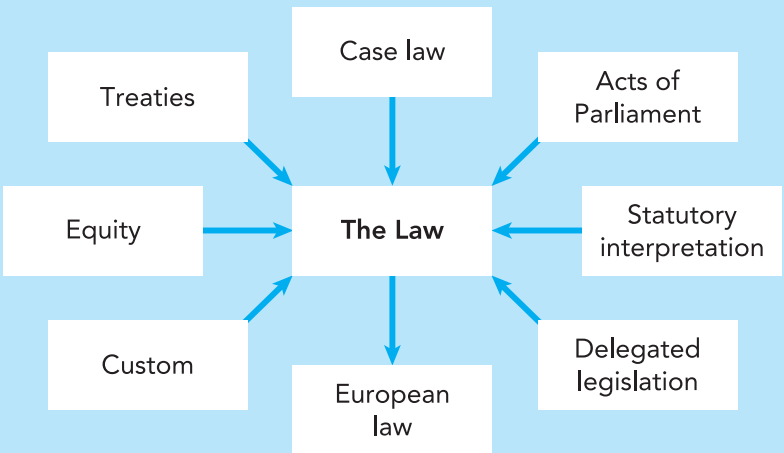
Part 1

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.

An increasingly important source of law is the legislation of the European Union, which is the only type of law that can take precedence over Acts of Parliament in the UK. Finally, custom, equity and international treaties are minor sources of law.

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.

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.

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.

TOPICAL ISSUE

Establishing the Supreme Court

Ess. Cases p. 4

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 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 suffers 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:

Photo 1.1 The Supreme Court in Parliament Square

Source: © Justin Kase Zelevenz/Alamy

> 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.

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.

Jurisdiction

The Supreme Court can hear appeals from the whole of the United Kingdom. Its jurisdiction is the same as that of the former House of Lords, except in relation to devolution cases. In the past the Privy Council, not the House of Lords, had the jurisdiction to hear cases concerning the devolution of Scotland, Wales and Northern Ireland. This jurisdiction has been transferred to the Supreme Court. The reason for this transfer is to remove any perceived conflict of interest in which the UK Parliament, with an obvious interest in a dispute about devolution, appears to be sitting in judgment over the case.

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, though we are becoming accustomed to this procedure for the European Court of Justice.

Membership

The full-time Law Lords from the former House of Lords are the first judges of the Supreme Court. The Government wants to keep the same number of 12 full-time judges, but to continue to allow the court to 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'.

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.

The appointment process is discussed on p. 150. Candidates are not subjected to confirmation hearings before Parliament as these would risk politicising the appointment process.

In the Supreme Court five judges normally sit together as they did in the House of Lords. An option for serious cases would be to allow all 12 judges to hear the case, but this would be an expensive procedure. The rules for permission to appeal have remained largely unchanged, so the range and number of cases is likely to be similar to those of the House of Lords. The senior Law Lord, Baroness Hale, has predicted that the opening of the Supreme Court will amount to 'business as usual'.

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 above. 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.

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 on-line. In **R** *v* **Erskine** (2009) the Court of Appeal said lawyers needed to select carefully the cases they

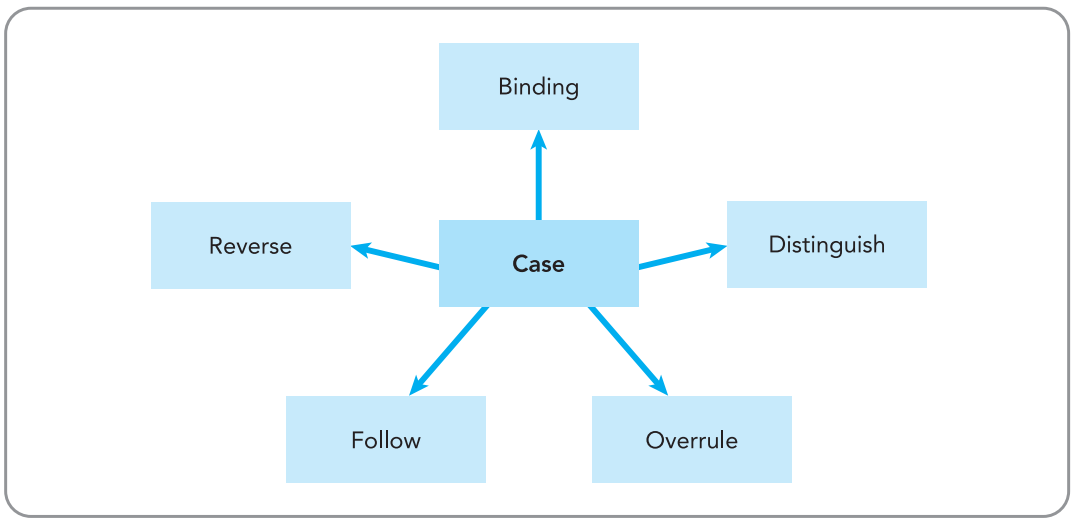


Figure 1.1 How judicial precedent works

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.

The hierarchy of the courts

The European Court of Justice

Decisions of the European Court of Justice 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.

The 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 expected to be 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.

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There is, however, a range of cases where the House of Lords had been prepared to apply the 1966 Practice Statement. 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 1992, 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.

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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).

Photo 1.2 Demonstrators celebrate the House of Lords' decision for the deportation of the former Chilean President, Augusto Pinochet

Source: PA Archive/Press Association Images

Privy Council

The Privy Council was established by the Judicial Committee Act 1833. It is the final appeal court for many Commonwealth countries. The judges of the Supreme Court have become the judges of the Privy Council and its other members have remained the same. The Privy Council sits in the new buildings of the Supreme Court but remains a separate entity.

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)). This well-established rule of precedent has been thrown into doubt by the recent Court of Appeal judgment of **R** *v* **James and Karimi** (2006). The Court of Appeal held that, in exceptional circumstances, a Privy Council judgment can bind the English courts and effectively overrule an earlier House of Lords' judgment. This conflicts with the traditional approach to such judgments (and the expected approach to judgments of the Supreme Court), confirmed by the House of Lords in **Miliangos** *v* **George Frank (Textiles) Ltd** (1976) that 'the only judicial means by which decisions of this House can be reviewed is by this House itself'.

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TOPICAL ISSUE

Increased influence of the Privy Council

Recent developments in criminal law suggest that Privy Council decisions can occasionally make important changes to the common law, even indirectly overruling an earlier House of Lords' decision and therefore also decisions of the Supreme Court. The cases which highlighted the potential power of the Privy Council were concerned with the partial defence of provocation in criminal law which if successful can reduce a defendant's liability from murder to manslaughter. The defence is laid down in s. 3 of the Homicide Act 1957. This section has been interpreted as laying down a two-part test. The first part of the test requires 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 provides that the defence will only be available if a reasonable person would have reacted as the defendant did. This is described as an objective test, because it is 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 succeed. As a result, in **R** *v* **Smith (Morgan James)** (2001) 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.

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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 that the case misinterpreted Parliament's intention when it passed the Homicide Act 1957. It considered that the only characteristics that should be taken into account when considering whether the defendant had reacted reasonably were

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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** 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 that 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 emphasis on the enlarged formation of the Privy Council potentially leaves the status of its judgments dependent upon an administrative decision as to how many judges should sit, a decision which has never been the subject of any legal controls.

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 lays 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 are still potentially six House of Lords' judges who could prefer the **Smith (Morgan James)** approach: the three dissenting judges and the three House of Lords judges who did not hear the **Holley** case.

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 makes 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.

The 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*);
2. there are two previous conflicting decisions;
3. there is a later, conflicting, House of Lords' (or Supreme Court) 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.

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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.

The 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.

The 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.

Magistrates' and county courts

These are called the inferior courts. They are bound by the High Court, Court of Appeal, the old House of Lords and the new 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.

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 is required to 'take account of' the cases decided by the ECtHR, though its decisions do not bind the English courts. This would suggest that the decisions of the ECtHR are not completely binding on UK courts. In practice, when considering a Convention right, the domestic courts try to follow the same interpretation as that given by the ECtHR. In **R (on the application of Alconbury Developments Ltd)** *v* **Secretary of State for the Environment, Transport and the Regions** (2001), the House of Lords said:

> In the absence of some special circumstances it seems to me the court should follow any clear and constant jurisprudence of the European Court of Human Rights. If it does not do so there is at least a possibility the case will go to that court which is likely in the ordinary case to follow its own constant jurisprudence.

Despite this, the House of Lords (now the Supreme Court) 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 **Boyd** *v* **The Army Prosecuting Authority** (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. Surprisingly, the 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

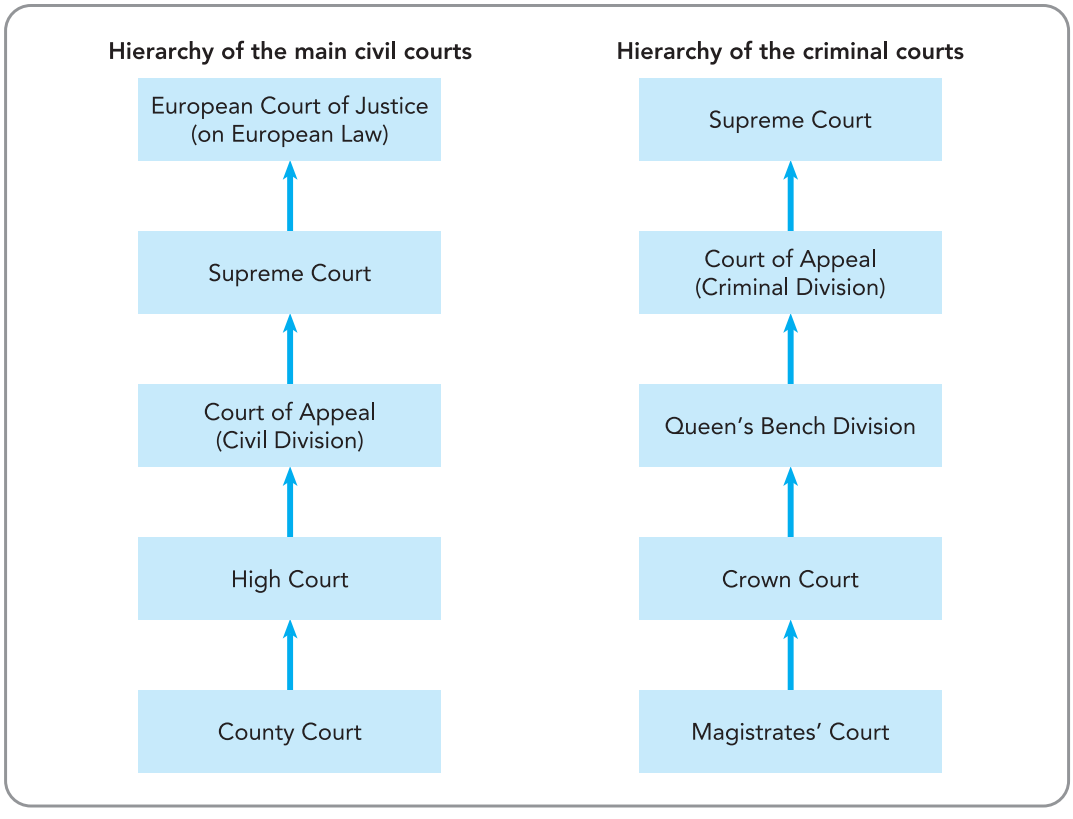

Figure 1.2 The routes for civil and criminal cases

case of **Al-Khawaja and Tahery** *v* **UK** (2009) where the European Court of Human Rights (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 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 **Al-Khawaja and Tahery** *v* **UK** decision was given in Chamber and the UK Government has requested that the case be reheard by the Grand Chamber (see p. 300). The Supreme Court hopes that the Grand Chamber will reconsider the case in the light of its decision in **R** *v* **Horncastle**.

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 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.

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 spelt 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.

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 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.

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.

Griffith: political choices

In 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. 161), 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.

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 judgements 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 JS 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.

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 courts had no option but to make a decision one way or the other, and they decided that 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. 62). 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 likely to be 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.

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.

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.

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.

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 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.

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 Compañia Navigación 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'.

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.

Advantages of case law

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 plan their affairs.

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.

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 they like it or not, and threatening the liberty of the individual.

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.

Disadvantages of case law

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 on-line 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.

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.

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.

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.

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.

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.

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 socio-economic 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.

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 round 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.

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.

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.

Recent 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 Hollywood 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.

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? *London External LLB*

The meaning of 'common law' is discussed at p. 10. The term 'common law' has different meanings depending on the context in which it is being used. In the context of this question the focus is on common law being a product of England's legal history. It can be contrasted to the civil law systems which can be found in Continental Europe (for example, France) and countries which were influenced by Continental Europe. This essay is not concerned with the distinction between equity and 'common law' which is discussed at p. 118.

One approach to this essay would be to first provide a historical analysis of the common law (found on p. 10). Secondly, contrast the common law systems which emphasise judge-made law and the doctrine of judicial precedent, with the civil law systems which place a greater emphasis on legislative codes. Finally, provide some examples of the common law working in practice. For example, the fact that the definition of murder can be found in case law and the way that definition has been developed by the courts.

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 Peak, 1833)

Does this statement reflect the operation of precedent today? *London External LLB*

Your answer could be divided into two parts. The first part could discuss how the statement of Mr Justice Peak fits within the classic declaratory theory of law provided by William Blackstone (p. 22). The basic rules that underpin judicial precedent with the hierarchy of

the courts, and the ways that cases can be followed, distinguished, overruled and reversed support this view (p. 14).

The second part of your answer could point to theories and practice which undermine this view so that it may not 'reflect the operation of precedent today'. Thus, you could discuss the work of the critical theorists (p. 24), and Griffith (p. 24). The material under the subheadings 'Do judges make law?' (p. 26) would also be useful to answer this part of the essay.

You might conclude that while Mr Justice Peak's statement might suggest that the judges are simply applying existing legal principles and judicial precedents to a particular set of facts, there may be some flexibility in the way in which those principles and precedents can be applied, and there may be other factors that help determine the outcome of a case.

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?

You should begin by explaining what precedent is and how *stare decisis* operates, drawing on the materials in the section on 'Judicial precedent' (p. 13). Certainty and flexibility are two of the advantages of precedent. Preoccupation with certainty could lead to an overly-rigid system where bad decisions have to be followed. However, there are a number of ways in which judges can exercise flexibility, and indeed, are permitted to do so. Examples that could be given include:

- Use of the 1966 Practice Statement.
- The rules in **Young** *v* **Bristol Aeroplane Co Ltd** (1946) (relevant material can be found under the heading 'The Court of Appeal' p. 19);
- The practice of distinguishing earlier cases on their facts (see the section entitled 'How do judges really decide cases?' on p. 22).

You could argue that this flexibility involves judges in 'making law', as opposed to applying the law, and you could express your view as to whether you think this is acceptable.

You might conclude with your view on how effectively (or not) you think judges balance certainty and flexibility, and indeed, whether you think they have to.

4 Critically evaluate the extent to which the doctrine of binding precedent inhibits judicial creativity.

The phrase 'judicial creativity' is a reference to the judges' ability to create or make law. Your essay could start by explaining the rules relating to judicial precedent including a clear explanation of the judicial hierarchy, and the exceptional rules relating to both the Court of Appeal and the Supreme Court (drawing upon material contained under the headings 'Judicial precedent' and 'How judicial precedent works'. The relevance of the distinction between *ratio decidendi* and *obiter dicta* should be explained and the importance of decisions of the European Court and the European Court of Human Rights could also be mentioned. Explain some of the arguments in favour of precedent, such as certainty and consistency. This part of your answer would aim to show how far the rules of judicial precedent inhibit judicial freedom.

The second part of your essay could then explore how far, despite the rules of judicial precedent, 'judicial creativity' still exists. You might discuss some of the material contained under the heading 'Do judges make law?' in this chapter. You could discuss:

- the sheer amount of case law in our system (especially in contract and tort);
- applying the law is not usually an automatic matter in practice;
- judges have been left to define their own role in the system, in the context of the principle of the separation of powers; and
- the increased availability of reported material can afford significant judicial opportunities to distinguish cases, and thus to influence the future direction of case law.

You should finish with a conclusion, drawing on the points you have made, that states how far you think precedent does inhibit judicial creativity.

5 Evaluate the advantages of abolishing the doctrine of binding judicial precedent.

You first need to describe the doctrine of binding precedent, but do not spend too much time on this, as pure description is not what the question is asking for.

You should then consider what the law would lose if precedent were abandoned – the material on the advantages of precedent is relevant here. Then talk about the disadvantages of the system of precedent, and what might be gained by abolishing it. You could bring in the effects of the 1966 Practice Direction as an example of the relaxation of precedent, and talk about whether you feel it has benefited the law or not, mentioning appropriate cases.

You might mention innovations which would lessen the role of precedent, such as codification, and say whether you feel they would be desirable and why.

Your conclusion could state whether or not you feel precedent serves a useful role, and outline any changes which you feel should be made to its operation.

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.

The hierarchy of the courts

The European Court of Justice is the highest authority on European law, in other matters the Supreme Court is the highest court in the UK. Under the 1966 Practice Direction, the Supreme Court is not bound by its previous decisions.

How do judges really decide cases?

According to the traditional declaratory theory laid down by William Blackstone, judges do not make law but merely discover and declare the law that has always been. Ronald Dworkin also accepts that the judges have no real discretion in making case law, but he bases this view on his concept that law is a seamless web of principles.

Very different views have been put forward by other academics. Critical theorists argue that judicial decisions are actually influenced by social, political and personal factors and that the doctrine of judicial precedent is merely used to legitimate the judges' decisions. Griffith also thinks that judges are influenced by their personal

background. Waldron accepts that judges make political choices but sees no fundamental problem with this.

When should judges make law?

There is no doubt that on occasion judges make law. There is some debate as to when judges ought to make law. When judges make law they can adapt it to social change, but Francis Bennion has highlighted the danger that if the courts are too willing to make law, they undermine the position of Parliament.

Advantages of binding precedent

The doctrine of judicial precedent provides:

- certainty;
- detailed practical rules;
- a free market in legal ideas; and
- flexibility.

Disadvantages of binding precedent

Case law has been criticised because of its:

- complexity and volume;
- rigidity;
- illogical distinctions;
- unpredictability;
- dependence on chance;
- retrospective effect; and
- undemocratic character.

Reading list

Bennion, F. A. R. (1999) 'A naked usurpation', 149 *New Law Journal* 421.

Devlin, P. (1979) *The Judge*, Oxford: OUP.

Dworkin, R. (1986) *Law's Empire*, London: Fontama.

Griffith, J. A. G. (1997) *The Politics of the Judiciary*, London: Fontana.

Hale, Sir M. (1979) *The History of the Common Law of England*, Chicago: University of Chicago Press.

Hayek, F. (1982) *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy*, London: Routledge.

Hohfeld, W. N. and Cook, W. W. (1919) *Fundamental Legal Concepts as Applied in Judicial Reasoning*, London: Greenwood Press.

Kairys, D. (1998) *The Politics of Law: A Progressive Critique*, New York: Basic Books.

Lawson, C. M. (1982) 'The family affinities of common law and civil law legal systems', 6 *Hastings International Comparative Law Review* 85.

Lennan, J. (2010) 'A Supreme Court for the United Kingdom: a note on early days', [2010] *Civil Justice Quarterly* 139.

MacCormick, N. (1978) *Legal Rules and Legal Reasoning*, Oxford: Clarendon.

Paterson, A. (1982) *The Law Lords*, London: Macmillan.

Summers, R. (1992) *Essays on the Nature of Law and Legal Reasoning*, Berlin: Duncker & Humblot.

Waldron, J. (1989) *The Law*, London: Routledge.

Weinreb, L. (2004) *Legal Reason: The Use of Analogy in Legal Argument*, Cambridge: Cambridge University Press.

Reading on the Internet

Decisions of the Supreme Court can be found on the website of the Supreme Court at:
http://www.supremecourt.gov.uk/decided-cases/index.html

The former House of Lords' judgments are available on the House of Lords' judicial business website at:
http://www.publications.parliament.uk/pa/ld/ldjudgmt.htm

Some important judgments are published on the Court Service website at:
http://www.hmcourts-service.gov.uk

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