

The english judiciary 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:

The English Judiciary continues to maintain its institutional commitment to the declaratory theory of law. The declaratory theory of judicial decisions is to be found in a statement by Sir Mathew Hale over 300 years ago, viz that the decisions of the courts do not constitute the law properly so called, but are evidence of the law and as such " have a great weight and authority in expounding, declaring and publishing what the law of United Kingdom is"[1]. To the like effect, Blackstone Commentaries[2], stated that " the decisions of courts are the evidence of what is the common law". In recent times, however, a more realistic approach has been adopted, as in Sir George Jessel's celebrated statement that rules of equity, unlike rules of the common law, are not supposed to have been established since time immemorial, but have been invented, altered, improved and refined from time to time[3]. There can be no doubt of the truth of this statement; and we all know that in reality, in the common law as in equity, the law is the subject of development by the judges - normally, of course, by appellate judges[4]. Declaratory theory is based on the belief that judges' decisions never make law, rather they only establish evidence of what the law is. However, this view is no more accepted. There are mainly three reasons for the perseverance of the declaratory theory. Firstly, it fascinated in the separation of powers. Secondly, it concealed the fact that judge-made law is retrospective in its effect and finally, when the judges confronted with a new, unusual, or different point, they tend to present as if the answer is provided

by the common law[5]. One of the most widely-accepted principles of the English Legal System is what is known as the ‘declaratory theory’ of judicial decision-making. This principle states that when judges are required to make decisions, they do not create or change the law, they merely ‘declare’ it. That is, a judge says what he or she finds the law to be; no ‘new’ law is ever created by judges. New law comes from Parliament. Law has a double life. It is in force as a matter of fact; historians and contemporary observers can describe and make predictions about its content and effect by attending to the opinions and practices prevalent among certain persons and groups, especially courts and their officers. But it has its force by directing the practical reasoning of those persons and groups. And since one engages in practical reasoning to reach normative conclusions[6], facts count in practical reasoning only by virtue of some further, normative premise(s), the source of the reasoning’s directiveness for decision and action. Law’s existence, force and effect can always be understood as sheer fact (historical or predictable) or alternatively as directive standard. Our law’s double life is at the root of the problems, partly substantive, partly illusory, which divided the Lords in *Kleinwort Benson v Lincoln City Council*[7], a case important for the law of restitution, but here considered for its jurisprudential interest[8]. In this case the question for the House of Lords was whether, on the facts as pleaded by the appellant bank, a bank making payments under a swaps agreement with a local authority, in the belief that the contract was binding, did so under a mistake of law when it turned out that the contract was ultra vires the local authority[9]. It was assumed at the time of the swaps agreements that a local authority could enter into them as ancillary to its

statutory borrowing and lending powers. Indeed, the Chartered Institute of Public Finance and Accountancy had received advice to this effect in 1983[10]. The majority of the court, notwithstanding the Law Commission's view, concluded that subsequent changes in the common law operated retrospectively so that the law always was the law as laid down in the subsequent decision. It therefore followed that the payer was indeed mistaken at the time of payment. This is the declaratory theory of the common law with retribution. Even on those infrequent occasions when they are expressed to be retroactive, statutory changes in the law do not falsify intervening legal history in such a way. As for the minority, Lord Brown-Wilkinson rejected the declaratory theory of law as " a fairy tale"[11]and saw it as artificial to say that a payment was made under a mistake when paid " on the basis of the law as it is then established"[12]. Lord Lloyd was quite clear that, where there was a settled understanding of the law, that was the law at the time of payment. And if there was real doubt about the law, it could not be said that the payer made a mistake at all[13]. He accepted that a change in the law necessarily had a retrospective effect on the parties to the litigation in which the change occurred, as well as on parties in a case not yet decided, but retrospectivity went no further than that[14]. Although it might be argued that the effect of the " true" view of the common law is that the payer had a common law right to the recovery of the payment, and that this should not be " taken away"[15], this is either over simplistic or over sophisticated. If at the date of the payment it was the law that the payer was liable, the payer was not laboring under a mistake at that date: the subsequent change in the law could not create a cause of action which, ex

hypothesis, did not exist at the relevant time[16]. But in the present context what is significant is the fact that the majority was prepared to modify a rule of common law in circumstances in which the result was clearly undesirable in the absence of legislative intervention. The "declaratory theory of law" was mocked by Austin and dismissed by Lord Reid as a "fairy tale"[17]- as the dissenters in *Kleinwort Benson* recalled with approval. And if it is taken as a "historical", descriptive assertion, it is of course falsified by the fact that the common law's rules have changed over the centuries[18]. But it is better taken as a way of stating an important element in judicial duty, an element emphasized in Lord Reid's article[19] and explained by Lord Goff in approving a "reinterpreted" declaratory theory: the duty of judges to differentiate their authority and responsibility, and thus their practical reasoning, from that of legislatures[20]. Overlooking the law's double life, the declaratory theory's despisers have not attended to its essential, normative claim. Professor Atiyah has provided a very comprehensive commentary on Declaratory Theory in "Judges and Policy"[21] and has identified five reasons for the continued existence of this theory. Firstly, judges can use it to evade responsibility by shifting criticism of his judgment onto 'the law' as a higher principle, and that they are 'bound by the law'. Second, because Parliament is the proper place for legislation to be made, judges should make law only within narrow constraints. They should do so to do justice. Third, judicial lawmaking is tolerated only because it is not exercised openly, and if judges made law without retrospective effect this would effectively mean they are engaging in 'naked legislation'. Fourth, many judges appear to believe that the only alternative to Declaratory Theory is to abandon the doctrine of

precedent and the separation of powers, despite this not occurring in the USA. Fifth, judges can hide behind Declaratory Theory to prevent the perception that they prefer one view of the law to another, and thereby retain public respect for the judicial impartiality. Once again referring to the case of Kleinwort Benson, if the House of Lords could do no better than create such uncertainty, it ought to have left mistake of law to the legislative implementation of the proposals of the Law Commission. The litigation in this case was driven, not by mistake of law as such, but by limitations difficulties arising in connection with the action for recovery of money paid on a failure of consideration[22]. Having chosen to pre-empt possible legislation on mistake of law, the adoption by the House of Lords of the declaratory theory of law led it to recognize that the law on limitations is in need of review. Furthermore, in this case the majority of the House of Lords did three things. They unpicked the carefully crafted package of law reform produced by the Law Commission. Secondly, they "declared" the mistake of law rule never to have been part of the law of England on a true view of restitutionary principle[23]. Thirdly, they asked Parliament to address the difficulties caused by the juxtapositioning of (a) the rediscovered principle, (b) their remorseless application of the declaratory theory, and (c) a Limitation Act passed on the (reasonable) assumption by Parliament that there was no need to deal with payments made where the law is subsequently changed by common law since they were not recoverable[24]. These were the difficult part of any reform of the mistake of law rule. It is submitted that it is manifestly unsatisfactory to develop the common law in a situation in which the removal of a rule causes acute practical problems because there is

legislation in force which has been enacted on the assumption that the rule exists[25]. One cannot help but feel that the willingness to do so is in fact a product of the "oil and water" approach to the relationship between common law and statute. Total Number of Words: 1620 (Approx.)