

Do judges make law? essay

[Law](#), [Common Law](#)



There are two main sources of English Law- legislation and cases. When interpreting legislation judges must ascertain the intention of Parliament and, except insofar as they apply the mischief rule of interpretation, they do not make law.

Traditionally and due to the doctrine of the separation of powers judicial role is really not properly legislative at all, but consist merely in stating what the existing law actually is, and interpreting authoritatively doubtful points as they arise. This traditional approach of common law, which insisted that the judges had no power whatever to make law but simply ‘ declared’ it as it had always been. Judges were regarded as specially qualified exponents and interpreters rather than the creators of the law. The assumption was that the common law was a complete system of legal rules and principles sufficient to meet any fresh combination of facts that might be presented to the court, and that judges did not make new law. By the (18th century), it was manifestly understood that the idea of judges doing no more than declare the law was a hollow pretence, and this idea was roundly stigmatised by both Bentham and Austin as a childish fiction. To suggest that Judges make law is to endow them with an unrestricted power of laying down abstract principles, but they have no such unlimited power.

Such legislative power as a judge may possess is necessarily limited to the facts of the case before him, and as a corollary, his decision will be law only in so far as it may be necessary for his actual decision. The *ration decidendi* is the essence and the rule and all else is *obiter dicta* and will not bind Judges in future cases. A Judge has no freedom of choice, since statutes or precedents must limit his action and although a Judge may have Power to

regard either he has no right to do so and in so far as he does, he violates the law.

Judges help to develop law but cannot be said to legislate since the common law is not made but has grown and “ plus ca change, plus c’est la meme chose”. If we agree that, in a sense, Judges may make law, the same may agree they can alter it, make a decision, another court reverses the decision and that is law, eventually it reaches the H. O. L. and then that is the law. In each of these steps the law is made – ‘ a judgement once declare is a new stock of descent’. Even Pollock points out that Case Law can no longer be cited as an instance of fictions, for the courts, so far from pretending that they do not add to and alter the law, constantly and freely use language admitting that they do.

Justice, moral fitness and public convenience when applied to a new subject, make common law without a precedent; per Willies J in MILLER vs. TAYLOR 4Bon 2312. It is argued that the prerogative of Judges is not to make law by declaring it and formulating it – this is for the legislature – but to make the law by applying it to cases as it comes before them. It is however, being increasingly accepted that judges are capable of “ making law” through the interpretation of statutes, particularly the mischief rule and the doctrine of precedent.

Furthermore, it is clear that when an act of Parliament makes no special provision for the case in question and there is no existing precedent, the Judge must and necessarily ‘ creates new law’.