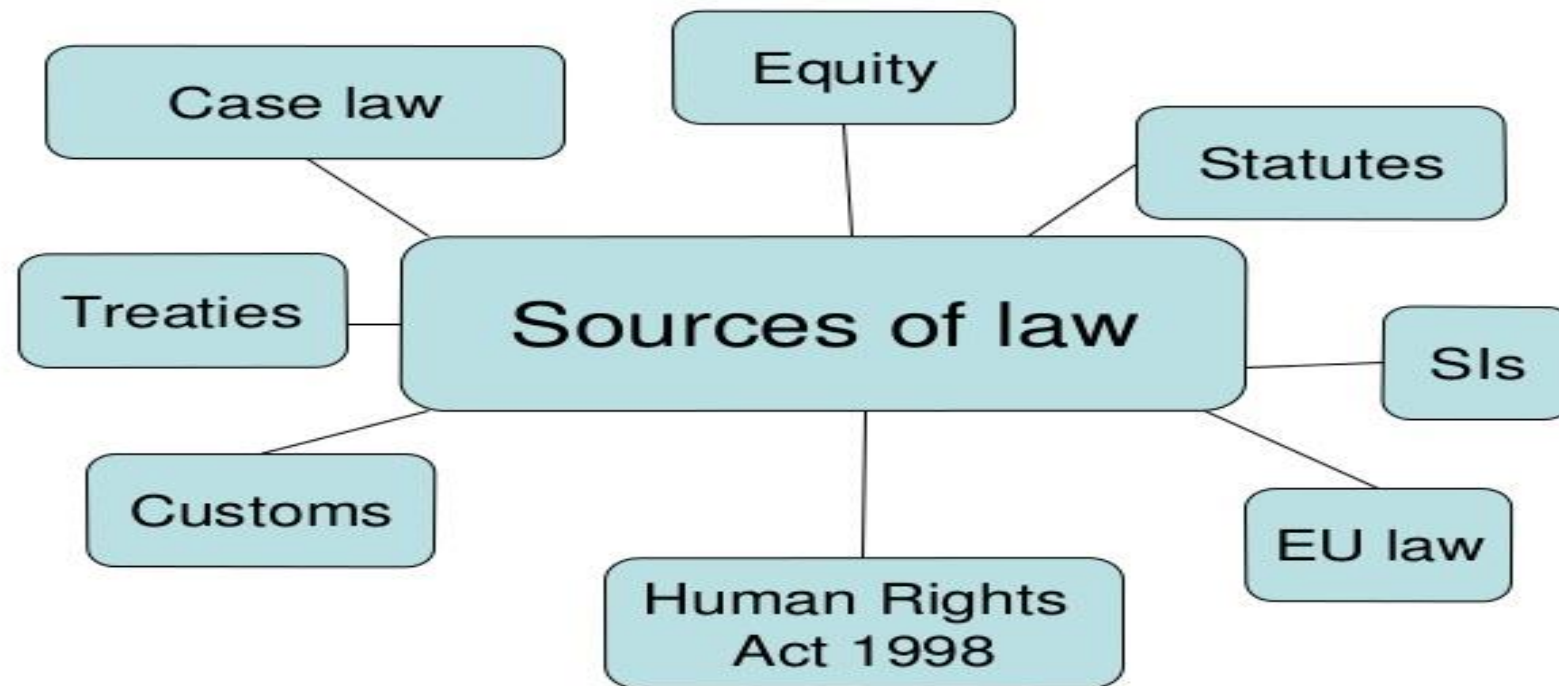


Sources of Law.



Minor Sources of Law.

- ▶ Some sources were very important to common law's development but have been assimilated into common law or statute law- *law of merchants & books of authority*.
- ▶ **Customs**- have an array of influence on common law-
- ▶ *Basis of CL*- existing customs made into law (discussed previously).
- ▶ *Trade usages*- trade customs in business transactions- can be implied by courts into contracts- not seen as a proper source.
- ▶ *Traditions or usages become rules of law*- in certain localities- *right of way* for example.
- ▶ A local usage or tradition will only be accepted by courts as a legal custom if it satisfies a 3 stage test- *Antiquity, Certainty & Reasonableness*.
- ▶ **Law of Merchants**- Overseas trade and expansionism saw a need for specialist courts to deal with the merchant community disputes- *trade customs and maritime practices*.
- ▶ The law applied by these courts became known as the *law merchant*. Rules and doctrines from *law merchant* were eventually assimilated into CL and incorporated into commercial law to date.

Minor Sources cont.

- ▶ **Canon Law**- the law of the Catholic Church- many common law concepts emanate from canon law such as the close link between *criminal law & morality*. In addition, the protections given to *marriage and family life*.
- ▶ **Canon Law** also had an influence on English law via the Ecclesiastical courts- which though was separate from common law- resulted in constant clashes over Church and State over absolute authority- which led to the decline of Ecclesiastical courts.
- ▶ **Books of Authority**- Authoritative books by famous jurists such as *Coke, Blackstone and Glanvill* shaped the development and direction of common law. The old rule stipulated that only deceased authors could be cited as authority in cases, however this has now changed.

Major Sources of Law.

- ▶ **Legislation**- 1- *Statute Law*- primary legislation is the form of most new law- are acts of Parliament passed by the legislature, receives *Royal Assent* to become binding law.
- ▶ English Parliament can pass any statute on any matter- *Parliamentary Sovereignty*- which means that courts cannot declare such acts void. Courts can only interpret & apply the statutes.
- ▶ *Human Rights Act 1998*- provided an exception to PS- where an act infringes on human rights laid out by the *ECHR*- courts can issue a *declaration of incompatibility*- wherein Parliament can alter the statute- though not obliged to.
- ▶ *Delegated Legislation*- subordinate or secondary legislation- Parliament delegates some of its legislative power to subordinate bodies- these bodies can then pass *rules, regulations & by-laws* of their own such as *Statutory Instruments & Orders in Council*. Parliament enacts a statute which gives subordinate bodies the delegated powers- *enabling act*.
- ▶ *Statutory Interpretation*- statutes carry very broad general language in order to cover a variety of situations- thus they require interpretation before application to individual cases.
- ▶ *Judicial interpretation* is therefore needed for cases where the statute is particularly ambiguous or uncertain- *Interpretation Act 1978*- lays down a number of principles.
- ▶ The courts have developed *rules of interpretation*- which are not binding but provides guidelines and approaches taken by the courts.

Major Sources cont.

- ▶ **Rules of interpretation- *the literal rule***- if words in statute are plain and straightforward- they should be interpreted with their plain, ordinary & grammatical meaning.
- ▶ ***The golden rule***- in cases where literal interpretation leads to confusion- ordinary meanings can be modified- the court can choose an interpretation that avoids absurdity.
- ▶ ***The mischief rule***- the court looks at the mischief- i.e. the defect in the law which the statute aims to remedy & uses an interpretation suitable to achieving that remedy.
- ▶ ***Eiusdem generis rule***- this is a subsidiary rule on interpretation- where general words follow specific words, the general words are applied to the meaning of the specific words.
- ▶ **Presumptions in statutory interpretation- *presumption against alteration of the law***- where Parliament intends to change existing law- it should do so expressly.
- ▶ ***Presumption against imposing liability without fault***- mostly, liability will only be imposed on an individual where he/she is at fault- negligence or intent.
- ▶ ***Presumption against depriving a person of a vested right***- courts will try to protect the existing rights of a person, unless a state expressly deprives him of one.
- ▶ ***Presumption against ousting the courts' jurisdiction***- Parliament must use clear and unambiguous words if it intends to restrict an individual's access to the courts.
- ▶ ***Presumption that the Crown is not bound by a statute***- one of the remaining prerogatives of the Crown is that it is only bound by an Act of Parliament if it is expressly named in it.

Major Sources cont.

- ▶ *Case Law*- in order to find out the state of law in a specific situation judges look to decided cases rather than statutes.
- ▶ *The rule of Stare Decisis*- 'let the decision stand'- doctrine of *precedent*- in common law where decided case is *binding*, it must be followed. The success of use of precedent is based on the following:
 - ▶ *Hierarchy of courts*- lower courts must follow decision of higher courts. Reliable system of *Court reporting*- in order for judges and lawyers to see that transcripts relied on are accurate.
- ▶ *Ratio Decidendi*- is the legal principle- the core of the judgment which binding. This can be interpreted narrowly or widely- depending on how the judge intended it to be construed.
 - ▶ A ratio's perception can change over time & is closely linked to the material facts of the case- it should therefore be viewed in light of these circumstances.
- ▶ *Obiter Dicta*- these are comments made by judges which are not necessary for the outcome of the case but are stated for certain purposes- i.e. the future development of the law.
 - ▶ Obiter statements have no binding authority but are *persuasive* therefore lower courts tend to follow them even though it is not mandatory.

Major Sources cont.

- ▶ *Distinguishing & Overruling*- these are two ways in which the courts can refuse to follow a binding precedent.
- ▶ Where a judge finds the facts of the case similar to a previous one but there is material difference- he can *distinguish* the precedent- therein it is only inapplicable in that case and not for future cases.
- ▶ Judges can also decide that the case should be *overruled* as a whole- where the higher court finds that the earlier case was wrongly decided- once overruled it is no longer good authority.
- ▶ *EU Law*- the UK became a member of the *European Community* in 1973 via the 1972 *EU Communities Act*. Since then it has been a major source of external law- which can take precedence over English law where there is a conflict between the two- hence it has a binding and direct influence on English law.