

# Common law assignment

Law



The source of English Law is broad, with the real starting point at the Norman Conquest in 1066. During that time, England was mostly ruled by customs prior to the Conquest. It wasn't until William the Conqueror took throne that modern English law started to develop, under the common law. Fast forward to 21st century, and now the law has been a lot more developed, with its sources divided into two, the primary source and the secondary source. The primary source being case law, legislation, and European law.

In the case of secondary source, it comes from law journals, textbooks, and parliamentary and non-parliamentary comments. The contents of this assignment will then be divided in examining these two SOURces, and how it ultimately becomes the pillars for what English law as it is today and beyond. First and foremost, case law, or to be more precise for this discussion, common law, is '... Law developed by judges through cases... ' 1, this means that English law is made through the cases which is dealt by previous judges, and makes future judges be bound by it.

Thus the term of " stare decides" comes in, whereby it means in accordance to Professor Gall " to stand by decisions and not to disturb settled manners" 2. This Latin describes what the English common law is all about, being that judges is bound by the previous judges' decisions. Upon discussing the term of stare decides in common law, it is then needs to be discussed on the matters of its advantages and disadvantages. The disadvantages of the doctrine of stare decides itself is that it will cause injustice.

This is due to the fact that courts need to be in line with previous cases on how to deal with their current respective cases, which leads to undesirable treatment to the respective claimants simply because it is a binding case that laid down an unjust rule. Of course, today's modern system of the English Legal System (ELSE) do have mechanisms in order to avoid this, but this wasn't exactly the case when the English common law is still in its adolescence. However, even when such mechanisms exist in our modern era, there is still some debates on its rigidity.

Next is in regard to the development of the common law itself. Indeed, as mentioned earlier, there are mechanisms that are made to specifically address such problems, but in the early days of the common law and at some part to this day, it is true that the doctrine of stare decisis made limiting factor for the development of the 'judge-made law'. This statement though, is rather debatable, as mentioned in the case of *Donohue v Stevenson* (1932)<sup>3</sup>, "judges don't make law, they merely apply it".

This 'judge-made law' issue is in fact a matter of serious debates, particularly among the orthodox against the progressive judges. Next up is the advantages. Due to the nature of its rigidity, the binding precedent, it creates certainty in the law itself. This argument is highly supported, as there is no need for current and future judges to make decisions according to their own considerations, when there are already previous cases that could help them to solve each case. Furthermore, due to the certainty of this binding precedent, there are bound to be less mistakes as to this doctrine of stare decisis.

This is because the existence of precedent prevent judges from making mistake that he are bound to make, had he not have the guidance which came from previous cases, thus making the precedent especially important. Another important aspect that needs to be discussed in the spectrum of the English common law is the equity. Equity, as it was originally developed around two or three hundred years after the common law, is never intended to replace he common law itself, as it was only designed as supplement to fill in the gaps and the loopholes that are in the common law.

That being said, there is also of what being called as maxims of equity. One of the better known maxims is called ‘ He who comes to equity must come with clean hands’. What it means is “... Equity will not assist a party who has acted in bad conscience” 4. To further define the maxim before, it basically means that a remedy that is being provided by the equity will not be granted by someone who has acted out of unfairness. This can be seen in the case of D & C Builders Ltd v Reese (1966)5.

What happens n the case is that the Defendant, Mr. and Mrs. Reese, had a contract with the D & C Builders, the claimant, in which it is required that the claimant pay a whole sum in three bills. The problem is that, with the Defendant themselves is in financial crisis, they hesitantly accepted the offer from the claimant, which is a one-third payment of the original amount. When it is brought to court, the court decided that the equity concerned to Reese does not work, as they had not come with ‘ clean hands’.

Although equity is designed as a supplement to common law and not to replace it, there are times when it clashes with each there. This is

highlighted in the Earl of Oxford's Case (1615), whereby the decisions between common law judges came head with the Court of Chancery. It is only then James 1 intervened, that the matters are settled. As with regards to this matters, if the matters were to conflict, then s. 25 of the Judicature Act 1873 comes in, which states that in the event both sides collide, equity must prevail over common law.

This is further enhanced in the s. 49 (1) of the Senior Courts Act 1981 as its modern equivalent. Next up for the source of law is legislation, which is made by Parliament. First of all, the UK does not have its own single, written constitution. It is often described that it is 'partly written and wholly unconfined'. A lot of it is written down, with the pretty much of it in the laws passed in Parliament. These laws come in the form of legislation, as mentioned earlier, which is then applied to the whole of the UK (unless otherwise stated).

Parliament, being the highest of legal authority in the UK, has the ability to enact any kind of law it wishes. This statement is in accordance with the quote of A V Dicey, being 'In theory Parliament has total power. It is sovereign.'<sup>7</sup> Such legislation that are made is superior to all other sources of law and is not to be challenged in courts. In order for Parliament to pass new laws, a draft in the form of draft legislation (Bills) needs to be made. This is done through proposals for new law or changes in existing law that comes in the form of Bills.

The Bill itself must be debated by both Houses of Parliament, which are The House of Commons and The House of Lords. After it has undergone set of

procedures, which will be discussed in the next two paragraphs, then it is given Royal Assent by the monarch, in which at this stage the Bill becomes an Act (which is enacted) and enters into force the day the Bill is given the Royal Assent, unless the Act stated otherwise. That being said, after the Bill is then recognized as part of the legislation enacted by the Parliament, it is then to discuss the two types of legislation.

These two types are Primary Legislation and Delegated Legislation. The Primary Legislation includes Acts of Parliament or Statutes (such terms are interchangeable) and enacted by the Parliament. To put it basically, it means that the laws are enacted by the Parliament itself, with the Bills going through the usual stages. On the other hand, Delegated Legislation (also known as Secondary Legislation) is made by people under the authority of Parliament under powers given by Acts (called the parent or enabling Act). For each type of delegated legislation, they will have a different parent Act.

What the parent Act does is that it serves as a requirement and scope for the delegated legislation to work. Simply put, primary legislation is made internally, that is by the Parliament; whilst delegated legislation is made externally. As to the procedure on how a Bill is passed, it is the discussed. The Bills itself may start its journey in either House of Parliament. Although it might go in different Houses, both procedures for debating it are the same, which will be discussed. There are 5 stages in which a Bill needs to go through, they are: First Reading, Second Reading, Committee Stage, Report Stage, and Third Reading.

After the Bill had undergone all these stages, it is then passed to another House, which will undergo the same stages again. This is to ensure that the Bill is as flawless as possible when it receives the Royal Assent. That said, delegated legislation is now discussed. What happens in delegated legislation is that unlike primary legislation, where legislation is passed by Parliament, here it is made by people acting under authority of Parliament. This authority, or can be called as parent Act which are given by Parliament, are divided into 3 types, these are: Orders in Council, statutory instruments, and bylaws.

The reason why delegated legislation is made are rather simple, it is because respective locals have their knowledge and expertise of their own compared to Parliament; that it saves Parliamentary time, since the Parliament itself already 'busy enough' with hundreds of Bills that come each year; and that it is more flexible than Acts of Parliament, since it is made in accordance to specific problems that it deals with. In the next paragraph, discussion will be on the types of delegated legislation stated earlier. At Orders in Council, the authority that is to make legislation is passed to the Queen and the Privy Council.

The Privy Council itself is made up of the Prime Minister and other leading members of the Government, which effectively means that it allows the Government to make legislation without the need to go through Parliament. With such authority, Orders in Council can be made in wide range of matters, which will be given from an extract, namely 'giving legal effect to European Directives, transfer of responsibility between government departments, and bringing Acts (or parts of Acts) of Parliament into force'<sup>8</sup>. In addition to that, <https://assignbuster.com/common-law-assignment/>

the Privy Council is able to pass new laws in emergency situations under the Civil Contingencies Act 2004.

For example, in s. 21 (2) of Civil Contingencies Act 2004, it is stated ‘ the first condition is that an emergency has occurred, is occurring or is about to occur’. This statement proves that Orders in Council are allowed to make laws in such conditions. The next one is statutory instruments, which is made by Government Ministers. In the Government which deals with the laws, there are 15 departments in it, each ‘ dealing’ with different area of policy and can make rules and regulations according to the matters it deals with.

For example, the Minister for Transport deals with necessary road traffic regulations, but it is obviously not allowed to deal other laws made by other Ministers, such as Minister for Justice. The statutory instruments that are made can be either very short or very long, with the long one given example in the Police and Criminal Evidence Act 1984, which deals with police codes of practice in powers such as stop and search, arrest, and detention.

Statutory instruments is considered important in being parts of the English law, this is because there are over 3000 statutory instruments that are brought into force each year.

Furthermore, in addition to specific Acts giving power to respective Ministers to make laws, there is also the Legislative and Regulatory Reform Act 2006, which states that it gives Ministers to make any provision by order, provided that it will remove or reduce ‘ burden’ that exults from legislation such as financial cost, administrative inconvenience, For bylaws, it is a type of laws that are made by local authority in their etc. Own respective areas. For



example, a District or Town council can make bylaws for its district or town, but only to that certain scope.

It is also can be made by public corporations within their areas, such as railways. This is in line with a Latin maxim, which is *intra virus*, that means it is acting inside the boundary of its powers. Example for such bylaws will be a notice sign in a lake that says “ Fishing is not allowed, penalty IEEEE”. In the case of discussing European Law, it is going to be started on how UK itself in the first place got into European Union (EH (formerly European Economic Community (SEC))). UK first joined SEC in 1 January 1973 in order to strengthen relation and ease of access.

The important part that to be discussed is that when UK joined EH, another source of law came into being, which is European law. Another important point that needs to be stated is that in the context of Europe, there are two different courts that operate, they are the Court of Justice of the European Union (CUE (formerly allied the European Court of Justice (SEC))), and European Court of Human Rights (Ochet). Since the topic weighs on the sources of UK law, the next discussion will take place on how OCHRE affects UK law, especially in the terms of Human Rights Act 1998.

In addition to that, the reason why Human Rights Act (HEAR) came into force, is because many locals in UK who aren't satisfied with the judgment, needs to go all the way to Strasbourg to enforce their rights. This takes money and time, and with the introduction of HEAR, such detriment need not be done again. With the inclusion of Human Rights Act 1998, the OCHRE is incorporated into English law. Such inclusion has affected a lot of the English

legal system, before it was previously. Here are some examples on how OCHRE affects the English law, particularly in Human Rights.

At trials, in Article 6 of the European Convention, it states that the right to have a fair trial. For example, in the case of *T v United Kingdom; V United Kingdom* (1999)9, it is deemed unfair for the Defendant, which are boys aged 10 and 11, to understand what was happening, since it was difficult to grasp what was happening, with such young age. At precedent, it is stated in s. (1) (a) of Human Rights Act, that English courts should take into account of any judgment or decision that are made in the OCHRE.

This means that when deciding a case, judges must not look only into English law, but also at human rights cases. At statutory interpretation, in s. 3(1) of HEAR 1998, it states that ‘ 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’. This means that, for example, when a certain wording from Acts of Parliament has two meanings, then the meaning which fits most to the European Convention the one to be used.

In the case of secondary source, which comes from law journals, textbooks, and parliamentary and non- parliamentary documents; this will be discussed at a minimum, since most of the source mainly and most importantly comes from the primary source. To put this simply, academic writings is considered less by the judges, and will only look for it the in the last resort. Textbooks, or books of authority, is used by court as a guidance when a court is unable to locate a precise or analogous precedent. Examples for the most important

one including Blackstone from 8th century, Coke from 17th century, and others.

Law journal, just like books of authority, is dealt the same with the courts. Whereby the courts found that a precedent is unable to be 'decoded' precisely, the courts will resort to law journals, albeit to a certain extent. The same also goes to parliamentary and non-parliamentary sources. This is because the primary sources are what the courts is concerned about, with the secondary sources acts as a guide, if the precedent is unable to decipher accurately. In conclusion, source of law for English law is indeed broad. This is increased after internally with common law and equity ND added with Parliament, and also with European law as well.

The secondary sources, albeit being the last resort for courts, still plays a certain vital parts, with examples given above. The English law is bound to continually expand, with advances in technology and others which will make it to adapt with every new circumstances.