Creating law in the uk

Parliament is the supreme law-making body in the UK. Statutes are above all, and Judge's role is to apply and interpret the statutes. There are four rules of interpretation, which have developed throughout the history and some of which after long lasting disputes. Law in the UK is also dependant on the EU law, which should be stronger that domestic law. There are several courts in United Kingdom, on the top of the hierarchy lies the Supreme Court, any precedent set there, cannot be overruled by any other court. Judges' job is to interpret statutes, and in some cases, to make law. But is it true that judges can make new law? Here I am going to discuss whether judges do in some cases make new law, or do they apply the existing statutes and common law cases.

The Law in United Kingdom comes as legislation, from the Acts of Parliament, or, from Common Law – decisions of the courts set as precedents. Legislation is superior to all other sources of law; judges' job is to interpret and apply them in courts. Common Law is historically the oldest source of law in the UK, all the law used to be made by judges on authority of the monarch. Precedents ensure the development of the legal system. So, this raises a question: are judges still considered as law makers in United Kingdom? The traditional way of judicial law making is that judges should play no part in creative law making, they should just declare it. The declaratory theory of law, famously introduced by William Blackstone on the eighteenth century, stated the idea that judges do not make the law but only declare what it has always been[1]. The theory was famously opposed by John Austin in *Lectures on Jurisprudence: Or, The Philosophy of Positive Law* as ' childish fiction'[2]. Nowadays the Declaratory Theory is widely opposed, it does not seem to go

together with today's changing society and technological development. In his book, Lord Reid called the opinion that judges only declare law and do not make it a fairy tale that is not believed anymore[3]. Therefore, there has been a lot of debate on whether Blackstone's theory is correct and judges do not actually make law but merely declare it.

After legislation comes Common Law – precedents set by previous decisions of cases, which is also a source of law making in the UK. The Doctrine of Precedent It is based on two principles: position of a court in the court hierarchy and how similar is the mixture of law and fact in the two cases being considered. The key feature in common law cases is *stare decisis,* which means ' to stand by things decided'. Highest is the Supreme Court (previously House of Lords), which is not bound by its own previous decisions. As said by Lord Chancellor Gardiner in The Practice Statement, that too rigid adherence to precedent may lead to injustice and restrict the development of the law, which is why House of Lords should be able to depart from previous decisions[4]. The Doctrine of Precedent is meant to lead to predictable and consistent development of legal principles, and the reason for the Practice Statement was that if courts are strongly bound by precedent the law cannot evolve. It is rarely used, though, but sometimes controversially. Like the case of *R v Howe* [5]which overruled the case of *Lynch v DPP for NI* [6], and fundamentally changed the defence of duress. By decision made in the case of Howe, in my opinion, judges did not make new law, but rather complemented it. On the contrast, in the case of *R v R* [7], where marital rape was decided to be illegal, seemed like a making of a new

law by judges. So, in some cases the courts can overrule a certain previous precedent and in some cases, make new law.

The primary law in UK comes as statutes. Four rules have developed throughout history to interpret statutes: The literal rule, the golden rule, the mischief rule and the purposive approach, last one being the most modern. The Literal Rule states that the words of legislation should be given their ordinary natural meaning, though that might in some cases lead to an absurdity. Like in *Fisher v Bell* [8]where the flick knives sold were treated as an invitation to treat and was not therefore under the Act[9]which clearly had the aim of prevent the exact matter. The second one, The Golden Rule, was described by Lord Wensleydale in *Grey v Pearson* as that if a literal meaning leads to absurdity, the grammatical sense of the word may be modified to avoid it[10]. The Mischief Rule is laid out in Heydon's case by four things to consider when interpreting statutes, which in summary consists of what was the common law before, what it was missing, and what is parliament trying to resolve[11]. Now, the most modern one of the rules is The Purposive Approach, which stresses the need to interpret legislation in a way to achieve its objectives. This approach gives judges a lot of flexibility of deciding cases, and might look like it gives judges the power to make law. About interpreting statutes, Lord Simonds stated in his opinion against interpretation of statutes other than in a literal way, that the duty of courts is to interpret words as they are, however ambiguous they are, it is still not up to the judges to ' travel outside them on a voyage of discovery'

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[1]The Declaratory Theory of Law – Oxford J Legal studies (2013)

[2]The Declaratory Theory of Law – Oxford J Legal Studies (2013), originally from – John Austin: *Lectures on Jurisprudence: Or, The Philosophy of Positive Law*

[3]Lord Reid, ‘ The Judge as Lawmaker’ (1972) 12 J Soc Public Teachers L 22 assessed 18 march 2017

[4]The Practice Statement, House of Lords [1966] 3 All ER 77

[5]R v Howe and another and another appeal – [1987] 1 All ER 771

[6]Lynch v Director of Public Prosecutions for Northern Ireland – [1975] 1 All ER 913

[7]R v R–(Rape: marital exemption) – [1991] 4 All ER 481

[8]Fisher v Bell [1961] 1 QB 394, [1960] 3 All ER 731

[9]Restriction of Offensive Weapons Act 1959, s 1(1).

[10]John Grey and Others, -Appellants; William Pearson and Others, -Respondents – (1857) 10 ER 1216

[11](1584) 3 Coke 7a 76 E. R. 637