

The common law reasoning and institutions law constitutional administrative essay...

[Law](#)



Essay Title: " There can be no real argument about it: judges make law. The declaratory theory is more or less nonsense." Student Number:

120364765Candidate Number: 111444Judges are authoritative figures in the

English Legal System. Their authority is wide because their job is mainly to dispense off justice in each case. There is no doubt that we want justice to be done and in fact to be seen done in every case at the English courts. But

the issue is: can judges make law while adjudicating upon a case in a fair and just manner? This is one of the issues that shall be explored in the

course of this research essay. The other issue is that do judges make law?

The declaratory theory that judges don't make law, they just interpret what has already been stated before, shall be discussed alongside. Let us first

consider what the law actually is. In the English legal system, the law mainly comprises of statute, that is law passed by the Parliament, and common law, that is the law developed by the courts in the form of judgments in cases

before them. A brief look at the history of English law tells us that in ancient times, the law mainly comprised of common law or judge-made law and

statute law was comparatively less in quantity. However one might rightly

argue that we are not living in the ancient times. In the contemporary UK,

Parliament is sovereign. It is the supreme law-making body and law-making is done only with the approval of the Parliament (delegated legislation).

Hence in the given circumstances, can the judges, who staff the courts of UK, make law in any sense? The answer to this question, prima facie, is no

because Parliament's sovereignty is precious to the constitutional

arrangements of the UK and it shall not be interfered with in any way. The

judges are also in a difficult situation where they have to be impartial,

dispense justice in every case at hand and also try not to make new laws. Things go on smoothly in the everyday circumstances. Cases are decided on the basis of binding precedent and no new laws are made. The problem however arises in exceptional situations like those of *R v R* [1991] 4 All E. R. 481 where marital rape was considered and subsequently declared illegal by the courts. The decision in *R v R* has, on one hand, been welcomed and on other hand, been criticized. Their Lordships rejected submissions that "unlawful" under the Sexual Offences (Amendment) Act 1976 s. 1 (1) meant outside the bond of marriage. It was unrealistic to describe extramarital sexual intercourse as unlawful, particularly as "unlawful" normally meant contrary to some law or enactment or without lawful justification or excuse. The word "unlawful" was superfluous in the context of s. 1 (1). The husband was guilty of attempting to have sexual intercourse with his wife against her will contrary to s. 1 (1) of the 1976 Act. (Lords, 1991) The decision in *R v R* led to the reform in law and marital rape was brought under the statute on Sexual Offences. The well wishers of the Declaratory Theory say that the court just stated the long standing law in a correct manner here. However, had the courts not given the decision they did in the case at hand, the law perhaps would not have changed to day. Hence *R v R* sets an example of judicial law-making as a beneficial practice for the citizens. The case of *Donoghue v Stevenson* [1932] AC 562 is another example of judicial law making. The judges changed the law to say that back in 1928 David Stevenson owed the plaintiff a duty to ensure there were no foreign objects in the bottle. By applying this new law she won. They changed the law on 26 May 1932 and it had effect from 26 August 1928 onwards. (Lords,

1932) This can be assessed in two different ways. The first is that judges create law: the law was wrong and the judges created new law which had retrospective effect. The second is that judges declare law: the other view is a "fiction", that the law was always the same and no one knew, the judges had found it, they "declared" the law. The facts of this case, to me imply that the judges did not simply "declare" the law, they actually created new law. No matter which account of the relationship between judges, the executive, and the legislature is accurate, one thing remains true. For those outside the court, the judges appear to be in a position to make law. In 1959, a publisher took legal advice as to whether or not it was a criminal offence to publish a book listing the names and addresses of prostitutes. He also sought the advice of Scotland Yard and sent a copy to the Director of Public Prosecutions. In 1961, the same publisher, having published the book under the title, *The Ladies' Directory*, was convicted of hitherto unknown offence of conspiracy to corrupt public morals (Crownie). This was the case of *Shaw v DPP* [1962] AC 220. (Lords, 1961) Clearly this case portrays an example of judicial law-making. So far this essay says that yes, judges do make law. But there has been a little discussion on the declaratory theory, let alone it being a 'nonsense' or not. In selecting a meaning, the English courts have consistently held that they are not free to read into statutes meanings that they might like to see there but are, rather, bound to interpret the statute in the light of the intention of Parliament. The view was adopted by Lord Browne-Wilkinson in *Pepper v Hart* [1993] 1 All ER 42. (Lords, 1992) This shows that the courts accept their subordination to the Parliament. (Crownie p. 10) It is believed that judges declare what the law is and do not make new

laws. However, the writer John Austin argued that judges did make law but that law was tacitly approved by the sovereign. (Crownie p. 13) Thus, again, the inconvenient notion that judges independently make law was avoided. Lord Hoffman believes that new legal rules can only be created in the context of old ones. He says that this account avoids the constitutional problems inherent in the notion of autonomous judicial creativity whilst not relying on the fictions of declarations on the fictions of tacit consent. He further says that this appeals to judges as a theory. Lord Hoffman here has tried to explain that judges do not make law in the ordinary course of adjudication as they simply declare what the law has already been stated. The judges of the superior courts of UK seem to be divided on the acceptability of the declaratory theory. Many of them traditionally believe that the declaratory theory is true and judges do not engage themselves in making law. For instance, Lord Diplock in *Duport Steels Ltd v Sirs* [1980] 1 WLR 142 (Lords, 1980) stated " Parliament makes the laws, the judiciary interpret them." Moreover, In the Times Law Awards ceremony 1997 Lord Mackay LC said that the duty of the judge is to apply the law as he finds it, not to seek to amend the recognised deficiencies by the use of creative interpretation. He also said where there is a gap in the law our judges are required to take account of precedent but where it is unclear he must decide the best way to continue and the result may be a decision which is in some way creative, but the basic principles were constantly a part of the law. Thus he believes judges acquire law by applying the principles that already exist. The opposite view has been expressed by Lord Denning on various occasions. In the case of *Re Sigsworth*, Lord Denning declared that when

they were interpreting statutes it was necessary for a judge to correct omissions left by Parliament: " We fill in the gaps." In the case of *R v Inland Revenue Commissioners ex parte Rossminster Ltd* [1980] AC 952 (Lords, 1979), Lord Denning condemned the breadth of power, stating that a warrant must ' particularise the specific offence which is being charged as being fraud on the revenue' and that it was ' the duty of the court so to construe the statute as to see that it encroaches as little as possible upon the liberties of the people of England'. On the appeal to the House of Lords, however, Lord Denning's view was rejected, Lord Scarman accepting ' with regret' that if the requirements of the statute were met, then the power was exercised was lawful. This case shows that there is a disagreement amongst the judges of superior courts. Denning, sitting in the Court of Appeal, stressed on imparting justice in the particular case, thus making new law whilst disregarding the provisions of the Taxes Management Act 1970. However, Lord Scarman's view portrays that the House of Lords preferred to restrict themselves to the declaratory theory and even though injustice was seem to be done, prima facie, Parliament's sovereignty was upheld and judicial law making was refrained from. There have been multiple cases in the English legal history which have led to a change in the law by the Parliament. These changes in law, while upholding the concept of Parliament's supremacy, also validate the concept of judicial law making. One of the examples of instances where a change in law has resulted due to a judicial decision is the case of *Malone v Metropolitan Police Commissioner* [1979] 1 Ch 344. Sir Robert Megarry V-C ruled that no trespass had committed by the police, but the interception of communications was a '

subject which cries out for legislation'. The case went up to the ECtHR, *Malone v United Kingdom* [1984] 7 EHRR 14, the court held that the United Kingdom had violated Article 8 of the Convention (the right to privacy) and that the English law fell short of the standards of clarity and certainty necessary to protect citizens. In response the Government proposed and Parliament passed the Interception of Communications Act 1985, placing the authorization of intercept warrants on a statutory basis. Concluding this research essay, I would agree with the notion that whilst adjudicating upon individual cases, judges do make law within the confine limits. However the statement that the declaratory theory is nonsense is a radical statement in my opinion. In law it is very difficult to regard any theory as nonsense. Therefore it may be wisely stated that yes judges do make, but the declaratory theory also continues to exist in practice.