



Max Planck Institute  
LUXEMBOURG  
for Procedural Law

# Sources of Law in the English Legal System

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## Outline - Session Two – 16<sup>th</sup> November

Key issues to be discussed:

- Domestic Sources of Law of the English Legal System
  - Major/Primary Sources
  - Minor/Secondary Sources
- Law of the European Union
- International Law

# What do we mean by Common Law?

- Common across the land (cf previous diversity of local custom)
- To distinguish the “common law” from specialised bodies of law (eg law of the Church; equity)
- Common law as case law or judge-made law
- Common law as a legal tradition (distinguished from civil law etc)



# The Structure of the English Law



EU Law



International Law  
(e.g. ECHR)



Statute



Common Law



Equity

# Major Sources of the English Legal System

Legislation: law created by the legislature:

- Acts of Parliament (primary legislation);
- Delegated legislation (secondary legislation).

Case law: decisions made by courts:

- Also characterised as “common law” – as judge-made law;
- The principle of binding precedent.



# Acts of Parliament/Statute – Primary Legislation

- Made and become law in line with procedural rules of Parliament;
  - Must receive Royal Assent (be accepted by the Queen, formal).
- Start as “Bills” (a proposal for a new law or to change an existing law);
- A proposal for the introduction and debate on a Bill.

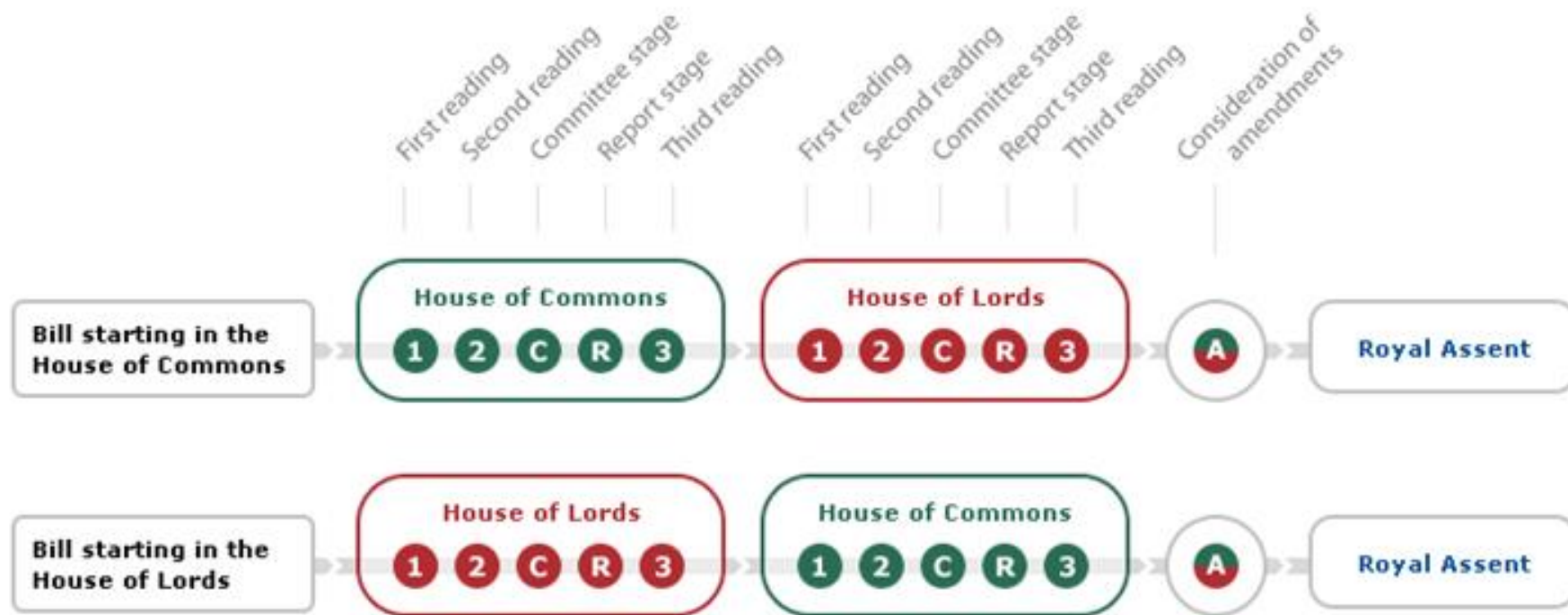


# Acts of Parliament/Statute – Primary Legislation

- Houses of Parliament – bicameral – two chambers:
  - House of Lords and House of Commons.
- Bills can be introduced in either chamber for a debate and must pass through both before being sent for Royal Assent.




# How does a Bill Pass Through Parliament?





# Example of an Act of the UK Parliament: Human Rights Act 1998

All legislation is available at: <http://www.legislation.gov.uk/>



Human Rights Act 1998

CHAPTER 42

ARRANGEMENT OF SECTIONS

*Introduction*

Section

1. The Convention Rights.
2. Interpretation of Convention rights.

*Legislation*

3. Interpretation of legislation.
4. Declaration of incompatibility.
5. Right of Crown to intervene.

*Public authorities*

6. Acts of public authorities.
7. Proceedings.
8. Judicial remedies.
9. Judicial acts.

*Remedial action*

10. Power to take remedial action.

*Other rights and proceedings*

11. Safeguard for existing human rights.
12. Freedom of expression.
13. Freedom of thought, conscience and religion.

*Derogations and reservations*

14. Derogations.
15. Reservations.
16. Period for which designated derogations have effect.
17. Periodic review of designated reservations.

*Judges of the European Court of Human Rights*

18. Appointment to European Court of Human Rights.

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c. 42 *Human Rights Act 1998*

*Parliamentary procedure*

Section

19. Statements of compatibility.

*Supplemental*

20. Orders etc. under this Act.
21. Interpretation, etc.
22. Short title, commencement, application and extent.

SCHEDULES:

Schedule 1—The Articles.  
Part I—The Convention.  
Part II—The First Protocol.  
Part III—The Sixth Protocol.

Schedule 2—Remedial Orders.

Schedule 3—Derogation and Reservation.  
Part I—Derogation.  
Part II—Reservation.

Schedule 4—Judicial Pensions.



# Parliamentary Sovereignty: Foundations

- Constitutional principle of parliamentary democracies;
- From sharing sovereignty with the King to limitation of powers of the monarchy;
- Parliament can pass statutes on any matter and any future Parliament can undo any law;
  - Parliament cannot bind future Parliaments;
  - E.g. Brexit.
- Parliament is supreme to all other institutions including courts and executive (i.e. government).



# Parliamentary Sovereignty and Common Law

- Common law can be enacted as statute;
- Statute is supreme to common law in case of conflict;
- Courts' role in reviewing primary legislation is limited;
  - A court cannot declare an Act of Parliament to be void or invalidate primary legislation;
  - Only Parliament can amend or invalidate statute;
  - Courts do have a power of judicial review – they can assess acts of state and state bodies and declare such acts to be void;
- Parliamentary sovereignty has been limited in the UK.



# Delegated Legislation – Secondary

- Parliament can delegate/transfer powers to other public bodies to make secondary legislation;
  - E.g. to government ministries or departments;
- Why?
  - Difficult for Parliament to legislate for all possible issues;
  - Saves time and resources of Parliament;
  - Decentralises law-making tasks;



# Delegated Legislation – Secondary

- How?
  - Parliament sets out a legislative framework for implementation and application (i.e. aims and objectives);
  - Sets out limits of legislation – the delegated body must act within them; otherwise, a court can declare legislation to be ultra vires;
- What?
  - Orders/statutory instruments by ministers or governments;
  - By-laws by local authorities to regulate issues in a geographical region.



# Case Law – What is Case Law?

- Decisions made by courts - common law courts and courts of equity were combined into a single system by Judicature Acts;
- All such law also characterised as “common law” – as judge-made law;
- Common law is inductive:
  - Broad principles are identified from numerous, specific case law;
  - From specific cases to general rules.
- Civil law is deductive:
  - Broad principles set out in code and applied.



## How is the Common Law Developed?

‘....common law" refers to the way judges decide and have decided the cases that come before them in areas of activity not governed by Acts of Parliament. ... [It explains] The way [the law] is built up as a system of precedents. ... The practice of justifying present decisions on the basis of past decisions.' J Waldron.

To understand case-law ‘... is to understand how it is that particular decisions by particular judges concerning particular parties to particular cases can be used in the construction of general rules applying to the actions and transactions of persons at large.' N MacCormick.



# Case Law – Precedent

What is the significance of case law in the English legal system?

- A body of case law, developed over a period of time and binding;
- Doctrine of precedent or stare decisis (let the decision stand).

Requires:

- A hierarchy of courts;
- A system of court reporting.





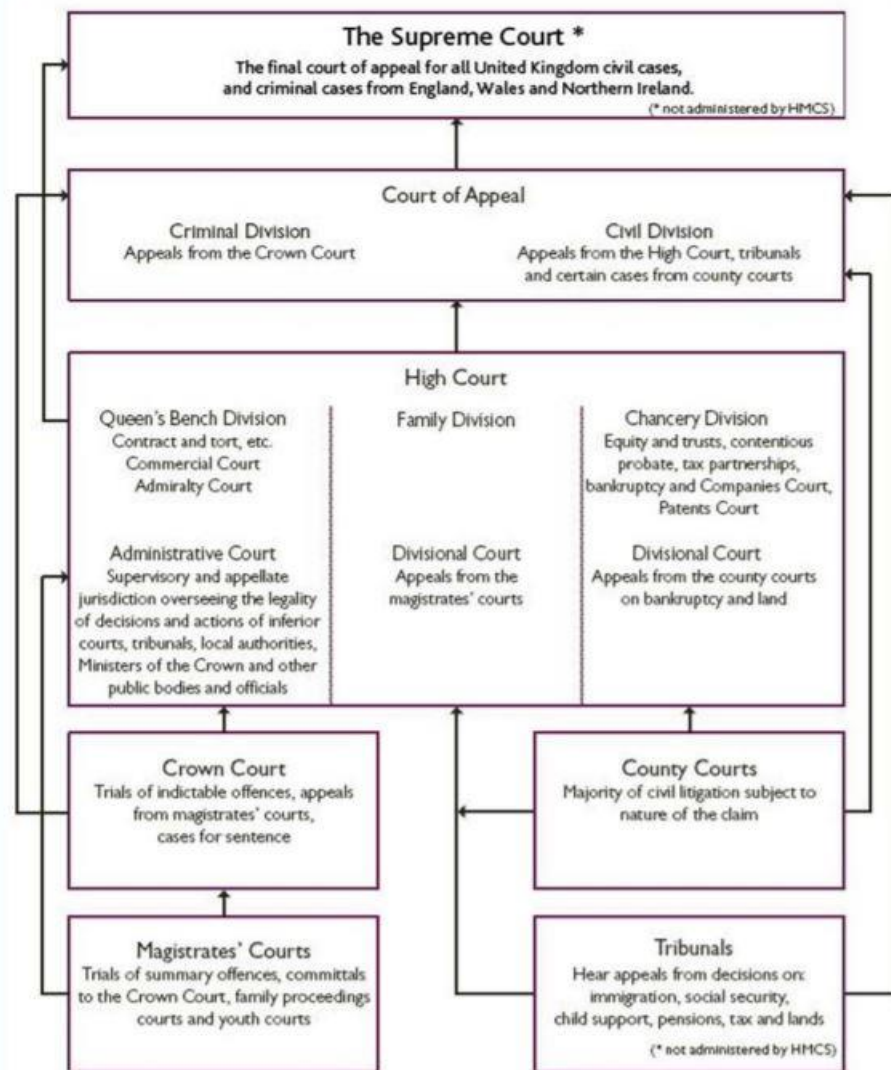
# Precedent: Hierarchy and Reporting

A hierarchy of courts:

- Higher courts (appellate and UKSC) set precedents in finding reasons for deciding cases – must be followed by lower courts;

A system of court reporting:

- 12-13<sup>th</sup> century;
- Not all cases but those with important questions of law.



# Precedent: Hierarchy and Reporting

## UK Supreme Court

- Highest domestic appellate court - binds all inferior courts in the UK but not itself. All decisions reported.

## Court of Appeal

- Binds lower courts and itself – can choose between its own conflicting decisions (if earlier court failed to take everything into account (or gets the law wrong) the decision will not be binding). All decisions reported.

## High Court

- Binds lower courts but not itself (most decisions are unreported and therefore cannot form precedents).



# What is Binding? Ratio Decidendi and Obiter Dicta

## Ratio Decidendi: Binding

- The reason for making the decision;
- The legal principles underlying the decision;
- The core idea of the case;
- Can be narrowly or broadly interpreted by judges in a later case.

## Obiter Dicta: Not Binding

- “things said by the way”;
- Comments made by the judge, but not affecting the outcome of the case;
- E.g. a comment on how the law might develop;
- Not binding but could be persuasive and followed – depending on the court.



# When is Case Law not Binding?

A lower court can depart from precedent of appellate and supreme court, in two ways.

## 1. Distinguishing case law:

- While the facts of the case seems *prima facie* to be similar, the judge finds a material difference between the cases;
- Material difference must concern the *ratio decidendi* and clearly distinguish the cases;
- Only that particular later case is distinguished; the precedent remains binding on all other case law.



# When is Case Law not Binding?

A lower court can depart from precedent of appellate and supreme court, in two ways.

## 2. Overruling case law:

- Determination that precedent has been wrongly decided by the higher court;
- Only higher courts can overrule its own decisions;
  - UKSC, CA and High Court bind lower courts but not themselves;
- No longer binding on any later case.



# Interpretation of Statute by the Courts

Acts of Parliament – provide a legislative framework – needs to be interpreted to apply in different situations.

Interpretation Act 1978 provides guidance to courts via general rules:

- E.g. masculine should be interpreted to include feminine.

Judicial rules of interpretation:

- Non-binding;
- Illustrate general approaches;



# Interpretation of Statute by the Courts: Judicial Rules of Interpretation:

1. Literal rule: if words are in plain and unambiguous – plain, ordinary and grammatical meaning; unless absurd.
2. Golden rule: if absurd, ordinary meaning can be modified by interpretation that avoids the absurdity or an inconsistency with the legislation.
3. Mischief rule: purposive – court interprets legal defect (aim of the statute) and adopts relevant interpretation.
4. Eiusdem generis rule (subsidiary): where general words follow specific words, the general words must be interpreted in line with the specific (e.g. cats, dogs and other animals will not include wild animals).



# Advantages and Disadvantages of Judge-made Law

## Advantages

- Accumulation of a body of knowledge and wisdom;
- Justice and consistency;
- Similar cases treated similarly – equal treatment in equal circumstances;
- Certainty – clear from past decisions how last is likely to apply to cases.

## Disadvantages

- Other than distinguishing and overruling (only certain courts), limited possibility to change;
- What is precedent is wrong?
- What if precedent is out of touch with what society requires?





# Minor/Secondary Sources of the English Legal System

- Custom
- Law Merchant
- Canon Law
- Legal Treatise



# Legal Custom

As basis of common law:

- Diverse legal customary rules applied across multiple Kingdoms;
- Itinerant judges began to identify what was common from this custom, as common “across the land”;
- Leading to development of body of common law (not imposed by Normans).

As trade usage:

- As how things are normally done – fact not law;
- As rules of law within a particular community; law if:
  - Existing since time immemorial (by statute at 1189) – rebuttable presumption);
  - Certain (identifiable);
  - Reasonable.



# Law Merchant

The development of a specific body of legal rules applicable to a particular area of law:

- Merchantary and shipping;
- To deal with specific problems brought before courts, which differed from others;
- More specific rules than general common law rules deemed too abstract;

Integrated into the common law through courts – basis for commercial law (e.g. legal rules regulating business-to-business relationships).



# Canon Law

The law of the Catholic Church (pre-separation of England from Rome by Henry VIII).

Still, links between the common law and canon law:

- E.g. family law, relationship between criminal law and morality.



# Legal Treatise

- Scholarly publications of laws applicable at a particular time;
- Blackstone (a judge, lawyer and scholar) – Commentaries on the Law of England – 4 books between 1765 - 1769;

→ to provide readable and portable overview of common law (also for lawyers in British colonies).

## CONTENTS OF THE ANALYSIS OF BOOK I.

|   |  |            |
|---|--|------------|
| INTRODUCTION.   |  |            |
| Of the study of the law.....                            |  | SECTION I  |
| The nature of laws in general .....                     |  | II         |
| The grounds and foundation of the laws of England ..... |  | III        |
| The countries subject to those laws.....                |  | IV         |
| The objects of the laws of England, viz.:               |  |            |
| I. THE RIGHTS OF PERSONS; which are                     |  |            |
| 1. Natural persons; whose rights are                    |  |            |
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| 2. Relative; as they stand in relations                 |  |            |
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| 3. Maritime .....                                       |  |            |
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| 2. Husband and wife.....                                |  | XV.        |
| 3. Parent and child .....                               |  | XVI.       |
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| IV. PUBLIC WRONGS.....                                  |  | IV.        |

## ANALYSIS.

### INTRODUCTION.

|  |              |  |
|--|--------------|--|
| OF THE STUDY, NATURE, AND EXTENT, OF THE LAWS OF ENGLAND.  |              | appear from considering the peculiar situations of I Gentlemen of fortune II The nobility III Persons in liberal professions |
| SECTION I.   |              | Page 6-17  |
| OF THE STUDY OF THE LAW.....   | Page 6 to 31 |  |
| I. The general utility of the study of the English common law will principally ap-   |              | pear from considering the peculiar situations of I Gentlemen of fortune II The nobility III Persons in liberal professions   |
| 2. The causes of its neglect were, chiefly, the revival of the study of the Roman laws in the twelfth century, their adoption by the |              | xiid   |



# Minor/Secondary Sources of the English Legal System

Why characterise these sources as “minor” or secondary?

- Numerous, distinct, local regimes of customary rules, attached to multiple Kingdoms;
- Important sources of norms regulating society;
- Assimilation into the common law through the courts;
  
- Legal treatise – supplement case law (past rulings of courts) and legislation (made by UK Parliament).



# Law of the European Union

- Proposed and agreed by the EU legislative institutions;
- Primary law (Treaties) set out and govern the fundamental framework of the EU;
- Secondary law (e.g. directives) govern other legal areas in which the EU has competence (power) to make law (e.g. consumer law) – Member States have to make the same.
- Interpreted by a court – the European Court of Justice, when asked questions by national courts.



# EU Law and the UK

## European Communities Act 1972

- Following referendum of UK to join the (then) European Communities;
- Obliges the UK to as regards its membership of the EU;
- Binds the UK to EU law and dictates that EU law can have a direct influence on the laws of the UK;
- Via the principles of primacy and direct effect of EU law (developed by the ECJ) – limits parliamentary sovereignty.

→ Primacy or supremacy of EU law - EU law prevails over domestic law both statute and common law.





# International Law (Focus on ECHR)

European Convention on Human Rights (signed 1950):

- Drafted by the Council of Europe (made up of states);
- International treaty to protect human rights and political freedoms;
- Interpreted and violations of the ECHR are determined by the European Court of Human Rights in Strasbourg.



# International Law (Focus on ECHR)

UK is a contracting state and founding state of the CoE:

- In 1998, Human Rights Act 1998 – allows individuals in UK to rely on the ECHR before courts in the UK;
- Limits parliamentary sovereignty;
- The HRA 1998 gives judges special powers of interpretation to make all domestic law convention compatible.



# Next Session: 30/11/2018

Readings: Chapters 4-5.

Topics to be covered: Chapters 1-8





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