# CHAPTER FOUR

# DEMOCRACY AND SOURCES OF LAW

**CONSTITUTIONAL AND ADMINISTRATIVE LAW**

**DEMOCRACY AND THE SOURCES OF LAW**

**Introduction**

The law in the United Kingdom comes from two distinct sources, legislation through Acts of Parliament or other body empowered to make law such as the European Union and from the Judicial Precedents established by decisions of the Courts of Law, the later of which may pose a threat to the democratic principle. A further threat to democratic law making by the legislature is the potential for the courts to interpret legislation in a manner which deprives it of effect or its intended purpose, though the courts would deny that this in fact takes place.

**CASE LAW :JUDICIAL PRECEDENT : THE DECLARATORY THEORY OF LAW**

Judicial precedent potentially at least, usurps the concept of Parliament as the sole law maker and undermines the theory of democratic accountability of those making the law, since judges in the UK are not elected.

**Judicial Precedent – The Justifying Rationale** :

In order that the law is seen to be fair and just, it is important, when similar cases come before the courts, that the courts make similar decisions. Further, it is only by so doing that the law becomes clear and certain and so represents a guide to the people as to what behaviour is acceptable, and what behaviour is unacceptable, in the eyes of the law. For this reason, once a principle of law is developed or refined by the courts of law, it should then be applied consistently by courts in the future.

The process of creating 'precedents' which are binding on future courts is known as Case Law or Binding Judicial Precedent. The system is peculiar to the Common Law Legal System used in the United Kingdom, present and former Commonwealth countries and the U.S.A. Binding precedent has also been adopted by the European Court of Justice in Luxembourg in respect of European Union Law and by the European Court of Human Rights at Strasbourg in respect of the European Convention on Human Rights.

**How Judicial Precedent Works.**

Reasons given by Judges for deciding cases form what is known as Case Law or the Common Law. Some case law enunciates (effectively makes) the law itself and some is concerned with the interpretation of statutes (says what the words of a statute mean). What is common to any court hearing, however, is that the judge compares the facts and points of law before him with the facts and points of law of previous cases. This procedure is always adhered to.

To the extent that facts and points of law stated in previous cases are similar or identical with the case in hand the decisions made by the judges in those previous cases are said to be binding and the judge is generally bound to follow those decisions. To the extent that previous facts and points of law differ previous cases are not binding though they may be p*ersuasive.*

Where facts or points of law differ from the previous cases the judge may distinguish the facts etc of the case from those previously decided and so reach a different decision. This process is described as reasoning by analogy and is the essential process of all British Court hearings. Reasoning by analogy is heavily dependent on an accurate system of reporting previous decisions and such a system was finally established in 1865 by the Incorporated Council of Law Reporting for Wales. This has enabled the current strict application of the doctrine of precedent to be effective.

Binding precedent is based on the view that it is not the function of a judge to make law, but to decide cases in accordance with existing rules. Two requirements must be met if a precedent is to be binding:-

i) It form part of the ratio decidendi of the case; and

ii) the court which made the statement must have a superior, or in some cases equal status to the court considering the statement at a later date. (Note that inferior courts, ie magistrates and Crown Courts do not create binding precedent).

If these above requirements are met and the material facts as found are the same the court is bound to apply the rule of law stated in the earlier judgement.

The significance of the ratio decidendi is illustrated by considering the structure of a judgement which is composed of

a) finding of fact;
b) statements of law applied to the legal problems raised by the facts as found;
c) statements of law made by the way (obiter dicta);
d) the decision.

It is point (b) above which is of prime importance. Statements of law applied to the legal problems raised by the facts as found upon which the decision is based are known as ratio decidendi statements and *are the only parts of the decision which are binding as precedent*

**The ratio decidendi contains the legal reason for the decision being made.** What actually constitutes the ratio decidendi of a case is sometimes decided in a later case. If there are two or more judgements as in the Court of Appeal or the House of Lords, the ratio becomes the statement of principle which commands the majority of judges. Where the judges have all given different reasons for their decisions a future judge may have to choose which of the ratio he will follow. Note that there is no choice in the matter if the ratio decidendi of a case is clear and unambiguous and clearly fits the facts of the case under consideration.

**Inferior Courts**. (Magistrates Courts and County Courts) These are not bound by--their own previous decisions since they are less authoritative and are rarely reported. Their decisions do not bind higher courts.

**Distinguishing.** A case is distinguished when the judge states that the material facts are sufficiently different to apply different rules of law.

**Overruling**. Precedents can be overruled either by statute or by a superior court. Judges are usually reluctant to overrule precedents because this reduces the element of certainty in the law. When an earlier case is overruled it means that the law was incorrectly applied to that case according to the judge(s) in the present case.

**Reversing**. A decision in a case is reversed when it is altered on appeal. Consider **The GILLICK Case** and the issue of contraceptive advice. The High Court decided in favour of the DHSS. The Court of Appeal decided in favour of Mrs Gillick. The House of Lords found, by a majority of 3-2 in favour of the DHSS. The result was that while only 4 judges decided in favour of the DHSS and 5 decided in favour of Mrs Gillick, the decision that finally decided the current law was that of the majority of the House of Lords i.e. the giving of contraceptive advice - treatment to a girl under 16 is *not* illegal. From then on only the House of Lords decision is important as a legal precedent.

Judicial precedent covers two separate areas, Statutory Interpretation and Common Law or Case Law.

**EC References :** Where a domestic court is uncertain as to the effect of EC legislation or as to whether or not domestic legislation complies with E.C. Law, the court may, and indeed must, under **s3 European Communities Act 1972,** make a reference to the European Court of Justice (E.C.J.) for a ruling to clarify the position. The case raising the issue is put on hold pending issue of the E.C.J. declaration. The domestic court then applies the E.C.J. ruling to the case in question.

## JUDICIAL PRECEDENT

*"If however similar things happen to take place, they should be adjudged in a similar way: for it is good to proceed from precedent to precedent".* [1]

A precedent is something which has gone before : a judicial precedent is a decision of a Court on a previous occasion. Alternative expressions are judge-made law, case law, and common law, the latter meaning law apart from statute. From a legal point of view the world is divided between those countries whose systems are based on English Law (and called common law systems) e.g. Canada and the U.S.A. and those countries whose systems of law are based on the Roman Law (civil law systems) e.g. Italy and France.

In the civil law countries the judges do not enjoy the prestige of English Judges and their decisions are of persuasive authority only. Civil law countries usually have a codified law and their Judges are subservient to the code. It is in fact difficult to think of a legal system without some sort of judicial precedent. However,

[1] Bracton: C.J. 1268. With his notebook of 2,000 decided cases, Bracton was the first to make the law into a science.

in the civil law systems precedent acts simply as a model for imitation and is not binding. Since decisions are rationalised on the application of codes they are seldom published which in itself makes the precedent difficult to follow by any but those present at the hearing since third parties would have no knowledge of the decision in any case.

Even among the common law countries England stands alone because of the English theory of binding authority or stare decisis which is short for "stare rationibus decidendus". The English Common Law has developed in such a way that certain decisions must be followed whether a subsequent court likes it or not. Indeed judges have been known to pronounce that their hands are tied even though they do not agree with the result. This theory and the doctrine of judicial precedent becomes clearer on an examination of how it works in the courts. The judicial function is to apply existing law, not to make the law. The deciding of cases according to existing legal rules is known as the doctrine of "Binding precedent".

**Pre-conditions binding precedent**

a) **A settled hierarchy of courts**. Thus one needs to understand the hierarchy of the courts and their relationship because a court decision binds courts below it but not those above it.

b) **A system of law reporting**. Earlier decisions can be vouched for and quoted by a member of the bar without any need to produce written proof of the case. However no one can accurately carry the weight of precedent in their heads.

Two basic principles ensure the proper operation and development of judicial precedent.

a) Superior courts can overrule decisions of inferior courts, and their OWN earlier decisions in certain cases. [2]

b) Any rule of law may be changed by statute. **The Taff Vale Railway Case**[3] was reversed by the Trades Disputes Act 1906. Thus every common or equitable (but not legislative) rule of law can be changed by the judges, and every rule of law be it common law, equitable or the result of legislation can be changed by Parliament.

**Advantages of judicial precedent.**

a) **Certainty**: if the legal problem has been raised before then the judge is bound to adopt that solution.[4]

b) **Precision** : The volume of reported cases containing solutions to the similar later problem.

c) **Flexibility**: By overruling and distinguishing.

**Disadvantages of judicial precedent**.

a) **Rigidity –** unless a rule is challenged in a higher court the law cannot be amended.[5]

b) **The sheer volume of case law** means that propositions of law can be buried beneath mountains of case law.[6]

**The binding element in a law report**. **Distinguish Ratio Decidendi from Obiter Dicta.**

**Ratio Decidendi** : "The statement of law applied to the legal problems raised by the facts as found upon which the decision is based." Sir George Jessel in **Osbourne v Rowlett,**[7] said that "The only thing in a judge's decision that is binding authority on a subsequent court is the principle on which the case is decided." The rest is strictly speaking superfluous though of course obiter statements can be highly persuasive.

**Obiter Dicta** : Things said by the way - which do not form part of the Ratio decidendi. Obiter statements may arise in one of two ways

a) Statements based on the facts which were not found to exist, or if found to exist were not material to the decision. Thus **Central London Property Trust v High Trees House Ltd.**[8] which was later to become a major principle of equitable estoppel was first propounded by Denning. The statement was obiter though it was adopted because of its 'persuasive' nature, in later cases.

2 See **Tiverton Ltd v Wearwell Ltd** [1973] C.A. and **Law v Jones**.

3 **Taff Vale Railway Case** 1902

4 e.g. **Heather v P.E. Consulting** 1973 CR was applied in **Jeffs v Ringtons Ltd** (1985) S.T.C. 80.

5 see **Addie v Dunbreck Ltd** [1923] H.L. and **Herrington v British Rail Board** [1972] H.L. see below.

6 Thus in **Pannett v McGuiness** [1972] C.A. 80 reported cases were cited in court.

7 **Osbourne v Rowlett** [1880]13 Ch.774

8 **Central London Property Trust v High Trees House Ltd** [19471 K.B. 1945.

b) Statements of law which although based on the facts as found, do not form the basis of the decision. Thus the case of. **Hedley Byrne v Heller,**[9] set out for the first time the basis of liability for negligent misstatement - albeit merely obiter in that case - which was adopted by later cases. The defendant was found not to be liable on the facts because he has issued a disclaimer before giving the negligent advice.

Cases can in fact have more than one ratio decidendi. Thus there were two in **Read v Lyons**,[10] The number of points of law decided are often listed as Held 1.... Held 2.... Held 3.... in the head note to the case in the law reports.

**Circumstances where a precedent is NOT binding**.

a) **Persuasive authorities**.
   i) Obiter dicta (above) is persuasive only
   ii) Decisions of inferior courts e.g.. C.A. is persuasive only in respect of H.L.
   iii) Decisions of Scottish, Irish, Commonwealth and foreign courts.
   iv) Decisions of the Privy Council - see **Wagon Mound** [1961] P.C.

b) **Precedents which have been overruled**. Courts are reluctant to overrule longstanding authorities. **Pinnel's Case**,[11] has not yet (nor is likely to be) been overruled, though it has been doubted on several occasions.

   The rule in **Pinnel's Case** was strongly reaffirmed in **Foakes v Beer**.[12] However, the courts will overrule decisions that are clearly wrong. Thus **Law v Jones,**[13] was abandoned and the reference therein to Lord Denning's words in **Gallie v Lee.**[14] To overrule is to declare a precedent is incorrect and no longer good law. To reverse a decision is what happens when a higher court reverses the finding of a lower court during an appeal of the same case.

c) **Precedents which can be distinguished**. Cases are distinguished on their facts - this helps to keep precedent flexible and adaptable. However, there are times when the courts have distinguished between the circumstances of two cases in situations where it appears to others that the circumstances are indistinguishable, as with the cases of. **Elderdempster v Paterson Zochonis,**[15] and **Scrutton v Midland Silicones.**[16] Such a practice is less likely to occur since the 1966 Practice statement of the House of Lords whereby the house stated that it would be prepared to overrule its previous decisions if the need arose.

d) **Statements of law made 'per incuriam',** where some relevant statute or precedent has been overlooked by the court in reaching its decisions.[17]

## LEGISLATION

Legislation may broadly be described as "the formulation of law by the appropriate organ or organs of the state, in such a manner that the actual words used are themselves part of the law.[18] Legislation includes

i) Acts of Parliament,
ii) Delegated Legislation and
iii) Automatic Legislation from the European Union.

**Acts of Parliament.**

In the U.K. Parliament is the Sovereign Law making power. The Queen in Parliament is competent to create any law on any subject matter that it chooses.

9 **Hedley Byrne v Heller** [1964] A.C. 465.
10 **Read v Lyons** [1947] A.C. 156
11 **Pinnel's Case** [1602] 5 Co. Rep 117a
12 **Foakes v Beer** [1884] 9 App Cas 605 HL
13 **Law v Jones** [1974] Ch 112
14 **Gallie v Lee** : **Saunders v Anglia Building Society** [1969] 2 Ch 17 CA
15 **Elderdempster v Paterson Zochonis** & Co [1924] AC 522 HL
16 **Scrutton v Midland Silicones** [1962] A.C. 446
17 see:- **Young v Bristol Aeroplane** [1944] C.A.
18 Hudson & Phillips. *'A First Book of English Law*.'

The Queen in Parliament comprises The House of Commons, The House of Lords and The Queen. Thus each Act of Parliament commences with the legend *"Be it enacted by the Queen's most excellent Majesty, by and with the advice of the Lords Spiritual and Temporal and the Commons, in this present Parliament assembled"*

Theoretically at least Parliament can legislate on any topic it chooses, and so it could declare that a certain man was in fact a woman, or that all blue-eyed babies be killed at birth, or that smoking in the streets of Paris is illegal. The political wisdom of such legislation or the ability to enforce such legislation would be quite a different matter. However, the U.K. courts of law would accept that once the Royal Assent is given to a Bill then it becomes the law of the land and is binding. The Authority of Parliament is supreme from the view-point of United Kingdom Courts.

In **Pickin v British Railways Board** [19] it was held per (by) Lord Reid that the courts have no power to disregard an Act of Parliament, be it public or private. The action was consequently struck out as an abuse of the court process since it is not the court's job to question the validity or content of Acts of Parliament. This view must be modified in the light of European Union Law, which takes precedence even over Acts of Parliament.

**The Procedure for producing an Act of Parliament**.

A Parliamentary Bill is drafted by Parliamentary draftsmen, often at the behest of the Law Reform Commission. The bill is introduced by either the Government in either the House of Lords or the Commons or by a Member of Parliament in the case Of a Private Member's Bill such as the **Abortion Act 1967** introduced by David Steel. The Bill must receive three readings (1st, 2nd & 3rd Reading) in both Houses - during which stages it may be subject to amendments. Finally it receives the Royal Assent and becomes an Act of Parliament. At this stage the Act is published by H.M.S.O. Not all Bills become Acts of Parliament. Statistics are published annually by the Incorporated Council of Law Reporting.

**Methods of Citation**

There are thee ways of citing an Act of Parliament, presented below in chronological order.

1 Early statutes are cited by the name of the place where Parliament met at the time of creation, for example **Constitutions of Clarendon 1164**; **Provisions of Oxford 1258**; **Statute of Westminster 1285**.

2 Later statutes were cited by reference to their regnal (number of years the monarch had reigned) year and chapter, e.g. The **Criminal Justice Act 1948** is cited as 11 & 12 Geo. 6. Ch. 58 (i.e.the 58th piece of legislation passed in the 11th and 12th years of the reign of George VI).

3 Since 1962 reference is made to the Calendar year and Chapter Number, e.g. The **Theft Act 1967**, Ch. 60. (Theoretically only one Act is passed per year which is them divided up into Chapters).

**Delegated Legislation.**

Why is delegated legislation used ? The activities of modern government are so varied and complex that Parliament does not have the time to deal with every item of legislation. The device is also used to make rules required by European Union directives where the European Union requires member states to pass laws to achieve a certain stated objected but leaves it to each member state to decide on the exact form that the domestic rule will take. This is often done so that the rule can take into account existing domestic law or to deal with special problems in each state where it is. considered that an automatic legal imposition from Brussels would cause too many problems for individual states.

**Definition of delegated legislation** 'The vast body of rules, orders, regulations and bye-laws created by subordinate bodies under specific powers delegated to those bodies by Parliament.' That is to say, Parliament creates or enacts an Act of Parliament in broad terms, but does not fill in the small details. The enabling Act states that a Minister or some other person of body is given the authority to fill in the details on Parliament's behalf for example a Local Authority may be given the duty by Act of Parliament to make bye-laws for the making and up keep of public foot paths. The bye-laws stating which parts of the land owned by the Local Authority are public foot paths - and rules against liner and parking etc are made by the Local Authority.

**The Ultra Vires Doctrine**. Acts of Parliament cannot be called in question (as to their validity, in a Court of Law), whereas delegated legislation is only valid within the limits of the power conferred on the delegatee

[19] **Pickin v British Railways Board** [1974] A.C. 765 (H.L.)

by Parliament (the delegator). If a case comes to court in which an action of a government body is being justified as authorised by delegated legislation, the Court will refer to the Act of Parliament which is alleged to confer the power. The Court will question whether or not the Act of Parliament conferred the power. The Civil Procedure Rules 1998 are an example of delegated legislation made under powers conferred by the Supreme Court Act 1998, replacing the SCA 1980 and the Supreme Court Rules.

**Attorney General v Fulham Corporation**.[20] The Fulham Corporation under Statutory powers provided wash houses (see the Baths & Wash Houses Act 1846-78) where people could bring their laundry, but had to wash it themselves, except that council employees would operate the wringers. The Local Council proposed to run a municipal laundry with the whole of the washing being done by its employees. The court held that statutory powers did **not** cover running a laundry.

**Bromley Borough Council v G.L.C.**[21] The House of Lords held that the Labour controlled General London Council has no power under the **Transport Act 1969** to pass resolutions to enforce a 25% cut in London's bus and tube fares. The G.L.C's duty was to operate an 'Economic Transport System,' which did not extend to deliberately losing money.

However, the powers that are conferred on subordinate bodies are often very wide e.g. D.O.R.A. (war time powers) and as such it may be difficult to question whether or not the body is in fact acting within its delegated powers.

**Types of Delegated Legislation:**

**Statutory Instruments**: The Statutory Instruments Act 1946 makes provision for the printing of Statutory Instruments "S.I.s". and Orders in Council "O in Cs," published by the H.M.S.O. and updated annually, for example, **Tobacco Products Duty (Increase) Order 1976.**

**Orders in Council**. The highest form of delegated legislation. An order of the Privy Council, consisting of the Queen and Privy Council. Many Acts of Parliament do not come into force immediately. A section may state that certain provisions will come into force (operation) by an Order in Council for example, The **Interpretation Act 1978**, D.O.R.A. (Defence Regulations issued by Order in Council. **s2(2) E.E.C. Act 1972** - states that European Community obligations may be implemented by Order in Council (or a Minister may make regulations).

**Bye-Laws** : Laws limited to certain premises or areas. These must be INTRA VIRES and reasonable. Lord Russell discussed the concept of reasonableness in **Kruse v Johnson,**[22] "If for instance they were found to be partial and unequal in their operation as between classes; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men... but a bye-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient.."

**Rules of the Supreme Court** : These are the rules by which the courts operate and govern court procedures such as the manner in which legal actions are to be presented to the courts, the granting of writs etc. These were revised in 1998 by the Civil Procedure Rules as a result of the Woolf Report.

**Advantages of Delegated Legislation.**

Delegated Legislation is often considered to be ideal for technical subject matter which Members of Parliament would not normally possess the specialised knowledge to deal with and which does not deal with generalised policy issues such as factory safety, construction sites, building regulations. Parliament simply lays down general principles such as that factories should provide a safe environment for men and women to work in. Delegated Legislation is necessary since Parliament is so busy that it could never deal with all the minute details of government today. Delegated Legislation is a way of coping with this problem since Parliamentary Debating time is not needed.

Delegated Legislation can be created relatively quickly, by comparison with Acts of Parliament which require three readings etc. For example, an order restricting movements of livestock after an outbreak of

20 **Attorney General v Fulham Corporation** [1921] 1 Ch.44.

21 **Bromley Borough Council v G.L.C.** [1982] 1 All E.R. 129 H.L.

22 **Kruse v Johnson** [1898] 2 Q.B. 92 at 99.

Foot & Mouth disease must be made rapidly - there is no time to wait for an Act of Parliament on the matter. Extensive delegation of legislative power existed during the wartime emergency. However, it should be noted that Parliament has from time to time passed Acts in a single day to deal with an emergency.

Parliament is seldom able to foresee all the problems that result from the passing of an Act. Thus, The **Gaming Act 1968** provided the general principles but left the detailed regulations to be made later by the Home Secretary on the advice of the Gaming Board. The **Carriage of Goods By Sea Act 1992** gives the power to the Secretary of State to pass regulations in respect of electronic bills of lading as and when the electronics industry perfects the technology for issuing secure bill of lading communications.

Delegated Legislation is also used where the provisions of an Act cannot be implemented until administrative steps have been made to pave the way for the Act. A Minister is given the power to declare when the Act should become operative. Sometimes powers or provisions are made but put into 'Cold Storage'. If the need arises then the Act is made operative. The provisions of many Acts of Parliament have never actually been made operative and some are so out dated that they never will be.

**Disadvantages to Delegated Legislation**

Delegated Legislation is not so easily accessible. This is often a problem for the construction industry amongst others since unless the changes to the law are picked up by current journals the rules can easily be over looked. The constitutional safeguards or controls over legislation are reduced.

**Controls over delegated legislation**.

Consultation exists via the One Day rule. Representations on draft regulations may be made by public bodies concerned. Some delegated legislation must be laid before Parliament before being approved. Parliamentary control exists over statutory instruments which must be made and laid before the House of Commons. Such an instrument may be annulled by the House within the "40 Day Rule". Drafts of the instrument must be approved and laid before Parliament. There is a special procedure for Orders in Council. The House of Commons Select Committee on Statutory Instruments (The Scrutiny Committee" considers and reports on Regulations. The Minister concerned is answerable to Parliament under the doctrine of Ministerial Responsibility, though the effectiveness of the doctrine as a whole is doubted by most contemporary commentators.

**European Union Legislation and other Autonomous Legislators**.[23]

In theory European Union Law has the authority of Parliament by way of the **European Communities Act 1972**. If this enabling Act were to be repealed then European Law would cease to have the force of Law within the United Kingdom. In other respects the degree to which the United Kingdom retains the power of veto in the Council of Ministers affects the ability of the United Kingdom Parliament though its government ministers who sit on the Council of Ministers to permit or veto European Union Legislation. Majority voting has now been introduced so an absolute veto no longer exists. Majority voting becomes more and more pervasive as additional members join the Union. Further more, once a law has been agreed in principle, the European Commission drafts the actual rules which are approved by the European Parliament, only some members of which are even from the same political party as the United Kingdom Government and strictly speaking are not part of the government at all. The ability to challenge the small print of the rules is very limited and has to be done through the European Court of Justice.

The European Union creates directly applicable law through its treaties and through its regulations. These must be enforced by domestic courts. If a domestic court fails to do so then the European Court of Justice can force government of member states to ensure that the domestic court enforces the law in future.

The European Union also creates directives. The rule is set out in a general manner or at least the objective to be fulfilled is set out. Each member state must then pass legislation either by Act of Parliament or by way of delegated legislation. The laws so made must abide by the spirit of the directive. The European Court of Justice acts as arbiter to determine whether or not the law does or does not abide by the spirit of the directive. Decisions of the European Court of Justice on the spirit of and meaning of all European Law is final and binding on all member states.

[23] Other Autonomous Legislative bodies include the Law Society & The Church of England which have independent power to pass laws.

The Doctrine of Ultra Vires applies to European Law. In order to apply to a member state the law must be sanctioned by a treaty signed by the member state. For this reason the Social Chapter of the Maastricht Treaty was not signed by the United Kingdom which negotiated an opt out from that part of the Treaty. The result is that during the period of the Conservative derogation all law passed by virtue of the Social Chapter was binding on all member states apart from the United Kingdom. This was of significance to all employers including the construction industry in that the U.K did not at that time have a minimum wage by law. At that time the minimum wage in the rest of Europe was approximately £5.80 an hour. In the event the Blair administration signed the social chapter ending that particular derogation. However, in a similar vein, the UK has not become of member of the Euro Zone, with the result that whilst most of the European Union has adopted the Euro, sterling remains the currency of the United Kingdom.

**Functions of Legislation.**

To create, alter or revoke law. Generally five main functions may be identified.

1. **Revision of Substantive Rules of Law** This occurs when the law has become 'state and incapable of adaptation' through the restrictive operation of the doctrine of judicial precedent (see later lecture). For example The War Damages Act 1965 was passed to overrule the House of Lords decision in **Burmah Oil v Lord Advocate**,[24] although of course this express intention was not bluntly stated in the Act.

**The Machinery of reform :-**

a). The Law Reform Committee Composed of lawyers who look at branches of law requiring reform - then publish reports - which are sometimes taken up by Parliament. This is a haphazard affairwhere lawyers meet in their spare time.

b) Royal Commissions. The Beeching Commission resulted in the Courts Act 1971, and Benson Commission on Legal Services.

c) Law Commission. Set up by the Law Commissions Act 1965 with a full time administrative staff. About 10% of annual legislation now arises from the work of various law commissions, for example, Animals Act 1971, The Administration of Estates Act 1971 and The Criminal Damage Act 1971 and the Carriage of Goods by Sea Act 1992.

2. **Consolidation of enactments**. Existing Law - now presented in a consolidated form, for example. Sale of Goods Act 1979 and The Merchant Shipping Act 1996. Compare these with The Sale of Goods Act 1893 which was a codifying act - since it codified common law rules made by the courts. Some consolidation allows 'corrections and minor improvements' for example the resolution of ambiguity in earlier legislation -Consolidation Procedure Act 1949. A consolidated statute book has been seen as desirable, but is highly unlikely. See the report of The Renton Committee 1975.

3. **Codification** : This is broader than consolidation - it applies to case law and statutes, for example, The Offences against the Person Act 1861 and The Sale of Goods Act 1893.

   Where there is a need for clarity and re-enactment in a single document is not sufficient amendments of odd sections is often needed. See the dicta of the Master of the Rolls, Sir John Donaldson in **Merkur Island Shipping v Laughton**.[25] Such improvements are necessary if "the rule of law is to be maintained" on the basis that the law cannot expect the subjects of the realm to abide by the law if the law is not easy to ascertain and its meaning is unclear.

4. **Revenue Budgets, Finance Acts, Tax Statutes**.

5. **Social Function** To regulate the day to day running of the social system for example Landlord & Tenant legislation, Rent Acts etc.

6. **Harmonisation** European Union Legislation often seeks to create a uniform law that applies to all states through out the Union. Whereas the Union may not have a preference for any particular form that the law should take, it is often desirable that a single consistent law is passed for all states in order to facilitate trade, to enable all states to compete on an equal footing and so that citizens are not confused by different rules in different countries. A central tenet of European Law is that ultimately all laws, or at least all laws with impact on commerce, within the Union will be harmonised.

[24] **Burmah Oil v Lord Advocate** [1965] AC 75

[25] **Merkur Island Shipping v Laughton** [1983] 2 A.C.

## STATUTORY INTERPRETATION AND SOVEREIGNTY

Language is an imprecise tool and words can have many meanings. Uncertainty as to the meaning of words can be the result of vagueness, that is to say, there is no precise and clear meaning to the words, or from ambiguity, because there may be more than one meaning to the words. The courts claim that they can interpret statutes, in the light of what Parliament intended to avoid uncertainty and to provide clear and unambiguous statements of the meaning of statutory provisions.

**The Declaratory Theory of Judicial Interpretation** The courts never make the law - they merely declare what the law has always been, that is to say they discover the common law or interpret the intentions of Parliament. The courts are assisted in interpreting statutes by the definitions sections that appear in some, though not all, Acts of Parliament. The sections are not so useful as they might at first sight appear since they only define individual words, whereas judges are often called upon to define phrases and paragraphs. The Interpretation Act 1978 consolidated the Interpretation Act 1889 and subsequent amendments that have been made over the years. This however only gives general descriptions of how many words should be interpreted. The Law Commission produced a Model Bill of Words. It has never been passed as an Act.

**Judicial aids to ascertain Parliament's intentions..**

1). **The Literal Rule**.

The intention of the legislature must be found in the ordinary natural literal meaning of the words used. This is supposed to be the dominant rule. A court will interpret the words in their obvious, ordinary plain literal meaning, regardless of whether or not it makes sense. To this extent the rule is nonsense since it contradicts the concept of discovering what Parliament intended.

If the words interpreted literally are capable of alternative meanings then the Literal Rule cannot be applied. However if the words are capable of any one literal meaning then the rule must be applied even if it appears absurd. Normally the application of the rule leads to a reasonable interpretation but careless drafting can lead to absurdity, as with **I.R.C. v Hinchly,**[26] which concerned the interpretation of s25(3) Income Tax Act 1952..... *Any person delivering an incorrect tax return should forfeit treble the tax which he ought to be charged under this Act ...*' Parliament intended obviously to place a penalty of treble the unpaid tax, but the House of Lords held that treble the normal yearly tax had to be paid. Eventually s44 Finance Act.1960 was passed to correct the decision.

The modern tendency is to apply the Golden Rule or the Mischief Rule where the Literal Rule does lead to absurdity. Denning M.R. stated in **Corocraft v Pan Am Airways,**[27] that *"…. the literal meaning of the words is never allowed to prevail where it would produce manifest absurdity or consequences which can never have been intended by the legislature ...*' However in **Kammins v Zenith,**[28] Viscount Dilhorne stated that '*... the words of a statute must not be overruled by the judges, but reform of the law must be left in the hands of Parliament...*'

2). **The Golden Rule** or purposive approaches.

Words in a statute must be interpreted in such a way as to avoid a manifestly absurd result.

a). **Narrow application of the rule.** Where the statute permits of two or more literal interpretations the court must adopt that interpretation which produces the least absurd or repugnant result. Thus s57 Offences against the Person Act 1861. 'Whosoever, being married, shall marry any other person during the life of the former husband or wife'. Marry has two meanings.

- i). contracts a valid marriage
- ii) Goes through a ceremony of marriage.
  - i) produces absurdity since no married person can legitimately marry again - thus the offence could never be committed and s57 would be useless. Hence,
  - ii). is the proper interpretation.

b). **Wide application**. Where statute has only one literal meaning and the court rejects that in favour of a more rational construction - hence applying the Golden Rule in preference to the Literal Rule.[29]

[26] **I.R.C. v Hinchly** [1960] A.C.

[27] **Corocraft v Pan Am Airways** [1969] 1 Q.B.

[28] **Kammins v Zenith** [1977] A.C.

[29] .See **Re Sigsworth** discussed below.

Walker & Walker[30] see the Golden Rule and the Mischief Rule as examples of the same rule, whilst Zander sees them as separate principles. The Judges are free to follow whichever of the rules they wish at any time regardless of which produces the most sensible result.

Lord Esher *"If the words of an Act are clear you must follow them even though they lead to a manifest absurdity. The courts have nothing to do with whether the legislature has produced an absurdity*."

This emphasises the principle of Parliamentary Sovereignty - namely that Parliament is the absolute source of law making in the United Kingdom and all other bodies are subservient to it.

1). It must however be contrary to the principle that judges seek to determine the intention of Parliament, since it is ridiculous to claim that Parliament would ever seek to create legislative nonsense.
2). Note that the Literal rule cannot be used if there is an ambiguity in the words.
3). If the words are vague then there is no literal meaning to follow in any case.

The Golden Rule to a certain degree conflicts with the Literal Rule and to a degree is compatible with it. It states that words in a statute must be given their ordinary grammatical meaning, until such time as they produce a manifest absurdity i.e. they do not reflect the intentions of the legislature.

**The Alma Case** 1880. Per Jessel M.R. *"Even if the words of a statute are quite clear the court must still look to see whether there is any such manifest absurdity as will enable a court of construction to say that the natural meaning of the words could not be the meaning intended by the legislature to put upon them*." This was first formulated by Lord Wensleydale in **Becke v Smith**.[31]

What happens if there is a clash between the literal and the golden rule ? It is observed that the literal rule is still the dominant rule. **Re Sigsworth** provides an instance where the golden rule prevailed. The question revolved around the word 'issue' in the Administration of Estates Act 1925. A son had murdered his mother. As the sole 'issue' (i.e. child) he stood to benefit from his crime as her heir. It was held that this was a manifest absurdity which Parliament could not possibly have intended. The Golden and Literal Rules are not always inconsistent with each other especially where the Literal Rule is not applicable e.g. where there is ambiguity.

Maxwell on Statutory Interpretation states that the Literal Rule is the Principal Rule and that the Golden and Mischief Rules are other main principles of interpretation. The advantage of the literal rule is that it does not detract at first sight from the Declaratory Principle (though if the result is that it does not produce the result that Parliament - as portrayed by the reports of Hansard etc - intended then this is questionable).

**Problems of the Golden Rule**. It is inherently subjective, i.e. there is no criteria for operating the Golden Rule. It allows a large amount of discretion and therefore it can produce uncertainty. When the Literal Rule is abandoned because of absurdity it suggests that there must be another meaning. If there is none then the Literal Rule must be applied.

**Problems of the Literal Rule**. It has been argued that it is based on the false premise that words do have a clear meaning. See Professor Lon Fuller of the U.S.A. Critics of the Literal Rule point out that the dictionary provides alternative meanings to most if not all words. An Act may say what the meaning of certain words is and then proceed to contradict itself. In **Ellerman Lines v Murray,**[32] all the judges in the case decided that the meaning of certain words was plain and obvious - but all three judges gave different meanings!

Whilst it may be acceptable outside a court of law that a word has a plain meaning, by definition if a case gets to court under a dispute over the meaning of a phrase then both parties allege that whet they understood as the meaning is the plain obvious meaning. Otherwise there would be no dispute in the first place. The claim on behalf of the Literal Rule is that it produces certainty. But does it? If only the Literal Rule were to be followed then perhaps it would. But, even the strongest judicial supporters of the literal rule have been forced to have recourse to the other rules at some time or another.

3). **The Mischief Rule** (The Rule in **Heydon's Case**).

This is thought by some to be the best rule. It was established in 1584 by the Court of Exchequer in **Heydon's**

30 *The English Legal System.* Text Book.
31 **Becke v Smith** 1836.
32 **Ellerman Lines v Murray** [1931] A.C. 126

**Case**. Where a statute is passed to remedy an earlier problem (and all statutes are passed to remedy earlier wrongs or for a purpose) the court should adopt an interpretation that will have the effect of correcting that mischief.

Application of the Mischief Rule involves four elements :-

i). What was the common law before the making of the statute?
ii). What was the mischief and the defect for which the common law did not provide?
iii). What remedy Parliament hath resolved and appointed to cure the disease of the commonwealth?
iv). The true reason for the remedy.

These elements derive from the joint judgements of Lord Diplock and Lord Simons in **Maunswell v Olins**.[33] This was a dissenting judgement in the House of Lords. The case itself did not specifically revolve around statutory interpretation and so the speech was obiter. *"…. The first task of a court of construction is to put itself in the shoes of the draftsmen - to consider what knowledge he had, and importantly, what statutory objective he had ….. here is the first consideration of the mischief. Being thus placed in the shoes of the draftsman the court proceeds to ascertain the meaning of the statutory language. In this task the first and most elementary rule of construction is to consider the plain and primary meaning of the words used* [the literal rule]. *If there is no such plain meaning* [i.e. if there is an ambiguity], *a number of secondary canons are available to resolve it. Of these one of the most important is the rule in* ***Heydon's case****.*

This suggests a fusion of the Literal and the Golden Rule. If the result is absurd move on to Heydon's Rule. The Mischief Rule is designed to get the court to consider why the Act in question was passed. Zander regards it as the best rule. "The mischief rule is a very great improvement on the other two rules in that it at least encourages the court to have regard to the context in which the doubtful words appear. It is therefore entirely different from the others i.e. the Literal and Golden Rules which direct attention instead, purely at the words themselves."

Do all courts interpret or rather only the lower courts whereas the appeal courts and above construct ? Note that there is nothing to make a judge chose one rule in preference to another. This is entirely at his discretion. However, having said that the most used of the rules is the Literal Rule. Denning used the other rules frequently to try and achieve his aims. The Literal Rule cannot be used where there is ambiguity. The fundamental principle is that judges do not make laws

In some cases both purposive and literal rules have been used. Thus **Suffolk County Council v Mason**, [34] concerned the meaning of a provision of the Affiliation Proceedings Act 1957. The court held that *'A single woman'* meant a woman with no husband to support her, and not necessarily an unmarried woman .. because the mischief which the Acts were passed to remedy is the possibility of a woman having an illegitimate child with no means of supporting it.

**Aids to applying the Mischief Rule.** In applying the Mischief Rule the judges can exceptionally ascertain the intention of the legislature by looking at other than the words of the statute i.e. at the preamble, at headings and at extrinsic sources such as Law Commission reports or reports of the Law Reform Committees which may indicate the state of the law before the passing of the Act. See further discussion of this below. The Mischief Rule is regarded by the Law Commission on Statutory Interpretation 1969 as *'a rather more satisfactory approach than the other two rules*.' For a modern formulation see **Jones v Wrotham Park Estates.**[35]

i) It must be possible to determine from the considerations of the Act as a whole precisely the mischief that it was the purpose of the Act to remedy.
ii). The draftsman and Parliament must have overlooked, and so omitted to deal with the mischief.
iii). It must be possible to state 'with certainty' what were the additional words that would have been inserted had it been drawn to Parliament's attention.

[33] **Maunswell v Olins** [1975].
[34] **Suffolk County Council v Mason** (1979) A.C. 70
[35] **Jones v Wrotham Park Estates** [1980] A.C. 74 at 105.

**Subsidiary techniques used in Statutory Interpretation.**

1). **The statute must be read as a whole**. Words taken out of context are capable of meanings which they cannot represent on a reading within a given contest, i.e. when read in conjunction with other words. Each section should be read in conjunction with all the other sections of the act and the schedule. Judges are merely trying to find out the intention of Parliament.

2). **Penal Provisions are to be construed narrowly**. Criminal or tax liabilities, or any provision limiting the rights or freedoms of the citizen, if unclear or uncertain, i.e. vague, should be construed so as to favour the individual... licence for tax avoidance techniques. This presumption is not strong enough to oust the Literal Rule. If the Act is obvious it must be given effect. The presumption is only operative if there is ambiguity.

3). **Presumptions and subordinate rules of interpretation**.[36] It is presumed that

i). a statutory provision is not intended to change the common law. In order to do this the statute must be expressed in unambiguous terms.

ii) a statute will not be in "inconformity" with international laws and obligations of the UK.

iii) a statute does not intend to create an offence of strict liability i.e. to exclude the need to prove that the accused had a 'guilty mind - otherwise known as mens rea.'

iv). Parliament did not intend to oust the jurisdiction of the courts - most likely to occur in provisions regarding tribunals etc.

v) But note that Parliament is presumed not to intend to legislate retrospectively (i.e. to affect the legality of conduct in the past) though it can do so by clear words as in the **War Damages Act 1965** regarding the **Burmah Oil.**[37]

vi) Words must be read in context. **Muir v Keay.**[38] Regarding the **Refreshment Houses Act 1860**. A section dealing with houses for public refreshments and entertainment did not extend to theatres and musical establishments, but was limited to establishments for refreshment and accommodation of the public. Furthermore, the statute must be read as a whole. **A.G. v Prince Ernest of Hanover.**[39] The preamble made the descendants naturalised - and included the Kaiser. However, the enacting words were **clear** - it was not absurd judged at the time the statute was passed that all trial descendants would be naturalised ... Lord Normand *'it is proper that the court should read the whole Act.'*

**Beswick v Beswick.**[40] A conflict occurred between s56(1) L.P.A. 1925 and s205(1) L.P.A. 1925 the interpretation section of the same Act. The House of Lords held that s56 is one of 25 sections in the Act grouped under the heading *'Conveyances and other instruments'*. The context required the word property to be limited in its effect to real property (i.e. land) and so did not include transfer of a business.

vii) Against implied repeal If a later Act is inconsistent with an earlier Act, the later one impliedly repeals the earlier. There is a presumption against implied repeal and two apparently inconsistent Act must be reconciled if logically possible. Similarly with inconsistant sections within the same Act. If finally there is inconsistency the later provision prevails.

4). **Eusdem Generis Rules.** General words used by way of summary, after the enumeration of particulars forming a category, are taken to refer only to things of the kind which fall within that category - **Powell v Kempton Park Racecourse** [1899] keeping of a house, office, room or other place for betting with persons resorting thereto –'*other place'* did not refer to an uncovered enclosure since only indoor places were intended. **Evans v Cross.**[41] Charged with ignoring a traffic sign, namely a white line. The word '*device*' following *'signpost, signals, warning posts, direction posts and signs'* did not include a white

36 see Walker & Walker *English Legal System* or Terence Ingram

37 **Burmah Oil**

38 **Muir v Keay** L.R. 10 Q.B. 594.

39 **A.G. v Prince Ernest of Hanover** [1967] A.C

40 **Beswick v Beswick** [1968] A.C.

41 **Evans v Cross** [1938] K.B. 694 :

line painted on the road. **Lane v London Electricity Board.**[42] Danger meant danger from shock burn etc, not danger from tripping. There must be a category in order for this rule to apply There can be no restriction following upon a generality e.g. 'any mask, dress or other disguise or any letter or any other article or thing' did not prevent the inclusion of a 'crowbar'.

Use of the masculine or the singular usually includes the feminine and the plural. Thus 'Man' normally includes 'Woman' and 'Person' includes 'Persons' though there are certain provisions that can only apply to men and vice versa or could only be applied in the singular, in which case the context of the text is of the essence. The Interpretations Act provides for example that a month = calendar month and many other interpretations.

5). **Expressio unius - exclusio alterius**. If one thing is expressly mentioned, without a general list then other things are excluded. This has some affinity with the eusdem generis rule but is less certain in application. Everything depends upon the completeness and certainty of the 'expressio'.

**Filling in the gaps : supplying omissions**. This occurs when the Court is faced with a factual situation for which the statute has not provided a remedy. The situation can only be remedied by the court if it attributes an intention to Parliament which it never had i.e. a legislative act on the part of the judicature - which strictly speaking the courts are not allowed to do (in theory if not in practice). The draftsman should, by inclusion or exclusion, expressly or impliedly provide for all foreseeable consequences of the statute, i.e. facts which are likely to occur, and to raise the question whether the case falls within the statute and what will be the effect of the statute upon it.

If this is not done, it gives rise to a 'casus omissus' i.e. the matter is not dealt with by the statute either directly or indirectly. The courts will not now extend the Act in order to fill the gap. Thus the Offensive Weapons Act failed to deal with flick knives as seen by the case of Fisher v Bell. The strict interpretation of a statute will never attribute to Parliament any intention which has not been expressly or implicitly provided for by the clear words of the Act.

Another kind of casus omissus occurs where Parliament has given a general indication, but has not specifically included the case which is in issue. Perhaps it could not have been foreseen at that time and the court needs to move with the times ? There is much difference of opinion as to how far the court should go when it is clear that there is no evidence of the intention of Parliament to include the instant case. Thus it would be farcical to say that in 1900 Parliament has the menace of 'Crack' in mind when debating anti drug legislation - but to exclude it might be to permit drug abuse by omission. Contrast the following judicial views

In **Magor v St Mellons,**[43] Denning L.J. stated that *"We sit here, to find out the intention of Parliament and of Ministers to carry it out and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis."* Furthermore, Lord Simons stated that, *"The general proposition that it is the duty of the court to find out the intention of Parliament - and not only of Parliament but of Ministers also - cannot by any means be supported... if a gap is disclosed the remedy lies in an Amending Act".*

**Written works courts can refer to.**

A). **Internal (intrinsic) aids ... within the Act**. These are words contained within the confines of the Queen's Printer's copy of the statute. This contains not only the Act itself but other material added at the printing stage by the draftsmen, but without having been voted on and approved by Parliament.

i) Marginal notes which summarise sections as an aid to construction.
ii) The long and short titles.
iii) The preamble... be it enacted by.... etc.
iv) Section headings and sets of headings.

Note however that schedules may be treated differently from the main part of the Act. Thus the court may find that a word is used in one way in one part of an Act but in an entirely different manner in another part of the Act. The context is paramount.

42 **Lane v London Electricity Board** [1955] Q.B.
43 **Magor v St Mellons** [1950]

B). **External (extrinsic) aids**. Can any material outside the Queen's printer's copy of the statute be referred to?

**Hansard .** Until recently it was clear that reports from Hansard (Parliamentary reports of what the Members of both houses said during the passage of the Bill) are strictly excluded. However in **Davis v Johnson**,[44] Denning argued the case for looking at Hansard and admitted to unofficially referring to it. His statement was Obiter, and equally obiter was the outright rejection of his submission by the Five Law Lords in the House of Lords when the case went to appeal. Maybe the waters have been muddied. Since this time the courts have become increasingly realistic about the need to consult Law Commission reports etc to fulfil the requirements of the Mischief Rule. This is a realistic acceptance of the fact that since much European Legislation is drafted in general terms, it is essential to seek out the objective of, and the spirit of, the legislation, rather than to pedantically scrutinise the exact words. The danger is that the uninitiated reader of such legislation may not realise the true scope of the measure simply by reading it. In these circumstances official guidelines and explanations become very important if the citizen is to be able to understand and observe the law.

**Other Extrinsic Sources**. The general historic background to an Act. This is permitted by both councils for the parties who can refer to text books etc. There are two categories of government publication.

1) Reports of committees and commissions e.g. Royal Commissions, Departmental Committees, Law Revision committees, Criminal Law Revisions Committees etc.
2) Any other form of publication.

**Committee Reports**. Consider the Police and Criminal Evidence Proceedings Bill which became Police and Criminal Evidence Act 1984. Whilst the courts cannot look at Hansard they can look at the Royal Commission report on Criminal Proceedings, chaired by Sir.C.Phillips. There is a limit however to what can be deduced from the report. The court is allowed to use it as a.brief on the state of the law prior to the Act and to find out what mischief the Act was intended to deal with, that is to say, .the purpose of the Act.

## JUDICIAL PRECENDENT AND THE HIERARCHY OF THE COURTS

It is impossible to apply case law without a firm understanding of the ranking of the decisions from the various courts within the Supreme Court of Judicature in England and Wales. The principal discussion here is with the relationship of the House of Lords with the Court of Appeal. The rules regarding lower courts are both clear and firmly established.

However, an added and very significant new dimension has been introduced with the advent of the European Communities Act in 1972. It is clear that the European Court of Justice, is supreme and stands at the top of the apex of courts when dealing with its own spheres of influence.

### The House of Lords

Decisions of the House of Lords are binding upon all other courts trying civil or criminal cases.[45] Regarding the Practice statement made in the House of Lords, Lord Gardiner said on the 26th July 1966 that "tho' the House should continue to follow its own rulings, it should yet for the future permit itself to depart from a previous decision when it appears right to do so".

Thus in **British Railways Board v Herrington**.[46] the H.L. refused to follow the ruling laid down by itself in **Addie v Dunbreck**,[47] regarding the duty of care owed by, the controller of land for child trespassers on its land, thus instituting a new standard of care 'the standard of common humanity' towards trespassers.

In **Jones v Secretary for State for Social Security**.[48] cogent reasons were forwarded as to why the House of Lords is, and should be, loath to use the power. Thus the freedom is used sparingly.[49]

44 **Davis v Johnson** [1979] A.C. 264
45 See **London St. Tramways v L.C.C.** [1898].
46 **British Railways Board v Herrington** [1971] 2 Q.B. 107 : [1972] AC 877.
47 **Addie (Robert) & Sons (Collieries) v Dunbreck** [1929] AC 358
48 **Jones v Secretary for State for Social Security** [1972] 1 A.C. 944
49 **Miliandos v George Frank** [1976] A.C. 443 is an example of a departure from a previous decision.

**The Court of Appeal**

The court of appeal has two divisions, the civil and the criminal divisions. (Prior to the Criminal Appeals Act 1966 the Criminal and Civil courts were completely separate). The rules differ regarding precedent.

**The Civil Division of the Court of Appeal** : The Civil division is bound by the House of Lords and also by its own earlier decisions[50]. In **Davies v Johnson,**[51] Denning attempted on the basis of precedent to claim a similar liberty to that claimed by the House of Lords, in order to depart from its earlier decisions. The case concerned the interpretation of The Domestic Violence Act 1976.

In **Gallie v Lee**[52] the majority of the Court of Appeal, Denning, Baker, Shaw, held that although the C.A. was as a general rule bound by its own previous decisions, nevertheless in exceptional circumstances it should be at liberty to depart from such a decision if convinced it was wrong.

On appeal to the House of Lords in a unanimous house held that the rule laid down in **Young v Bristol Aeroplane** on stare decisis is still binding on the C.A. Lord Diplock recognised the need to balance the need for legal certainty resulting from the binding effect of previous decisions and the avoidance of undue restriction on the development of the law. The House of Lords is reasonably accessible to take care of the proper development of the law.

In **Williams v Fawcett,**[53] it was held that the C.A. could depart from one of its own previous decisions where that decision was felt to be wrong in law and there was unlikely to be an appeal to the House of Lords by a person whose liberty was at stake.

**Criminal Division of the Court of Appeal** : The Criminal Division of the Court of Appeal binds inferior courts. The Criminal Division of the C.A. is not bound by its own previous decisions where this would cause injustice to appellants.[54]

**The High Court**

The Divisional Courts are bound by the C.A. and the House of Lords,[55] subject to the exceptions of **Young v Bristol Aeroplane**. They are also bound by their own earlier decisions. Decisions of the High Court judges sitting alone at First Instance are binding on inferior courts, such as the County Courts and below. However, they are not binding on other High Court Judges - though they may be very persuasive.[56]

**The European Court of Justice (ECJ) Luxembourg:**

**s3(1) European Communities Act 1972** : In matters concerning the E.E.C. legislation etc. all English courts are bound by its decisions. However it does not bind itself. This is probably the result of the fact that the first five members of the E.E.C. all had civil law systems. Nonetheless, the precedent is highly persuasive and instances where the court does not follow prior decisions are very rare.

Under the Treaty of European Union a hierarchy of European Courts is now being established which will be able to handle the increased work load being placed on the courts as the scope of the European Community's work expands. Under the new hierarchy the inferior courts will be bound by the higher court. In certain circumstances the citizen may apply direct to the ECJ for rulings.

The European Commission also has a judicial role in that it can consider certain issues in respect of Competition Law under articles 84 - 88 of the Treaty of European Unity. These are binding subject to appeal to the E.C.J. The Commission can hand out substantial fines to individuals and companies that breach European Community Competition regulations. The E.C.J. can award compensation to individuals and can fine member states for breach of the law.

**The European Court of Human Rights (ECHR) Strasbourg**.

This Court is binding in international law on signatory states but does not change the law of the signatory state automatically. The Domestic Parliament must do this. Decisions of the ECHR have considerable influence in shaping domestic law. The ECHR can award compensation to individuals, payable by the State.

50 see **Young v Bristol Aeroplane** ; since confirmed by **Davies v Johnson** [1978] 2 W.L.R. 553).

51 **Davies v Johnson** C.A.

52 **Gallie v Lee** (1969) 2 C. 17 and **Barrington v Lee** [1972]1 Q.B. 326

53 **Williams v Fawcett,** [1985] 1 AII.E.R. 787.

54 See **R v Gould** [1968]

55 see **The Police Authority for Huddersfield v Watson** [1947] 1 K.B. 842.

56 See **Carr v Mercantile Products Ltd** [1949] 2 K.B. 601.

## CONSTITUTIONAL AND ADMINISTRATIVE LAW

The Conventions is part of English law under The Human Rights Act 1998 and is applied by every court of the land. If English Law breaches the Convention the Court refers the matter to Parliament for its attention within 90 days. Failing a remedy in an English Court, individuals may apply directly to the ECHR.

## OUTLINE OF THE COURT SYSTEM IN ENGLAND AND WALES

The English Court structure is fairly complex. It has four basic levels :

**The House of Lords**

**The Court of Appeal,**

**The High Court (including the Crown Court) and**

**The Inferior Courts (including County Courts and Magistrates Courts).**

Within this structure there is neither a clear division into Criminal and Civil Courts, nor a division into First Instance and Appeal Courts. Thus the Queen's Bench Division of the High Court hears both Civil and Criminal cases and operates as both a first instance and an appeal court.

**Magistrates Courts**. These are composed of Justices of the Peace. The court consists of at least two but not more than seven (usually three) justices, or a Stipendiary Magistrate (a legally qualified Solicitor of 10 years standing). Lay magistrates are unqualified and unpaid, and have a qualified clerk to help advise on the law. There is no jury in the magistrates court.

Any person may apply, or be proposed to be a Magistrate. Selection is made by one of the Lord Chancellor's Advisory Committees. There is one in each county. Membership of these committees is secret as is the criteria they use.

Lay Justices of the Peace keep their full time jobs, hearing cases perhaps one day in every two weeks. They must retire at seventy. Stipendiary Magistrates are full time paid Magistrates. They are appointed by the Crown on the advice of the Lord Chancellor from barristers or solicitors of certain standing. They are only appointed in certain urban areas and usually sit alone.

**Criminal Jurisdiction of Magistrates Courts.**

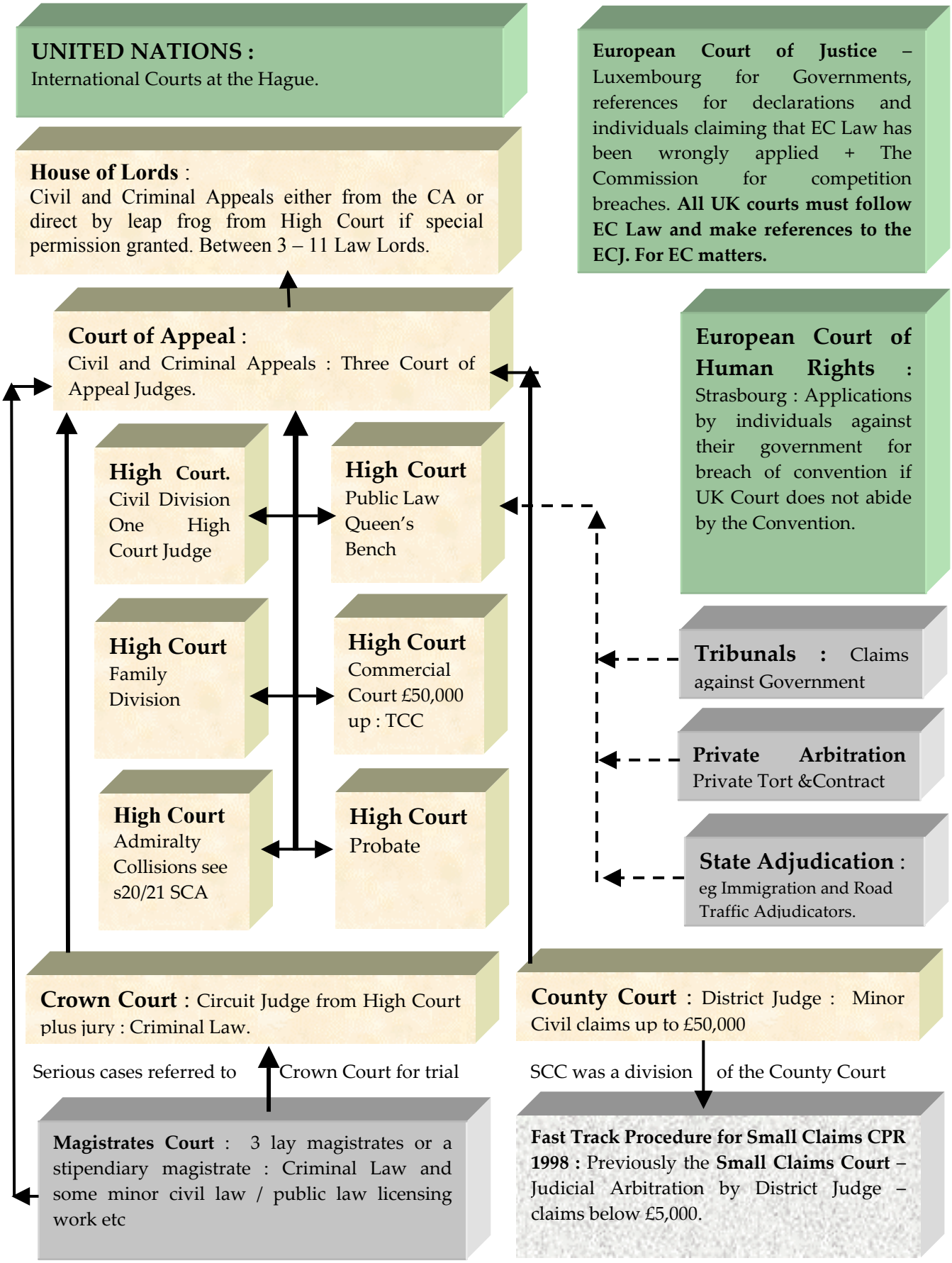
a). **Summary Offences**. The Court's criminal jurisdiction exists mainly over summary offences, all of which are statutory offences. The maximum penalty which can be imposed is six months imprisonment or a fine of £1,000 (Criminal Law Act 1977 (The financial limits are regularly revised and updated to stay in line with inflation). Most summary offenders are convicted of motoring offences. Since convictions were so numerous the Magistrates Courts Act 1957 introduced a procedure enabling persons to plead guilty by post. There are over 1½ million persons a year found guilty of summary offences.

b). **Indictable Offences**. The most serious indictable offences are triable only in the Crown Court, such as murder, manslaughter, rape, bigamy, conspiracy. Statute states that some offences are both indictable and summary. In these hybrid cases, if the accused consents the case may be tried summarily, although an accused of 17 or over may demand the right to a jury trial in the Crown court. It is proposed that this right will be removed. If tried in the Magistrates Court and found guilty the accused may be sent to the Crown Court for sentence if the Magistrates consider that he deserves a greater punishment than they have the power to impose.

**Examining Magistrates (Committal Proceedings**.) A person cannot be tried on indictment before a jury unless he is first brought before one or more Magistrates so that they can hold a preliminary examination to decide whether or not a prima facie case can be made out against him. If such a prima facie case (on the face of it) is found to exist he will be committed for trial in the Crown Court.

**Juvenile Courts**. Children (under 14) and young persons (14-16) must generally have their cases heard (not "tried") in a Juvenile court. The Children & Young Persons Act 1963 specifies that the court must consist of 3 Magistrates specially qualified to deal with juvenile cases. The Court sits in private and must include a man and a woman among its members.

# Hierarchy of the Courts.



Under the Children and Young Persons Act 1969 a child or young person may only be brought before the Court in the following circumstances

i) If his health or development is being impaired. or
ii) If he is exposed to moral danger. or
iii) If he is beyond parental control. or
iv) If he is not being educated properly. or
v) If he is guilty of an offence and is in need of care and control.

Two points can be noted regarding the above circumstances

i) In many cases a child may be brought before the court even though not at fault.
ii) Under (v) above, a child may be found guilty of an offence without a trial as such. However, the Court must not find. the 'offence condition' satisfied unless it would have found him guilty of that offence' in ordinary criminal proceedings. Thus, the usual onus of proof rules apply.

The main principle of the 1969 Act is that children and young persons should not be treated as criminals, but as subject to one of several orders. Thus, if a child is found "guilty" of an offence, this finding is in no way or sense a conviction and he is not dealt with as a criminal, but as a child or young person in need of help. The court does however have the power, where the offence condition is satisfied to make orders for compensation up to a maximum of £100 to be paid (in the case of a child) by the parent or guardian. The Court may order the detention of a child or young person in a "community home" in the limited circumstances where this is necessary for the protection of the public. The Court may also make

i) A supervision order (i.e. an order placing him under the supervision of a probation officer).
ii) A hospital order.
iii) A guardianship order.

**Civil Jurisdiction of the Magistrates Court**. The Magistrates Civil Jurisdiction is smaller than its criminal jurisdiction. It is however varied and includes

a) The recovery of certain civil debts including income tax. electricity and gas bills, Council Rates and presumably from 1990 will also embrace recovery of unpaid Poll Tax.
b) The granting of liquor licences.
c) Domestic proceedings under the Domestic Proceedings and Magistrates Courts Act 1978. Under this Act there are Domestic Courts set up to hear "domestic proceedings". These will include affiliation, adoption, guardianship and matrimonial proceedings.

The only people allowed to be present at the civil proceedings are the officers of the Court, the parties and their legal representatives, witnesses and other persons directly concerned with the case and other persons whom the Court may permit to be present.

Under the 1978 Act either party to a marriage may apply for an order on the ground that the other :-

a) Has failed to provide reasonable maintenance for the applicant, or
b) Has failed to provide or make proper contribution towards reasonable maintenance for any child of the family, or
c) has behaved in such a way that the applicant cannot reasonably be expected to live with the respondent, or
d) Has deserted the applicant.

If one of these ground is proved the court has a variety of orders available

i) Periodical payments and or a lump sum ( up to £500 ) to or for the benefit of the applicant or any child of the family.
ii) Orders for custody or access.
iii) Orders committing children to the care of the local authority.
iv) Orders excluding one spouse from the matrimonial home.

**Advantages of the Lay Magistrates System**.

1) Public participation in the legal process reduces the remoteness of the law from the public.
2) The system is cheap since magistrates are not paid, but it nevertheless appears to attract high quality personnel.

3) Lay magistrates reduce the pressure on professional lawyers, leaving them to hear the more serious offences and most civil cases.
4) Although not legally qualified, Magistrates may be better qualified in other respects, e.g. to hear children's cases. In addition the use of Lay Magistrates reduces the risk of the child perceiving himself as a young criminal.

**Disadvantages of the Lay Magistrates System**.

1) Magistrates tend to be drawn from a narrow background (arguably, the majority are male, middle-aged and middle class) e.g. less than 10% of Magistrates are under 40.
2) It has been argued, although not proved, that Magistrates are too willing to accept police evidence and that they are 'hard-liners' when it comes to sentencing.
3) The cost involved in paying the expenses and loss of earnings of several lay magistrates is just as if not more expensive than the cost of employing a full time, full paid professional stipendiary magistrate.

**The Crown Court** : The Crown Court was created by the Courts Act 1971. It replaced the Assizes and the Quarter Sessions and was made part of the Supreme Court of Judicature. The Assizes and the Quarter Sessions were local courts, but, in contrast3 the Crown Court is a single court, which has buildings throughout the country and may sit in England and Wales. Its jurisdiction is in no sense local. When sitting in the City of London it is known as the Central Criminal Court (The Old Bailey).

**Crown Court Judges**. In the Crown Court these are either High Court judges, usually of the Queen's Bench Division; or Circuit Judges, i.e. full time judges appointed from the ranks of solicitors or barristers of 10 years standing, or from recorders of at least 3 years standing. Recorders, i.e. part-time judges who are either barristers or solicitors of 10 years standing.

The judge will usually sit alone unless an appeal is being heard from a Magistrates Court, when the judge will be joined by 2,3 or 4 Lay Magistrates. The court, sitting in this form also exercises a limited civil jurisdiction mainly over appeals concerning liquor and gaming licences.

**Criminal Jurisdiction Of Crown Court** : The Criminal jurisdiction of the Crown Court concerns all cases above the level of Magistrates Courts. The more serious offences are tried by the High Court Judges, and the less serious by the circuit judges and recorders. When hearing appeals from the Magistrates courts, the court may allow the appeal, reduce the sentence or increase the sentence up to the maximum that could have been imposed by the Magistrates Court.

The courts sit with a jury of 12 and a majority verdict of 10-2 will be sufficient to convict the accused.

**County Courts** : County Courts were created by the Courts Act 1846 to try civil cases involving small sums of money. Originally the upper limit of the jurisdiction was fixed at £20. This limit has been extended on many occasions so that today they deal with the majority of the country's civil litigation, Jurisdiction is however limited in 3 respects

a) It is entirely statutory, so that if in any matter statute provides no jurisdiction then none exists.
b) They have no appellate jurisdiction.
c) Jurisdiction is local so there must be a connecting factor between the action and the County Court district where it is tried.

There are about 400 County Court Districts grouped into circuits each of which is presided over by one or more circuit judges. The term "County Courts" is misleading since these circuits are not based on County boundaries

**Jurisdiction of County Courts.** In general terms the extent of the county Court Jurisdiction is (though limits are periodically revised)

1) Contract and Tort claims up to £49,000.
2) Equitable matters concerning trusts, mortgages and partnership dissolution up to £30,000.
3) Disputes concerning land where the rateable value is less than £1,000.
4) Undefended matrimonial cases and adoptions.
5) Probate matters where the estate of the deceased is less than £49,000.
6) Miscellaneous matters conferred by various statutes, e.g. Rent Act : Consumer Credit Act 1974.

All limits are subject to periodic review and may have risen between writing and the present time.

In addition, some courts outside London have bankruptcy jurisdiction which is unlimited in amount. The courts with such jurisdiction also have the power to wind up companies where the paid up capital is less than £120,000. Some courts in coastal areas also have Admiralty jurisdiction, restricted to claims of £5,00 and to those matters set out in paragraph 20(2)(d) to (p) of the Supreme Courts Act 1981. Where both parties to the action agree these courts may hear actions relating to claims in excess of the above limits. If a party wrongly commences an Admiralty action in the High Court which ought, by virtue of the nature of the claim and the amount awarded in the judgement, to have been commenced in the County Court, that party may be penalised by being awarded only County Court Costs, or possible no costs at all. Thus a plaintiff in a High Court action must expect to recover in excess of £50,000 whether in salvage or other claims.[57]

**Composition of the County Courts**. A County Court is presided over by a circuit judge. The Courts Act 1971 contains provisions enabling judges of the Court of Appeal and the High Court and recorders to sit in the County Court. .The judge usually sits alone, without a jury, although in some cases, e.g. fraud, there is provision for trial by a jury of eight.

Each County Court also has a registrar who acts as an assistant judge. He must be a solicitor of at least seven years standing. In his administrative capacity he maintains the courts records, arranges for the issue and service of summons, deals with money paid into court, and a large number of similar functions. In practice much of his work is delegated to clerks and bailiffs. The registrar's judicial function is narrower than that of the judge. He may hear undefended cases and will hear all cases up to £500 unless it raises a point of law.

The practical importance of the County Courts is that they deal with the majority of the country's civil litigation. Over 1 1/2 million actions are commenced each year, although only about 5% result in trials since most actions are discontinued, or settled out of court before the trial stage is reached. Several factors may however prevent County Courts being as effective a means of resolving small disputes as was originally intended. These factors may be expressed as three questions

1) Does X know that he has suffered a wrong which entitled him to a legal remedy ? He may for example be unaware that an exemption clause is invalidated by the Unfair Contract Terms Act 1977.
2) Does X wish to involve the Law ? He may see the law as a middle or upper class institution which is "not for me".
3) Can X afford to risk losing his case, possibly incurring legal expenses in excess of his original claim? There is a so called poverty trap which results in only the poorest person (who are entitled to legal aid) and the richest persons being able to afford to "go to law".

**The Small Claims Court**. This was part of the County Court. It was originally set up under s7 Administration of Justice Act 1973. Both parties entered on a voluntary basis.[58] This has been replaced under the CPR 1998 by a new fast track procedure for small claims.

**The High Court**. The High Court was established by the **Judicature Acts 1873-5**. Prior to 1971 it sat in the Royal Courts of Justice in London, although when the judges tried a case on assize they constituted a court of the high Court. **The Courts Act 1971** abolished all courts of assize but provided that sitting of the High Court could take place anywhere in England and Wales. The centres where the sitting are held are determined by the Lord Chancellor.

The High Court is divided into three divisions The Queen's Bench (King's Bench when a King is on the throne) Chancery : Family. Each division has a head and a number of puisne judges.

High Court Judges are appointed by the Queen on the advice of the Lord Chancellor. They must be barristers of not less than 10 years standing. (Note the provisions of the current Green Paper which is gradually dismantling the gulf between solicitors and barristers). The division to which they are appointed depends on the practice followed prior to appointment. The maximum number of High Court judges is fixed by Order in Council at 75. The trial is usually before a judge sitting alone, or before 2 or 3 judges in appeal cases. A jury may sit in defamation false imprisonment and fraud cases.

[57] see **The Katcher I (No2)** [1968] 3 AER 350.

[58] See Order 13 Rule B.

**The Queen's Bench Division**. The jurisdiction of this division is wider than that of the other two divisions. It is both civil and criminal and original and appellate.

The most important aspect of its business is its original civil jurisdiction, mainly over contract and tort actions. Jurisdiction over commercial matters is exercised by a Commercial Court, which is part of the Division. It sits in London, Liverpool and Manchester. The division also has an Admiralty Court which deals with claims for damage, loss of life or personal injury arising out of collisions at sea, claims for loss or damage to goods carried in a ship and disputes concerning the ownership or possession of ships.
The appellate civil. jurisdiction of the division is relatively minor. A single judge has jurisdiction to hear appeals from some tribunals, e.g. the Pensions Appeal Tribunal. A divisional court consisting of two or more judges may hear appeals by way of "case stated" from magistrates courts, the Crown Court and from the Solicitor's Disciplinary Tribunal.

The criminal jurisdiction of the High Court is exercised exclusively by the Queen's Bench Division. This is entirely appellate and is exercised by the divisional court, usually consisting of three judges and often including the head of the division, the Lord Chief Justice. The jurisdiction is over appeals by way of "case stated" from the magistrates Court and the Crown Court.

The divisional court also exercises a supervisory jurisdiction. It may issue the prerogative writ of "Habeas Corpus", and it may make orders of mandamus, prohibition and certiorari by which inferior courts and tribunals are compelled to exercise their powers properly and are restrained from exceeding their jurisdiction.

Finally, the jurisdiction of the Queen's Bench Division Judges extends to hearing trials in the Crown Court. Judges of the division spend about half their time on circuit and half their time in the Royal Courts. About 45 judges are appointed to me Queen's Bench division,

**The Chancery Division.** Its nominal head is the Lord Chancellor, though he never sits in first instance cases. A recent challenge to the European Court of Human Rights may mean the Lord Chancellor will no longer be allowed to act as a judge because it breaches the Doctrine of Separation of Powers because the Lord Chancellor represents the Government and could be deemed to favour the Government. The jurisdiction includes trusts, mortgages, bankruptcy, company law and partnership and contentious business. There used to be some overlap of jurisdiction with the Queen's Bench Division, as can be seen from the allocation of two very similar cases, **Esso Petroleum v Harper's Garage (Stourport) Ltd.**[59] and **Petrofina (G.B.) v Martin**.[60] Today both would most likely be listed before the Technology Court.

**The Family Division**. Set up in 1970. It deals with defended divorces, wardship, adoption, guardianship, legitimacy, disputes concerning the matrimonial home and non-contentious probate. It also hears appeals from the Magistrates and county courts on family matters. The head of the division is The President and he is assisted by about 18 puisne judges.

**The Technology Courts** : Since the introduction of the CPR 1998, a new range of commercial courts have been established, taking the High Court out into the regions, including Manchester and Cardiff.

**The Court of Appeal**. This was split into civil and criminal division in 1966. The head of the Civil Division is the Master of the Rolls and the head of the Criminal division is the Lord Chief Justice. Appeals must be heard by at least three Lord Justices of Appeal. A majority decision is sufficient and a dissenting judgement may be expressed.

**The House of Lords.** The full title of the House of Lords is "The Appellate Committee of the House of Lords". The judges are knows as the Lords of Appeal i.e. the Law Lords. There are up to 11 plus the Lord Chancellor. His is a political post and until Lord Hailsham revived the practice in recent years the Lord Chancellor has not exercised his right to sit in the court. Law Lords are Life Peers, appointed by the Queen on the advice of the Chancellor and chosen from the Lords of Appeal, though not all Lords of Appeal get to be a Law Lord. This is the final court for all internal cases.

[59] **Esso Petroleum v Harper's Garage (Stourport) Ltd**

[60] **Petrofina (G.B.) v Martin** [19651 Ch. Div.

The court consists of three, five or on rare occasions even more[61] Law Lords and, as in the Court of Appeal, a majority decision is sufficient. Dissenting judgements are both expressed and reported.

Lay members of the House of Lords cannot be Law Lords.

The Civil Jurisdiction of the House of Lords is from the Court of Appeal Civil Division and from Scotland and Northern Ireland, thus uniting the judicial systems of the U.K. It is usual for a Scottish or Irish judge to sit in the court in these instances. Cases must be certified, in that a point of law of general public interest is in issue and appeal necessitates a grant of leave to appeal.

There are also appeals direct to the House of Lords from the High Court using the Leap frog procedure - without going first to the court of appeal civil division, though this is rare. Two conditions are necessary :-

a) All parties to the dispute must, consent.
b) It must raise a point of public importance relating to a statute or a statutory instrument. The House of Lords gives leave to appeal. It is largely used in cases of revenue and patents.

Criminal jurisdiction is from the criminal division of the Court of Appeal and the Criminal division of the Queen 5 Bench Division of the High Court. In both cases the lower court must certify and give leave to appeal.

**Other Courts**. There are other courts that do not fit into the hierarchy, eg. The Restrictive Practices Court, The Bankruptcy Court, The Judicial Committee of the Privy Council, which hears appeals from the Channel Islands, The Isle of Man and certain Common wealth Countries, though this is in decline as more and more of these countries set up their own independent appeal courts. It is the Law Lords who sit in the Privy Council and this is what makes the judgements so persuasive to English Lawyers, though the Common Law is not strictly bound to follow such decisions.

**The European Community**. Art 177(3) Treaty of Rome affects the jurisdiction of the House of Lords. It provides that a court of a member state against whose decisions there is no judicial remedy under national law must refer certain questions to the European Court for a preliminary ruling and having obtained the ruling is bound to follow it. The questions concern the :-

a) interpretation of a treaty ; or
b) validity and interpretation of Acts of the Institutions of the Community; or
c) interpretation of the Statutes of bodies established by an Act of the Council of Ministers

Since January 1st 1973 the E.C. has become relevant in certain Civil Law areas as the final court of appeal. This only concerns E.C. law arising out of Treaties, regulations etc. There is no right of appeal from a decision of the European Communities Court. Each country contributes one judge and all the judges appoint the President of the Court.

**Tribunals :** At the turn of the century the increase in the interaction of affairs between the citizen and the state meant that provision had to be made for additional facilities for dispute settlement between the organs of state and the citizen. At this time a conscious choice had to be made between using the existing dispute settlement process, that is to say, the court structure, or whether or not to introduce some new method such as tribunals. The first tribunal was the Health and Employment Tribunal in 1911.

The courts have not been used to resolve many of these areas of dispute. Various governments of all political persuasions have set up dispute settlement bodies outside the court structure such as ACAS in respect of industrial relations in 1974, to act as a body to settle employer employee disputes -and funded by government money. The Employment Protection Consolidation Act EPCA set up the rights of workers to make employment claims at Industrial Tribunals. Whilst it is still possible to go to court and make a claim for breach of contract the bulk of this work has until now been handled by Industrial Tribunals. However, in 1998 s7 of the Employment Rights Dispute Resolution Act created an alternative system run by ACAS to conciliate / mediate and or arbitrate employment disputes in order to relieve the pressure of work carried out by the Employment Tribunals. Over 2,000 tribunals handle up to 2 million disputes 1 year. The majority are concerned with the welfare state.

[61] in **R v Keyn** [1876] all eleven Law Lords heard the final appeal.

The resultant tribunals were and are not homogenous, so no general description of tribunals is possible. There is a bewildering variety with enormous variations in powers and procedures. For example, there is the Industrial Tribunal for redundancy, with appeal to the Employment Appeals Tribunal; Rent Tribunals for fair rent; Land Tribunals; Social Security Tribunals and Social Security Appeals Tribunals. Tribunals are statutory bodies set up by a wide range of statutes each setting out different formats, rules and jurisdiction for the tribunals they establish.

**Reasons for increase in state activity.**

1 State Management of economic affairs in the public sector.

2 Establishment of the welfare state.

3 Environmental planning - public health.

4 State industries, nationalisation and government quangos.

**Reasons for the establishment of tribunals**

1 The ordinary courts were perceived to be over burdened and tribunals were introduced to relieve that burden. This is not entirely convincing since extra money could have been pumped into the court process instead of into setting up tribunals.

2 Judicial proceedings are expensive relative to the value of potential tribunal claims, for example social security claims tend to be very small even though very significant in the eyes of the claimant, but note that Tax Tribunals can deal with large sums.

3 Courts are slow and hide bound with procedure - highly formal - probably because they are inhabited by lawyers and their technical jargon. Not all tribunals have turned out to be quick. There is a strong call for lawyers to be admitted in the interests of justice. Small social security claims need to be settled very quickly from the claimants point of view.

4 Tribunals deal with a narrow confined specialist area - perhaps judges lack the expertise - it is cheaper to train a person in one area than as a complete lawyer, but so do some courts, for example Coroners Courts, Prize Courts and Divorce Courts.

5 The attitude and social background of judges militates against the welfare state but judges must deal with the poor in other disputes. This was a strongly held belief of the 1945-51 Labour government.

6 Courts are rigid and bound by precedent - tribunals need to be flexible with wide discretionary powers but rigid rules protect the claimant, and precedent produces certainty and enforceability.

**Frank's Committee Report and Criteria.** It would appear that the original objective of setting up tribunals was to provide instant, cheap, cost effective, efficient justice in an informal setting. The Frank's Committee was set up to evaluate tribunals and recommend on the best system for operating tribunals. The committee recognised tribunals as a permanent feature of decision making affecting the lives of ordinary people. The committee developed criteria of openness, fairness and impartiality by which to judge a good tribunal.

The Committee, established 1955, reported in 1957 on the consistency in tribunals and recommended the establishment of the Council on Tribunals, implemented in 1958 by the Tribunals & Inquiries Act 1958 & revised as the T & I Act 1971. The function is to review the working of tribunals and make periodic reports and suggest improvements and reforms.

**The Frank Criteria**. "Openness appears to us to require the publicity of proceedings and knowledge of the essential reasoning underlying the decision. Fairness to require the adoption of a clear procedure which enables parties to know their rights and to present their case fully, and to know the case they have to meet. Impartiality to require the freedom of tribunals from the influence real or apparent from the departments concerned with the subject matter of their decisions."

Openness, that is to say open to public view providing publicity of their existence and knowledge of reasons for decisions. Openness can be aided by representation and by the applicant appearing in person rather than by written deposition. It has been suggested that social worker representation is the best solution based on statistics, but is the high success rate due to a careful vetting of cases whereby they only support winnable cases ? Who can say ?

Fairness, a standard clear procedure so that the claimant can know the order of events and plan his campaign; so that arbiters can clearly judge the merits of each sides arguments; so that it is the chairman and not the department that runs the hearing; and so that one side's assertions are not accepted through fear or favour. A lack of formality endangers justice.

Impartiality, so there is no question, real or imaginary of a partisan attitude towards one party to the detriment of the other as might be feared with departmental tribunals. Some tribunals are department based but others are led by independent legal chairmen.

Tribunals have been criticises for failing to meet the Frank Criteria. A major problem is that tribunals are not homogenous. Research on Social Security Tribunals provide some useful statistics. Established in 1982 by the amalgamation of two tribunals - one of which operated on a purely discretionary basis without any form of consistency or precedent pre 1980. Appeal is to the Social Security Commissioners or the courts for judicial review. Some decisions have been overturned within a week by statutory orders initiated by the DHSS when they do not like a court decision.

**Representation & openness**. Many appellants fail to attend. There is strong evidence that attendance considerably increases chances of success. [62]

| Status | Success rate |
|---|---|
| Present & Represented | 38% |
| Present & Unrepresented | 27% |
| Absent & Represented | 34% |
| Absent & Unrepresented | 6% |

Claimants are not informed on Social Security handouts of the significance of non-attendance on the success rate of appeals to the tribunals. Representation aids the full presentation of a case. The department has the equivalent of a professional representative - even if not a qualified lawyer, since the representative will have attended many times and is therefore experienced at tribunal presentations whereas most individuals make a single visit to a tribunal. The individual may well lack knowledge of his rights and the obligations of the department, the procedures to be followed and the skills of advocacy. Statistics have shown that representation increases the chances of success. [63]

| Mode of presentation | Success rate |
|---|---|
| Solicitor representation | 37% |
| Welfare of social worker representation | 53% |
| Friend or relative | 29% |
| Claimants Union & Trade Union | 30% |
| Unrepresented | 12% |

**Tribunal Procedure.** If there is no clear procedure, the claimant will not know how best to present his case. The procedure for the Social Security Tribunal is regulated by the Secretary of State for Social Security and is published. However, it is very brief and gives no detailed guidelines. Much of the procedure is left to the discretion of the chairman. The rationale behind this is to allow for flexibility and to prevent a rigid procedure developing which would result in formal inflexible hearings. However, informality can cause a decline in fairness.

Some tribunals are considered to have inadequate sloppy procedures. Research suggests that is detrimental to the interests of applicants. Proceedings are dominated by the responsible department and are too ready to accept without challenge, unsubstantiated departmental assertions. This danger was recognised by the Frank's Report. 'Informality, without rules of procedure may be positively INIMICAL to right adjudication since the proceedings may assume an unordered character which makes it difficult, if not impossible for the tribunal to sift facts and weigh evidence." To solve this legally qualified / trained chairman have been introduced but the danger is that either tribunals will become too formal and the assumption that all lawyers understand procedure is too optimistic.

62 Ch 15 Benson - table 15:1 & research by Prof Cathleen Bell 1970'ies.

63 See Professor Zander, The State of the Law pp50-51.

**Access to Justice, Legal Aid and Tribunals.** The Legal Aid Act 1949 gave the Lord Chancellor the power to extend legal aid to tribunals at any time by means of statutory instrument but this has never been done. This could be for one of two reasons - either because it is felt to be too expensive or because it is felt to be undesirable. Some tribunals, such as The Lands Tribunal, The Commons Commissioners Tribunal and The Employment Appeals Tribunal have legal aid facilities. The Mental Health Review Tribunal is not covered by legal aid. However, it is covered by the Green Form Scheme for advice & Assistance and representation has been given.[64] There is scope for increasing legal aid to tribunals. At present solicitors and barristers are not prevented from representing clients but few attend because there is no money in it. The issues are several :-

a) should representation be increased ? and if so
b) should it be by lawyers or others and
c) should self help be provided to improve individuals presentation skills?

There were calls for the extension of Legal Aid by The Legal Aid Advisory Council and the Benson Report 1979. The Benson Report proposed new criteria for providing legal aid to replace the existing tests of need & merit. Benson stated legal aid should be made available for the following

1 Significant point of law (Who decides whether it is a significant point of law?).
2 Complex presentation (if so a lawyer was probably required to put the claim together in the first place to show it was complex).
3 Where the amount contested even if small is significant to the claimant (almost inevitable in social security claims !).
4 When suitable lay representation is not available (but what are the criteria for judging suitability?).
5 Where the special circumstances of an individual make representation desirable ( What are special circumstances ? Deaf - dumb -blind - illiterate - stupid - uneducated? ).

Benson stated that legal aid should not be made available where

1 There is no need, but who is to judge the need ? There is no evidence that representation by lawyers is better than representation by non lawyers such as by social workers but there is no firm evidence that the reverse is true either.
2 Lawyers are too formal and may complicate the procedure and introduce jargon, delay etc and render hearings incomprehensible to the client and should not be used in simple cases.
3 Lawyers should not be used where there is no legal expertise in a field, for example in welfare law cases, but if it paid well lawyers would soon develop the expertise!

Some claim there is no need for representation. Lawyers know nothing of the welfare state and are too formal. Many lawyers are now being trained in welfare law - the biggest stumbling block is to induce lawyers to represent clients for small sums of money under legal aid. So there is a dual problem –

1) legal aid is often not available in tribunal cases and
2) even if it is, can lawyers be found to undertake the work?

**The McKenzie Man concept 1970**. This has been used via the green form scheme to give back door legal representation in tribunals. s1 Legal Aid Act 1979 extended the Green Form Scheme to include assistance by way of representation in certain circumstances and has thus resulted in legal aid in tribunals. The development sprang from the developments in **Mckenzie v Mckenzie,**[65] where the CA ruled that any person whether he be a friend of either party or not may attend as a friend of either party, may take notes and may quietly make suggestions and give advice". This represents an important development in lay advocacy and self help. If a lawyer fulfils the Mckenzie man role he can be paid under the green form scheme. Some chairmen have allowed Mckenzie men to actually speak directly to the bench.

The Mckenzie Man principle was adopted by the now defunct Claimants Union and Up Against the Law - established in 1973. The manual of Up Against the Law stated that "The lawyers are so buried in this legal bullshit that they have a fine record of selling our interests down the river and conning the innocent man into pleading guilty." Lawyers dominate in the clients / advisor relationship - and there is no educative feature in the relationship.

64 See Smith & Bailey Introduction to ENGLISH LAW p340.
65 **Mckenzie v Mckenzie** [1970]

**The Provision of Reasons for Tribunal Decisions**. With regard to openness and the giving of reasons - in most cases now a written reason has to be given. The criticism is that the written statement is often inadequate. The quality of the reasoning varies from tribunal to tribunal depending on the chairman. Ruth Williams "It is a rare statement of reasons that actually explains on what grounds a decision was arrived at." The importance of reasons cannot be over stressed. The principal control over the activities of tribunals lies by way of judicial review to the Q.B.D.

**Judicial Review : Challenging the Decisions of a Tribunal : The** High Court exercises a supervisory role over judicial decision makers on the grounds of Breach of the Rules of Natural Justice, error on the face of the record and ultra vires, where a decision was made beyond the statutory powers of the decision maker.

1 If there are no fixed procedures then the rules of natural justice may not be observed. Parties need to know of the case in advance to prepare a presentation - including prior reasons for decisions in order to refute the allegations and the right to challenge and cross question the other side and to put ones case to the court/tribunal.

2 If there is no record of the reasons for a tribunals decisions it is not possible to show that the decision has been made in error (brief unhelpful reasons are sphinx like and just as unhelpful).

3 Where a statute sets down prerequisites for a decision it is often only by the provisions of reasons that it can be shown that the prerequisites were or were not complied with.

Without adequate reasons for a decision, the ability to apply for judicial review and have the decision set aside and reconsidered in a proper manner is prejudiced. However, whilst there is a duty to provide reasons if asked for, few of the pamphlets advising claimants of their rights bother to point out the importance or significance of asking for reasons. A tribunal is likely to deliver a far more coherent and logical decision if it has to provide reasons, which in itself improves the claimants chances of success, since an off the cuff dismissal of a claim becomes impossible. Recent decisions of the ECHR make it even more important now for both government and private tribunals and arbitrators to give reasons for decisions.

A contrast may be made here with arbitration in the USA where the majority of awards are made without reasons to ensure that the award is effectively final and unchallengeable. In Europe this is not possible and in the UK the Arbitration Act 1996 requires reasons. Similarly the new ACAS Employment Arbitration Rules require a reasoned award.

**Ombudsmen and other Regulatory Bodies**[66]

Whilst not strictly part of the judicial process, a variety of ombudsmen or watchdogs have been established by Parliament, including the Parliamentary Ombudsman for England and Wales. Further to this there are a number of adjudicators and Quasi Autonomous Non-Governmental Organisations otherwise known as QUANGOS which perform regulatory functions. Some bodies are purely advisory, whilst others are fully judicial in character and may be likened to tribunals under another name.

**Judicial Inquiries : Planning Inquiries etc.**

These are inquiries, appointed on an ad hoc basis by the government, to consider specific issues. As the name implies, a judge is put in charge of a judicial inquiry. The powers of an inquiry are set out in its brief from Parliament. Powers may be limited or extremely wide, both in terms of information gathering and in terms of outcome ranging from mere recommendations to statements of fact and advisory opinion. They can be given contempt powers to compel attendance.

**Parliamentary Committees of Inquiry.**

These again are set up on an ad hoc basis and as above can have a range of powers. Contempt powers for members are those of the Houses, but outsiders would require specific general powers.

**CONCLUSIONS REGARDING DEMOCRATIC ACCOUNTABILITY OF PARLIAMENT**

The impact that the common law and the role of the courts in statutory interpretation and as enforcers of European Community Law and ECHR / Human Rights Act 1998 have on the sovereignty of Parliament to make and unmake any law without question is significant. It should be noted that whilst it becomes the Government badly, to criticise the courts for enforcing that which it has put in place, such as Human Rights, the independence of the judiciary and the notion of separation of powers mean that an un-elected judiciary exercises un-predicatable policy discretion over the executive.

[66] See Chapter 12 below.