing as legal reasoning, in the sense of a logical, neutral method of determining rules and results from what has gone before. He states that judicial decisions are actually based on 'a complex mixture of social, political, institutional, experiential and personal factors', and are simply legitimated, or justified, by reference to previous cases. The law provides 'a wide and conflicting variety' of such justifications 'from which courts pick and choose'.

The process is not necessarily as cynical as it sounds. Kairys points out that he is not saying that judges actually make the decision and then consider which precedents they can pick to justify it; rather their own beliefs and prejudices naturally lead them to give more weight to precedents which support those views. Nevertheless, for critical legal theorists, all such decisions can be seen as reflecting social and political judgments, rather than objective, purely logical deductions.

Critical theory argues that the neutral appearance of so-called 'legal reasoning' disguises the true nature of legal decisions which, by the choices made, uphold existing power relations within society, tending to favour, for example, employers over employees, property owners over those without, men over women, and rich developed countries over poor undeveloped ones.

1.4.3 Griffith: political choices

In a similar vein, Griffith (1997) argues in his book *The Politics of the Judiciary* that judges make their decisions based on what they see as the public interest, but that their view of this interest is coloured by their background and their position in society. He suggests that the narrow social background – usually public school and Oxbridge – of the highest judges (see p. 211), combined with their position as part of established authority, leads them to believe that it is in the public interest that the established order should be maintained: in other words, that those who are in charge – whether of the country or, for example, in the workplace – should stay in charge, and that traditional values should be maintained. This leads them to 'a tenderness for private property and dislike of trade unions, strong adherence to the maintenance of order, distaste for minority opinions, demonstrations and protests, the

avoidance of conflict with Government policy even where it is manifestly oppressive of the most vulnerable, support of governmental secrecy, concern for the preservation of the moral and social behaviour [to which they are] accustomed’.

As Griffith points out, the judges’ view of public interest assumes that the interests of all the members of society are roughly the same, ignoring the fact that within society, different groups – employers and employees, men and women, rich and poor – may have interests which are diametrically opposed. What appears to be acting in the public interest will usually mean in the interest of one group over another, and therefore cannot be seen as neutral.

1.4.4 Waldron: political choices, but why not?

In his book, *The Law* (1989), Waldron agrees that judges do exercise discretion, and that they are influenced in those choices by political and ideological considerations, but argues that this is not necessarily a bad thing. He contends that while it would be wrong for judges to be biased towards one side in a case, or to make decisions based on political factors in the hope of promotion, it is unrealistic to expect a judge to be ‘a political neuter – emasculated of all values and principled commitments’.

Waldron points out that to be a judge at all means a commitment to the values surrounding the legal system: recognition of Parliament as supreme, the importance of precedent, fairness, certainty, the public interest. He argues that this itself is a political choice, and further choices are made when judges have to balance these values against one another where they conflict. The responsible thing to do, according to Waldron, is to think through such conflicts in advance, and to decide which might generally be expected to give way to which. These will inevitably be political and ideological decisions. Waldron argues that since such decisions have to be made ‘the thing to do is not to try to hide them, but to be as explicit as possible’. Rather than hiding such judgments behind ‘smokescreens of legal mystery . . . if judges have developed particular theories of morals, politics and society, they should say so up front, and incorporate them explicitly into their decision-making’.

Waldron suggests that where judges feel uncomfortable about doing this, it may be a useful indication that they should re-examine their bias, and see whether it is an appropriate consideration by which they are to be influenced. In addition, if the public know the reasoning behind judicial decisions ‘we can evaluate them and see whether we want to rely on reasons like that for the future’.

Some support for Waldron’s analysis can be found in Lord Hoffmann’s judgment in *Arthur J.S. Hall & Co v Simons* (2000). In that case the House of Lords dramatically removed the established immunity of barristers from liability in negligence for court work. Lord Hoffmann stated:

I hope that I will not be thought ungrateful if I do not encumber this speech with citations. The question of what the public interest now requires depends upon the strength of the arguments rather than the weight of authority.

1.5 Do judges make law?

Although judges have traditionally seen themselves as declaring or finding rather than creating law, and frequently state that making law is the prerogative of Parliament, there are several areas in which they clearly do make law.

In the first place, historically, a great deal of our law is and always has been case law, made by judicial decisions. Contract and tort law are still largely judge-made, and many of the most important developments – for example, the development of negligence as a tort – have had profound effects. Even though statutes have later been passed on these subjects, and occasionally Parliament has attempted to embody whole areas of common law in statutory form, these still embody the original principles created by the judges.

Secondly, the application of law, whether case law or statute, to a particular case is not usually an automatic matter. Terminology may be vague or ambiguous, new developments in social life have to be accommodated, and the procedure requires interpretation as well as application. As we have suggested, judicial precedent does not always make a particular decision obvious and obligatory – there may be conflicting precedents, their implications may be unclear, and there are ways of getting round a precedent that would otherwise produce an undesirable decision. If it is accepted that Blackstone's declaratory theory does not apply in practice, then clearly the judges do make law, rather than explaining the law that is already there. The theories advanced by Kairys, Griffith and Waldron all accept that judges do have discretion, and therefore they do to some extent make law.

Where precedents do not spell out what should be done in a case before them, judges nevertheless have to make a decision. They cannot simply say that the law is not clear and refer it back to Parliament, even though in some cases they point out that the decision before them would be more appropriately decided by those who have been elected to make decisions on changes in the law. This was the case in *Airedale NHS Trust v Bland* (1993), where the House of Lords considered the fate of Tony Bland, the football supporter left in a coma after the Hillsborough stadium disaster. The court had to decide whether it was lawful to stop supplying the drugs and artificial feeding that were keeping Mr Bland alive, even though it was known that doing so would mean his death soon afterwards. Several Law Lords made it plain that they felt that cases raising 'wholly new moral and social issues' should be decided by Parliament, the judges' role being to 'apply the principles which society, through the democratic process, adopts, not to impose their standards on society'. Nevertheless, the court had no option but to make a decision one way or the other, and the judges decided the action was lawful in the circumstances, because it was in the patient's best interests.

Thirdly, our judges have been left to define their own role, and the role of the courts generally in the political system, more or less as they please. They have, for example, given themselves the power to review decisions of any public body, even when Parliament has said those decisions are not to be reviewed. And despite their frequent pronouncements that it is not for them to interfere in Parliament's law-making role, the judges have made it plain that they will not, unless forced by very explicit wording, interpret statutes as encroaching on common law rights or judge-made law (see p. 71). They also control the operation of case law without reference to Parliament: an obvious example is that the 1966 Practice Direction announcing that the House of Lords would no longer be bound by its own decisions, which made case law more flexible and thereby gave the judges more power, was made on the court's own authority, without needing permission from Parliament.

The House of Lords has explained its approach to judicial law-making (which is the same for the Supreme Court) in the case of *C (A Minor) v DPP* (1995) which raised the issue of children's liability for crime. The common law defence of *doli incapax* provided that a defendant aged between 10 and 14 could be liable for a crime only if the prosecution could prove that the child knew that what he or she did was seriously wrong. On appeal from the magistrates' court, the Divisional Court held that the defence was outdated and should no longer exist in law. An appeal was brought before the House of Lords, arguing that the

Divisional Court was bound by precedent and not able to change the law in this way. The House of Lords agreed, and went on to consider whether it should change the law itself (as the 1966 Practice Direction clearly allowed it to do), but decided that this was not an appropriate case for judicial law-making. Explaining this decision, Lord Lowry suggested five factors were important:

- Where the solution to a dilemma was doubtful, judges should be wary of imposing their own answer.
- Judges should be cautious about addressing areas where Parliament had rejected opportunities of clearing up a known difficulty, or had passed legislation without doing so.
- Areas of social policy over which there was dispute were least likely to be suitable for judicial law-making.
- Fundamental legal doctrines should not be lightly set aside.
- Judges should not change the law unless they can be sure that doing so is likely to achieve finality and certainty on the issue.

This guidance suggests that the judges should take quite a cautious approach to changing the law. In practice, however, the judges do not always seem to be following these guidelines. For example, in an important criminal case of *R v Dica* (2004) the Court of Appeal overruled an earlier case of *R v Clarence* (1888) and held that criminal liability could be imposed on a defendant for recklessly infecting another person with HIV. This change in the law was made despite the fact that the Home Office had earlier decided that legislation should not be introduced which would have imposed liability in this situation (*Violence: Reforming the Offences Against the Person Act 1861* (1998)). The Home Office had observed that ‘this issue had ramifications going beyond the criminal law into wider considerations of social and public health policy’.

Some commentators feel that the judiciary’s current approach is tending to go too far, and straying outside its constitutional place. Writing in the *New Law Journal* in 1999, Francis Bennion, a former parliamentary counsel, criticised what he called the ‘growing appetite of some judges for changing the law themselves, rather than waiting for Parliament to do it’. Bennion cites two cases as examples of this. The first, *Kleinwort Benson Ltd v Lincoln City Council* (1998), concerns contract law, and in particular, a long-standing rule, originating from case law, that where someone made a payment as a result of a mistake about the law, they did not have the right to get the money back. The rule had existed for nearly two centuries, and been much criticised in recent years – so much so that a previous Lord Chancellor had asked the Law Commission to consider whether it should be amended by legislation, and they had concluded that it should. This would normally be taken by the courts as a signal that they should leave the issue alone and wait for Parliament to act, but in this case the Lords decided to change the rule. In doing so, Lord Keith expressed the view that ‘a robust view of judicial development of the law’ was desirable. Bennion argues that, in making this decision, the Lords were usurping the authority which constitutionally belongs to Parliament. He also points out that judicial, rather than parliamentary, change of the law in this kind of area causes practical difficulties, because it has retrospective effect; a large number of transactions which were thought to be settled under the previous rule can now be reopened. This would not usually be the case if Parliament changed the law.

The second case Bennion criticises is *DPP v Jones* (1999), which concerned a demonstration on the road near Stonehenge. In that case the Lords looked at another long-held rule, that the public have a right to use the highway for ‘passing and repassing’ (in other words,

walking along the road), and for uses which are related to that, but that there is no right to use the highway in other ways, such as demonstrating or picketing. In *Jones*, the House of Lords stated that this rule placed unrealistic and unwarranted restrictions on everyday activities, and that the highway is a public place that the public has a right to enjoy for any reasonable purpose. This decision clearly has major implications for the powers of the police to break up demonstrations and pickets.

Bennion argues that, in making decisions like these, the judiciary are taking powers to which they are not constitutionally entitled, and that they should not extend their law-making role into such controversial areas.

Key case

An interesting example of judicial law-making is the Court of Appeal decision of *Simmons v Castle* (2012). The background to the case was that Lord Jackson (a senior judge) had produced a report recommending certain reforms should be made to the civil justice system to try to reduce the cost of litigation (see p. 679). Some of the key recommendations of this report were included by the Government in the Legal Aid, Sentencing and Punishment of Offenders Act 2012. But the legislation did not include a proposed reform to increase the award of damages by 10 per cent. The Government stated that calculation of damages was governed by the common law and it would be left to the courts to make this change. The Court of Appeal subsequently announced, in *Simmons v Castle* (2012), that this increase would take effect from 1 April 2013 at the same time as the 2012 Act would come into force. The Court of Appeal stated that when the 2012 Act was passed there was a 'clear understanding that the judges would implement the ten per cent increase', and that it would be 'little short of a breach of faith' if the judges failed to do so. The problem with the courts changing the law in this way is that it throws into doubt how independent they are from the politicians. Also, the judges do not have the benefit of the tight parliamentary scrutiny. After the case was decided, the Association of British Insurers applied for the Court of Appeal to reopen its decision because it was unhappy that the decision would apply retrospectively to cases that had commenced before the April deadline and thereby increase the cost of these cases for the insurance companies.

Legal principle

Judges should change the law if Parliament intended them to do so and a failure to do so would be a breach of faith.

1.6 When should judges make law?

Again, this is a subject about which there are different views, not least among the judiciary, and the following are some of the approaches which have been suggested.

1.6.1 Adapting to social change

In 1952, Lord Denning gave a lecture called 'The Need for a New Equity', arguing that judges had become too timid about adapting the law to the changing conditions of society. They were, he felt, leaving this role too much to Parliament, which was too slow and cumbersome to do the job well (by 1984, he felt that judges had taken up the task again).

Lord Scarman, in *McLoughlin v O'Brian* (1982), stated that the courts' function is to adjudicate according to principle, and if the results are socially unacceptable Parliament can legislate to overrule them. He felt that the risk was not that case law might develop too far, but that it stood still and did not therefore adapt to the changing needs of society.

Paterson's (1982) survey of 19 Law Lords active between 1967 and 1973 found that at least 12 thought that the Law Lords had a duty to develop the common law in response to changing social conditions. A case where the judges did eventually show themselves willing to change the law in the light of social change is *Fitzpatrick v Sterling Housing Association Ltd* (2000). The case concerned a homosexual man, Mr Fitzpatrick, who had lived with his partner, Mr Thompson, for 18 years, nursing and caring for him after Mr Thompson suffered an accident which caused irreversible brain damage and severe paralysis. Mr Thompson was the tenant of the flat in which they lived and, when he died in 1994, Mr Fitzpatrick applied to take over the tenancy, which gave the tenant certain protections under the Rent Acts. The landlords refused. The Rent Act 1977 states that when a statutory tenant dies, the tenancy can be taken over by a spouse, a person living with the ex-tenant as wife or husband, or a member of the family who was living with the tenant. Mr Fitzpatrick's case sought to establish that he was a member of Mr Thompson's family, by virtue of their close and loving relationship.

The Court of Appeal agreed that 'if endurance, stability, interdependence and devotion were the sole hallmarks of family membership', there could be no doubt that the couple were a family. They also pointed out that discriminating against stable same-sex relationships was out of step with the values of modern society. However, they recognised that the law on succession to statutory tenancies was firmly rooted in the idea that families were based on marriage or kinship, and this had only ever been relaxed in terms of heterosexual couples living together, who were treated as if married. As a result, the court concluded that it would be wrong to change the law by interpreting the word family to include same-sex couples; all three judges agreed that such a change should be made, in order to reflect modern values, but it should be made by Parliament. The House of Lords, however, overturned the Court of Appeal's decision. It ruled that the appellant could not be treated as the spouse of the deceased tenant, but as a matter of law a same-sex partner could establish the necessary familial link for the purposes of the legislation.

1.6.2 Types of law

Lord Reid has suggested that the basic areas of common law are appropriate for judge-made law, but that the judges should respect the need for certainty in property and contract law, and that criminal law, except for the issue of *mens rea*, was best left to Parliament.

1.6.3 Consensus law-making

Lord Devlin (1979) has distinguished between activist law-making and dynamic law-making. He saw new ideas within society as going through a long process of acceptance. At first society will be divided about them, and there will be controversy, but eventually such ideas may come to be accepted by most members of society, or most members will at least become prepared to put up with them. At this second stage we can say there is a consensus. We can see this process in the way that views have changed over recent decades on subjects such as homosexuality and sex before marriage.

Law-making which takes one side or another while an issue is still controversial is what Devlin called dynamic law-making, and he believed judges should not take part in it because it endangered their reputation for independence and impartiality. Their role is in activist law-making, concerning areas where there is a consensus. The problem with Devlin's view is that in practice the judges sometimes have no choice but to embark on dynamic law-making. In *Gillick v West Norfolk and Wisbech Area Health Authority* (1985), the House of Lords was asked to consider whether a girl under the age of 16 needed her parents' consent before she could be given contraceptive services. It was an issue on which there was by no means a consensus, with one side claiming that teenage pregnancies would increase if the courts ruled that parental consent was necessary, and the other claiming that the judges would be encouraging under-age sex if they did not. The House of Lords held, by a majority of three to two, that a girl under 16 did not have to have parental consent if she was mature enough to make up her own mind. But the decision did not end the controversy, and it was widely suggested that the judges were not the right people to make the choice. However, since Parliament had given no lead, they had no option but to make a decision one way or the other, and were therefore forced to indulge in what Devlin would call dynamic law-making.

1.6.4 Respecting parliamentary opinion

It is often stated that judges should not make law where there is reason to believe Parliament does not support such changes. In *President of India v La Pintada Compañía Navegación SA* (1984), the House of Lords felt that there was a strong case for overruling a nineteenth-century decision that a party could receive no interest on a contract debt, but they noted that the Law Commission had recommended that this rule should be abolished and the legislators specifically decided not to do so. Lord Brandon said that to make new law in these circumstances would be an 'unjustifiable usurpation of the function which properly belongs to Parliament'.

Similarly, it is sometimes argued that judges should avoid making law in areas of public interest which Parliament is considering at the time. Lord Radcliffe suggested that, in such areas, judges should be cautious 'not because the principles adopted by Parliament are more satisfactory or more enlightened, but because it is unacceptable constitutionally that there should be two independent sources of law-making at work at the same time'.

The Bigger Picture: Assisted voluntary euthanasia

There is an ongoing debate about whether someone should be able to lawfully assist another person to die. Under the current law such assistance could amount to murder. Campaigners in favour of voluntary euthanasia argue that the law should be changed either by Parliament or by the courts. In *R (on the application of Nicklinson) v Ministry of Justice* (2014) the applicant, Tony Nicklinson, had led an active life until, at the age of 51, he suffered a catastrophic stroke. This left him paralysed below the neck, unable to speak and only able to move his head and eyes. His condition is sometimes described as 'locked-in syndrome', because his active mind is locked into a virtually useless body. Tony summed up his life as 'dull, miserable, demeaning, undignified and intolerable'. He decided that he wanted to die but due to his disabilities he was not able to commit suicide without assistance unless he starved

himself, which is a slow and very uncomfortable death. He sought a declaration from the courts that any doctors who assisted him in dying (known as assisted voluntary euthanasia (AVE)), would not be committing the offence of murder because they would have a defence of necessity. This declaration was refused. The court ruled that the defence of necessity was not available on these facts. To allow the defence of necessity would amount to a major change in the common law. This change could not be made by the courts, because any such change raised controversial social policy issues: parliamentary legislation would instead be required. The High Court noted that 'the subject is profoundly difficult and complex, raising a myriad of moral, medical and practical considerations'. As a result, a court hearing an individual case, concentrating on the dire circumstances of the claimant, is not in a position to decide such broader questions, but its decision would create a precedent which would affect many other cases. The High Court commented:

... it is one thing for the courts to adopt and develop the principles of the common law incrementally in order to keep up with the requirements of justice in a changing society, but major changes involving matters of controversial social policy are for Parliament.

The High Court's decision has been confirmed by the Court of Appeal, and the Supreme Court. Parliament, unlike the courts, can control the consequences of such a move. If assisted voluntary euthanasia were legalised in this way, then the legislation would be able to put into place a surrounding framework regarding end-of-life care and procedural safeguards. The case, in effect, confirms the supremacy of Parliament. The judges did not want to be seen to be taking over the role of Parliament in making laws. The court followed the traditional role of judges as declarers of law, rather than makers of law. While the judiciary will not make law in this area, with every high-profile case the pressure for Parliament to review this area of law increases.

1.6.5 Protecting individual rights

In a 1992 lecture, the human rights lawyer, Anthony Lester QC, argued that while judges must have regard to precedent, they could still use their discretion within the system of precedent more effectively. He argued that, in the past, judges have abdicated responsibility for law-making by surrounding themselves with self-made rules (such as the pre-1966 rule that the House of Lords was bound by its own decisions). Since the 1960s, however, he feels that this tendency has gradually been reduced, with judges taking on more responsibility for developing the common law in accordance with contemporary values, and being more willing to arbitrate fairly between the citizen and the state. Lester praises this development, arguing that the judges can establish protection for the individual against misuse of power, where Parliament refuses to do so.

1.7 Advantages of case law

1.7.1 Certainty

Judicial precedent means litigants can assume that like cases will be treated alike, rather than judges making their own random decisions, which nobody could predict. This helps people to plan their affairs.

1.7.2 Detailed practical rules

Case law is a response to real situations, as opposed to statutes, which may be more heavily based on theory and logic. Case law shows the detailed application of the law to various circumstances, and thus gives more information than statute. The academic Roscoe Pound (1963) has written on the doctrine of precedent:

Growth is ensured in that the limits of the principle are not fixed authoritatively once and for all but are discovered gradually by a process of inclusion and exclusion as cases arise which bring out its practical workings and prove how far it may be made to do justice in its actual operation.

1.7.3 Free market in legal ideas

The right-wing philosopher Hayek (1982) has argued that there should be as little legislation as possible, with case law becoming the main source of law. He sees case law as developing in line with market forces: if the *ratio* of a case is seen not to work, it will be abandoned; if it works, it will be followed. In this way the law can develop in response to demand. Hayek sees statute law as imposed by social planners, forcing their views on society whether the majority of people like it or not, and threatening the liberty of the individual.

1.7.4 Flexibility

Law needs to be flexible to meet the needs of a changing society, and case law can make changes far more quickly than Parliament. The most obvious signs of this are the radical changes the House of Lords made in the field of criminal law, following announcing in 1966 that its judges would no longer be bound by their own decisions.

1.8 Disadvantages of case law

1.8.1 Complexity and volume

There are hundreds of thousands of decided cases, comprising several thousand volumes of law reports, and more are added all the time. With the development of the internet, almost every decided case is available online or in legal databases. Judgments themselves are long, with many judges making no attempt at readability, and the *ratio decidendi* of a case may be buried in a sea of irrelevant material. This can make it very difficult to pinpoint appropriate principles.

A possible solution to these difficulties would be to follow the example of some European systems, where courts hand down a single concise judgment with no dissenting judgments. However, some of these decisions can become so concise that lawyers are required to do considerable research around the specific words used to discover the legal impact of the case, because no detailed explanation is provided by the judges.

1.8.2 Rigid

The rules of judicial precedent mean that judges should follow a binding precedent even where they think it is bad law, or inappropriate. This can mean that bad judicial decisions are perpetuated for a long time before they come before a court high enough to have the power to overrule them.

1.8.3 Illogical distinctions

The fact that binding precedents must be followed unless the facts of the case are significantly different can lead to judges making minute distinctions between the facts of a previous case and the case before them, so that they can distinguish a precedent which they consider inappropriate. This in turn leads to a mass of cases all establishing different precedents in very similar circumstances, and further complicates the law.

1.8.4 Unpredictable

The advantages of certainty can be lost if too many of the kind of illogical distinctions referred to above are made, and it may be impossible to work out which precedents will be applied to a new case.

1.8.5 Dependence on chance

Case law changes only in response to those cases brought before it, so important changes may not be made unless someone has the money and determination to push a case far enough through the appeal system to allow a new precedent to be created.

1.8.6 Unsystematic progression

Case law develops according to the facts of each case and so does not provide a comprehensive code. A whole series of rules can be built on one case, and if this is overruled the whole structure can collapse.

1.8.7 Lack of research

When making case law the judges are only presented with the facts of the case and the legal arguments, and their task is to decide on the outcome of that particular dispute. Technically, they are not concerned with the social and economic implications of their decisions, and so they cannot commission research or consult experts as to these implications, as Parliament can when changing the law. Increasingly, the senior courts have been willing to allow interveners to make representations in the public interest during court proceedings. Such an intervener might be, for example, a charitable body, such as Liberty or JUSTICE, and it will present to the court arguments about the broader impact of the case on society, provide comparisons with practice abroad and refer to socioeconomic research in the field. In the House of Lords' last year of operation, it allowed third-party interveners to make representations in almost a third of its cases.

1.8.8 Retrospective effect

Changes made by case law apply to events which happened before the case came to court, unlike legislation, which usually only applies to events after it comes into force. This may be considered unfair, since if a case changes the law, the parties concerned in that case could not have known what the law was before they acted. US courts sometimes get around the problems by deciding the case before them according to the old law, while declaring that in future the new law will prevail: or they may determine with what degree of retroactivity a new rule is to be enforced.

The same issue came before the courts again in *R v C* (2004). In that case the defendant was convicted in 2002 of raping his wife in 1970. On appeal, he argued that this conviction breached Art. 7 of the European Convention and tried to distinguish the earlier case of *SW v United Kingdom* (1995). He said that while in *SW v United Kingdom* the defendant could have foreseen in 1989 when he committed the offence that his conduct would be regarded as criminal, this was not the case in 1970. This argument was rejected by the Court of Appeal. It claimed, rather unconvincingly, that a husband in 1970 could have anticipated this development in the law. In fact, the leading textbooks at the time clearly stated that husbands were not liable for raping their wives.

Key case

In *SW v United Kingdom* (1995), two men, who had been convicted of the rape and attempted rape of their wives, brought a case before the European Court of Human Rights, alleging that their convictions violated Art. 7 of the European Convention on Human Rights, which provides that criminal laws should not have retrospective effect. The men argued that when the incidents which gave rise to their convictions happened, it was not a crime for a man to force his wife to have sex; it only became a crime after the decision in *R v R* (1991). The court dismissed the men's argument: Art. 7 did not prevent the courts from clarifying the principles of criminal liability, providing the developments could be clearly foreseen. In this case, there had been mounting criticism of the previous law, and a series of cases which had chipped away at the marital rape exemption, before the *R v R* decision.

Legal principle

There is no breach of the European Convention when courts clarify the law, provided legal developments can be foreseen.

Subsequent criminal cases have shown that the retrospective effect of case law can also work to the benefit of the defendant. In *R v Powell and English* (1999) the House of Lords clarified the law that should determine the criminal liability of accomplices. An earlier controversial case that had involved the criminal liability of an accomplice was that of *R v Bentley* (1953), whose story was made into the 1992 film *Let Him Have It*. Bentley was caught and arrested after being chased across rooftops by police. Craig had a gun and Bentley is alleged to have said to Craig, 'Let him have it'. Craig then shot and killed a policeman. Craig was charged with murdering a police officer (at that time a hanging offence) and Bentley was charged as his accomplice. In court Bentley argued that when he shouted, 'Let him have it', he was telling Craig to hand over his gun rather than, as the prosecution claimed, encouraging him to shoot the police officer. Nevertheless both were convicted. Craig was under the minimum age for the death sentence, and was given life imprisonment. Bentley, who was older, was hanged. The conviction was subsequently overturned by the Court of Appeal in July 1998, following a long campaign by his family. In considering the trial judge's summing up to the jury, the Court of Appeal said that criminal liability 'must be determined according to the common law as now understood'. The common law that applied in 1998 to accomplice liability was more favourable than the common law that applied in 1952. The danger in practice is that every time the common law shifts to be more favourable to defendants, the

floodgates are potentially opened for defendants to appeal against their earlier convictions. To try to avoid this problem, the Criminal Justice and Immigration Act 2008 provides that the Court of Appeal can reject as out of time references made to it by the Criminal Cases Review Commission which are based purely on a change in the common law. The court is likely to do this where a rejection of the appeal will not cause substantial injustice.

1.8.9 Undemocratic

Lord Scarman pointed out in *Stock v Jones* (1978) that the judge cannot match the experience and vision of the legislator; and that unlike the legislator the judge is not answerable to the people. Theories, like Griffith's, which suggest that precedent can actually give judges a good deal of discretion, and allow them to decide cases on grounds of political and social policy, raise the question of whether judges, who are unelected, should have such freedom.

Answering questions

- 1 What do we mean when we say that the English Legal System is a common law system? *University of London, International Programmes LLB*
- 2 Judicial reasoning in case law 'consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents . . . and we are not at liberty to reject them, and to abandon all analogy to them'. (Mr Justice Peck, 1833)
Does this statement reflect the operation of precedent today? *University of London, International Programmes LLB*
- 3 Precedent must, on the one hand, provide certainty, but on the other hand, it must be flexible in adapting to social change. In view of the so-called binding nature of precedent, how are judges able to reconcile these seemingly contradictory characteristics in their use of precedent?
- 4 Critically evaluate the extent to which the doctrine of binding precedent inhibits judicial creativity.
- 5 Evaluate the advantages of abolishing the doctrine of binding judicial precedent.

For answers to these questions, visit the companion website at go.pearson.com/uk/he/resources

SUMMARY OF CHAPTER 1: CASE LAW

Judicial precedent

In deciding a case, a judge must follow any decision that has been made by a higher court in a case with similar facts. Judges are bound only by the part of the judgment that forms the legal principle that was the basis of the earlier decision, known as the *ratio decidendi*. The rest of the judgment is known as *obiter dicta* and is not binding.