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PREFACE

The aim of this book is to provide a high-quality overview of the rules and principles that constitute English private law. Along with its companion volume, *English Public Law*, it presents a unique picture of English law that it is hoped will be of great benefit to practitioners, academics, and students alike. Moreover, with the increasing emphasis on globalisation in legal services, it is anticipated that foreign lawyers will find these two volumes of invaluable help in understanding English law, which may otherwise appear to be unstructured and lacking in principle.

To produce a succinct and yet authoritative overview requires mastery of the field in question and it is with that in mind that the team of contributors has been assembled. The authors are acknowledged experts in their respective subject areas and their brief has been to produce as clear, simple and accurate an overview as possible of the relevant rules and principles. What one has here, therefore, is the product of many years of learning in each particular area.

All this was the brainchild of the late Professor Peter Birks, to whom this book is dedicated. Inspired by the example of *Gloag and Henderson's Law of Scotland*, and with the particular encouragement of Lord Rodger of Earlsferry, Birks's goal was for this and *English Public Law* to be on every English lawyer's desk as at least a first point of reference. His mark is indelibly stamped across the whole work not least in the structure which he devised for this book.

It is worth recalling here that, while seeing the enterprise as following in the tradition of Gaius' *Institutes* and Blackstone's *Commentaries*, Birks regarded the need for a well-organized overview, or map, of English private law as responding to two particular challenges in the modern practice of law. He referred to these as 'stovepipe mentality' and 'information overload'. In his words:

There is a constant complaint of 'stovepipe mentality'. It is an allegation that practitioners—especially young practitioners, since the complaint is usually made by senior people—know their law only in the way that many people know London, as pools of unconnected light into which to emerge from a limited number of friendly tube stations. . . The reason why these 'stovepipe' lawyers cannot move confidently from one area of the law to another is that nobody has shown them the map.¹

¹ Introduction to the First Edition, xxxv–xxxvi.

Later he turned his attention to ‘information overload’:

The information explosion makes the need for the structured Blackstonian approach all the more urgent. Information can now be accessed more and more rapidly. The mechanical aspects of the research function are well provided for and constantly being improved. Meanwhile the structure, which is the software which allows the brain to keep the mass of information under intellectual control, is being neglected. While it is becoming ever more essential that lawyers should have a sound grip on the concepts and principles which hold the law together, that need is not being met. . . A high price will be paid if this goes on. Clients will be badly served. The common law will become incoherent, and it will lose respect. That unnecessary disaster is what we hope that *English Private Law*, and its sequel *English Public Law*, will help to prevent, by setting out a coherent, economical account, not only of individual topics, but also of the larger categories of the law and the way that they fit together and, hence, of the law itself.²

In addition to a thorough updating—and, in some instances, substantial rewriting—of the chapters, two major changes have been made to this edition. Most importantly of all, it is hoped that publication in a single volume will render this book easier to use. At the same time, some gaps in the coverage of commercial contracts have been filled by new chapters on carriage of goods by air and land, insurance and banking. We welcome Malcolm Clarke and Richard Hooley to the team as authors of those new chapters.

We would like to thank the team at OUP (Roxanne Selby, Benjamin Roberts, and Annabel Moss) for their dedication, skill, and hard work. Annabel Moss was responsible for the early day-to-day overseeing of the project and we are especially grateful to her for being so efficient and patient in dealing with the inevitable complexities of such a multi-authored work. Particular thanks are also due to Richard Walshe for his excellent copy-editing.

Subject to some minor amendments at proof stage, the law is stated as at 30 April 2007.

Andrew Burrows
Oxford
June 30 2007

INTRODUCTION

This introduction explains the structure of this book. It is the scheme pioneered by Professor Peter Birks (inspired most by his beloved Gaius). He was anxious to stress that it is nothing more than ‘the best currently available hypothesis as to the structure of our law’.³

The scheme is arrived at by first subdividing the whole law into private and public. English public law deals with constitutional law, human rights, administrative law and criminal law. It is the subject-matter of the companion volume in this series and is outside our present concern.

English private law is best viewed as concerned with the rights which, one against another, people are able to realize in courts. There is then a threefold division corresponding to three questions that may be asked about realizable rights. Who can have rights? What are the rights? What are the means by which the rights are realized in court? We therefore arrive at a threefold subdivision between the *law of persons*; the law of rights; and the law of actions for the realization of rights, which in modern parlance can be labelled ‘*litigation*’. The trichotomy corresponds to, but is not identical to, the Roman proposition to the effect that the concerns of private law are persons, things, and actions.⁴

Two further adjustments are then made in order to arrive at the fivefold division used in this book.

First, one needs a general introduction (applicable to both public and private law) as to what counts as law and that, more specifically and practically, identifies the *sources of law*. This is Part I.

Secondly, the law of rights, which requires the most detailed examination, can be helpfully divided according to who the rights can be enforced against (the question of ‘exigibility’). Some rights can be demanded only from the person against whom they first arise or against someone who stands in that person’s shoes and thus represents him. Some rights are by contrast, more widely demandable and, of those, some follow things and can be demanded from any person in whose hands the thing is found. When names are added, this makes a division between

³ Introduction to the First Edition, xxxv.

⁴ Justinian, *Institutes* 1.1.4: ‘there are two aspects of this study, public and private. . . Our business is private law’. And 1.2.12: ‘All the law we use concerns persons, things, or actions’.

rights *in rem*—that is, proprietary rights—whose exigibility depends on the location of a thing (in Latin a *res*), and rights *in personam*—that is, personal rights—which are rights exigible only against the person against whom they originally arise or that person's representatives.⁵ Rights realizable in court are therefore either proprietary or personal. *The law of property* is the law of proprietary rights;⁶ and, as personal rights correlate with obligations, the category of all personal rights is called *the law of obligations*. The law of property and the law of obligations are the two great pillars of private law.

The subdivision of rights between property and obligations brings us to our fivefold division. Private Law is about: I Sources, II Persons, III Property, IV Obligations, V Litigation.

Part IV is itself structured according to the main causative events of personal rights, namely contract, wrongs and unjust enrichment. So Chapter 8 looks at contract in general and Chapters 9–16 examine specific types of contract (agency, sales, carriage, insurance, banking, employment, and bailment). Chapter 17 then deals with torts and equitable wrongs and Chapter 18 is on unjust enrichment.

No such straightforward 'causative events' division of Part III is possible because the focus has to be as much on the different types of proprietary right (which Birks referred to as the 'content question') as on the events by which proprietary rights arise. So a good deal of the general chapter on property (Chapter 4) and the separate chapters on security and intellectual property (Chapters 5 and 6) is concerned with kinds of property right. Chapter 7, on succession, is directed to a causative event, death, and the sub-species of that event, death intestate and death testate.⁷

⁵ It must not be allowed to escape notice that the subdivision of rights between *in rem* and *in personam* is not exhaustive, although, possibly, it might be said to be exhaustive of 'rights realizable in court'. The category which is omitted is the category of rights which are good against all people but do not follow any *res*. All of these are superstructural rights which manifest themselves in the wrongs which infringe them. Thus the right to bodily integrity is protected through the torts which are committed against the body, and the right to reputation is protected by the torts of defamation. Such primary rights are 'superstructural' in that they provide the superstructure over the wrong: every wrong is the infringement of a primary right. Not every primary right is a right *in rem*. A primary right can be *in rem*, *in personam* (say, from contract), or, to give the residue a name, 'purely superstructural'.

⁶ There is a constant tension between the law of property in the strict sense—the law of proprietary rights—and a loose sense in which 'property' means nothing more than 'assets' or 'items of wealth', hence cars, clothes, money, land, and so on. In this latter sense 'property' engulfs most of the law of obligations, since personal rights can also be regarded as assets. My claims against others are valuable, and many of them can indeed be sold for money—that is, they can be assigned. 'Factoring' or 'debt-factoring' is a business based on buying up, at a discount, the debts owed to others.

⁷ Chapter 7 (Succession) co-ordinates with that part of the general discussion of property in Chapter 4 concerned with acquisition *inter vivos* but also with the acquisition of security rights (part of Chapter 5) and intellectual property rights (part of Chapter 6).

Birks summarized his explanation of the structure of this book as follows:

Our business is with the rights which a claimant can if necessary realize through the courts. Part I, with its single chapter on sources of law, is an essential introduction. Part II separates out the study of persons who hold rights. At the other end, Part V deals with the realization of rights. Part III and IV are about the rights themselves. Part III is about property rights. Part IV is about personal rights, called from their negative end, obligations. Property and obligations divide in response to the question which asks against whom rights can be demanded. At lower levels within Part III the treatment of property rights is ordered primarily by two questions, the content question and the causative event question: To what is the right-holder entitled? And, From what events does the right arise? Within Part IV the treatment of obligations is dominated by the latter question: From what events do obligations and their correlative rights arise?⁸

In conclusion, however, it is important to emphasize that Birks was not suggesting, and nor are we, that this structure should be rigidly followed. On the contrary, there are various ‘concessions to convenience’ as Birks labelled them.

It does not follow from the need for a structural overview that in its application there can be no concessions to convenience. The important thing is to know what the scheme is, when it is being departed from, and why. Rigorous purity would have brought the whole project to the ground. A more liberal attitude has been adopted. There are a number of places where such concessions have been made, whether to avoid affronting expectations based on longstanding practice or simply because of the extreme inconvenience of separating two consequences of a single causative event. For example, the contract of sale is treated in the law of obligations, where it properly belongs. Obligations arise from contracts and from other events, and sale is a specific contract. A rigid interpretation of the scheme would say that the passing of property under a sale could not be mentioned at this point. The reader should simply be remitted to the law of property. Nevertheless, the chapter on sale does include its own discussion of the proprietary effects. The same is true of the chapter on bailment. Similarly, the chapter on unjust enrichment is considered within the law of obligations, but the effects of unjust enrichment in generating proprietary rights are also considered at some length and are not remitted to the law of property. Again, personal security, though it rests entirely on obligations, is treated alongside mortgages in Chapter 5 within the law of property, and obligations arising from entering into family relationships are considered in Part II on the law of persons and are not postponed to Part IV on obligations. Too many such concessions would dissolve the scheme, but a limited number can be tolerated.⁹

⁸ Introduction to the First Edition, xliii.

⁹ Ibid at xlix–l.

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PART I

SOURCES OF LAW

1

SOURCES OF LAW

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A. Introduction

Under the rule of law decision-makers cannot decide simply on the basis of whatever they personally think is right. They are constrained to offer legal reasons for their decisions. When judges claim that their decisions are legally right, they need only claim that the decisions are supported by legal reasons which can be found through the interpretation of certain sources.¹ In a pluralistic society, personal morality cannot always be aligned to the moral values which the law enforces. This chapter presents the kinds of sources from which legal justifications can be drawn in English law. **1.01**

The term 'sources of law' is sometimes used to identify the *material* sources—where lawyers look in order to find out what the law is. Thus they might consult textbooks, encyclopaedias, legal retrieval systems, or increasingly they visit sites on the Internet. This chapter is concerned not with these material sources of information about the law, but about the sources of legal justifications. **1.02**

¹ R Alexy, *A Theory of Legal Argumentation* (1991), 220 and 289.

- 1.03** When proposing a new law, politicians offer arguments why it would be morally right or economically, politically or socially beneficial. Such reasons are *substantive reasons* for the decision, but are often controversial. To ensure more consistency and stability, society prefers to limit the range of reasons on which a judge or official can rely by identifying a number of acceptable *formal reasons*.² For example, a rule of European law, statute or precedent must be treated as an authoritative statement of the law and a judicial decision must be based on one such authoritative source of law. The existence of such sources will either exclude or reduce the weight of the substantive reasons on which the judge might otherwise rely.

B. The Hierarchy of Norms

- 1.04** Legal rules, principles and guidelines are called collectively legal norms or standards. It is useful to talk of legal norms in terms of a hierarchy—some types of norm prevail over others. The following constitutes the hierarchy of English legal norms: (1) European Union law, (2) the European Convention on Human Rights, (3) the Constitution, (4) the common law (what other legal systems might call ‘general principles of law’), (5) statutes, (6) precedents, and (7) customs. Each of these is an authority reason for a legal decision, but there is a clear ranking between them. Statutes and precedents are so substantial that separate sections are devoted to them.

(1) *European Union Law*

(a) Status of European Union law

- 1.05** The United Kingdom has been a member of the European Community (now Union) since 1973. The initial accession through the European Communities Act 1972 made the European treaties part of the law of the United Kingdom, authorized the implementation of future European Community legislation by delegated legislation, and established the supremacy of this European law. Treaties signed subsequent to 1973 have been ratified by specific Acts of Parliament, eg the Treaty of Amsterdam was ratified by the European Communities (Amendment) Act 1998. Unlike the laws of some Member States, English law does not provide for a referendum to approve such ratifications.
- 1.06** A preliminary point of terminology must be dealt with. Since 1993, when the Treaty of Maastricht came into force creating the European Union, it has become quite

² PS Atiyah and RS Summers, *Form and Substance in Anglo-American Law* (1987) 2 and 25.

common for authors to switch from using the terms ‘European Communities’, ‘European Community’, ‘Community’ and ‘EC’ to using the terms ‘European Union’ and ‘EU’ without giving the shift a great deal of thought. All the same, the European Union has three ‘pillars’. They are, first, the European Community (EC); second, the Common Foreign and Security Policy (CFSP); and, third, Police and Judicial Co-operation in Criminal Matters (PJCCM). The CFSP and the PJCCM are inter-governmental programmes of co-operation. As far as the hierarchy of norms is concerned, the first pillar (EC) is the only one to produce norms that prevail over national legislation. For this reason, the terms ‘EC law’ and ‘Community Law’ continue to be used in relation to the European sources that contribute to English law.

European Union law has several forms. The highest form of legislation is the *treaties*, the fundamental framework setting out powers, responsibilities and rights. The treaties recognized in English law are set out in s 1(2) of the European Communities Act 1972 (as amended). Specific policies are then developed through directives and regulations enacted under the provisions of the treaties. *Directives* establish a policy direction towards which all member states have to adapt their national legislation. *Regulations* are rules that apply without adaptation in the same form in all member states. **1.07**

The priority of European Community law was a principle established well before the United Kingdom joined. In a decision of 1964, *Costa v ENEL*,³ the European Court of Justice (ECJ) ruled that, in creating the European Economic Community (now the European Union), ‘Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves’. The duty of the courts was then specified in *Amministrazione delle Finanze dello Stato v Simmenthal (No 2)*:⁴ **1.08**

A national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law, is under a duty to give effect to those provisions, if necessary by refusing of its own motion to apply any conflicting provisions of national legislation, even if adopted subsequently. . .

A good example of this priority is *R v Secretary of State for Transport, ex p Factortame Ltd*.⁵ The criterion for treating ships as of British nationality under s 14 of the Merchant Shipping Act 1988 discriminated against British firms with shareholders from other EU states (here Spain) in breach of the EC Treaty. The ECJ ruled that the Act’s provisions were unlawful and the House of Lords then decided to disapply the Act. In a subsequent case, the House of Lords has also given a

³ Case 6/64, [1964] ECR 585.

⁴ Case 106/77, [1978] ECR 629.

⁵ Case C-213/89, [1990] ECR I-2433; [1991] 1 AC 603, ECJ and HL.

declaration that British legislation on sex discrimination was in breach of EC law, even without a ruling from the ECJ.⁶

(b) Direct effect

- 1.09** Much EC legislation is said to have ‘direct effect’ in the sense that it creates rights and duties in domestic law without intermediate national legislation. The treaties are not just agreements between nation states but create a legal order in which individual citizens have rights and duties against those member states.⁷ The current test is that the provision of EC law must be (a) clear and unambiguous, (b) unconditional, and (c) not dependent on further action being taken by the Community or national authorities.⁸ Direct effect can take two forms. *Vertical direct effect* creates rights only between an individual and a Member State. Directives will not have horizontal direct effect until they are implemented as part of national legislation, but they may have effect between a citizen and the state or its organs. For example, in *Marshall v Southampton & South West Area HA*,⁹ Mrs Marshall complained that she was forced to retire at 60 when men need not retire until 65. Directive 76/207 established the principle of equal treatment between the sexes and prohibited all discrimination on grounds of sex in working conditions. The deadline for implementing this Directive had passed, but the UK had not enacted it into domestic law. The ECJ found that it prevailed over the English Sex Discrimination Act 1975 permitting different retirement ages to apply to men and women. Mrs Marshall was able to rely on a directive against an emanation of the state, a health authority.¹⁰ *Horizontal direct effect* creates rights between individual EC residents. Regulations almost invariably fit into this category. Many provisions of the treaties also do. For example, in *Barber v Guardian Royal Exchange Assurance Group*,¹¹ a man was able to complain successfully against a private pension company that it discriminated unlawfully against him contrary to art 119 EC. Under his pension scheme, women made redundant at the age of 50 qualified for an immediate pension, but men had to wait until they were 55.

⁶ *R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1995] 1 AC 1.

⁷ Case 26/62, *Van Gend en Loos NV v Nederlandse Administratie der Belastingen* [1963] ECR 1.

⁸ Case 43/75, *Defrenne v SABENA* [1976] ECR 455; Case 41/74, *Van Duyn v Home Office* [1974] ECR 1337.

⁹ Case 152/84, *Marshall v Southampton & SW Hants AHA* [1986] ECR 723; Case C-271/91 *Marshall v Southampton & South West Area HA (No 2)* [1993] ECR I-4367.

¹⁰ For a body to be treated as ‘an emanation of the state’, it must be a body (whether a public or private person), which (a) provides a public service; (b) for that purpose has special powers; (c) acts under the decisive or special influence of public authorities: Case C-188/89, *Foster v British Gas* [1990] ECR I-3313.

¹¹ Case C-262/88, [1990] ECR I-1889.

Even if an EC legal rule is not directly effective, it may have an impact on national law in two ways: either as a principle of interpretation or as a basis for a legal claim for compensation against the State. Where faced with national legislation that is designed to implement a directive, courts should interpret it ‘in the light of the wording and the purpose of the Directive’.¹² Even where the member state has failed to implement a directive, the national court is required to interpret existing national law (whether the provisions in question were adopted before or after the directive) ‘as far as possible, in the light of the wording and purpose of the directive in order to achieve the result pursued by the latter’.¹³ Where a Community obligation has not been implemented, then a national court must be willing to award damages against the state for non-compliance.¹⁴ 1.10

(2) The European Convention on Human Rights

The Human Rights Act 1998 gives effect to the European Convention on Human Rights. Under s 3(1), ‘So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights’.¹⁵ Although the courts cannot refuse to apply primary legislation that conflicts with the Convention, a declaration of incompatibility authorizes the minister to promote delegated legislation to bring UK law into conformity. There is thus a strong presumption in favour of an interpretation that makes the UK law consistent with the Convention. 1.11

In applying s 3(1), there are several stages in reasoning. First, it is necessary to examine whether a Convention right (properly understood) is affected by domestic legislation. The clear and constant case law of the European Court of Human Rights will serve as a guide.¹⁶ For example, in *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions*,¹⁷ that case law established that judicial review of planning decisions did not require a rehearing of the merits of the application. Secondly, even if a Convention right is affected, the interference may be justified under the terms of the Convention itself. Many Convention rights are not absolute and the 1.12

¹² Case 14/83, *Von Colson v Land Nordrhein-Westfalen* [1984] ECR 1891.

¹³ Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135 where provisions of an 1889 Code had to be interpreted so as to implement a 1975 directive.

¹⁴ Cases C-6/90 and C-9/90, *Francovich & Bonifaci v Italy* [1991] ECR I-5357; Cases C-46/93 and 48/93 *Brasserie du Pêcheur SA v Germany, R v Secretary of State for Transport, ex p Factortame Ltd* [1996] ECR I-1029, for the damages settlement in this case see [1999] 2 All ER 640.

¹⁵ See D Feldman (ed), *English Public Law* (2004), ch 7.

¹⁶ See *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [26], per Lord Slynn.

¹⁷ *ibid.*

Convention permits interference in certain circumstances to protect other rights or to pursue a public interest goal, provided the interference is proportionate. For example, the privilege against self-incrimination has to be balanced against other Convention rights, and this may justify the requirement that the owner of a vehicle reveal the name of its driver.¹⁸ Thirdly, if a Convention right is affected in an apparently illegitimate way, it is necessary to examine whether the domestic legislation can be construed to be compatible with it. Here the first approach is to see whether ordinary methods of interpretation, as discussed in paras 1.42–1.51, will remove any conflict. If that is insufficient, the more radical approach of s 3(1) of the Human Rights Act 1998 will be invoked under which the domestic legislation is construed as compatible, as far as this is possible, even if the interpretation which has to be adopted to this end is linguistically strained.¹⁹ It may be that, in order to determine either the extent or the justifiability of an interference with a Convention right, this robust approach to interpretation must be adopted.²⁰ Both the second and the third stages involve interpretation, and it may be that one judge finds no apparent interference with a Convention right, whereas another finds that there is an apparent interference, but no incompatibility between the Convention right and the legislation (properly interpreted).²¹ Finally, where it is not possible to interpret the domestic legislation in a way which is compatible with the Convention right, a competent court may make a declaration of incompatibility. An example was *A (FC) and Others v Secretary of State for the Home Department*²² in which a number of individuals challenged their detention without trial. They were held because they were suspected of being a danger to national security, but they could not be expelled to another country. The House of Lords held that s 23 of the Anti-terrorism, Crime and Security Act 2001 was incompatible with articles 5 and 14 of the European Convention insofar as it is disproportionate and permits detention of suspected international terrorists in a way that discriminates on the ground of nationality or immigration status, and it quashed the Government's derogation from the Convention. It is accepted that where a proposed compatible interpretation departs substantially from a fundamental feature of the Act, it is not a permissible interpretation, but an amendment, which only Parliament can make: for example, in *Ghaidan v Godin-Mendoza*,²³ where the term 'spouse' was interpreted to include a homosexual partner. As Lord Nicholls stated, '[Section 3 allows] a court to read in words which change the

¹⁸ *Brown v Stott (Procurator Fiscal, Dunfermline)* [2001] 2 All ER 97.

¹⁹ Lord Steyn in *R v A (No 2)* [2001] UKHL 25; [2002] 1 AC 45 at [44].

²⁰ See *Poplar Housing and Regeneration Community Association v Donoghue* [2001] EWCA 595; [2002] QB 48 at [75] *per* Lord Woolf CJ; see also *R v Director of Public Prosecutions, ex p Kebilene* [2000] 2 AC 326.

²¹ Compare the opinions of Lord Hope and Lord Steyn in *R v A (No 2)* (n 19 above).

²² [2004] UKHL 56; [2005] 2 AC 68.

²³ [2004] UKHL 30; [2004] 2 AC 557.

meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation.²⁴ By contrast, *Ghaidan* demonstrates that many areas of private law are likely to be affected by the Convention.²⁵

Section 6(1) of the Human Rights Act makes it unlawful for a 'public authority' to act in a way that is incompatible with any Convention right.²⁶ The Convention lists certain inalienable rights: the right to life (art 2), the freedom from torture or inhuman or degrading treatment or punishment (art 3), the freedom from slavery (art 4), the right to liberty and security of the person (art 5), the right to a fair trial (art 6), the right to marry and found a family (art 12), the right to an effective remedy (art 13) and the freedom from discrimination in respect of Convention rights. In addition, some rights can only be subject to such limitations as are necessary in a democratic society, for example in the interests of public safety. These rights are the right to respect for family life, home and correspondence (art 8), the right to freedom of thought, conscience and religion (art 9), the right to freedom of expression (art 10), and the right to freedom of peaceful assembly and association (art 11). The impact of the Convention on private law is more limited. Baroness Hale of Richmond noted, 'The 1998 Act does not create any new cause of action between private persons. But if there is a relevant cause of action applicable, the court as a public authority must act compatibly with both parties' Convention rights.'²⁷ Consistently with s 3, rules and principles of private law are interpreted in the light of Convention rights. This may lead to the revision of established principles of law, such as the expansion of the tort of breach of confidential information to protect a person's Convention rights to privacy.²⁸

Section 8 of the 1998 Act provides for remedies against public authorities where Convention rights have been breached.²⁹ Nothing in the Human Rights Act prevents a person from making an application under the Convention to the European Court of Human Rights in Strasbourg. The remedies under the Act merely help

²⁴ *ibid* at [32].

²⁵ For example, the liability of public authorities in tort for the exercise of their supervisory powers has been the subject of decisions of the European Court of Human Rights in *Osman v United Kingdom* Series A 1998-VIII, 3124; (2000) 29 EHRR 245 and in *Z v United Kingdom*; Application 29392/95, (2002) EHRR 3.

²⁶ There is no exhaustive definition of a 'public authority' but s 6(3) includes both courts and tribunals and other bodies performing 'functions of a public nature'.

²⁷ *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457 at [132].

²⁸ *ibid*. See paras 17.364–17.366.

²⁹ See D Feldman (ed), *English Public Law*, ch 19.

to define what counts as the exhaustion of national remedies under the admissibility criteria of art 35 of the Convention.

(3) *The Constitution*

(a) The absence of a single authoritative text³⁰

- 1.15** The highest level of national legal authority lies in the Constitution. Rules laid down in the Constitution define the authority of other sources of law and prevail over them. In some countries, there is a document containing such rules.³¹ In Britain, there is no such text. Leading authors such as Dicey and Jennings define the constitution in terms of laws and practices, a mixture of legal and political rules. Dicey argued that political practices and constitutional conventions are only part of the story; they fail to explain the enforcement of the Constitution. For him, ‘constitutional law, as the term is used in England, appears to include all rules which directly or indirectly affect the distribution or the exercise of the sovereign power of the state’.³² Dicey stated that one set of such rules is ‘law’ in the strictest sense of the word, namely rules that are enforced by the courts (whether they come from statute or the common law). The other set of rules consist of conventions, ie understandings and practices which regulate the conduct of the sovereign power of the state, but which are not enforced directly by the courts.³³ While the precise scope of this distinction is debated, the distinction itself is widely accepted.³⁴ Thus, while there may not be a ‘constitution’ in the sense of a single, formally enacted written document, there are actual principles or maxims in terms of which the country ought to be ruled.
- 1.16** The absence of a written document leads to the criticism, voiced by Jennings, that constitutional law ‘is not a system at all but a mass of disconnected rules depending on historical accidents’.³⁵ It is certainly the case that lawyers often do not see the constitution as a whole with its different kinds of legal norms and their connection to conventions of the constitution.³⁶ But for some distinguished judges and writers, the solution lies not in producing a written constitution, but in a

³⁰ See *ibid*, paras 1.09–1.15; D Feldman, ‘None, One or Several? Perspectives on the UK’s Constitution’ [2005] CLJ 329.

³¹ For example, the German Basic Law of 1949 lists of fundamental rights is set out which prevail over rules in private law or criminal law.

³² AV Dicey, *The Law of the Constitution* (10th edn by ECS Wade, 1959), 23; see generally D Feldman (ed), *English Public Law*, paras 1.03–1.08.

³³ *ibid* 23–4. Conventions may, however, provide a background justification for judicial decisions, eg *A-G v Jonathan Cape Ltd* [1976] QB 752.

³⁴ See more generally G Marshall, *Constitutional Conventions* (1984), ch 1.

³⁵ WI Jennings, *The Law and the Constitution* (5th edn, 1959), 71.

³⁶ See Lord Nolan, and G Wilson in Lord Nolan and Sir S Sedley, *The Making and Remaking of the British Constitution* (1997), chs 1, 6 and esp. ch 7.

clearer appreciation of the role of the common law in establishing constitutional principles and of the role of judges in contributing to the creation of constitutional laws and conventions.

(b) The constitutional texts

Although the United Kingdom does not have a single document called ‘the Constitution’, there are a number of constitutional statutes. To take recent examples, the Scotland Act 1998, the Government of Wales Acts 1998 and 2006, the Northern Ireland Act 1998, the Human Rights Act 1998, the House of Lords Act 1999 and the Constitutional Reform Act 2005 would all rank as constitutional statutes. They create assemblies in Scotland, Wales, and Northern Ireland, and give legal force to the European Convention on Human Rights in the United Kingdom. But, unlike in other legal systems, constitutional statutes cannot be separated from other statutes by virtue of the special procedure required for their enactment.³⁷ For example, devolution in Scotland and Wales was preceded in September 1997 by consultative referendums on the principle of creating a Scottish Parliament or a Welsh Assembly authorized by the Referendums (Scotland and Wales) Act 1997, but the decisions of the peoples in those countries had no legal force. Rather it created a political mandate for the UK Parliament to vote the detailed constitutional reforms contained in the Scotland Act 1998 and the Government of Wales Act 1998. At best, one can identify certain subject matter as constitutional, and this is the approach adopted in Schedule 5 to the Scotland Act 1998, though the list there is, by its own admission, not exhaustive. The Constitutional Reform Act fits this pattern, as it deals with the independence, appointment and governance of the judiciary and the role of the Lord Chancellor. **1.17**

The hierarchical priority of certain statutes can be seen in two ways. In the first place, their provisions are presumed to apply in relation to subsequent legislation unless there is an irreconcilable conflict. Examples of this are s 28(8) of the Scotland Act 1998 and s 3(1) of the Human Rights Act 1998. In the second place, the statutes may radically reshape the way in which government or Parliament acts so it is virtually impossible to go back to the original arrangement without a further conscious and overt legislative change. Examples are the Act of Settlement 1701 (in relation to succession to the Crown), the Acts of Union 1707 (uniting the English and Scottish Parliaments), the Parliament Acts 1911 and 1949 (determining how Acts of Parliament are voted), the European Communities Act 1972 **1.18**

³⁷ In France, an amendment to the constitution has to be adopted either by referendum or, more normally, by a joint session of both houses of the Parliament: see J Bell, *French Constitutional Law* (1992), 228, 260–1.

and the subsequent Acts amending it, as well as the devolution and human rights legislation mentioned above.

(c) Common law rules

- 1.19** Common law constitutional rules are more difficult to identify. Again there is no procedural difference in the elaboration of such rules. Unlike many European countries, the UK does not have a constitutional court. The nearest equivalent is the Judicial Committee of the Privy Council which interprets the constitutions of some Commonwealth countries and, most recently, has been given jurisdiction over devolution issues.³⁸ To identify common law constitutional rules, one needs to consider their subject matter. Common law rules define that an Act of Parliament requires the consent of the Queen, the Lords and the Commons³⁹ and that the Executive or Parliament alone cannot make laws.⁴⁰ The common law also defines the unchallengeability of Acts of Parliament, except where overriding European Community law is involved.⁴¹ The principles for the conduct of the executive are defined through precedents on the judicial review of administrative action.
- 1.20** It is thus true that constitutional norms are the highest source of domestic law; but it is a difficult exercise to identify which norms count as constitutional. The following subject-matter should be treated as constitutional:
- (1) succession to the Crown;
 - (2) inherent and emergency powers of the Executive;
 - (3) the powers and procedures of Parliament;
 - (4) elections to Parliament;
 - (5) the existence, powers and composition of devolved parliaments and assemblies;
 - (6) the basic organization of local government;
 - (7) the definition of fundamental rights and the guarantees essential for their protection;
 - (8) the independence of the judiciary;
 - (9) rights to nationality, passports and asylum;
 - (10) the establishment of religion;
 - (11) the transfer or acquisition of territory.

³⁸ 'Devolution issues' are defined in para 1 of Schedule 6 to the Scotland Act 1998, para 1 of Schedule 8 to the Government of Wales Act 1998, and para 1 of Schedule 10 to the Northern Ireland Act 1998.

³⁹ *Prince's Case* (1606) 8 Co Rep 1a.

⁴⁰ *Case of Proclamations* (1611) 12 Co Rep 74, *Stockdale v Hansard* (1839) 9 Ad & E 1.

⁴¹ *Edinburgh and Dalkeith Ry v Wauchope* (1842) 8 Cl. & F 710; *Pickin v British Rys Board* [1974] AC 765.

Other countries might include language, culture and the currency as similarly fundamental, but this does not appear to be the case in the United Kingdom.

(4) The Common Law

The common law can be viewed in three ways. First, it is a body of rules and principles which are judge-made, rather than contained in statutes. Although this distinction is rightly distinguishes different sources of initiative in legal developments, there has been a misconception that statute and common law are distinct bodies of law which do not mix, just as oil does not mix with water.⁴² In truth, the task of the lawyer is to integrate rules from these different sources into a coherent whole. Secondly and more specifically, the ‘common law’ is the body of judge-made rules which has its origins in the common law courts, as opposed to the rules of equity developed by the courts of Chancery. Since the Judicature Act 1873, the courts have tried to integrate these two sets of rules. Thirdly, the most valuable way of looking upon the common law is a source of general principles of law. **1.21**

The role of the common law as a source of general principles of law is illustrated in cases such as *R v National Insurance Commissioner, ex p Connor*⁴³ where the provisions of s 24 of the Social Security Act 1975 that ‘[a] woman who has been widowed shall be entitled to a widow’s allowance’ were held not to apply where the woman in question had killed her husband. The general principle of law that ‘no one can profit from his own wrong’ applied, even though it was not expressly mentioned in the statute. **1.22**

In a more general sense, the term ‘common law’ is used to describe a legal culture, an attitude towards law and the resolution of legal problems. The cast of mind of the common lawyer is described by Lord Goff: **1.23**

the historical fact that common lawyers have been reared on a diet of case law has had a profound effect on our judicial method. Common lawyers tend to proceed by analogy, moving gradually from case to case. We tend to avoid large, abstract, generalisations, preferring limited, temporary, formulations, the principles gradually emerging from concrete cases as they are decided. In other words, we tend to reason *upwards* from the facts of the cases before us, whereas our continental colleagues tend to reason *downwards* from abstract principles embodied in a code. The result is that we tend to think of each case as having a relatively limited effect, a base for future operations as the law develops forwards from case to case—and occasionally backwards if we are modest enough to recognise that perhaps we have gone too far. This method

⁴² For criticism, see J Beatson, ‘Has the Common Law a Future?’ [1997] CLJ 291.

⁴³ [1981] QB 758, DC.

of working can be epitomised in the statement that common lawyers worship at the shrine of the working hypothesis.⁴⁴

At the same time, the common law is seen as a system of principles which cross national boundaries such that American, Irish, Australian and Canadian authorities may all be relevant to an English case. The importance of this culture to legal thinking is that the common law is seen as a set of interlocking principles which should be interpreted as coherently as possible. Yet, at the same time, its formulations are provisional, capable of improvement or change to adapt to new circumstances or situations. This conception suggests that the common law judicial decisions (in law or equity) are provisional statements of fundamental common law principles which have to be reviewed and developed over time. There is no equivalent of the pithy statement in a code or statute that contains an invariable formulation of the basic idea to which the courts add layers of interpretation. On the one hand, this requires the lawyer to build on previous decisions by way of analogy. On the other hand, he is required to offer a constructive reinterpretation of the common law in such a way that a new development fits coherently into it.⁴⁵

(5) Custom

- 1.24** Custom, as the law understands it, is a usage which has the force of law and binds in relation to a particular place, person or thing.⁴⁶ For example, the residents of Windsor had the right to play lawful sports and pastimes on Bachelors' Acre.⁴⁷ As there, most customs are local law which supplements the ordinary law of the land. More loosely, there are also practices of particular trades.⁴⁸ To count as a custom, it must be reasonable, certain, and be considered by those involved as binding. The law distinguishes between customs that have existed from time immemorial (ie since 3 September 1189), which have equal authority to the common law, and those of more recent date, which do not prevail over the common law.⁴⁹

⁴⁴ Lord Goff of Chieveley, 'The Future of the Common Law' (1997) 46 ICLQ 745 at 753.

⁴⁵ This is the idea contained in RM Dworkin's analogy of the chain novel: *Law's Empire* (1986), 240–5.

⁴⁶ *Tanistry Case* (1608) Davis Ir 28 at 31.

⁴⁷ *New Windsor Corporation v Mellor* [1974] 2 All ER 510; affd [1975] Ch 580.

⁴⁸ Eg *McGowan (Inspector of Taxes) v Brown and Cousins* [1977] 3 All ER 844 at 848 (concerning estate agents).

⁴⁹ Scrope CJ, *Plumer v Leicester* (1329) 97 Selden Society 45 at 46.

C. Statutes and Their Interpretation

(1) *The Nature of Statutes*

(a) Forms of legislation

Statutes and other enactments are the most substantial part of English law. The basic principles of many branches of law have been specifically created by statute, eg child law, planning law, company law. Statutes can be either 'public general Acts', or 'local Acts' (applying to a particular locality) or 'private Acts' applying to specific individuals or companies. A public body, such as a local authority or a public corporation, might seek a local Act or a private Act to give it special powers.⁵⁰ A typical statute or Act of Parliament is divided into sections, some of which are further divided into sub-sections, and 'schedules', as the annexes are known. Statutes usually contain interpretation sections which define key terms used in the legislation. (Frequently occurring terms are defined in the Interpretation Act 1978.) Among their provisions, Acts of Parliament typically authorize ministers to make delegated legislation in the form of *statutory instruments* or *orders in council*. In addition, local authorities and other bodies may be authorized by statute to pass *by-laws* regulating such things as the use of parks or public spaces, or setting parking restrictions. The principles for interpreting statutes set out in this section apply not only to public and general Acts, but also to these other forms of legislation. **1.25**

The essential feature of a statute, statutory instrument or by-law is that it is a deliberate and systematic attempt to lay down rules of law in a precise, written formulation which tries to anticipate the situations to which it will apply. Case law develops rules in response to specific, concrete situations which present themselves before a court. The rule laid down in a judicial decision will apply to similar future situations, but the court does not have to consider all its implications. By contrast, the legislator is trying to lay down rules in abstract for future situations and is expected to have thought through the consequences of the rule to be adopted. **1.26**

(b) Problems of interpretation⁵¹

This abstract character of the words used provides a first problem for the reader, since he will have to make them concrete by way of illustration. The second problem is the difficulty for the legislator to foresee how the provision will come to be applied. An example of this is the case of *Royal College of Nursing v Department of* **1.27**

⁵⁰ Public general Acts are numbered in a different series from local and private Acts. In terms of rules of interpretation, there is no significant difference between them these days.

⁵¹ See FAR Bennion, *Statute Law* (3rd edn, 1990), part III.

Health and Social Security.⁵² The Abortion Act 1967 provided that a lawful abortion had to be ‘carried out by a registered medical practitioner’. All the methods of abortion practised in 1967 required the continuous presence of a doctor during the abortion process. By the end of the 1970s, other methods became available which required the presence of a doctor only to start and finish the process. By a majority, the House of Lords ruled that the new medical procedure, though unforeseen in 1967, fell within the purpose of the Act to provide safe abortions and was lawful under the Act.

- 1.28** A third problem arises where the legislator does foresee a problem, but deliberately leaves it unresolved. For example, s 2(4) European Communities Act 1972 provides that ‘any enactment passed or to be passed. . . shall be construed and have effect’ subject to the provisions of European Community law. This wording does not clearly state what is to happen when a subsequent statute does not comply with EU law. The courts were left to resolve the issue when it arose in the *Factortame* case⁵³ when the House of Lords disapplied the Merchant Shipping Act 1988 insofar as it breached EC law.
- 1.29** Finally, like all human institutions, the legislature makes mistakes. A classic example is *Adler v George*⁵⁴ in which s 3 Official Secrets Act 1920 made it an offence for a person to obstruct a member of Her Majesty’s forces ‘in the vicinity of’ a military base. In this case, protesters actually went *inside* an airforce base and obstructed aeroplanes involved in carrying nuclear weapons. When prosecuted, the protesters claimed that they were not ‘in the vicinity of’ the airbase, since they were actually inside. The Divisional Court upheld their conviction on the ground that it was obvious that the wording intended to prevent obstruction of the armed forces and the wording should be read as making it an offence to obstruct a member of Her Majesty’s forces ‘*in or in the vicinity of*’ a military base. The court was effectively altering the wording of the text to deal with the inaccurate use of words by the legislator. This is often described as a ‘rectifying interpretation’.
- 1.30** More commonly, the problem for a reader is not dealing with mistakes or unforeseen situations, but applying the apparently straightforward, general expressions used by the legislature to the complexity of actual situations. For instance, the concept of a ‘student’ is an everyday notion. In *Chief Adjudication Officer v Webber*,⁵⁵ the question was how this notion applied within Reg 61 of the Income

⁵² [1981] AC 800. See also *R v Ireland* [1998] AC 147 where it was held that a telephone call could amount to an assault within the Offences Against the Person Act 1861, even though telephones had not been invented at the time.

⁵³ See para 1.08.

⁵⁴ [1964] 2 QB 7; see also, *McMonagle v Westminster City Council* [1990] 2 AC 716 where words in s 12(4) of the Greater London Council (General Powers) Act 1986 were ignored as ‘surplusage’.

⁵⁵ [1998] 1 WLR 625, CA.

Support (General) Regulations 1987 which provided that a person is to be treated as a 'student' from the beginning of a full-time course until its last day, including vacations. The Court of Appeal held that this definition did not apply to a person who had failed some of the modules on his full-time course and had to re-sit them as a part-time student.

(2) *What are Judges Trying to Find Out?*

(a) The 'intention of Parliament'

Statutes express the purposes that legislators are trying to achieve, and judges defer to these. Judges do not try to achieve simply what *they* think would be right or socially desirable, but they try to see how the words of the legislation can be made to achieve the purposes of the legislator. Judges often describe this task as attempting to find 'the intention of Parliament' or 'the intention of the legislature' and then carrying it out. This way of talking gives the impression that there exists somewhere outside the text the expression of 'the intention of Parliament' which judges have to find. But this is a misleading impression. As Lord Reid put it: **1.31**

We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said.⁵⁶

That passage may appear cryptic, but it contains an important point. The courts are not concerned with the subjective opinions of those who made the statute, but are concerned with the objective meaning of the words used read in the context of the materials which the audience for the text is expected to use.

It is obvious that it is actually difficult to identify the appropriate individuals whose opinions might be said to constitute 'the intention of Parliament'.⁵⁷ A government bill is typically the product of a long policy-making process that has involved ministers, civil servants, and outside organizations, as well as political parties. Once the policy is formulated, the text is drafted by a professional lawyer, the parliamentary counsel, and approved by the relevant Cabinet committee. Within Parliament, it is examined by the House of Commons and the House of Lords, in debates in the whole House and in a small committee. An Act is not the product of the intention of a single person, but of a legal and political process. When judges talk of 'the intention of Parliament', they are saying that the text of an Act has to be understood as the product of that process. **1.32**

⁵⁶ *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 613; see now also *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349, 397 *per* Lord Nicholls.

⁵⁷ DN MacCormick and RS Summers, *Interpreting Statutes* (1991), 522–525.

- 1.33** The reader of the text does not read it in isolation. He will start with some broad understanding of what the legislation was meant to achieve derived from common knowledge. The reader will also be able to fit the text into the pattern of legislation in that field. But even when a court refers to parliamentary debates, this does not make the meaning of the text just depend on what a particular minister said. In *Pepper v Hart*,⁵⁸ the House of Lords decided to reverse its previous rule of long-standing and to allow judges to consult *Hansard* in interpreting Acts of Parliament. But Lord Oliver started from the premise that ‘a statute is, after all, the formal and complete intimation to the citizen of the particular rule of law which he is enjoined. . . to obey and by which he is both expected and entitled to regulate his conduct’. Thus, the permission to consult *Hansard* ‘can only apply where the expression of the legislative intention is genuinely ambiguous or obscure or where a literal or *prima facie* construction leads to a manifest absurdity and where the difficulty can be resolved by a clear statement to the matter in issue’.⁵⁹ In such situations, the reader is put on notice by the ambiguity or obscurity of the text or the potential absurdity of a literal interpretation that he needs to look further in order to find an appropriate solution. But where the text is clear, no such enquiry is needed. Furthermore, the reader need bother only with those passages which provide clear solutions.

(b) Purposive construction

- 1.34** In order to explain their approach, English judges talk not so much about finding the ‘intention of Parliament’, but rather of the ‘purpose of the legislation’. The Law Commission in 1969 suggested in its draft Interpretation of Statutes Bill that ‘a construction which could promote the general legislative purpose underlying the provision in question is to be preferred to a construction which would not.’⁶⁰ Unlike a literal approach, the courts were to ensure that the words of a provision carried out the objective of the statute, as could be interpreted from the text and other permitted materials. As Lord Griffiths said in *Pepper v Hart*:⁶¹

The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose

⁵⁸ [1993] AC 593. See paras 1.48–1.50.

⁵⁹ *ibid* at 620; this view, concerning when the permission to consult *Hansard* applies, is confirmed in *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349, 391, 399 and 413. Lord Hope was alone in suggesting (*ibid* 407–8) that *Hansard* may be consulted to clarify the meaning of the enacted text, but not the purpose of the legislation.

⁶⁰ Law Commission, *The Interpretation of Statutes* (Law Com 21; 1969), clause 2 (a). ‘Purposive construction’ has replaced earlier approaches to interpretation of a similar kind notably the ‘golden rule’ and the ‘mischief rule’: for these see *Cross on Statutory Interpretation*, ch 1.

⁶¹ [1993] AC at 617.

of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.

Similarly, Lord Nicholls has remarked that:

linguistic arguments. . . should be handled warily. They are a legitimate and useful aid in statutory interpretation, but they are no more than this. . . [B]efore reaching a final decision, . . . one should stand back and view a suggested interpretation in the wider context of the scheme and purpose of the Act.⁶²

That said, Laws LJ has doubted whether it is right to suggest that there has been a radical departure from a literal approach by the adoption of the purposive approach. The difference is really one of degree, and a balance has to be struck between the literal meaning of the words used and the purpose of the legislation.⁶³

The courts still recognize that there are limits to how far the meaning of words used in a text can be strained in order to achieve a satisfactory outcome to a case. *Cutter v Eagle Star Insurance Co Ltd*⁶⁴ concerned the liability of insurance companies under s 151 of the Road Traffic Act 1988 to pay for injuries caused to third parties by 'the use of a vehicle on the road'. The question arose whether a car park was a 'road' within s 145 of the Act. Elsewhere in the Act the phrase 'a road or any public place' was used. A car park could not be included within the meaning of the word 'road' in s 145, but elsewhere could be included in the concept of a 'public place'. Consistency of terminology suggested a narrower meaning for 'road', even if this resulted in the absence of compensation for third parties injured by vehicles in a car park.⁶⁵ There was an important limit to the acceptable scope for interpretation, even if the outcome did not benefit the accident victim. **1.35**

(c) European teleological approaches

European influences on interpretation are important. British judges interpret and apply European Union law or the European Convention on Human Rights as part of the ordinary law of the land. But some differences of approach are required. First, an emphasis on the literal interpretation of words in, for example, a directive, is inappropriate. Such an enactment is produced in multiple languages and so a precise meaning in English may appear less precise in another authentic language.⁶⁶ It is not always appropriate to give weight to the choice of particular vocabulary in such a multi-lingual environment.⁶⁷ Secondly, legislative history is **1.36**

⁶² *Associated Dairies Ltd v Baines* [1997] AC 524 at 532.

⁶³ *Ashworth (Oliver) (Holdings) Ltd v Ballard (Kent) Ltd* [1999] 2 All ER 791, 805.

⁶⁴ [1998] 1 WLR 1647.

⁶⁵ Lord Clyde at [1998] 1 WLR at 1655.

⁶⁶ Eg *Customs & Excise Commrs v Bell Concord Educational Trust Ltd* [1990] QB 1040.

⁶⁷ See Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135; Case 283/81 *CILFIT v Minister of Health* [1982] ECR 3415 at 3430, paras 18 and 19.

more complex and less clear. In the European Union, a number of different organs may be involved in the making of legislation—not only the Commission, the Council of Ministers and the Parliament, but possibly also the Economic and Social Committee and the Committee of the Regions. Some of these give reasoned opinions, but the Council of Ministers does not. In the case of the EU Treaties, the preparatory works are incomplete. Thirdly, the complexity of the legislative process in the EU or of the renegotiation of the EU and ECHR treaties, means that it is not possible for a court simply to identify a problem with the existing state of the law and to expect the legislator to correct it. Unlike in the domestic context where the legislator can take prompt action to correct the law, there is more pressure on the courts in the European contexts to adopt a flexible interpretation of the law in order to remedy deficiencies in the drafting of the law. This situation leads to two features of what is known as the *teleological approach* to interpretation.

- 1.37** The first feature is that the court seeks to define for itself the purpose (*telos*) of the enactment in question. A classic example of this is *Van Gend en Loos*⁶⁸ in which the European Court of Justice was faced by an action by a company against a state authority arguing that Dutch customs legislation violated the EEC treaty. The treaty did not expressly provide that it created rights which individuals (as opposed to states) could enforce. The European Court of Justice nevertheless considered that the ‘objective of the EEC Treaty’ was more than an agreement between states and created rights which were part of an individual’s heritage. This purpose was discovered by the Court reading the scheme of the Treaty as a whole, and offering an interpretation of its objective which made sense of what the Court thought the Treaty was trying to achieve, even though this was not identifiable in what had been said by the treaty-makers. The second feature is that the court should seek to interpret the text, as far as possible, to achieve the purpose thus identified. Thus, in *Case C-106/89, Marleasing SA v La Comercial Internacional de Alimentación SA*,⁶⁹ the European Court of Justice stated that ‘in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and purpose of the directive in order to achieve the result pursued by the latter’. In that case, it was held that a Spanish court was required to interpret restrictively long established provisions in the Civil Code of 1889 in order to give effect to a directive which had yet to be implemented in Spanish law, and even though the directive did not have direct effect. But in *Cutter v Eagle Star*,⁷⁰

⁶⁸ Case 26/62, *Van Gend en Loos NV v Nederlandse Tariefkommissie* [1963] ECR 1.

⁶⁹ [1990] ECR I-4135, [1992] 1 CMLR 305.

⁷⁰ [1998] 1 WLR at 1656.

Lord Clyde remarked that fidelity to *Marleasing* could not force a construction beyond what is reasonable:

The adoption of a construction which departs boldly from the ordinary meaning of the language of the statute is... particularly appropriate where the validity of legislation has to be tested against the provisions of European law. In that context it is proper to strain to give effect to the design and purpose behind the legislation, and to give weight to the spirit rather than the letter... But even in this context, the exercise must still be one of construction and it should not exceed the limits of what is reasonable.

Similarly, section 3 (1) of the Human Rights Act provides that ‘so far as it is possible to do so’ primary legislation and subordinate legislation must be interpreted to be compatible with the Convention rights. **1.38**

The role assigned to the court as interpreter by the European teleological approaches is more active than would be acceptable in domestic law. In domestic law, the sources of information about the purpose of legislation are more focused and public, and the legislator is available to reform the law. There is thus a difference in emphasis between the purposive approach to the interpretation of domestic law and the teleological approach to the interpretation of European laws. The rest of this section of the chapter examines the interpretation of domestic law. **1.39**

(3) *Where do Judges Look?*

(a) Basic rules

Cross⁷¹ sets out as the first two rules of statutory interpretation: **1.40**

1. The judge must give effect to the grammatical and ordinary or, where appropriate, the technical meaning of words in the general context of the statute; he must also determine the extent of general words with reference to that context.
2. If the judge considers that the application of the words in their grammatical and ordinary sense would produce a result which is contrary to the purpose of the statute, he may apply them in any secondary meaning they are capable of bearing.

The starting point for interpretation must be that a statute has been drafted by skilled people and that the words have been carefully chosen to convey their intended meaning. The intended reader should thus be able to understand what the text is meant to say from ordinary meaning of words in the context of the statute. Only where the apparent result seems to contradict the apparent purpose of

⁷¹ Cross on Statutory Interpretation, 49.

the statute is the reader put on alert that he should look for a secondary or less obvious meaning.

(i) *Ordinary meaning depends on context*

- 1.41** All words take their meaning from the context in which they are used. The point was clearly stated by Butler-Sloss LJ in *Re C and another(minors) (parent: residence order)*⁷² where she noted that even a simple word like ‘parent’ has different ordinary meanings:

The term ‘parent’ must be given its natural and ordinary meaning. It does not follow, however, that that meaning will always include the natural parents. The natural and ordinary meaning of a word is not fixed but changes according to the context in which a word is used. Thus the meaning of ‘parent’ in a school prospectus will include a person with de facto parental responsibility even if not a natural parent, but exclude a natural parent who has no contact with the child. On the other hand, the meaning of ‘parent’ in a work on genetics will be the biological parents, including a father who has no more connection than the initial act of fertilisation. The question is therefore whether the natural and ordinary meaning of a ‘parent’ in the Children Act 1989 can include a natural parent whose child has been freed for adoption.

Her conclusion, and that of the Court of Appeal, was that a natural father did not qualify as a ‘parent’ under s 10(4)(a) of the Act once a court had ordered that the child be freed for adoption. Therefore he was not entitled to apply to the court for a residence order in respect of the child.

(ii) *Identifying the appropriate context*

- 1.42** The context for a provision in a statute is found both within the text itself (eg its title, other provisions, side-notes)⁷³ and outside the text (eg other statutes on the same subject, general principles of the common law, and policies stated by the courts or the legislature in relation to this area of the law). The reader of any document is expected to read the whole of it and to fit one provision into the scheme of the text as a whole. For example, in *Cutter v Eagle Star*, the exclusion of a car park from the meaning of ‘road’ in s 145 was strongly influenced by the use of the phrase ‘road or other public place’ in other sections of the Road Traffic Act 1988.⁷⁴
- 1.43** In terms of matters outside the text, a reader is expected to be aware of the ‘obvious’ purpose of the statute to be derived from knowledge of the rest of the law in the area, or as Lord Denning once remarked ‘matters generally known to

⁷² [1994] Fam 1 at 7. On linguistic rules of interpretation, see *Cross on Statutory Interpretation*, 134–41.

⁷³ On the need to interpret a provision in the context of the text as a whole see *Att-Gen v Prince Ernest Augustus of Hanover* [1957] AC 436 at 461 *per* Viscount Simonds.

⁷⁴ [1998] 1 WLR 1647.

well-informed people'.⁷⁵ In most cases, the court will look no further to determine the purpose of the statute. For example, *Mandla v Dowell Lee*⁷⁶ concerned the interpretation of the word 'ethnic' in the definition of a racial group against whom discrimination was not lawful under s 1(1)(b) of the Race Relations Act 1976. Both the House of Lords and the Court of Appeal relied on general knowledge about the purpose of the Act, but reached different conclusions about its scope and, as a consequence, whether the term 'ethnic' applied to discrimination against Sikhs.

Readers are also expected to be familiar with other statutes on the same subject matter. For example, in *Re C*,⁷⁷ the Court of Appeal referred to the Adoption Act 1976 in order to support its interpretation of the Children Act 1989. The context of consolidating legislation may include the context in which the original legislation was enacted.⁷⁸ In addition, readers are expected to know the common law relevant to the area in question. The legislator cannot be expected to include reference to all the principles of the common law which it expects to be applied, and so they are left unstated.⁷⁹ Government announcements or delegated legislation which are contemporaneous with the enactment of the legislation may provide assistance in understanding an Act of Parliament, but this is not always reliable since it reflects the views of the government, not Parliament.⁸⁰ **1.44**

(iii) *Technical meaning*

In many fields, words have a technical meaning among the specialists who are expected to be the principal audience of the legislation. For example, the term 'download' is a technical term in computing and is interpreted according to usage in the field.⁸¹ By contrast, a term such as 'miscarriage of justice' may have a popular meaning, but no technical legal meaning.⁸² **1.45**

⁷⁵ *Escoigne Properties Ltd v IRC* [1958] AC 549 at 566. Cf Lord Fraser in *Mandla v Dowell Lee* [1983] 2 AC at 562: 'the ordinary experience of those who read newspapers at the present day'.

⁷⁶ [1983] 2 AC 548; [1983] QB 1. For an explanation of how parliamentary history might have helped in this case, see St John A Robilliard, [1983] PL 348.

⁷⁷ [1994] Fam 1.

⁷⁸ See *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349, 388, but cf Lord Nicholls at 399.

⁷⁹ Eg the principle that 'no person can profit from her own wrong': see *R v Chief National Insurance Commr, ex p Connor* [1981] QB 758, see para 1.22.

⁸⁰ *Hanlon v Law Society* [1981] AC 124.

⁸¹ See *R v City of London Magistrates' Court, ex p Green* [1997] 3 All ER 551, DC. But words are not always used in a technical sense: cf *Re K (deceased)* [1986] Ch 180, CA.

⁸² *R (on the application of Mullen) v Secretary of State for the Home Department* [2005] 1 AC 1; [2004] UKHL 18 at [9] per Lord Bingham.

(iv) *Secondary meaning*

- 1.46** A secondary meaning is simply a less usual meaning. Such a meaning is adopted where a simple, ordinary meaning would not achieve the purpose of the legislation. For example, in *Wills v Bowley*,⁸³ s 28 of the Town Police Clauses Act 1847 provided that a police officer 'shall take into custody, without warrant, and forthwith convey before a justice, any person who within his view *commits*' any of a list of offences. The appellant claimed that, since magistrates had found that she was not guilty of using obscene language in a street 'to the annoyance of passengers' contrary to s 28, her arrest by police officers under that section was unlawful and so she could not be convicted of assaulting police officers in the execution of their duty. At first sight, the lawfulness of an arrest under s 28 appears to be limited to situations where a person actually 'commits' an offence. Nevertheless, by a majority, the House of Lords held that the wording authorized an arrest where a police officer honestly believed that a person had been committing an offence within his view. The Act was one of a family of statutes permitting the arrest of people caught in the act of committing an offence, and these statutes usually authorized arrest without warrant upon reasonable suspicion that an offence was being committed. A secondary, more extended meaning of 'commits' was necessary to ensure similarly effective police powers under s 28.

(4) *Research to Discover the Purpose*

- 1.47** In most situations, it is sufficient for a judge or lawyer to rely on ordinary language and 'common sense' knowledge in order to determine the purpose and meaning of a statutory provision. But there are always situations in which some more careful research is needed. English law is much more explicit than most legal systems in specifying which sources may be used and to what extent. In the past there was a significant reluctance to enter into wide ranging research into the history of legislative provisions, especially Parliamentary debates. The three concerns remain accessibility, reliability and cost. *Accessibility* is important since, as Lord Diplock expressed it, 'the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible'.⁸⁴ This still leads to concern about the permissibility of preparatory works for some treaties. *Reliability* is more of a problem. For example, members of both Houses of Parliament make many statements during the months in which a bill goes through its various stages. It is often difficult to establish how far a single statement represents the considered views of either the promoters of a

⁸³ [1983] 1 AC 57.

⁸⁴ *Fothergill v Monarch Airlines* [1981] AC 251 at 279.

bill or its supporters. The *cost* of detailed research outside the legislative text has become less of a concern in recent years. But, despite the quality of published commentaries and annotations, a thorough search outside a statute requires time from skilled people and raises the cost of advice or litigation.

In the leading case of *Pepper v Hart*,⁸⁵ the House of Lords produced a rule that attempts to meet these concerns while ensuring that the purpose of an enactment is faithfully carried out. Whereas in the past, parliamentary debates published in *Hansard* had been considered inadmissible, the House permitted it, but subject to a number of constraints. Lord Browne-Wilkinson stated that *Hansard* could be referred to where: 1.48

- (a) Legislation is ambiguous or obscure or leads to an absurdity;
- (b) The material relied upon consists of one or more statements by a Minister or other promoter of the Bill together with such other Parliamentary material as is necessary to understand such statements and their effect;
- (c) The statements relied upon are clear.⁸⁶

The rule focuses on the necessity to engage in research, the authority of the person making the statement, and the utility of the product of research. Researches into the history of legislation remain exceptional. Even if the lawyers have conducted such researches, they cannot be debated among the lawyers in court unless the researches have produced answers that are authoritative (ie made by the minister or promoter) and are clear in providing an answer to the question of interpretation at issue. Other researches are conducted at the risk of the parties in preparing a case for trial, but need not prolong the hearing. For example, if the material which counsel wishes to present is not clear, then it cannot be used in court.⁸⁷ The justification for such a restricted approach remains legal certainty.⁸⁸

Although it is permissible to look at the minister's views as promoter of a bill, it is not permissible to use statements in *Hansard* about the legal meaning of an Act made by a minister after it has been passed.⁸⁹ It is permissible to use official guidance or the publication of implementing delegated legislation which are part of the scheme of the Act as a whole and are roughly contemporaneous with the Act.⁹⁰ 1.49

⁸⁵ [1993] AC 593. See J Steyn, 'Pepper v Hart: A Re-examination' (2001) 21 *OJLS* 59; S Vogenauer, 'A Retreat from *Pepper v Hart*: A Reply to Lord Steyn' (2005) 25 *OJLS* 624.

⁸⁶ [1993] AC 593 at 640.

⁸⁷ *Melluish (Inspector of Taxes) v BMI (No 3)* [1996] AC 454 at 481–2.

⁸⁸ See the quotation from Lord Oliver, para 1.33; see also *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349.

⁸⁹ *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862 at 898 per Knox J.

⁹⁰ See Lord Lowry, *Hanlon v Law Society* [1981] AC 124 at 193–4; Lord Browne-Wilkinson, *Deposit Protection Board v Dalia* [1994] 2 All ER 577 at 585; Lord Bridge, *Nottinghamshire CC v Secretary of State for the Environment* [1986] AC 240 at 264.

(5) Sources which may be Consulted

- 1.50** In the light of *Pepper v Hart*, the rules on sources are more liberal than before 1992. That case concerns the intention of the legislator expressed in the legislative process. But in many cases, Parliament is passing legislation to give effect to ideas generated by someone else either when a treaty has been signed, when a committee report makes a recommendation for legislation, or where European legislation is to be implemented.

(a) Treaties

- 1.51** In English law, a treaty signed by the government does not become law until it is enacted by Parliament. Frequently, the text of the treaty is set out in a schedule to the Act, for example Schedule 1 of the Human Rights Act 1998 contains the text of the European Convention on Human Rights and Fundamental Freedoms of 1950, but this is not essential. In interpreting the English statute, the courts try to ensure that it is construed as far as possible in a way that is consistent with the original treaty.⁹¹ To this end, an English lawyer may have to refer either to the text of the treaty or to the preparatory works (*travaux préparatoires*) which preceded its signature where the words of the statute are ambiguous or unclear.⁹² The rule on the use of preparatory works (*travaux préparatoires*) for treaties was laid down by Lord Diplock in *Fothergill v Monarch Airlines Ltd.*⁹³

I think that it would be proper for us. . .to recognise that there may be cases where *travaux préparatoires* can profitably be used. These cases should be rare, and only where two conditions are fulfilled, first that the material involved is public and accessible, and secondly, that the *travaux préparatoires* clearly and indisputably point to a definitive legislative interpretation.

A treaty is negotiated in private and so it is important that the materials which are relied upon in interpreting them are in the public domain.

- 1.52** The authentic text of a treaty may be in several languages, and so these may need to be compared. For example, *Buchanan & Co Ltd v Babco & Co Ltd*,⁹⁴ the House of Lords sought support for its interpretation by reference to the French language text of the Convention on the Contract for the International Carriage of Goods by Road when applying the Carriage of Goods by Road Act 1965.
- 1.53** A further principle in relation to treaties is that the interpretation given in the United Kingdom should be similar to that in other signatory states. As Lord

⁹¹ See *A-G v BBC* [1981] AC 303 at 354 *per* Lord Scarman.

⁹² *Quazi v Quazi* [1980] AC 744 at 808 *per* Lord Diplock.

⁹³ [1981] AC 251, 278.

⁹⁴ [1978] AC 141. Similarly in *Fothergill v Monarch Airlines Ltd* [1981] AC 251 the French language version of a treaty was used to interpret the Carriage by Air Act 1961 which gave effect to it.

Browne-Wilkinson put it, 'An international convention, expressed in different languages and intended to apply to a wide range of different legal systems, cannot be construed differently in different jurisdictions. The convention must have the same meaning and effect under the laws of all contracting states.'⁹⁵ As a result, in that case the term 'acquiescence' used in the treaty enacted by the Child Abduction and Custody Act 1985 was not to be interpreted in accordance with the special rules of English law.

(b) Committee reports

Much legislation is passed as a result of the recommendations of a committee independent of government, such as a Royal Commission or the Law Commission. The reports of these bodies are an important and influential guide to the purpose of the legislation and, especially where they produce a draft bill, to the meaning of the Act itself. In *Anderton v Ryan*,⁹⁶ the House of Lords had held that a person could not attempt to commit an offence by an action which was objectively innocent, for example by selling a tape recorder thinking (wrongly) that it had been stolen. But in *R v Shivpuri*,⁹⁷ the House of Lords overruled this interpretation once it had read the report of the Criminal Law Revision Committee which led to the Criminal Attempts Act 1981. **1.54**

(c) European legislation

European laws, especially directives, lead to much English legislation. The interpretation of the English law may therefore require analysis of the original European legislation. To interpret the European legislation correctly, it may be necessary to refer to the views of the various EU organs which have been involved in its enactment. For example, in *Three Rivers DC v Bank of England (No 2)*,⁹⁸ the Court of Appeal referred to the opinion of the Economic and Social Committee on the Banking Directive which had been implemented through the Banking Act 1979 in order to decide whether the Bank of England was entitled to immunity. **1.55**

A second feature is that the authentic text of EC legislation exists in several languages. As with treaties a comparison of the text in the different languages may aid interpretation.⁹⁹ **1.56**

⁹⁵ *Re H and others (Minors) (Abduction: Acquiescence)* [1998] AC 72 at 87.

⁹⁶ [1985] AC 560.

⁹⁷ [1987] AC 1.

⁹⁸ [1996] 2 All ER 363 at 366. There was no appeal in relation to this point: see [2003] 2 AC 1; [2001] UKHL 16 at [10].

⁹⁹ Eg *Customs & Excise Commrs. v Bell Concord Educational Trust Ltd* [1990] QB 1040 (comparison of English and French language versions of a directive).

(6) *Presumptions of Interpretation*

1.57 However detailed the text of a statute, there many things that have to be left unsaid. When in doubt, the courts have long resorted to presumptions about what Parliament intended. Some presumptions adopted relate to the way the text is written. For example, it is presumed that a word is used with the same meaning in different parts of the text, unless the contrary is explicitly provided. Other presumptions relate to the values which Parliament is assumed to uphold. Traditionally, these values are said to include:

- (1) the strict construction of penal statutes (ie those imposing a penalty)
- (2) that Parliament does not intend to interfere with individual liberty (eg in granting powers of arrest or detention)
- (3) that Parliament does not intend to deprive people of their property rights
- (4) that a tax legislation should be strictly interpreted
- (5) that the jurisdiction of the courts should not be ousted.¹⁰⁰

In broad terms, they are the values of protecting life, liberty and property established by the 1688 Revolution. It has been suggested that these values are no longer predominant, and that the courts simply adopt the solution which public policy requires and which seems to accord most closely with the purpose of the legislation.¹⁰¹ In any case, wider access to the parliamentary record of proceedings reduces the need to presume what Parliament intended.

1.58 But with the Human Rights Act 1998, discussed in para 1.38, a more modern statement of values has been provided. Section 3(1) of the 1998 Act requires that the courts construe provisions of domestic legislation consistently with the Convention rights and these have thus become the modern test of values which Parliament is presumed to intend, which is more extensive than the list set out in para 1.57. The European Convention is likely to be the more usual point of reference on fundamental values to which judges will refer when interpreting UK legislation.

1.59 There remains a general presumption against unclear changes in the law at least in so far as these affect vested rights.¹⁰² But in most cases, the courts will be able to

¹⁰⁰ See further *Cross on Statutory Interpretation*, ch 7.

¹⁰¹ For example, for criticism in relation to the presumption in favour of the strict construction of penal statutes, see JC Smith, *Codification of the Criminal Law* (Child & Co Lecture, 1986), 9; G Williams, 'Statutory interpretation, prostitution and the rule of law' in CFH Tapper (ed), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (1981), 72; Law Commission, *Criminal Law: A Criminal Code for England and Wales* (Law Com no 177, 1989) para 3.17.

¹⁰² *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 614 *per* Lord Reid.

resolve the ambiguity by means of a purposive construction without application of the presumption.¹⁰³

The presumption against retrospective application is of greater importance in practice and is found in art 7(1) of the European Convention on Human Rights in relation to the specific area of criminal penalties. The current approach of the courts is to ask first whether, in the absence of inescapably clear words to indicate that a provision is to be applied retrospectively, it would be unfair to apply it in this way. Second, if they conclude that it would be unfair, the presumption is applied unless it is rebutted by clear words of necessary implication. The greater the unfairness which would result, the clearer the words of the statute have to be that establish the retrospective effect of the relevant provision.¹⁰⁴ **1.60**

D. Precedent

Precedent is a method making decisions in individual cases in the light of legal principle exemplified in previous cases which is the distinguishing feature of case law as opposed to statute-driven legal development: **1.61**

The method of statute requires the use of reason to work out a large plan in advance; the method of precedent applies critical intelligence to reasoning out the best new decision in the light of the prior ones, in the light of what is special about the case in hand, and in the light of the need to maintain a coherent principles body of law.¹⁰⁵

(1) What is 'Precedent'?

In English law, the concept of 'precedent' covers two ideas that are closely connected. In the broad sense, precedent involves treating previous judicial decisions as authoritative statements of the law which can serve as good legal reasons for subsequent decisions. In the narrow sense, precedent (often described as *stare decisis*) requires judges in specific courts to treat certain previous decisions, notably of superior courts, as a binding reason. In this sense, the precedent offers a sufficient reason for his decision. **1.62**

¹⁰³ See eg *Chief Adjudication Officer v Maguire* [1999] 2 All ER 859, CA; *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* [1999] 2 All ER 791; *Cross on Statutory Interpretation*, 167–70.

¹⁰⁴ Staughton LJ, *Secretary of State for Social Security v Tunncliffe* [1991] 2 All ER 712 at 714, dictum approved in *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486 at 525. For clear examples, see *Plewa v Chief Adjudication Officer* [1995] 1 AC 249; *Bairstow v Queens Moat Houses plc* [1998] 1 All ER 343, CA.

¹⁰⁵ DN McCormick and RS Summers, *Interpreting Precedent* (1997), 5.

- 1.63** The broader sense of ‘precedent’ requires a lawyer to base a legal argument on the available and relevant decisions of previous judges, even when his argument is trying to take the law in a new direction or to depart from its previous direction. In any legal system, as a matter of prudence, lawyers should consult previous decisions to discover possible legal arguments and find out whether they have been successful. But the doctrine of precedent entails that precedent decisions are not merely a source of knowledge about law, but that they are an *authoritative statement of the law*. Where a rule declared in a decision does not accord with principle, judges are likely to distinguish it or otherwise reduce the scope of the rule. To that extent, a single decision will only carry weight if it can be understood to rest upon justifying grounds.¹⁰⁶
- 1.64** In a narrow sense, English law equates the doctrine of precedent with the doctrine of *stare decisis*. Cross and Harris define the English doctrine of precedent as follows: ‘Every court is bound to follow any case decided by a court about it in the hierarchy, an appellate courts (other than the House of Lords) are bound by their previous decisions.’¹⁰⁷ But they recognize that this formulation is too narrow and does not exclude the broader sense of precedent discussed in para 1.63:

It does not indicate that only certain aspects of a previous case, called the *ratio decidendi*, are binding, and it does not refer to the existence of important exceptions to the rule of *stare decisis*. . . it must not be forgotten that the rules of precedent are subsidiary to, and far less important than, the obligation of judges to consider case-law.¹⁰⁸

(2) What does ‘Precedent’ Involve?

- 1.65** In most countries, even where precedent is not a formally recognized source of law, lawyers and judges typically cite previous judicial decisions to justify an argument, although this does not always appear from published judgments.¹⁰⁹ Such citation demonstrates that a particular argument fits coherently with the rest of the law. But the English doctrine of precedent goes further and insists that previous decisions are a source to which lawyers *must* refer. Such authoritative statements can have different kinds of weight. A previous case could simply be *persuasive*, ie the previous decision provides an argument in favour of a particular solution by showing it would be consistent with how courts have acted in the past, but the argument can be outweighed by other arguments. The English doctrine of precedent, however, involves treating some judicial decisions not simply as weighty

¹⁰⁶ MacCormick and Summers, *Interpreting Precedent*, 541.

¹⁰⁷ R Cross and JW Harris, *Precedent in English Law* (4th edn, 1991), 6.

¹⁰⁸ *ibid* 6–7.

¹⁰⁹ See DN MacCormick and RS Summers, *Interpreting Precedent*. In England, tribunals will commonly cite decisions of other tribunals: J Farmer, *Tribunals and Government* (1974), ch 7.

arguments, but as *binding* statements of the law. In such a case they offer reasons which justify ignoring the countervailing substantive arguments in favour of any alternative decision.¹¹⁰ For example, in *Smith v Gardner Merchant Ltd*,¹¹¹ the Court of Appeal simply applied previous case law of the Court of Appeal and the European Court of Justice that discrimination ‘on grounds of sex’ did not include discrimination on the ground of sexual orientation.

(3) What Constitutes a ‘Precedent’?

The discursive character of English judgments makes it more difficult to identify clearly the rule on which a decision is based compared, for example, with a decision of the European Court of Justice. The latter’s single judgment lays down in short, numbered paragraphs the formulation of a rule to be applied. By contrast, members of an English appellate court may well give several long judgments which do not clearly identify a single specific passage as central to the decision in the case. **1.66**

A precedent is a ruling on a point of law that is laid down in a judicial decision as the justification for the outcome which is reached in that case. Neil MacCormick offers the following definition: **1.67**

A ratio decidendi is a ruling expressly or impliedly given by a judge which is sufficient to settle a point of law put in issue by the parties’ arguments in a case, being a point on which a ruling was necessary to his justification (or one of his alternative justifications) of the decision in the case.¹¹²

There are thus four elements that make a precedent: (i) a ruling on a point of law; (ii) expressly or impliedly given by a judge; (iii) related to an issue raised by the arguments of the parties; and (iv) which is necessary as a justification for the decision reached.

(a) A ruling on a point of law

Most of the issues litigated in court are not questions of law, but questions of fact. For example, if a pedestrian is injured as a result of being knocked down by a car and sues the driver, several questions of fact might be disputed—was the driver exceeding the speed limit? did the pedestrian look before crossing the road? was the road well lit? Decisions on such points, though important to the parties, are **1.68**

¹¹⁰ J Raz describes these as ‘exclusionary reasons’ for decisions: *Practical Reason and Norms* (1975), 35–39.

¹¹¹ [1998] 3 All ER 852, following *R v Ministry of Defence, ex p Smith* [1996] QB 517, CA; Case C-249/96 *Grant v South West Trains* [1998] ICR 449, ECJ.

¹¹² N MacCormick, ‘Why Cases have Rationes and What These Are’ in L Goldstein (ed), *Precedent in Law* (1987), 170.

not of general application and do not create precedents.¹¹³ By contrast, if the parties dispute whether a driver owes a duty to take care not to knock down a pedestrian, this is a matter of general application and is a question of law. The judge's decision on this point can create a precedent for similar decisions in the future. There may also be issues of classification. The parties may accept that there is a rule of law under which a driver owes a duty to take care not to knock down a pedestrian, but they may dispute the issue of whether exceeding the speed limit constitutes 'careless' driving. The judge's decision on this point is of general significance, but is narrow in scope. It does create a precedent, but only in relation to pedestrians injured by speeding.

(b) Expressly or impliedly given by a judge

- 1.69** MacCormick rightly points out that the ruling which is derived from the case may not be based on the words used by the judge, particularly when there are several judges. In the first place, the ruling on a point of law may be implicit, not explicit. For example, in *Spencer v Harding*¹¹⁴ an auctioneer issued a circular stating that they were selling stock by tender to be received on a particular day. The plaintiffs submitted the highest tender, but this was not accepted. Willes J stated:

If the circular has gone on, 'and we undertake to sell to the highest bidder', the reward cases would have applied, and there would have been a good contract in respect of the persons. But the question is, whether there is here any offer to enter into a contract at all, or whether the circular amounts to anything more than a mere proclamation that the defendants are ready to chaffer for the sale of goods. . . Here there is a total absence of any words to intimate that the highest bidder is to be the purchaser. It is a mere attempt to ascertain whether an offer can be obtained within such a margin as the sellers are willing to adopt.

There is no clear formulation of a rule that, unless there is a specific undertaking to sell to the highest bidder, an invitation to tender is not an offer. Any lawyer reading the judgment has to take account of the issues raised in the case and to reconstruct what the judge said into a ruling that can form the basis of future decisions.

- 1.70** A case is only authority for the issues raised and those are identified by what Goodhart has described as the 'material facts'.¹¹⁵ Any case relates to a whole series of facts. For example, in *Donoghue v Stevenson*,¹¹⁶ one woman bought a drink of ginger beer for a friend in a cafe. The friend alleged that she suffered gastroenteritis as a result of drinking some of it before she noticed a decomposed snail

¹¹³ The judge's decisions on these questions of fact do bind the parties and cannot be contested again except by way of appeal. This is the doctrine of *res judicata*.

¹¹⁴ (1870) LR 5 CP 561.

¹¹⁵ A Goodhart, *Essays in Jurisprudence and the Common Law* (1931), ch 1.

¹¹⁶ [1932] AC 562, HL.

that came out with the contents of the bottom of the bottle. Now, it did not matter that the cafe was in Paisley or that both the purchaser and the consumer of the drink were women. On the other hand, it did matter that the ginger beer bottle was opaque and not clear. As a result, neither the cafe owner, nor the purchaser, nor the ultimate consumer was able to spot the snail before the drink was partly consumed. This was the main reason why the manufacturer was held potentially liable, as is clear from Lord Atkin's formulation of the rule:

a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up the products will result in an injury to the customer's life or property, owes a duty to the consumer to take that reasonable care.¹¹⁷

Now Lord Atkin himself is famed for the formulation of a different rule that recasts the facts in a different way:

the rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable steps to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.¹¹⁸

Mrs Donoghue is here characterized as a 'consumer' or a 'neighbour' and the ginger beer becomes a 'product' or an 'act'. The discursive style of English judgments does not make it clear which of the formulations is the most important.

In one sense, the level of abstraction is set by what is necessary to decide the case. **1.71** MacCormick's formulation clearly points out that the binding legal ruling is related to the issues raised in the case. So, in *Donoghue*, it might be sufficient to say that the plaintiff was a consumer of a negligently manufactured product that was not capable of intermediate inspection or intervention before she suffered her alleged harm. But, any case also becomes re-interpreted over time as subsequent judges see how a particular decision fits into the rest of the law. For example, *Donoghue* was applied in a number of cases in the 1930s which did not fit the narrow formulation of the rule as one applying to manufacturers. In *Brown v Cotterill*¹¹⁹ it was applied to a case in which a recently erected tombstone fell and injured a child playing in a churchyard, even though there was neither a 'product' nor a 'consumer'. It was then applied to a person injured by the faulty repair

¹¹⁷ [1932] AC 562, 599.

¹¹⁸ [1932] AC 562, 580.

¹¹⁹ (1934) 51 TLR 21.

of a lift.¹²⁰ These subsequent applications broadened out the case to be closer to the principle encapsulated in the second quotation from Lord Atkin. On the other hand, there are other cases in which this broader formulation has been rejected as too wide. Thus, although it was foreseeable that a prostitute might be killed if the police carelessly failed to apprehend and detain the ‘Yorkshire Ripper’, the House of Lords held that the police owed no duty of care.¹²¹ Similarly, in *Murphy v Brentwood*,¹²² the House of Lords held that a local authority did not owe a duty of care to a subsequent purchaser to ensure builders constructed foundations in accordance with by-laws, even though it could foresee that such a person could suffer as a result.

- 1.72** MacCormick’s quotation is careful not to equate the ruling in a case with what the judge said. A good illustration of this is the case of *Mutual Life v Evatt*.¹²³ The House of Lords had laid down in *Hedley Byrne v Heller*¹²⁴ that a person could commit the tort if they undertook to offer advice in circumstances in which they knew it would be relied upon and, in the words of Lords Reid and Morris, they failed to take ‘such care as the circumstances require’. In the subsequent *Mutual Life* case, the majority of the Privy Council took the view that ‘this passage should, in their Lordships’ view, be understood as restricted to advisers who carry on the business or profession of giving advice of the kind sought’.¹²⁵ By contrast, the original authors of the passage under discussion dissented arguing ‘We are unable to construe the passages from our speeches cited in the judgment of the majority in the way they are there construed.’¹²⁶ The case illustrates that a subsequent judge is not trying to divine the intention of the earlier judge, but simply trying to give the best interpretation of the rule stated by the earlier judge consistent with both the issues argued in the case and the general law of which it is part.

(c) Related to an issue raised by the arguments of the parties

- 1.73** Case law decision-making takes place in the context of a particular dispute. The judge is faced by the arguments of the parties and does not address issues generally in the same way as the legislator. The ruling that he makes provides an answer in the light of the arguments raised. Future cases may well raise issues that did not occur to the original judge. On the other hand, the judge does not simply justify the decision in relation to the facts of the case. The judge offers a reason that would be applicable in a generalized way to other such situations. But the

¹²⁰ *Haseldine v Daw* [1941] 2 KB 343.

¹²¹ *Hill v Chief Constable of West Yorkshire* [1989] AC 53.

¹²² [1991] 1 AC 398.

¹²³ [1971] AC 793: see J Stone, *Precedent and Law* (1980), ch 9.

¹²⁴ [1964] AC 465.

¹²⁵ Lord Diplock, [1971] AC 793 at 807.

¹²⁶ Lords Reid and Morris, [1971] AC 793 at 813.

authority of a case is limited to the arguments raised.¹²⁷ It is this point which Goodhart addressed with his notion of ‘material facts’.

(d) Which is necessary as a justification for the decision reached:

ratio and obiter

English lawyers try to identify the ruling on a point of law which is necessary for the decision in the case, since this constitutes the binding part of the precedent. For this they draw a distinction between the *ratio decidendi* and a mere *obiter dictum* in the judgment. The *ratio decidendi* (‘the reason for deciding’) is that part of a decision which sets out the essential justification for the decision reached. Any other statement is an *obiter dictum* (‘a statement made in passing’). All the same, it is important to recognize that there are significant differences in the weight which attaches to *obiter dicta*. **1.74**

In some cases, there will be specific argument before the court on an issue. Even if a decision on this point is not necessary for the resolution of the case, out of deference to counsel, the court will make observations on the arguments made. Thus, in *Hedley Byrne v Heller*,¹²⁸ there was clear argument about the duty of care owed by the bank to the customer of the other bank. In the end, the customer lost because of a disclaimer issued by the bank tendering the advice. All the same, the House of Lords did make clear statements on the issue of the duty of care and these are treated effectively as the *ratio* of the case by subsequent judges. By contrast, where there has been little argument, then the statement is of less weight. **1.75**

Even though they are only *obiter*, statements made by certain judges of great repute carry particular weight—Lords Reid, Wilberforce and Diplock, and earlier judges such as Lord Atkin and Scrutton LJ. **1.76**

Long-standing opinions are less frequently overturned, even if they are not formally binding on a lower court. For instance, the doctrine of privity of contract was accepted in *Beswick v Beswick*,¹²⁹ even though it was not previously laid down by the House of Lords. **1.77**

¹²⁷ For example, in *Saif Ali v Sydney Mitchell (a firm)* [1978] AC 198, the House of Lords invited counsel to offer arguments why it should overrule its precedent in *Rondel v Worsley* [1969] 1 AC 191 which established the immunity of a barrister from being sued for the conduct of a case in court. The parties declined and so the House was unable to review the issue. *Rondel v Worsley* [1969] 1 AC 191 was overruled in a later case: see para 1.90.

¹²⁸ [1964] AC 465.

¹²⁹ [1968] AC 58; but cf *R v R (Marital Rape Exemption)* [1992] 1 AC 599.

(4) *Distinguishing*

1.78 In interpreting precedents, judges frequently use the technique of ‘distinguishing’ when they expressly do not wish to follow a precedent. Distinguishing treats the precedent as legally irrelevant to the case at hand. Raz has helpfully identified different forms of distinguishing:¹³⁰

There is what I shall call ‘the tame view’ of distinguishing according to which to distinguish a binding precedent is simply to determine that its ratio does not apply to the instant case. . . . As against this, there is another view of distinguishing according to which one distinguishes a rule by changing it so that a rule which did apply to the present case no longer applies to it in its modified form. . . . Distinguishing. . . is a very restricted form of law-making. It is subject to two crucial conditions:

- (1) The modified rule must be the rule laid down in the precedent restricted by the addition of a further condition for its application.
- (2) The modified rule must be such as to justify the order made in the precedent.

1.79 An illustration is *Blackpool and Fylde Aeroclub Ltd v Blackpool BC*¹³¹ in which an invitation to tender to provide pleasure flights from an airfield was issued by the Council with a deadline of 12 noon. The plaintiff’s tender letter was delivered by 11 am, but the postbox was not cleared by Council staff until after 12 noon, and so that tender was not considered by the Council, and the contract was awarded to someone else. In the precedent, *Spencer v Harding*,¹³² it had held that there was no liability on the part of an auctioneer for rejecting the lowest tender, since the invitation to tender was merely an invitation to treat. The tender itself was the offer which the auctioneer was free to accept or not. In the *Blackpool* case, that decision was distinguished on the ground that the invitation to tender here amounted at least to an implied promise to consider tenders made in due time, even if not to award the concession to the lowest of them. Now, the rule stated by the Court of Common Pleas was that, in the absence of any words to show that the highest bidder was to be the purchaser, an invitation to tender ‘is a mere attempt to ascertain whether an offer can be obtained within such a margin as the sellers are willing to adopt’ and does not provide the basis for contractual liability. In *Blackpool*, the Court of Appeal qualifies this rule by adding a further condition that the tender, delivered on time, has been duly considered. Thus the new rule is that, in the absence of an express undertaking to accept such a tender, a person inviting tenders is not liable for refusing to accept the lowest tender, provided he

¹³⁰ J Raz, *The Authority of Law* (1979), 185–6.

¹³¹ [1990] 1 WLR 1195.

¹³² See para 1.69.

has opened and considered the tender in conjunction with all other conforming tenders.¹³³

(5) *The Rules of Precedent in Particular Courts*

(a) European Court of Justice

Precedent operates in two significant ways in the law of the European Union. **1.80**
First, the ECJ itself respects its own previous decisions, though it is not bound by them. Secondly, lower courts ought to respect the judgments of the ECJ and this may justify them refusing to refer a case to the ECJ by application of the *acte clair* doctrine.

On the first point, it is clear that the ECJ does not always follow its previous decisions. In line with many continental European courts, it does not always cite its own precedents nor make it clear when it is departing from them.¹³⁴ For example, in *Plaumann*,¹³⁵ the Court at first considered that an act of an EC institution had to be annulled before damages could be claimed for the loss caused by that unlawful act. In *Lütticke*,¹³⁶ it then held that an action for damages was an independent action and so a prior action for annulment was not required. It then appeared to revert to the *Plaumann* view before confirming *Lütticke* in *Merkur*.¹³⁷ **1.81**

On the other hand, in *Da Costa en Schaake*, where no new arguments had been presented, the previous judgment of the ECJ on almost identical facts was restated and the parties were referred to it.¹³⁸ The Court stated that, although art 177 EEC (now art 234) appeared to create an unreserved obligation on national courts to refer questions of Community law to the ECJ, 'the authority of an interpretation under Article 177 already given by the Court may deprive the obligation of its purpose and thus empty it of its substance. Such is the case especially when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case'. It developed the point in *CILFIT*¹³⁹ in which it commented that national courts need not refer matters to the ECJ 'where previous decisions of the Court have already dealt with the point of law in question, irrespective of the proceedings which led to those decisions, even though the questions at issue are not identical'. The Court thereby in effect **1.82**

¹³³ Bingham LJ, [1990] 1 WLR 1195 at 1202.

¹³⁴ See Brown and Jacobs, *The European Court of Justice* (4th revised edn by LN Brown and T Kennedy, 1994) ch 16.

¹³⁵ Case 25/62, [1963] ECR 95.

¹³⁶ Case 4/69, [1971] ECR 325.

¹³⁷ Case 43/72, *Merkur* [1973] ECR 1055; cf Case 96/71 *Haegman* [1972] ECR 1005.

¹³⁸ Cases 28–30/62, *Da Costa en Schaake NV et al v Nederlandse Belastingadministratie* [1963] ECR 31.

¹³⁹ Case 283/81, *Srl CILFIT v Ministry of Health* [1982] ECR 3415.

initiated a system of precedent by declaring that its own decisions should be treated as authoritative. As a result of *CILFIT*, an English court has to treat as a precedent a decision rendered by the ECJ in relation to a case concerning another member state.¹⁴⁰

(b) House of Lords

(i) Lower courts are bound

1.83 Because the House of Lords is the highest court in the English legal system, lower courts must follow its decisions. The House of Lords reiterated this in two decisions in the 1970s, *Cassell v Broome*¹⁴¹ and *Miliangos v George Frank (Textiles) Ltd.*¹⁴² In the second decision, a precedent¹⁴³ had laid down that English courts could not give judgments in foreign currency. The House of Lords agreed with the Court of Appeal that this decision should be overruled as inappropriate in contemporary circumstances. Nevertheless, it stated that the Court of Appeal had no authority to decide that a precedent of the House of Lords was out of date. It should have simply applied the precedent and given leave to appeal to the House of Lords.

1.84 That obligation on lower courts is subject to two exceptions. The first of these is that a decision *per incuriam* is not binding. Lord Donaldson MR explained that:

the doctrine of *per incuriam* only applies where...[the court] has reached a decision in the absence of knowledge of a decision binding on it or a statute, and that in either case it must be shown that, had the court had this material, it *must* have reached a contrary decision. That is *per incuriam*. I do not understand the doctrine to extend to a case where, if different arguments had been placed before it, it *might* have reached a different conclusion.¹⁴⁴

For example, in *IM Properties plc v Cape & Dalglish (a firm)*,¹⁴⁵ the Court of Appeal refused to follow the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington London BC*.¹⁴⁶ In that case, the House of Lords had awarded interest on a debt owed under s 35A of the Supreme Court Act 1981

¹⁴⁰ See especially Case 66/80, *International Chemical Corporation v Amministrazione delle Finanze dello Stato* [1981] ECR I 191 on the duty of national courts in respect of the annulment of the acts of Community institutions. The *acte clair* doctrine takes this idea one step further by allowing national courts to refuse to refer a matter to the ECJ where 'the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved' (*CILFIT*, n 139 above).

¹⁴¹ [1972] AC 1027.

¹⁴² [1976] AC 433, commenting on [1975] QB 487 (CA).

¹⁴³ *Re United Railways of Havana* [1961] AC 1007.

¹⁴⁴ *Duke v Reliance Systems Ltd* [1988] AC 618.

¹⁴⁵ [1999] QB 297, CA.

¹⁴⁶ [1996] AC 669.

contrary to its precedent in *President of India v La Pintada Cia Navegacion SA*¹⁴⁷ and without argument on the point. The second is where there are two conflicting decisions. For example, in *Moodie v IRC*,¹⁴⁸ the House was faced with two inconsistent precedents of its own. A decision had been reached without argument in the first and a different decision had been reached after argument in the second. In *Moodie*, the House preferred to follow the more reasoned argument in the second case. In an exceptional case, the Court of Appeal in *R v James and Karimi*¹⁴⁹ extended this category by following a more recent decision of the Privy Council rather than a precedent of the House of Lords. But this arose only where the Privy Council was seeking deliberately to clarify English law, its members constituted half the Appellate Committee of the House of Lords, and, as a result, the outcome of an appeal to the House of Lords was a foregone conclusion.

(ii) *When will the House of Lords overrule itself?*

As regards the House of Lords itself, a rule was established in the course of the nineteenth century that the House was bound by its own previous decisions.^{1.85} But this was altered by the *Practice Statement (Judicial Precedent)*¹⁵¹ in which the members of the House of Lords declared:

Their Lordships recognise. . .that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose to modify their present practice and, while treating former decisions. . .as normally binding, to depart from a previous decision when it appears right to do so.

In this connection, they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.

The House of Lords implied here that it would only rarely overrule its previous decisions. Certainly, in the early years after this statement, there were few instances of explicit overruling and in most cases, their Lordships undermined the authority of the precedent by distinguishing.¹⁵²

In an exhaustive study of the House of Lords and the Australian High Court, Harris¹⁵³ identified a number of criteria. The principal arguments in favour of overruling can be said to be the necessity to overrule to reach an appropriate 1.86

¹⁴⁷ [1985] AC 104.

¹⁴⁸ [1993] 1 WLR 266, HL.

¹⁴⁹ [2006] EWCA Crim 14, esp. paras 43 and 44.

¹⁵⁰ See *Beamish v Beamish* (1861) 9 HLC 274; *London Street Tramways v London County Council* [1898] AC 735; but compare *Bright v Hutton* (1852) 3 HLC 341.

¹⁵¹ [1966] 1 WLR 1234.

¹⁵² Eg *Conway v Rimmer* [1968] AC 910.

¹⁵³ JW Harris, 'Towards Principles of Overruling—When Should a Final Court of Appeal Second Guess?' (1990) 10 OJLS 135. See also A Paterson, *The Law Lords* (1982), 146–83.

decision in the instant case, the injustice of the precedent, and its incoherence with the rest of the law.

- 1.87** A major concern is the necessity to overrule a precedent to reach a decision in a case. A good example is provided by the disquiet which the House of Lords felt over *Anns v Merton LBC*¹⁵⁴ for many years. In a number of cases in the mid-1980s, members of the House distanced themselves from the reasoning in *Anns* concerning the scope of the tort of negligence.¹⁵⁵ But they did not try to overrule that case because this was not necessary for the decisions in the cases before them. When, in *Murphy v Brentwood DC*¹⁵⁶ a case presented itself when overruling was necessary for the outcome of the case, then they did overrule *Anns*. In most cases, it will only be necessary to consider overruling where new arguments are raised which were not presented in the previous case.¹⁵⁷
- 1.88** The argument about injustice is well flagged in the *Practice Statement* itself. The case of *Miliangos v George Frank*¹⁵⁸ is a clear application of this principle, as injustice to the plaintiff caused by the decline in the value of the currency was the principal reason for the House of Lords decision. This point needs relating to a similar argument that the policy of the legislature has been misinterpreted by a precedent. In *R v Shivpuri*,¹⁵⁹ the speed with which the House of Lords overruled its precedent in *Anderton v Ryan*¹⁶⁰ came from a recognition that this decision had misunderstood the purpose of the legislation in question, as was made clear from the Law Commission report giving rise to the Act, which had not been cited in *Anderton*. Clearly unjust results following from the previous decision will justify the House of Lords overruling itself. In *R v G*,¹⁶¹ the definition of 'recklessness' set out in *R v Caldwell*¹⁶² led to the conviction for arson of boys of 11 and 12, who had not appreciated the likely consequences of their actions. This unfair result, combined with criticism from academics, judges and practitioners, justified overruling the previous test.
- 1.89** The *Practice Statement* suggests that criminal law needs especial certainty. To be sure, legal certainty may sometimes justify the House of Lords refusing to overrule

¹⁵⁴ [1978] AC 728.

¹⁵⁵ See *Leigh & Silavan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785; *Peabody Donation Foundation (Governors) v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210.

¹⁵⁶ [1991] 1 AC 398.

¹⁵⁷ See *Fitzleet v Cherry* [1977] 3 All ER 996 and *The Hannah Blumethal* [1983] 1 AC 854.

¹⁵⁸ [1976] AC 443. See also *Vestey v IRC* [1980] AC 1148, *R v Howe* [1987] AC 417.

¹⁵⁹ [1987] AC 1.

¹⁶⁰ [1985] AC 560.

¹⁶¹ [2003] UKHL 50; [2004] 1 AC 1034.

¹⁶² [1982] AC 341.

a previous decision which it considers to have been wrongly decided.¹⁶³ By contrast, the House of Lords did overrule decisions in *R v Shivpuri* and *R v Howe*.¹⁶⁴ Given that few criminals will plan their lives on the basis of what the courts have decided, the House of Lords will rarely be dissuaded from coming to the decision which it considers most appropriate.

Among the constraints are the attitude of Parliament to law reform in a particular area. This is well illustrated by *President of India v La Pintada*.¹⁶⁵ The House of Lords had decided (with regret) that the rule that courts could not award interest on debts was an established feature of the common law. Although the Law Commission had proposed a change in this rule, Parliament had failed to take the opportunity of the Supreme Court Act 1981 in order to change the law, and so the courts should not alter it. On the other hand, inaction by Parliament may simply indicate that it is content for the law to be changed by judicial decision. The House of Lords took this view in *Arthur J S Hall & Co (A Firm) v Simons*¹⁶⁶ in which it abolished the immunity of an advocate from being sued for the conduct of a case in court which was laid down in *Rondel v Worsley*.¹⁶⁷ The House of Lords considered that contemporary public policy no longer justified the immunity. 1.90

(c) The Court of Appeal

The Court of Appeal takes different approaches with regard to its Civil and Criminal Divisions, and this is based mainly on the different roles they play and the seriousness of the issue of individual liberty in criminal matters. 1.91

(i) Civil Division

In broad terms, the Civil Division is bound by its own previous decisions. As was stated in *Young v Bristol Aeroplane Ltd*:¹⁶⁸ 1.92

If the Court of Appeal . . . has in a previous case pronounced on a point of law which necessarily covers a later case coming before the Court, the previous decision must be

¹⁶³ *R v Kansal* [2001] UKHL 62; [2002] 2 AC 69, refusing to overrule *R v Lambert* [2001] UKHL 37; [2002] 2 AC 545.

¹⁶⁴ [1987] AC 1 and [1987] AC 417 respectively. Similarly, the Privy Council overruled recent previous and fully-argued decisions on the implications of fundamental rights for death penalty cases in *Lewis v A-G for Jamaica* [2001] 2 AC 50. Lord Slynn at ibid 75 stated that legal certainty had to be balanced against the importance of saving someone's life.

¹⁶⁵ [1985] AC 104; cf *British Railways Board v Herrington* [1972] AC 877 where Parliament's inaction did not evidence a rejection of the need to change the law.

¹⁶⁶ [2002] 1 AC 615.

¹⁶⁷ [1969] 1 AC 191. Because it considered that *Rondel v Worsley* was correctly decided at the time, the House of Lords did not make use of the *Practice Statement*.

¹⁶⁸ [1944] KB 718; [1946] AC 163 at 169 confirmed by the House of Lords in *Davis v Johnson* [1979] AC 264.

followed (unless, of course, it was given *per incuriam*, or unless the House of Lords has in the meantime decided that the law is otherwise). . . .

- 1.93** The principal justification is that there is always an appeal to the House of Lords and the number of divisions sitting at once is such that there is a real chance of confusion of case law for the lower courts and hence the litigants.
- 1.94** The rule in *Young* accepts three main exceptions to which a further two can be added. As with the House of Lords, where there are conflicting decisions, then a later court obviously has to choose between them.¹⁶⁹ Where a decision is inconsistent with a decision of a superior court, the House of Lords or the European Court of Justice, then the Court of Appeal must follow the decision of the higher court and not its own precedent.¹⁷⁰ To this might be added that the Court of Appeal may also follow the Privy Council rather than its own inconsistent precedent.¹⁷¹ The third exception, that the decision was *per incuriam*, has been mentioned in relation to the House of Lords.¹⁷²
- 1.95** Two further exceptions are worth noting. In the first place, where a decision is interlocutory and will have been decided by a smaller formation of the Court this is not treated as binding on a Court of Appeal hearing a substantive appeal.¹⁷³ The second exception is where the kind of case is unlikely to be appealed to the House of Lords, for example because it is a ruling on a committal order or an order to refuse leave. This exception is allowed, provided the previous decision is manifestly wrong.¹⁷⁴ A possible third exception links the Civil Division with the Criminal Division. Where the liberty of the subject is at stake, for example in an application for judicial review concerning a mental patient or in a habeas corpus case, then the arguments which lead the Criminal Division to refuse to follow its own precedents apply with similar force in the Civil Division.¹⁷⁵

¹⁶⁹ Eg *Fisher v Ruislip-Northwood UDC* [1945] KB 584.

¹⁷⁰ See *Miliangos v George Frank* [1976] AC 43, cf the attitude of the Court of Appeal [1975] QB 487. A good example is *Pickstone v Freemans plc* [1989] AC 66. The potential for confusion arising from the failure of the Court of Appeal to refer to the *Young* principles in *Great Peace Shipping Ltd v Tsavliris Salvage Ltd* [2002] EWCA Civ 1407; [2003] QB 679 at [157] is noted by SB Midwinter, 'The *Great Peace* and Precedent' (2003) 119 LQR 180.

¹⁷¹ See para 98.

¹⁷² For example, where one Court of Appeal failed to take account of a section in a statute, then a subsequent Court of Appeal was entitled to refuse to follow that erroneous approach which had led to misapplying the statute: *Dixon v BBC* [1979] QB 546 refusing to follow *BBC v Ioannu* [1975] ICR 276.

¹⁷³ *Boys v Chaplin* [1968] 2 QB 1.

¹⁷⁴ *Williams v Fawcett* [1986] QB 604; *Rickards v Rickards* [1990] Fam 194, CA, (appeal on refusal of extension of time by a County Court judge where the decision involved 'a manifest slip or error').

¹⁷⁵ *R v Parole Board, ex p Wilson* [1992] QB 740 at 754–6 *per* Taylor LJ.

(ii) *Criminal Division*

The Criminal Division is concerned with matters which directly affect the liberty of the subject. Given that the state has to justify a person's detention, it would seem strange for a court to argue that the individual should be kept in jail on the basis of a precedent which the court itself thought was wrong. This is especially important since the House of Lords deals with only one or two criminal cases in a typical year. For these reasons, the Court of Appeal in its Criminal Division holds that it will depart from its previous decisions in appropriate cases. Lord Goddard CJ laid down the principle in *R v Taylor*:¹⁷⁶ **1.96**

This court has to deal with questions involving the liberty of the subject, and if it finds, on reconsideration that, in the opinion of a full court assembled for the purpose, the law has been either misapplied or misunderstood in a decision which it has previously given, and that, on the strength of that decision, an accused person has been sentenced or imprisoned it is the bounden duty of the court to reconsider the earlier decision with a view to seeing whether that person has been properly convicted.

This statement refers to cases in which the Court of Appeal has laid down an interpretation of the law. It has been made clear that this is only a very limited departure from the basic approach laid down in *Young v Bristol Aeroplane* in order to protect the liberty of the subject.¹⁷⁷ The Criminal Division of the Court of Appeal exercises a degree of discretion to decide whether a previous decision should be treated as a binding precedent in future or not when there are grounds for saying that the decision is wrong. This discretion applies not only when overruling the precedent will benefit the accused, but also when it would deprive the accused of a purely technical defence.¹⁷⁸ It has no application to matters of sentencing, though the 'guidelines' laid down by the Court are to be respected by the lower courts. In individual cases, where a conviction is unsafe, the Court of Appeal may be asked to reconsider a case it has considered before.¹⁷⁹ But this again has nothing to do with precedent.

(d) *Divisional Court and High Court*

The High Court is a court of first instance in which judges sit on their own. It does not seem sensible for one High Court judge to be bound by decisions of predecessors. The position of the Divisional Court used to be different, but in *R v Greater Manchester Coroner, ex p Tal*,¹⁸⁰ it decided that it would apply the same **1.97**

¹⁷⁶ [1950] 2 KB 368.

¹⁷⁷ See May LJ, *R v Spencer* [1985] QB 771 at 778–9. In that the Court of Appeal did refuse to follow its own precedent in *R v Bagshaw* [1984] 1 WLR 477 which conflicted with a previous decision of the same court.

¹⁷⁸ *R v Simpson* [2003] EWCA Crim 1499; [2004] QB 118 *per* Lord Woolf CJ at [38].

¹⁷⁹ Criminal Appeal Act 1968, s 2 (as amended by the Criminal Appeal Act 1995).

¹⁸⁰ [1985] QB 67 at 79–81.

rule as the High Court, namely that it would follow the decision of another judge unless convinced it was wrong.

(e) Privy Council

- 1.98** The Privy Council is only rarely a court for the United Kingdom, for example in relation to certain professional disciplinary matters, though it has significant constitutional functions under the devolution legislation.¹⁸¹ Where it is outside the English court hierarchy, its decisions do not bind English courts. All the same, because its members are typically also members of the House of Lords, they are given high regard. Thus the decision of the Privy Council in *The Wagon Mound*¹⁸² justified the Court of Appeal departing from rules on remoteness of damage laid down in its own decision in *Re Polemis*.¹⁸³ As noted in para 1.84, the Privy Council may have significant authority when deliberately laying down rules applicable to English law.
- 1.99** The Privy Council itself is not bound by decisions of English courts, unless it is applying English law. In other cases, it is free to depart from a House of Lords decision.¹⁸⁴ The Privy Council has made it clear that other jurisdictions may quite properly develop the common law on different lines from England.¹⁸⁵ As a result, the authority of Privy Council decisions for English courts will depend on whether it is laying down principles which purport to be drawn from English law or not.

E. Influential Sources of Law

- 1.100** English law recognizes a number of sources of legal argument which are not formally binding, but help to shape the law.

(1) Treaties

- 1.101** The courts seek to interpret statutes to be as compatible as possible with the treaty obligations of the United Kingdom.¹⁸⁶ In this way, though not binding sources of law, the treaties are influential in the development of domestic law.¹⁸⁷

¹⁸¹ These functions will pass to the Supreme Court when it is created under the Constitutional Reform Act 2005.

¹⁸² [1961] AC 388.

¹⁸³ *Worcester Works Finance v Gooden Engineering* [1972] 1 QB 210 at 217.

¹⁸⁴ Lord Scarman, *Tai Hing Cotton v Liu Chong Bank* [1986] AC 80 at 108; see generally, JW Harris, 'The Privy Council and the Common Law' (1990) 106 LQR 574.

¹⁸⁵ *A-G for Hong Kong v Reid* [1994] 1 AC 324 at 338; *Invercargill City Council v Hamlin* [1996] AC 624.

¹⁸⁶ *R v Home Secretary, ex p Brind* [1991] AC 696 at 718 and 748.

¹⁸⁷ See eg the cases cited at n 14 above.

(2) Doctrinal Legal Writing

Lord Goff explained the judiciary dominates the development of English law on the ground that ‘it is important that the dominant element in the development of the law should be professional reaction to individual fact-situation rather than theoretical development of legal principles. Pragmatism must be the watch-word.’¹⁸⁸ For him, the judicial role is to decide cases, whereas the jurist’s principal role is to formulate legal principle. The danger of principle lies in an over-emphasis on elegance, the fallacy that it offers a complete solution, and that it neglects the historical origins of the law. On the whole, the law is untidy, complex and developed pragmatically in historical circumstances.¹⁸⁹ All the same, Goff notes that ‘the work of the judges has become more and more influenced by the teaching and writing of jurists’.¹⁹⁰ In addition, it has to be recognized that judges, such as Lord Goff, are themselves significant legal authors whose academic writings have shaped their subject. Doctrinal legal writing is now a major influence on legal development. **1.102**

The reports of the Law Commission constitute a significant source of influence, connected to doctrinal legal writing. These include both scholarly surveys of the existing law and recommendations for change made following consultation among practitioners, the public and academics. The serious process of deliberation gives weight to its proposals and courts frequently refer to them.¹⁹¹ **1.103**

¹⁸⁸ R Goff, ‘The Search for Principle’ (1983) LXIX Proceedings of the British Academy 169, 184–5.

¹⁸⁹ *ibid* 174–5.

¹⁹⁰ *ibid* 182; see also P Birks, ‘The Academic and the Practitioner’ (1998) 18 LS 397.

¹⁹¹ For example, see *Kleinwort Benson Ltd v Lincoln City Council* [1999] 1 AC 153; *White v Chief Constable of South Yorkshire* [1998] 3 WLR 1509; *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399; *Yaxley v Gotts* [1999] 3 WLR 1217, 1232.

