

Inevitable duty of the courts law constitutional administrative essay

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In United Kingdom (UK), the legal system has been built up gradually over the centuries. There are many different ways of creating or developing law. The methods of developing law are usually referred as sources of law. Historically, the most important ways were custom and case law. Then, as Parliament became more powerful, Acts of Parliament were then the main source. Furthermore, statute law and judicial decisions were the major sources of law during the 20th century. In addition, two new sources of law, which are delegated legislation and European law became increasingly important. Today's English law is compromised by all these sources of law as mentioned above. The question hereby requires us to compare and contrast the various sources of law in the UK and also discuss about the effect of European influence as a source of law. With regard to law, 'source' simply means the law comes into existence. Basically, the sources of law in UK can be divided into two categories, which are primary and secondary. Primary sources are those state the law while secondary sources are those, which discuss and comment on the law like works of authority. The story starts when William the Conqueror conquered England in 1066. In England and Wales, there was no unified system of law before 1066. Instead, customary laws applied which varied from one area of the country to another in accordance with local custom. After the Norman Conquest in 1066, William the Conqueror set up the Curia Regis (the King's Court) and appointed his own judges to standardise the law. Judges were sent to major towns to decide any important case other than the central court. In the time of Henry II, he divided up the country into circuits for the judges to visit. Day by day, judges selected the best customs, which were to be used by judges

throughout the country. Hence, the law was then applied to the whole country which known as 'common law'. The origin of the law today begins from the common law. The reason why such importance is attached to case decisions is explained by the doctrine of judicial precedent, which is a Latin maxim 'stare decisis' (to stand by what has been decided). The doctrine refers to the fact that, 'obiter dicta' are not binding but are persuasive on future cases. "Obiter dicta' refers to the all parts of judgment which contrasted with the ratio decidendi (legal reasoning of decision). On the other hand, the hierarchy of court is central to the operation of binding precedent. Within the hierarchy of English Courts, a decision of a higher court is binding on all lower courts. An extension of the doctrine of judicial precedent leads to a consideration of further possible source of law, it may refer to legal textbooks for guidance and assistance. In strict term, only certain venerable works of antiquity are actually treated as sources of law. Amongst the most important of these works are those by Glanvill from the twelfth century, Bracton from the thirteenth century, Coke from the seventeenth and Blackstone from eighteenth century.[2] Notice, these works of authority are categorized under secondary source of law. Despite the fact that common law originates from judicial precedent, it cannot be denied that common law plays an important role as a source of law in UK. Nonetheless, the system of common law becomes inflexible and inadequate after some time. Thus, many people were unable to seek redress for wrong through common law. Upon this period of time, 'equity' developed in the sense of fairness. Dissatisfied parties petitioned the King who then passed these petitions to the Lord Chancellor who as the number of petitions rose,

established the Court of Chancery. Not surprisingly, the Court of Chancery became popular, and caused some resentment among common law lawyers, who argued that the quality of decisions varied with the length of Chancellor's foot- in other words, that it depended on the qualities of the individual Chancellor. Because precedents were not followed and each case was considered purely on its merits, justice could appear arbitrary, and nobody could appear arbitrary, and nobody could predict what a decision might be.[3]The major advantage of equity was that injustice is being avoided. Gradually, tension between equity and the common law come head to head in Earl of Oxford's case (1615).[4]Sir Francis Bacon, who partitioned the King acting on the authority of James I upheld the use of the common injunction issued by the Lord Chancellor and concluded that in the event of any conflict between the two jurisdictions of common law and equity, equity would prevail.[5]This established the supremacy of equity over common law. However, the Judicature Acts 1873-75 fused the administration of the common law and equity to create a unified system of courts and procedures. It is also important to know that it was never intended that equity would replace the common law, equity would just fill the gaps in it and make up for its defects. On the other hand, there is a series of equitable maxims, which had to be satisfied before equitable rules could be applied to ensure fairness. A classic example of an equitable maxim was " he who come to equity must come with clean hands" by Lord Denning in D&C Builder v Rees (1966).[6]In addition, there are various contributions of equity such as new rights and new remedies such as the concept of the rights of the beneficiary and the rights of the mortgagor. These new remedies include injunction, specific

performance, rectification and rescission. In addition, two important new remedies were created extending the scope of injunctions- mareva injunction (freezing order) and anton pillar order (search order). Another contribution of equity was the 'doctrine of promissory estoppel' where originated from Lord Denning's obiter statement in *Central London Property Trust v High Tree House* (1947).[7] Today, equitable rights, interest and remedies remain important and are influential sources of law within country. Another important source of law today is legislation. They began life as bills, it refer to draft law introduced in Parliament. Bills come into force following by the debate in the House of Commons, approval in the House of Lords and will then receive Royal Assent if it is to become law. If it is formally agreed by the Royal Assent, the bills will then become a statute and in otherwise known as an Act of Parliament. It is recognized that supreme power is vested in Parliament and that there is no limit to its law-making capacity in UK. This is now tempered by membership of the Common Market since 1973 (now EU) and the further effect given to the European Convention on Human Rights by the Human Rights Act 1998, in 2000.[8] On the other hand, Secondary legislation here refers to delegated legislation where Parliament delegates the power to make legislation to another body the power to make law. They have previously been granted by Parliament in a 'Parent Act'. Delegated legislation can take a variety of forms, which are for different purposes. Firstly, Orders in Council are made by the Queen on the advice of the Privy Council have authority to make Orders in Council for the purpose of declaring a state of emergency under the Emergency Power Act 1920. Next, Statutory Instruments refer to rules and regulations that made by Government

Ministers. Last but not least, local authorities have power given to them under certain statutes to allow them to make law, which suits their area (By-Law). Delegated legislation is needed because Parliament does not have the time to debate every detailed rule necessary for efficient governing. For example, in 2003 only 45 statutes were adopted compared to approximately 3,500 statutory instruments.[9] It is important to know that common law is judge made law while Statutory Law is made by legislature. Legislation can be used to change common law, or to deal with areas in which case law is unclear. When governments pass legislation that changes common law significantly, they create a new body to administer the legislation, such as an administrative tribunal, board, or agency.[10] Thus, legislation power outweighs common law. Statutes are essential sources of law. Hence, many cases heard by the courts involve the meaning of words in a statute or delegated legislation. Words in statutes may be ambiguous, so it is sometimes difficult to verify Parliament's intention. Traditionally, the courts relied on three main approaches to interpret statutes: the literal, golden and mischief rules. Gradually, as a result of European influences, the courts are increasingly using a purposive approach in interpreting statutes. In addition, there are also rules of languages, presumption, intrinsic aids and extrinsic aids to assist judges in interpreting statutes. The next source of law that remains to be considered is custom. These are rules of behavior, which develop in a community without being deliberately invented.[11] They can be divided into general customs and local customs. Historically these are believed to have been very important in that they were, effectively, the basis of common law. It is thought that following in the Norman Conquest, the

judges appointed by the kings to travel around the land making decisions in the King's name based at least some of their decision on the common customs. This idea caused Lord Justice Coke in the seventeenth century to describe these customs as being 'one of the main triangles of the laws of England.'^[12] However, general customs are no longer an important source of law as most general customs have long since been absorbed into legislation or case law. On the other hand, local customs only operate in a particular area. For the court to recognise any local custom, various tests had to be satisfied. Amongst these requirements are that the custom must have existed from the 'time immemorial (since 1189) and must have been exercised continuously within that period and without opposition. The custom must also have been consistent with other customs, and in the final analysis, must be reasonable. Given these requirements, it can be seen why local customs do not loom large as an important source of law. Apart from domestic sources of law, European Union law is also an important source of UK law. The European Community was set up by the EEC (known as the Treaty of Rome and later re-named the EC Treaty) in 1957, and the UK joined the community in 1973.^[13] On joining the Community, now called the European Union, the UK law became subject to EU law. In addition, there are several objectives of the EU as stated in the Article 3 Treaty on European Union (TEU).^[14] These including promote peace, its values and the well-being of its people; to offer an area of freedom, security and justice without internal frontiers in which the free movement of persons is ensured; to establish an internal market working for the sustainable development of Europe; combating social exclusion and discrimination, promoting social

justice, equality and solidarity; to establish an economic and monetary union. Basically, European sources of law are classed as primary and secondary sources of law. Primary sources are mainly the Treaties, the most important is the Treaty of Rome itself. Secondary sources are legislation passed by the institutions of Union under Article 288 (TFEU).[15] There are three types of secondary legislations: regulations, directives and decision. The treaties are directly applicable in that they are automatically incorporated into nation law. In the UK this is achieved under s2 (1) of the European Communities Act 1972. In addition, the Treaties may have direct effect. This means that they are capable of creating rights that an individual may enforce in their own national courts. In order to have direct effect, a provision must be clear and precise, unconditional and non-independent, according to the case of *Van Gend en Loos* (1963).[16] The European Court of Justice (ECJ) held that an individual was entitled to rely on Article 45 giving the right of freedom of movement. This had direct effect and conferred rights on individuals, which could be enforced not only in the ECJ, but also in national courts. In addition, in the case of *Macarthys Ltd v Smith* (1980), [17] clearly illustrated that citizens of the UK are entitled to rely on the rights in the Treaty of Rome and other treaties, even though those rights may not have been specifically enacted in English law. Here, Mrs Smith was able to claim the company, which employed her was in breach of Article 157 (TFEU) over equal pay for men and women and this claim was confirmed by the European Court of Justice (ECJ).[18] Gradually, because of the influence of European Law is shown in that English Courts are now prepared to apply European Treaty law directly rather than wait for the ECJ to make a ruling on

the point. This is illustrated in *Diocese of Hallam Trustee v Connaughton* (1996)[19], which the Employment Appeal Tribunal had to consider facts, which had similarity to the *Macarthy's Ltd v Smith* case. On the other hand, regulations are a form of secondary regulation. They are also binding without further enactment, known as direct applicability, which gives regulations the effect of being 'binding in every respect' and automatically part of the legal system of every Member State as we can be seen in Article 288 (TFEU). Member States must therefore enforce regulations as laid down in *Re Tachographs: Commission v United Kingdom* (1979).[20]When the matter was referred to the ECJ, it was held that Member of State had no discretion in the case of regulations. Next, a "directive" is a legislative act that sets out a goal that all EU countries must achieve. However, it is up to the individual countries to decide how. This was the case with the working time directive, which stipulates that too much overtime work is illegal. The directive sets out minimum rest periods and a maximum number of working hours, but it is up to each country to devise its own laws on how to implement this.[21]Last but not least, decisions here does not refer to decisions made by the ECJ, but decisions issued under the power of article 288.[22]Decisions of the ECJ are binding throughout the EU and take precedence over any domestic law. Up to 1998, the UK did not have a Bill of Rights giving its citizens the right to certain basic freedoms. However, as early as 1950 the UK government signed the European Convention on Human Rights (ECHR). It is a treaty of the Council of Europe, which was formed in London in 1949 from a idea of Winston Churchill that we needed a "United States of Europe" to make all of Europe "free and happy" and peaceful, after World War II.[23]Although the

ECHR was signed in 1950, it was only incorporated as part of UK law in October 2000 with the coming into effect of the Human Rights Act (HRA) 1998. Since that, it was easier for individuals to enforce their rights. UK citizens can now enforce their rights under ECHR directly before the domestic courts instead of apply to the European Court of Human Rights (ECtHR) to enforce their rights. This incorporation had also intense implications for the operation of English legal system. Once ECHR incorporated, the court has to take into account any judgment of the ECHR as stated in s. 2 of the HRA 1998. This means that the court must follow decisions of the ECHR instead of a conflicting decision by a UK court, but this does not mean that the Court's decision are binding as illustrated in *R v Spear* (2003).[24]Next, s. 3 of the HRA 1998 says " (s)o far as possible, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights".[25]This gives the courts new and extended powers of interpretation as we can be seen in *Ghaidan v Mendoza*.[26]It was held that s. 3 of the HRA 1998 requires the court to read in word which may change the meaning of legislation so as to make it Convention compliant. The HRA 1998 also acted on public authorities. For example, s. 6 stated that it is unlawful for public authorities or authorities playing a public function to act in a way which was incompatible with the HRA 1998. Furthermore, s. 4 and s. 10 have made various changes to the UK parliament. S. 4 stated allows the higher courts to make a declaration incompatibility if a legislation is found to be in breach of the ECHR while s. 10 of the Act gives government Ministers the power to amend the legislation to bring it into line with the Convention. In *H v Mental*

Health Review Tribunal (2001)[27], it concerned the fact that involved the liberty of the subject it was a breach Article 5. However, the domestic law was incompatible with the Convention and so the court could not give effect to the rights. It could only declare that the law was incompatible.[28] This declaration does not affect the validity of the Act of Parliament in the sense that the HRA 1998 seeks to maintain the principle of Parliamentary sovereignty. The doctrine of parliamentary sovereignty lies at the heart of the UK constitution. According to A. V. Dicey (Law of the Constitution, 1885), "In theory Parliament has total power. It is sovereign." Dicey's view of parliamentary sovereignty consisted of four factors: Parliament is competent to pass laws on any subjects; Parliament's laws can regulate the activities of everyone, anywhere; Parliament cannot bind its successors to the content, manner and form of subsequent legislation; and laws passed by Parliament cannot be challenged by the courts.[29] The Parliament in UK may make or unmake any law and there are no restrictions upon its freedom to legislate. Hence, according to Dicey's theory, Parliament's power is absolute in UK. However, the impact of EU law on parliamentary sovereignty was laid down in the Factortame Case (1990).[30] The European Communities Act (ECA) 1972 gave effect to British entry to the European law. Directly applicable EU Law now applies in the UK and takes precedence over national law. The ECJ held that English courts could not apply the Merchant Shipping Act 1988, designed to protect British fishermen, because it contravened the Treaty of Rome 1957.[31] This was a legal history, representing the first occasion on which provision of an Act of Parliament were set aside, and making clear that parliamentary sovereignty only exist to the extent that domestic legislation

does not fall foul European provisions.[32]Parliament does not enjoy legislative sovereignty anymore. Furthermore, subsequent cases has been reinforced the impact of Factortame, such as R v Secretary of State for Employment, ex parte Equal Opportunities Commision (1994).[33]More recently, the constitutional significance of the ECA 1972 was commented upon in Thoburn v Sunderland City Council (2002),[34]where it was described by Lord Justice Laws as a ‘ constitutional Act’ which could only be repealed by express provisions of an Act of Parliament. Parliamentary sovereignty has undoubtedly been affected as a result of the UK’s membership of the EU. However, there is a strong argument to be made for the proposition that Parliament can reclaim its complete sovereignty anytime by simply repealing the ECA 1972. This was evidently confirmed by Lord Justice Laws in the case of Thoburn, where he re-stated the fundamental principle that no Parliament can bind its successors meant the 1972 Act could not become entrenched in domestic law to the point where it could not be repealed. Nonetheless, the case of that parliamentary sovereignty can arguably be fully asserted at any stage although political factors make this unlikely.[35]Basically, it can be concluded after a real depth of research that the supreme law of UK is an establishment of a few sources of law. In a brief it is made up by the legislation, common law, and with the turning of European Communities law. These sources came into a powerful source together with the help of HRA. Pushing us back to the question of the sources of law and the effect of EU, the main revealing part that cannot be denied is that EU or better describe as HRA does not play a significant role towards the law of UK as it is a mere persuasive law. In a closed view, the

main sources of UK law come in hand to hand by the UK own implementation.