

UNIT 1

THE NATURE OF LAW; CRIMINAL COURTS AND CRIMINAL PROCESSES

THE NATURE OF LAW

Aims

The aim of this chapter is to:

- provide basic definitions of law
- look at the basic classifications of English law
- define the differences between criminal and civil law
- examine why we need law
- examine how laws are made: the role of Parliament, delegated bodies, the courts and membership of the European Union.

1.1 Definitions of law

The word ‘law’ could be described as being:

“ a set of rules that allows us to do certain things and prevents us from doing others. ”

If you were asked to give an example of law you might probably use examples of criminal law such as murder or robbery. However, the English and Welsh legal system is much more than that. It not only provides citizens with individual rules and regulations; it also provides us with the framework within which the rules operate and with a means of enforcing those rules through the courts. Without the basis of a sensible system of rules, we would be confused over our rights and responsibilities.

A strong legal system will *create law* and *enforce law* to try to provide an answer to any problem. The law guides us from the moment (and before!!) we are born through to death. Think about every time you buy an item from a shop; for example, a sandwich. From the point that the materials used to make the sandwich are created, to the way it is

delivered to the shop that sells them, to the way it is stored in the shop, to the way it is displayed in the shop, to the way it is packaged and labelled, to the method and time it is sold to you, the law covers how this is to be done. Even the person who has sold you the sandwich is governed by the law, a kind of law called employment law

Many of the links in this chain are covered by what is called civil law – especially contract law, but it may be that the criminal law is broken if the food, for example, the sandwich, is spoiled or out of date.

If a person were deliberately to take such an item without paying for it, then the criminal law could provide a solution. In criminal law this is known as theft.

The law is enforced by the courts and its aim is either:

- to punish and to prevent certain actions (criminal law)
- to compensate a person (contract law) by placing them in the position they were in before the problem arose.

1.2 The basic classifications of English law

The English legal system provides different types of law to govern different situations. Our system of law is divided into public and private law. Public law is that which affects the *whole of society at any one time*; for example, criminal law; while private law (or civil law) is that which affects *individuals and businesses*; for example, in contract law as and when the need to use it arises.

1.2.1 Criminal law

The main type of public law is criminal law. The purpose of the criminal law is to stop certain types of act (or failures to act) that would cause physical danger to others, or cause distress. For example, the definition of murder can be defined as:

“ the intentional and unlawful killing of a human being. ”

If a person breaks the criminal law, then the legal system allows that they will be punished in some way. Depending on how serious the crime is, the defendant, once convicted, will usually face a fine, imprisonment or both.

1.2.2 Civil law

The purpose of the civil law is to settle disputes between individuals and/or businesses. There are many different types of civil law. The most common types of civil law are:

- contract
- consumer
- tort
- family
- employment.

The purpose of the civil law is to settle these disputes by trying to place the individuals in the position they would have been in before the dispute arose. This is known as restitution.

Contract law: when individuals or business enter into an agreement both parties generally want the other to carry out what they have agreed in the way they have agreed them. If the parties intended to be legally bound by the agreement, then usually this is called a contract. If either party fails to carry out their obligations, then the other party can seek help through the courts under contract law.

Consumer law: this allows customers to purchase goods and services in a safe and secure manner with the knowledge that if anything goes wrong

with the goods or services, they have rights that will be protected under the law. Much of this law is driven by EU legislation.

Tort law: a tort is a civil ‘wrong’ and in many cases complements criminal law. The criminal law will punish the defendant, but tort law can financially compensate the injured party. A claim under tort law usually arises where someone is injured as the result of another person’s carelessness, or ‘negligent act’. There are many types of tort, but negligence (failure to do something) is the most common.

Family law: this covers areas like marriage and divorce, death and inheritance.

Employment law: whenever we are employed to do a job or a person wants to employ another person to work for them, the Law provides rules and boundaries that both employers and employees must adhere to.

1.2.3 The differences between criminal and civil law

It is really important as a student of Law to have an understanding of the differences between criminal and civil law. There are many. The main ones are summarised below:

The different types of law: the reason we have criminal law is to maintain order in a civilised society, while the reason why we have civil law is to ensure that individuals can resolve disputes in an orderly manner – to be placed in the position they would have been in, had the dispute not arisen. This usually involves asking for compensation in the form of money.

Who starts the case? In the criminal law, following the police investigation the Crown Prosecution Service (CPS) is the main organisation responsible, if necessary, for taking the case to court on behalf of the state. In criminal law the CPS is known as the prosecution or prosecutor and the person accused of committing the crime is the defendant.

In civil cases it would be the responsibility of the individual, known as the claimant, alleging a failure to carry out obligations under an agreement, to start proceedings in court, while the person against whom the allegations are made is again the defendant.

Where is the case heard? In criminal law, the cases would be heard in either the Magistrates' Court or the Crown Court, depending on the seriousness of the crime. In the civil law the most likely court for the claim to start would be the County Court or the High Court. This would depend this time not on seriousness, but on how much compensation the injured party is claiming.

Proving the defendant's legal responsibility: in order to prove whether the defendant in criminal law carried out the crime, the magistrate or Crown Court judge must be satisfied that the evidence proves beyond all reasonable doubt that the defendant committed the crime. In civil law this level of proof is much lower. Here the claimant has only to prove on a balance of probabilities that the defendant has broken or breached his agreement and therefore owes him some form of compensation, or, simply to carry out the agreement as planned. This requirement in a court case is known as the burden or standard of proof.

The conclusion of the case: if the defendant in a criminal case is proved to have committed the crime, then he will be found guilty. In consequence, depending on the seriousness of the crime, he will usually be either fined or sent to prison. In civil cases if the defendant is deemed to be responsible for the broken agreement, then he will be found liable and asked to pay the claimant damages: usually money. It may be that the claimant wants the defendant simply to stop doing something, such as to stop a neighbour making too much noise. In this case the court can grant an injunction

stopping the defendant from carrying out the act – in this case the noise.

1.3 Why do we need law?

To maintain law and order: the law prevents people from doing what they want whenever they want as this could conflict with what other citizens want. Citizens need to feel safe and protected in their communities and conflict between citizens could lead to violence.

Protecting individual freedoms: if citizens did not have freedoms such as the right to free speech or freedom of movement then they would have their lives unnecessarily restricted. It is important for us to be able to say what is on our minds or to visit places where we want or need to go. Also, we should be responsible and live our lives in harmony. In order to live our lives in such a way, we must have the ability to control our lives as best as possible.

Regulating relationships: if two or more citizens enter into an agreement and at some point disagree over what the agreement was, then the law must be able to step in to regulate a successful outcome. In family law the creation of a marriage through to its termination in divorce or judicial separation or even after the death of a spouse is guided by the law.

Setting standards: in all areas of life it is important to set a level or standard that someone must achieve and if he was to fall below that standard, then the law may have to intervene. For example, when driving a car the driver must pay attention to the road around him and drive according to what he sees. As examples, specific attention must be made to the speed of the vehicle and to not using a mobile phone when driving.

**ACTIVITY****Activity 1**

Law can be described as a set of rules that govern society.

Identify three reasons why we need law.

Reason 1

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Reason 2

.....

Reason 3

.....

1.4 How are laws made?

In England and Wales the law comes from a variety of different sources. The four main sources are:

- Acts of Parliament
- delegated legislation
- European law
- judge-made law, called Judicial Precedent.

1.4.1 What is the role of Parliament?

The United Kingdom (UK) is a democracy. This means that the supreme lawmakers, the people who run the country, are elected officials, representing the majority view of the public. Acts of Parliament are passed by our elected Parliament. Statute Law and Legislation are different ways of describing Acts of Parliament.

When making laws (this is called 'passing legislation') the UK's Parliament is made up of three separate parts. Each of the three parts plays an important role in the creation and passing of new laws in this way. The three parts are:

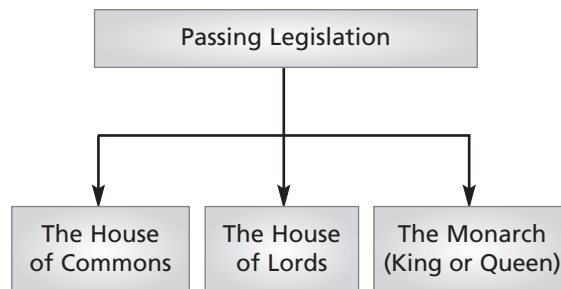


Figure 1.1 Passing legislation

Legislative process

This means the process in Parliament and, in particular, the different stages through which new laws have to go before they can be passed and introduced into English Law. The process by which Parliament changes or introduces a new law can take a very long time.

The pre-legislative process

Before a new law is debated in Parliament, the Government will usually put its ideas together and produce a document called a Green Paper asking for the public's opinion. This is known as the consultation period and it is the Government's attempt to include the public in the process of changing law and to encourage democracy. Green Papers are published on the Internet for interested parties to share their thoughts with the Government. Once the consultation process is over, the Government may include some changes suggested from the consultation process before publishing a White Paper. This is the Government's firm proposals on what it wants to do in order to change the law.

The next stage is the actual writing or drafting of the proposed Act. This is done by lawyers working on behalf of the Government. Once this is done the resulting document is called a bill. The bill is debated through the variety of stages in Parliament. If it passes all the stages, then the bill becomes an Act and the new laws are therefore passed into English law.

Types of bill

Public bill

The vast majority of bills that are introduced into Parliament are these types of bill and are developed by the Government in order to change the law as they see fit. The Hunting Act 2004 is a recent example. This Act prohibits, with certain exceptions, all hunting of wild mammals with dogs.

Private Members' bill

It is not only the Government who are allowed to introduce a bill. Any MP can, in theory, introduce a bill into Parliament. Twenty MPs are selected from a ballot at the beginning of the parliamentary year to try to introduce a bill that is important to them. There is a similar process for members of the House of Lords to introduce such bills. However, because parliamentary time is limited for such bills, the chance of a Private Members' bill becoming an Act is very slim. A

noticeable Private Members' bill that succeeded in becoming law the Forced Marriage (Civil Protection) Act 2007 introduced by Lord Lester of Herne Hill, a member of the House of Lords, to protect the victims in forced marriages and help to remove them from the situation.

Private bills

Where public bills affect the general public, this type of bill affects only an individual or company or perhaps a local authority – not the whole country. This is where individuals, companies or local authorities ask for permission to carry out their role in conflict with existing law or in excess of it. In the north-east of England, The Tyne Tunnel Act 1998 was passed to allow the Tyne and Wear Passenger Transport Authority to build a new and much needed second tunnel for traffic to move north and south across the River Tyne; this following the massive increase in volume of traffic since the first tunnel was opened in 1967.



ACTIVITY

Activity 2

Identify the most appropriate bill for each of the following three scenarios. Fill in the table with the most appropriate sentence from the list below.

- Public bill
- Private Members' bill
- Private bill.

Scenario		Most appropriate bill
A	An MP wishes to introduce a controversial bill which is not a priority for the Government.	
B	A local authority wishes to build a new road bridge across a river to reduce congestion on another road bridge.	
C	The Government introduce a bill into Parliament to ban motor cars from all city centres.	

Table 1.1

The legislative process in Parliament

A bill is normally started in the House of Commons, but can be started in the House of Lords going through the same stages:

First reading

Here, the bill is introduced into the House of Commons. The name and purpose of the bill is read out. There is no debate at this point, but a verbal vote is taken whether the bill should pass this stage. If enough MPs vote yes, then the bill moves to the next stage.

Second reading

This is the main chance for MPs to debate the bill. MPs are able to raise points in favour of or against the bill's proposals. Here the main proposals are debated and the minister responsible for the bill will have a chance to answer any points raised during the debate. At the end of the second reading, another vote is taken and if there is a majority in favour of the bill, it will pass on to the next stage.

Committee stage

This is an opportunity to look at each part of the bill in close detail. The Committee is made up of from up to 50 MPs from all political parties in proportion to the number of MPs in the Commons. Clearly, the existing Government will have the most members sitting on the Committee. Usually, the MPs are chosen if they have a specific skill or interest in the bill. The Committee can suggest and vote on amendments to the bill. If this is the case, any amendments have to be debated in the next stage.

Report stage

Here, the Committee reports back to the Commons on any suggested amendments to the bill. This stage acts as a 'safety net' to the Committee stage. The amendments are debated in the Commons and again voted on. New amendments can be suggested by MPs at this

stage. If there were no suggested amendments from the Committee stage, then there is no report stage.

Third reading

This provides the final vote on the bill in the Commons and the final draft of the Bill before being sent to the House of Lords.

The House of Lords

The Bill passes through the same stages as it does in the Commons. The only exception is the Committee stage where the whole House sits rather than a small number, as in the Commons. There is the same chance to debate amendments as there was in the Commons. If it does recommend amendments, then the Bill will have to go back to the Commons to debate and vote on them.

The Royal Assent

Once the bill has passed the Lords, then, as a matter of formality, the monarch gives consent



ACTIVITY

Activity 3

Using the grid below, complete the table by inserting a number from 1 to 7 next to the stage that indicates the order that the stage comes in the legislative process.

Stage of legislative process	Order number
Committee stage	
Royal Assent	
First reading	
Third reading	
Report stage	
House of Lords	
Second reading	

Table 1.2

to the passing of the bill so that it becomes an Act of Parliament and therefore a new law of the land.

Is Legislation the best way to pass laws?

It may be that legislation is the most democratic way of passing new laws or amending existing laws. Parliament can legislate on any issue it wants, and if the law needs changing, then Parliament can amend the law as it sees fit. There are clearly problems, particularly the time it takes to pass laws.

The problems with using legislation to pass laws

Time taken to pass legislation

Looking at all the stages that need to be passed, it would not surprise you to learn that the legislative process is a slow process which can take months and even years to complete. For example, the Human Rights Act 1998 was introduced as a Green Paper in 1996, and did not receive Royal Assent until late in 1998. However, if there is a national emergency and a new law or laws need to be passed quickly, then Parliament can debate a bill in a matter of hours, providing that there are no major objections. One of the quickest passings of an Act was the Northern Ireland Act 1972. This was passed in a little over seven hours, following a court decision made earlier that day. The Government felt that the decision threatened the stability of law and order in Northern Ireland and moved quickly.

Difficult language

Legislation has to be written in such a way that makes it straightforward to read and understand. The reality is sometimes different and a common criticism is the complex language used in drafting legislation, and what exactly each word or phrase means.

European influence on legislation

Having joined the European Union (EU) in 1973, another criticism is that the UK Government has removed its total ability to pass laws on any subject it wants. The UK Parliament is no longer able to pass laws on what it thinks is best for the UK if it conflicts with existing European Law. This has led to calls for the UK to leave the EU. In *Factortame v Secretary of State* (1991) [PQ1] the European Court of Justice stated that the Merchant Shipping Act 1988 conflicted with existing EU law and was invalid.

More than one Act dealing with the same issue

Sometimes an Act can be amended by later legislation and therefore more than one Act of Parliament needs to be read together.

Finding the correct law

As there are many thousands of Acts of Parliament it may be difficult for the public to find what they are looking for. The Internet has speeded this up, with Government websites providing such information.



ACTIVITY

Activity 4

One of the main criticisms of the legislative process is the length of time it takes to pass a bill through Parliament.

Identify three other criticisms of the legislative process.

Reason 1

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Reason 2

.....

Reason 3

.....

1.4.2 The role of delegated bodies

In this section we will explore the different types and reasons for delegated legislation, and any potential disadvantages of them.

What is delegated legislation?

Where someone delegates a task, he is asking someone else to carry it out on his behalf. This could be for a variety of reasons. It might be quicker for the other person to carry out the task; perhaps it will be cheaper; or perhaps the person to whom the task is being delegated is simply more qualified or experienced to carry out the task.

Delegated legislation is where the Government allows the final law to be made by an individual or organisations, rather than the Government itself. This does not mean that those passing delegated legislation can pass what they want; there are controls placed on the process. In the majority of cases Parliament will pass an Act called a Parent Act. This provides a framework within which the finer detail is drawn up by the other bodies and then passed in different ways depending on the type of delegated legislation.

What are the types of delegated legislation?

There are four main types of delegated legislation and each has its own function:

1. Orders in Council

These are rarely used and only passed when Parliament is not sitting, and usually passed in emergency situations. The Parent Acts that give the power to pass this type of delegated legislation are the Emergency Powers Act 1920 and Civil Contingencies Act 2004.

The Orders are drawn up and passed by the Queen sitting with the Privy Council. The Privy Council is made up of the Prime Minister, senior politicians and Law Lords.

2. Statutory instruments

Here the power to make laws is granted by Parliament to individual Government departments. This means that the minister responsible for the department and their civil servants will pass delegated legislation that relates to the work of that department. The Parent Act will give guidance, but not the specific detail. For example, the Education (Student Loans) Act 1990 allowed students studying for degrees to apply for loans to help them meet the costs of studying. How much money is available is decided by the minister responsible for education and they will set the amount available.

3. Bylaws

This type of delegated legislation is usually passed by local authorities. These bodies can only pass legislation in the area they control. For example, in the north-east area of North Tyneside the local authority issued a bylaw banning the consumption of alcohol in certain streets and other areas on the coast in order to reduce and prevent the amount of disorderly behaviour caused by alcohol. Also, other public bodies such as Rail Track or the London Underground can pass bylaws that affect the running of their services.

4. European Regulations

The Regulations are made by the European Commission [PQ2] and enforced into English law by delegated legislation in the form of a statutory instrument under the European Communities Act 1972.



ACTIVITY

Activity 5

Identify the most appropriate type of delegated legislation for each of the following three scenarios. Fill in the table with the most appropriate type from the list below.

- Order in Council
- Statutory instrument
- Bylaw

Scenario	Situation	Most appropriate type of delegated legislation
A	A local train operator wants to prevent commuters bringing prams onto its trains	
B	The Government wants to pass legislation quickly, following a major terrorist attack	
C	A Government Minister wants to increase the amount of child benefit for parents under an existing Act.	

Table 1.3

The advantages of delegated legislation

The future needs of the country

When Parliament passes legislation, it cannot see any changes in society in the future, such as changes in attitudes or opinions. Delegated legislation can be used to amend legislation more quickly and effectively. If there were to be another terrorist attack such as that which happened in the USA in 2001 (9/11) or the one which happened in 2005 in London (7/7) when Parliament is not sitting, then Orders in Council could be passed quickly to allow a state of emergency.

Quick response

Since the passing of delegated legislation is much quicker than using the Parliamentary process, those responsible can react quicker in times of necessity.

Expertise

Ministers from specific departments can pass legislation using the expert opinions of the civil servants who work for them. Members of Parliament come from different backgrounds so, during the Parliamentary process, MPs without the knowledge of the area concerned would have to have the law explained to them.

More parliamentary time

As the passing of delegated legislation takes the process of lawmaking away from the complete control of the parliamentary process, Parliament can spend its time dealing with the passing of day-to-day or controversial legislation.

Local geographical knowledge

For a Parliament based in London to legislate on local issues would be time consuming. Instead, it makes far more sense to allow locally elected councillors to pass laws that affect their area.

The local councillors who live in the area have the necessary understanding of local issues and are best placed to pass the bylaws.

The disadvantages of delegated legislation

Lack of control

As the power to pass the law is delegated there must be some degree of control to ensure that those people passing the law are not acting illegally or unfairly. There is some available control from Parliament and the courts, but it is argued that because of the sheer volume of delegated legislation, it is difficult to keep track of it all.

Overused

Each year more than 3,000 statutory instruments are used to pass laws via delegated legislation. It has been argued that in the past, certain governments would use this method of lawmaking in order to avoid the lengthy Parliamentary process to pass contentious legislation 'by the back door'. [PQ3]



ACTIVITY

Activity 6

Read the following passage and fill in the missing words from the list below:

There are a variety of types of delegated legislation including Orders in
 An Act of Parliament, known as a
 Act provides the framework for the types of delegated legislation to be passed. Local authorities can pass laws that affect them on a local level, these are called

bypasses
 public
 council
 bylaws
 parent
 concert

Undemocratic

A common criticism of delegated legislation is that many people or bodies who pass laws here are not democratically elected. Clearly, local councillors are elected, but civil servants working for a government minister and who advise him/her on the detail of a statutory instrument are not. This therefore allows anyone who works for that body or organisation to have an input into how we lead our lives.

1.4.3 The role of the courts – judicial precedent

Historically the decisions of judges are an important source of law and this remains so today. If the Act fails to define the words or it is unclear what Parliament meant when it passed the Act, judges while sitting in court have been asked to rule on what the Act means or to clarify whether something in particular satisfies as being part of a definition. In the higher courts such as the House of Lords, the judge makes a judgment at the end of the case that sets out his reasoning for coming to his conclusion. This decision will bind future courts where the facts are the same or similar. This is called judicial precedent and is also known as case law. This, depending on the court and judge, is usually made available to the public in the form of a law report.

If a defendant has disagreed with the judge's interpretation of the law, they may ask permission for another, more senior judge, to re-look at it.

The judge's decision – the judgment

If a senior judge makes a decision, his judgment will usually create a law that other judges have to follow in the future. In the judgment, the part of the judge's decision that is his legal reasoning that lays down his decision, forms the judicial (judge-made) precedent. It is this part of the

judgment that will normally be followed, or will bind, later (similar) cases. This is known as the *ratio decidendi*, which means: ‘the reason behind the decision’. If the judge takes the opportunity to talk about other areas of law that are linked but are not directly relevant to the facts of the present case, then this is known as *obiter dicta* – which means other things said ‘by the way’.

Lawyers will use the *ratio decidendi* from previous cases to support their cases and argue in court that the decision in an earlier case must be followed.

The three types of precedent

There are three different types of precedent. Original precedent is where a court makes a decision as to what the law is for the very first time. This could be because a new law has been passed and this is the first ever opportunity for a court to give its opinion. It may also be that the court makes a ruling in the absence of an Act of Parliament to guide the courts. This is done rarely by the courts as, because they are not elected, they could be criticised for acting ‘above their powers’. However, there are some notable examples of where the courts have felt obliged to create new original precedent. In *Donoghue v Stephenson* (1932) the House of Lords held that a manufacturer owed a duty of care to consumers who use their products and are injured even if they did not buy them themselves. [PQ4]

Binding precedent is the part of the decision which will bind future courts. Judges in the courts will generally follow previous decisions, in other words, precedent, on the grounds of certainty. Whether they can ignore or have to follow previous decisions depends on where that judge sits in which court in the hierarchy of the courts. Persuasive precedent is a decision that has been made by a previous court but, for a variety of reasons, a later court does not have to follow. This would be most common where a court

lower in the hierarchy of the courts has decided a point of law; then a case with similar or the same facts comes before a court higher in the hierarchy. Here, judges can follow the precedent and create a binding precedent if they wish, but they do not have to if they do not want to. This is what happened in the cases of *Howe* and *Gotts* above. [AQ1]

In looking at judicial precedent there are three important parts to consider: the principle of *stare decisis*, the court’s hierarchy and law reporting.

Stare decisis

One of the main advantages of judicial precedent is that if a senior judge has made an earlier decision as to the law on a particular matter, then you can be fairly certain that this is the definition that the courts will use in future. If, however, that judge got it wrong, then it can be changed by another judge. However, in order to change precedent there must be a series of rules, otherwise any judge could change any earlier decision and there would be no certainty in the law. The main rule of precedent is *stare decisis*, which means ‘stand by the decision’. Therefore, for the reason of certainty, rather than have any judges making any decision they want, they are told to follow the previous decision of judges. This makes the law certain so that clients can be advised by lawyers.

The hierarchy of the courts

The courts’ hierarchy is divided up into the civil courts and criminal courts. The lower courts, termed ‘inferior courts’, differ largely between the civil and criminal courts. Where there is similarity in the structure of courts is at the top of the hierarchy where the courts are the same. The higher up the hierarchy, the more important the judge’s decision is and therefore the more likely that the judge’s decision is binding on the lower courts. Therefore, precedent binds the

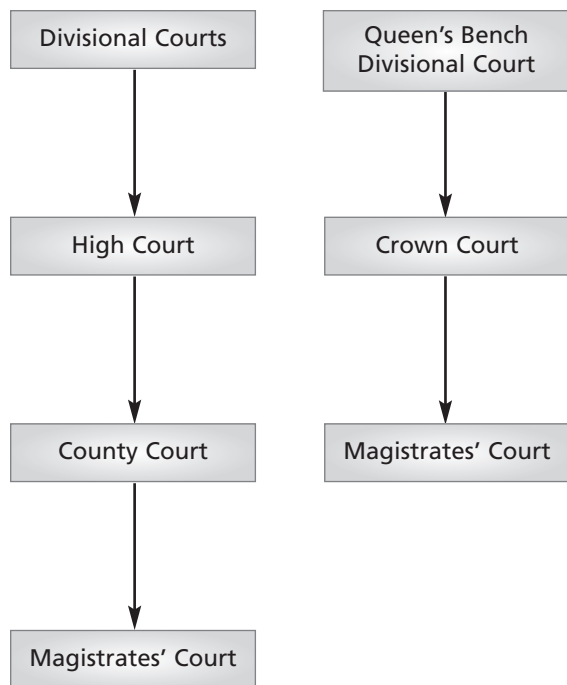


Figure 1.2 Diagram of hierarchy of civil and criminal courts

lower courts, and sometimes the higher courts themselves. Since joining the European Union in 1973, the highest court in our hierarchy of courts is the European Court of Justice (ECJ), which hears appeals from English courts on matters of European law that affect us. When the ECJ makes a decision, as it is top of the hierarchy, it binds all of the courts below it.

The House of Lords (Appellate Committee) sits at the top of the domestic courts in the English legal system and is the most senior superior court along with the Court of Appeal and the High Court. Below these courts sit the inferior courts which consist mainly of the Crown Court, County Court and the Magistrates' Court.

The House of Lords (Appellate Committee)

The House of Lords (not to be confused with the second chamber of Parliament) is the most

senior domestic court in England and Wales. The Lords are bound by decisions that are made in the ECJ. This has caused a lot of controversy in this country. One of the most important functions of the House of Lords is where its judges – the Law Lords – sit and hear appeals from lower courts asking for clarification or interpretation of the law. Because it sits at the top of the English hierarchy of courts, its decisions are very important and the courts below must follow its decisions or rulings. Importantly, if the House of Lords makes a decision, it is able to change its mind at a later date and overrule the previous decision. This has not always been the case.

Up to the end of the nineteenth century the House of Lords had allowed themselves the power to overrule its own decisions and not be bound by previous decisions, to allow flexibility. In 1898 in *London Street Tramways Co Ltd v London County Council* [PQ5] the Lords decided that certainty in the law was more important than flexibility and decreed in that case that they would be bound by their previous decisions. The *only* exception to this rule would be that if the Lords made a decision by mistake and clearly got the law wrong. In that case the decision could be overruled and thus put right.

The responsibility of law reform was put on Parliament – if the Lords made a decision that they wanted to change (and now could not), it was up to Parliament as supreme lawmaker to pass an Act of Parliament to change the law. This caused problems, most notably in *DPP v Smith* (1960), where the Lords decided that the definition of the word ‘intent’ was to be decided objectively, which contradicted with the existing common law which had looked at it from a subjective perspective.

Unable to amend their own decision and in reaction to criticism of the decision in *Smith*, Parliament passed the Criminal Justice Act 1967 which changed the ruling in *Smith*.

Following criticism, the Lord Chancellor Lord Gardiner issued in 1966 a Practice Statement, which allowed the Lords to change their minds in certain limited circumstances and change previous decisions they had made – when ‘it is right to do so’. This allowed the Lords to go back to the more flexible position that they had been in before 1898 – they could amend the law in appropriate circumstances. Initially, the Lords were reluctant to use the Practice Statement. In 1972 in a civil case *Herrington v British Railways Board*, the Lords were asked to reconsider the earlier case of *Addie v Dumbreck* (1929).

Both cases concerned the liability of owners of land to child trespassers who are injured on their land. In *Addie* the Lords had decided that an owner of land would only be liable for injury to such children if they deliberately injured the child or were reckless in allowing the child to get injured. Therefore, the owner of land would not be liable to a young child who strayed onto the defendant’s land and was injured by the child’s own actions. In *Herrington*, a child had trespassed onto the defendant’s land through a hole in a fence of which the defendant was aware, and was seriously injured on railway lines. The Lords used the 1966 Practice Statement to modify the decision in *Addie*. They said the test as to whether the defendant owed a duty to the child trespasser was extended to *whether they had done all they could* to protect a trespasser. As the defendant had not (as they knew there was a hole in the fence), then they were liable to the child.

The Lords were somewhat reluctant to use the Practice Statement in criminal cases. This was to ensure that the law was more certain, since the liberty of individuals is a stake. The first criminal case that used the Practice Statement was in *Shivpuri* (1986), which overruled a case decided by the Lords only a year earlier in *Anderton v Ryan* (1985). A more recent example is in *R v G and R* (2003), which overruled the previous decision in *R v Caldwell* (1982) over the true test of the meaning of recklessness.

The Court of Appeal (Civil Division)

Below the House of Lords in the hierarchy is the Court of Appeal, which must follow decisions made by the ECJ and the House of Lords. The Court of Appeal is split into a Civil Division and a Criminal Division dealing with the respective areas of law. The Court of Appeal (Civil Division) is bound also by its own rulings unless one of the three exceptions in *Young v Bristol Aeroplane Co Ltd* (1944) applies. The exceptions are:

- where two previous decisions of the Court of Appeal contradict each other. Here the Court of Appeal can choose which of the two decisions to follow and which one to ignore
- where a previous Court of Appeal decision conflicts with a decision made (usually later) by the House of Lords. Here, because of the hierarchy of the courts, the Court of Appeal must follow the House of Lords decision and ignore its own earlier decision
- where a decision has been made *per incuriam*. This means without care or by mistake. Here, the Court of Appeal may simply have made a mistake and this is amended by a later Court of Appeal case.

The Court of Appeal (Criminal Division)

The Criminal Division is bound by the same three exceptions in *Young* as the Civil Division. Since the ultimate punishment for a crime is prison, the Court of Appeal Criminal Division has been more flexible in allowing itself to overrule its own previous decision if it feels that the law has been ‘misapplied or misunderstood’.

The Divisional Courts

Next in the hierarchy is the three Divisional Courts. They deal with specific areas of law and are again bound by those courts above them in the hierarchy and by their own decisions, unless one of the exceptions in *Young* applies.

The High Court and the Inferior Courts

The High Court is again bound by the decisions of all the courts above it in the hierarchy. It normally binds itself, but judges can, if they wish, depart from previous High Court decisions, provided that there is no precedent set by those courts above it. The inferior courts – the Crown Court, County Court and Magistrates' Court – do not technically create precedent. It could be possible for the Crown or County Court to create an 'original' precedent that a Magistrates' Court would have to follow.



ACTIVITY

Activity 7

Consider the following situations in the superior courts. Assuming the facts of each case to be similar, decide whether the later case is bound by the previous decision.

1. Case X was decided by the House of Lords in 1945. Case Y comes before the House of Lords in 1963.
2. Case X was decided by the House of Lords in 1945. Case Y comes before the House of Lords in 1970.
3. Case X was decided by the Court of Appeal (Criminal Division) in 1985. Case Y comes before the Court of Appeal (Criminal Division) in 2000.
4. Case X was decided by the European Court of Justice in 1975. Case Y comes before the House of Lords in 2009.

Law Reports

All superior courts' decisions are published both on paper and electronically on the Internet. The only way a court (especially a lower court), a lawyer or an individual researching law can understand precedents is if they are correctly and accurately recorded.

How does precedent work?

Following a precedent

As we know from what we've read so far, the main rule of precedent is that courts must follow the previous decisions of courts higher in the hierarchy of the courts where the facts of both cases are the same or similar.

Distinguishing

One way a lower court can avoid following a precedent is by drawing a distinction between the current case and the earlier case. It would do this by saying that the facts of the current case are different from the facts of the earlier case the other party is trying to use and therefore is not bound by it. In *Merritt v Merritt* (1970) the court was asked to follow the previous precedent in *Balfour v Balfour* (1919), a case with similar facts, which had said that an agreement made between a husband and wife had no enforceability in law because there was no intent to create legal relations. Such an agreement was deemed to be merely a domestic arrangement with no legal enforceability. However, in *Merritt* the court distinguished *Balfour* by saying that the difference between the two cases was that in *Merritt*, while still married they had separated (in *Balfour* they had not) and therefore the agreement must have legal enforceability. The court therefore distinguished the two cases based on their specific facts.

Overruling

Sometimes a judge will decide that the precedent in a previous case was wrongly decided. When he makes this decision he is said to overrule the previous decision and make a new binding precedent in its place. This was the case in *Shivpuri* (1986). A previous case's decision can only be overruled by a court more senior in the hierarchy.



ACTIVITY

Activity 8

There are three main ways in which a court can avoid a previous decision. Identify the most appropriate type of avoidance for each of the following three scenarios. Fill in the table with the most appropriate type from the list below.

- distinguishing
- overruling
- reversing.

Scenario	Situation	Most appropriate type of avoiding a previous precedent
A	The House of Lords in 2009 disagrees with the decision of the High Court in 1990	
B	The High Court in 2007 decides not to follow a Court of Appeal decision made in 1975 because of differences in the facts.	
C	The House of Lords hears an appeal from the Queen's Bench Division and disagrees with their decision	

Table 1.4

Reversing

Both distinguishing and overruling cases involves considering different cases at different times. The process of reversing involves the same case. If a lower court decides a precedent, say in one of the Divisional Courts, and the case is asked to be heard in a higher court, called an appeal [AQ2], then if the judge in the higher court feels the lower court made the wrong decision, he can change or 'reverse' the decision of the lower court to that he thinks is correct.

Adapting

It may be that a higher court thinks that a previous decision is largely correct but wants to amend or adapt the earlier decision rather than overrule it. The House of Lords in *Woollin* (1998) agreed largely what the Court of Appeal

had said earlier in *Nedrick* (1986) when again trying to define what is meant by the word intent. In *Woollin* the House of Lords slightly amended the definition from *Nedrick* to make the law, in their opinion, more certain.

What are the benefits of a system of precedent?

Certainty in the law

As previous decisions are reported accurately, those interested in understanding the law can say with some degree of accuracy and certainty what the law is on a given point. Similar cases are treated in the same way. Thus, judges have clear preset rules to follow allowing clarity and consistency of their decisions in similar fact cases.

Real situations

As precedent is made in respect to real life situations it makes it easier to understand, knowing how it relates to the real facts of the case. There is therefore no need to imagine how a precedent would operate when a judge has to decide on actual real facts.

The law is allowed to develop

As courts are able to avoid previous decisions or overrule incorrect ones, the law can grow and change with the times.

It allows the correcting of mistakes

If a previous court has clearly made a mistake when making a precedent, there is the opportunity to rethink the law in a later case.

What are the problems caused by a system of precedent?

Sheer volume of case law

With the many hundreds of cases reported each year, keeping up-to-date knowledge of the existence of precedent can be difficult. The use of the Internet and Web resources has made it easier to check, but it is still difficult, keeping track of all decisions made.

Rigidity

Despite the ability to change the law, many judges are reluctant to do so. If a lower court has rigidly to apply the law set in higher courts, then the system in fact becomes inflexible. This in turn leads to a slowness of growth in the law.

The law can only develop if a new case comes before the courts

As precedent is 'judge made' law, the judge can only rule on questions and facts that lie before him. Judges cannot create binding precedent

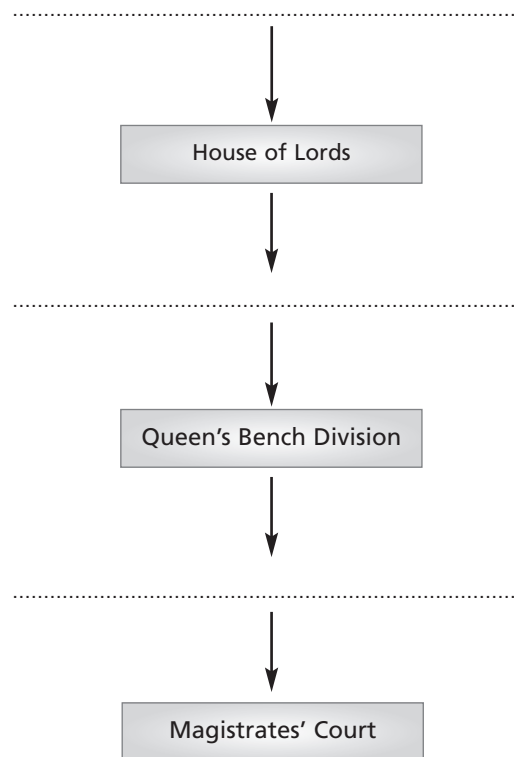
that is unconnected with the case – this would be for Parliament to do through an Act of Parliament.



ACTIVITY

Activity 9

The following diagram shows the hierarchy of the criminal courts. Fill in the missing words from the list below:



- County court
- Court of Appeal (civil division)
- European Union
- Crown court
- European Court of Justice
- Court of Appeal (criminal division)

Figure 1.3 Hierarchy of the criminal courts

Continued application of bad law

If a higher court has made a mistake, then the lower courts have to follow that decision (see *DPP v Smith* above) until a higher court later overrules the earlier precedent.

1.4.4 Membership of the European Union

The important areas to understand here are: what are the lawmaking institutions and what types of law are passed by them?

Why European law?

The UK joined in 1973 what is now known as the European Union (EU). Originally set up following the Second World War, the EU was an attempt by many western European countries to rebuild their economies by working closely together. The idea was that these countries would be more prosperous when working together than working apart. These countries decided that they would share a common framework of laws, originally in areas of employment law and in trading goods and services between the countries. As time progressed, European laws were introduced to cover other areas such as health and food safety and sex discrimination laws. It is therefore European law that holds together this framework of cooperation.

There have been moves to adopt a common criminal law among EU member countries, but this has been strongly resisted by the UK and other EU states, as they feel that the criminal law should be unique to that country and reflect its own opinions and attitude to crime, not those of another country with different traditions or tolerances.

The institutions of European lawmaking

Different to the UK's Parliament, the running of the EU is carried out by four bodies or institutions:

- the Council of Ministers
- the European Commission
- the European Parliament
- the European Court of Justice.

The Council of Ministers

This is the main lawmaking body of the EU. Its main responsibility is in the coordination of the EU's economic policy. Each member state has one representative on the council, normally the Foreign Secretary. It can be the case that a specific issue is being discussed, for example agriculture, so each member state would send a Government minister responsible for agriculture to the Council. When it comes to voting on new EU laws, each country is given a number of votes that are weighted against its population. The UK currently has 29 votes, whereas a smaller state such as Malta, for example, has only three votes.

The European Commission

This body's main function is to propose new laws for the Council to discuss. There are currently 27 Commissioners who are appointed from member states with the agreement of all the member states for five-year terms. They each agree to put aside any personal interests relating to their own countries and work for the benefit of all member states. Other key responsibilities for the Commissioners are to investigate large companies trading within the EU to make sure they are operating fairly and to make sure agreements made by the EU are adopted and carried out by the member states. If not, the Commissioners have the power to refer those states to the ECJ.

The European Parliament

The main function of the Parliament is to discuss and comment on the proposals made by the Commission or any other European legislation. Each Member of the European

Parliament (MEP) is elected by the citizens of the member states, similarly to general elections. This is done once every five years.

The European Court of Justice

Since the EU has its own law, it also has its own court. While the House of Lords remains the highest appeal court in the UK, parties can further appeal to the ECJ on matters that are covered by European law. It consists of 27 judges who are not bound by the system of precedent in the way English domestic courts are. Therefore, the ECJ can create new precedent by interpreting European law and change their minds when they wish. Following a decision, this will bind all domestic courts in the EU member states and therefore creates binding precedent.

The sources of EU law

It is important that we first understand that there are three main sources of EU law. Second, we need to know how they are used within the English legal system. Problems arise where there is conflict between our own domestic law and EU law and in such circumstances, EU law takes priority over domestic law.

The primary source – treaties

Treaties

Treaties are a primary source of law and as such are the most important source of EU law. They are signed by the Heads of Governments providing the framework to create and manage the relationships between members of the EU. In essence it is the Treaties which empower the Institutions and dictate the direction the EU wishes to follow on specific policies. Treaties are directly applicable to domestic law and, once signed, automatically become part of the English law. The Treaty of Rome (1957) created the EU. When Parliament passed the European

Communities Act 1972, s 2(1) allowed British citizens to rely on any rights granted under the Treaty. For example:



EXAMPLE

Here the defendant had complained that her employer was paying her less money to do her job than the man who had previously carried out the same job. She successfully argued that this practice was in breach of Art 141 of the Treaty of Rome, which guaranteed equal pay for equal work

From the case of Macarthy Ltd v Smith (1979)



EXAMPLE

However, in this case the ECJ said that it was acceptable for a man to be paid more than a woman if she were to take time off from work for maternity leave and therefore was not in breach of Art 141.

From the case of Cadman v Health and Safety Executive (2006)

A Treaty is therefore similar to a Parent Act and provides the framework, while Regulations and Directives provide the detail.

The secondary sources – regulations and directives

Regulations

These types of law are similar to an Act of Parliament and relate to a specific issue. They are issued by the Commission. Like treaties, regulations under Art 249 of the Treaty of Rome are automatically incorporated into the domestic law of the member states when passed.

Directives

Directives are set by the Commission to direct member states as to what the law should achieve on a particular issue. It is then up to the

member states to pass their own legislation to incorporate the purpose of the directive. Each directive is given a time limit within which the member state must implement the law.

European Court of Justice Precedent – When the ECJ makes a ruling, this becomes an important source of law in that such a decision binds all EU domestic courts.



EXAMPLE

Here, the Government banned the claimant from entering the country. She argued under Art 39 that the ban breached her right to freedom of movement between member states. However, the British Government was able to rely on a directive that stated that they could ban such a person if they felt her conduct was against the public good.

From the case of Van Duyn v Home Office (1975)



EXAMPLE

Here, Spanish fishermen challenged the Merchant Shipping Act 1988, which had restricted their trawlers from using British water in which to fish. The ECJ ruled that EU law allowed EU citizens to work anywhere in the EU and therefore the 1988 Act conflicted with EU law and could not be enforced.

From the case of R v Secretary of State for Transport ex parte Factortame (1990)



ACTIVITY

Activity 10

Identify the most appropriate type of source of EU law for each of the following four scenarios. Fill in the table with the most appropriate type from the list below.

- treaty
- regulation
- directive
- ECJ.

Scenario	Situation	Most appropriate source of EU law
A	The European Commission pass a law restricting teenage working hours.	
B	The heads of EU countries wish to increase the number of countries into the EU.	
C	The most senior court in the hierarchy of the English courts makes a ruling.	
D	The European Commission decide to pass a new law but leave the detail to the individual EU state.	

Table 1.5