AN INTRODUCTION TO THE STUDY OF LAW & LEGAL TECHNIQUES[1]

Whilst you may feel you have perfected your own method of study the following is intended as a guide which no doubt you will want to adapt in due time for your own needs.

A. **LECTURES**

Lectures are usually scheduled to last for an hour and a half. You must attend all lectures, which will provide a comprehensive foundation about the various topics for further study.

Note keeping during lectures : Writing on one side of your note pad only enables you to "fill in" the lecture on the other side and yet still retain one basic set of notes.

A proper system of headings with cases made to stand out not only makes notes look neat but enables you to revise easily for examinations. The emphasis you place on this will go a long way to determining your exam result!

Lecture notes are a foundation. From this foundation you should develop your knowledge by reading relevant textbooks, cases and articles.

It is not essential to remember all case names – you should try to know the titles of cases. As regards articles there may be more than one view on the particular point under discussion – but know the salient points of law so as not to lose sight of the wood for the trees.

B. **TUTORIALS**

The prescribed subject matter and reading material must be prepared. In the tutorial situation the major part of the contribution should be made by students – not the tutor.

C. **TEXTBOOKS**

Textbooks do not have to be read cover to cover. If a set book is not clear on a particular aspect go to a book, which deals with that point more fully to grasp the point. It is important that you understand what you are reading. Do not just read it.

D. **WRITTEN WORK**

a) **Golden Rule**: Write legibly.

b) **Terminology :** It is important to familiarise yourself with, understand and be able to use specific legal terminology.

c) **Using authorities :** If stating a principle, then state the authority, i.e. the case, statute or statutory instrument.

d) **Essays:**

- Answer the specific question asked.
- If the question reads "Juries are middle class, middle-aged and middle-minded". Discuss – then illustrate your argument for or against the proposition in addition to putting down what you know about juries.
- Essays should have a beginning, a middle and an end. Thus they will usually involve starting at a general principle and progress logically until a conclusion is reached on the precise point of issue.

e) **Problem solving questions:**

- These comprise by far the majority of questions which law students are required to deal with in examinations.
- It is important to remember that the first step is to analyse each problem in order to discover what particular legal issues are involved. Once this has been done, it is then possible to recognise and consider the areas of law relevant to such issues.

[1] Richard Owen, Scheme Leader CPGDip. et al

- It is suggested therefore that an approach based on the following steps be adopted.
  a) Consider what legal issues are posed by the factual circumstances presented in the problem.
  b) Locate and discuss the law relevant to such issues (i.e. case law, statutes).
  c) Suggest an appropriate answer based on (b) (application).
- It must be emphasised that there can be no "model" answer as such because it is not always possible to provide an answer which is the only acceptable or authoritative one. As suggested above, what is important is that law students should develop an ability to highlight the legal issues to which a particular set of facts gives rise and then arrive at that conclusion which is considered to be the most appropriate one given the current legal position.
- Remember that the answer must be supported by cases and statutes wherever possible.

E. **EXAMINATIONS**

Again you will probably have developed your own method of revision. You should start revision in plenty of time and a good set of lecture notes will save much revision time. Look at previous examination questions.

DOING THE EXAMS

a) Arrive in good time.

b) When you get the exam paper check how many questions you have to do and whether or not there are any limitations on your choice such as "Do three questions from Part A and two Questions from Part B".

c) Allocate your time evenly over all the questions over the examination paper, allowing time for reading the paper through at the beginning and your script at the end. It is amazing the way points come back. Before you answer a question, write salient points, statute, case names etc. in pencil at the top of a question and tick them off as you write the answer. Remember it is far easier to get out of twenty on five questions than ten out of twenty on four. If you run short of time do the final answer in note form (but do not plan your time so this is necessary!!)

d) If you cannot remember the name of a case or title of a statute use a phrase such as "in decided case" or "a statute provides that…"

LEGAL WRITING

During the year, tutors will be setting you written work. This will be in additional to the normal preparation of questions for oral discussion in tutorial. It is most important that you develop a proper approach to legal writing; not only is it one of the skills expected of a practising lawyer but, more immediately, it is the foundation for your exam success. It is on your written performance in the exams that you are largely judged. Many students fail to do themselves justice in the exams through lack of a technique which they could and should have learned in their written work during the year.

Essays and Problems : The Essay is used in most disciplines for general exposition and analysis of a topic, looking down and over it from a vantage-point. In law, you may be asked to explain, illustrate or discuss a particular doctrine or institution (e.g. strict liability, the jury, frustration, act of state); or to analyse recent developments or proposed reforms in a particular area (duress, powers of arrest, habeas corpus, judicial precedent, etc); or to comment critically on a quotation ("The jury is virtually defunct in civil cases and should be dispensed with in criminal ones". Discuss).

Where imaginary facts are given and your advice sought on these, this is called a problem. in what follows, guidance is offered first on essay-writing and then on tackling problems. But much of the first part on essays is applicable also in problems and so is not repeated in the second part.

ESSAYS

Preparation : Read and consider carefully the question set before plunging into the research necessary. It will usually be on a topic covered or touched upon in the lecture course; but the treatment required must always be somewhat different from that of the lecture or there would be little point in setting the essay. So think what further depth or breadth is required (more detail? more history? more comparison? more criticism?) and let your own opinion develop, both as to the treatment of the topic and its content. To a large extent your ideas will be formed only while you are reading-up the topic. But you should start out with an idea of what you think the question is asking for - this is especially important where it is in the form of a quotation - and then concentrate your research on this aspect. Otherwise you may be pulled in all directions by what you read and will find it difficult to know where to stop.

Sources : Legal reasoning requires something more than bald assertion, however self evident you may think the matter asserted. Imagine that the reader is going to check on everything you say. So for every major proposition of law you make, you must cite some supporting authority. (see later under footnotes). In the end this comes down to something said in a judgement in a reported case, or contained in a section of a statute. Look at these in the original, and satisfy yourself that in context they really do say what your lecture notes or text-book have led you to believe they say. You must have some surprises.

Citation : Authorities should be properly cited. A case should be given its full name (at least on the first occasion you refer to it) which should always be underlined. Footnote by number its principal reference. If you want to refer to a particular dictum (i.e. statement by a judge. The plural is dicta), give the page reference (e.g. [1976] 2 Q.B. 842, 853; or you can say "*as Brown L.J says at page 853.....*"). Use text books and articles as exemplars of the correct way of referring to judges according to their rank in the hierarchy.

Statutes: : Give the short title and the number of the section to which you refer. Much-cited Acts may be referred to by their initials (CJA, SOGA, LPA, etc.) but may still need their year.

Academic Opinion : Secondary Sources do not normally include modern text-books as authority. Statements of law in a text-book or article are merely the writer's opinion of what the law is, synthesised from cases and statutes that he has studies. : It follows that however learned and respected a writer may be, his propositions are only a secondary source of what the law is; it is to his authority that you should go. Even when a court has considered and approved a text book statement in a later case (and they often disapprove them) it is this new case, not the statement, that is now authoritative. There are exceptions to this rule where there is a gap in the law, because authority is totally lacking or uncertain. The academic writer (which includes even judges off-duty) may then be offering theory, analogy or explanation to fill the gap. It will be clear from the context and the lack of authority cited that this is so. In this instance you may put forward the writer's view as a statement of the law; which you may then commend to the court).

BEFORE YOU BEGIN

Plan. : When you have gathered the knowledge which you think is the necessary and sufficient raw material for your essay, make a rough plan of what you intend to say. It need be only a few headings and sub-headings. This will help you to organise your material and ideas before committing them to paper. Impose this discipline on yourself so that it becomes a habit; it will be invaluable in the exams.

Margin : If you want legible running comments from the marker, you must provide space for them. Always leave a margin of about 3 cm on every page.

Neatness : Unlike exam-writing there is no good reason for a tutorial or coursework essay to be written in haste. You will of course need to do a lot of rough scribbling while you are preparing but the essay submitted must be a final and considered version, neat and legible, without second - and third - thoughts interlined, extensive deletions or other agonies in indecision. Copying out a fair copy from your notes or draft will enable you to remember the content better and to put a final polish on your thoughts and style. And it is a courtesy which the tutor will appreciate.

Headings : Write out at the head the full title, question, quotation, etc. as set. this way you will have a complete record which will be useful to you later in the year when you come to revise. (But don't do this in exams of course. It will be a complete waste of time).

PRESENTATION

Literacy : You are supposed to have already learnt to spell and punctuate, make sentences and paragraphs. If you did not you had better acquire these skills quickly. Illiteracy in a lawyer-is a serious handicap.

Style : Express yourself simply and directly. Be literate but don't try to be literary: it only clouds What ought to be clear. The right style for legal writing is to be found in well-written text-books and articles. You should be under their influence before long. But meanwhile don't try to affect a style; be yourself and say what you mean in ordinary words as you would if speaking. A useful test is to read your essay aloud (to others or yourself) and see if it sounds natural or inflated.

- Write in the 3rd Person.
- Do not say, "I think", "I would advise" etc
- Use phrases such as "it would appear" "it is submitted" etc (This applies to problems also).

"…" : These have one essential use: to indicate to the reader that you are setting out someone else's actual words, not your own. So always put inverted commas round extracts for judgements, statutes and writings.

Do not put them round case-names, statute titles, *(you may use bold and or underline cases and statutes)* latin terms (e.g. mens rea, per incuriam, consensus ad idem) or common technical terms or titles (Family division, contempt of court, indictable offence, promissory estoppel). It just betrays your unfamiliarity *(you may instead use italics for terms).*

Pitch : The level at which your first essays should be pitched is that of the intelligent but uninformed layman. So imagine you are writing for such a reader, who needs to be introduced to things just as you were (better than you were?) not long previously. Define any technical terms you use and explain doctrines and concepts, without assuming he has any knowledge of these.

Length : How long should a coursework essay be? This must depend on the subject-matter. Tutors don't expect an exhaustive account. It may be around 2,000 words or perhaps less and a word limit will be specified. You may be penalised if you greatly exceed this. The real questions to ask yourself are: have you dealt with the topic thoroughly in principle? Have you given sufficient appropriate illustrations to present a balanced account? Have you commented adequately? Have you drawn conclusions? Are they justified by your exposition?

Conclusions : Come to some sort of conclusion.. Something however tentative, should follow logically from your examination of the topic. If the question was in the form of a quotation, look back at it and say how valid it was. Remember that attributed quotations are often selected for discussion because they are thought to be provocative and not necessarily sound; whilst unattributed quotations are often concocted by the question setter.

Footnotes and Bibliography : Essays (but not problems) should be accompanied by adequate footnotes and bibliography. A lack of these means a lack of authority - with consequent results.

How to answer problem questions

The purpose of problem questions is to see how you are able to apply legal rules and principles to a given set of facts.

These rules and principles are derived from cases and from statutory provisions.

Rules derived from cases (called the 'Common law' or 'judge made' rules) are the decisions which the judges reach in those cases on the basis of the facts before the courts.

Clearly, the facts from case to case vary. Nevertheless, one set of facts in case A, say, may be very like the facts in case B - so much so, that the judges' decision in case A will be applied by the judges to the facts in case B in order to reach a decision.

When you are presented with a problem question you are, then, being asked to apply ruling from previous cases to the facts before you in order to decide what the legal solution to the problem is.

Problem : An example of a problem and its solution will illustrate this:

1. On the 1st February John writes to Fred offering to sell his car to him for £500.
2. On 3rd February Fred Writes to John accepting his offer.
3. Meanwhile, on the 2nd February John has written to Fred withdrawing his offer
4. This letter reaches Fred on the 4th February.
5. Fred seeks your advice : he wishes to know if he has a valid contract with John.

This problem concerns certain legal rules about offer and acceptance in the law of contract, but the same principles and techniques are applicable in other subjects.

- Firstly, John has, on 1st February, made a clear, definite offer to John.
- A contract will come into being between Fred and John if and when Fred accepts this offer.
- Fred has apparently done so on 3rd February.
- In order for an acceptance to be legally binding, the usual rule is that it must be communicated to the 'offeror' (i.e. person making the offer - here, John).
- Meanwhile, the offeror is free to 'revoke' (i.e. withdraw) his offer at any time before it is accepted and Fred did indeed receive John's revocation on the 4th.
- So it would appear that there is no contract between John and Fred.
- However, there is another legal rule which is relevant to this problem where an acceptance is made by post (letter or telegram) it is legally binding on the offeror as soon as it is posted.
- Applying this and the above rules to the problem, it will be seen then that, as far as the law is concerned, Fred accepted John's offer on 3rd February when he posted it to John.
- It is irrelevant that John tried to revoke his offer on 2nd February, because this did not reach Fred until after he had already accepted John's offer (remember : an offer is not effectively revoked until the offeree receives the revocation).
- 'So, the result is that Fred and John are bound by a contract which came into being on 3rd February when Fred accepted John's offer.
- You, as the solver of the problem, would inform Fred accordingly, giving him the above reasons for your answer, quoting the cases from which you derived the rules you applied.
- You would, of course, need to quote the relevant facts from those cases to show how they are essentially similar to those in his case.
- If the rules you were quoting were not common law rules but were derived from statute, you would of course quote the relevant provisions of the statute.
- You will gradually develop the technique of answering problem questions.
- The questions will not always ask you to 'advise' someone : they are sometimes simply as you to say what the legal outcome would be.
- Now, it sometimes occurs that there are no legal rules to cover a particular situation simply because there is no relevant statutory provision and no situation of that sort has come before the courts for a decision.
- Where the law is not clear, then your answer should reflect this fact - do not assume that there is a always a neat, clear and definite legal solution to a problem.

N.B. DO NOT FORGET THAT FOR All OF THE POINTS YOU MAKE ABOVE YOU SHOULD HAVE SUPPORTED YOUR ANSWER BY REFERENCE TO CASE AUTHORITIES. I.E. AT LEAST GIVING THE NAME AND IDEALLY A BRIEF ACCOUNT OF THE RELEVANT FACTS.

ANSWERING LEGAL PROBLEM QUESTIONS

Questions in problem-form consist of invented fact-situations. You are usually asked to discuss these or, more often, to give advice to one of the parties. So instead of the lofty and detached over-view of a general area of law required in an essay, you now have to disentangle a very particular situation in the way a practising lawyer would, looking, as it were, upwards at the law.

Given Facts : You must accept these as established. Your task is to say what their legal implications are. How such facts could ever be known or proved does not concern you.

Scenario : There will quite often be facts, omitted from the given facts, which you, **need to know before you can offer a complete answer.** In real life you would ask your client for this further information, whose significance he has not appreciated. You cannot do this with a tutorial problem so you must do the next best thing: speculate. You point out that you are not told whether factor X or factor Y was present. If X, the law treats this in such a way..... If Y, the further question of Yl and Y2 has to be considered..... and so on.

Gaps : Use common sense about missing facts. On the one hand look for something beyond the line of least resistance, the most obvious and simple construction of the facts which dodges the real legal difficulties. On the other hand, don't try to dredge up fanciful ambiguities, e.g. insanity or infancy, just because the facts do not specifically state that the parties are fully competent to contract or commit crimes.

Relevance : Problem facts are usually carefully devised to focus on an area of uncertainty or intricacy in the law. If you depart from the facts, whether deliberately or through careless reading, you evade the problem set. Fill out the facts where they are vague or ambiguous but never so as to contradict any given fact.

Precedent : Given facts may sometimes be similar to those of a well-known case. But beware of such resemblances. A slight variation or generalisation of fact may make a big difference.

Preparation : Read the problem carefully several times until you get a complete grasp of the facts and the names of the parties. The area of law concerned should be obvious to you. Study it in your text-book and lecture notes, and in the further reading here indicated: cases, articles, etc. which look as if they might have some bearing on the point.

Having done this, you should have been able to pinpoint the exact legal problems involved and their nature: e.g. intricate legal rules and exceptions which are difficult to apply to a concrete situation; a gap in the law; conflicting authorities; an ambiguity in the statute or casus omissus; etc. If you can identify the problem, you are half way to a solution.

Targeting : If you prepare thoroughly, you will learn much more than is necessary for answering the problem set. This is not wasted effort. The extra knowledge is valuable and so is the exercise spent in obtaining it. But the best exercise is to eliminate it. The most important thing is to learn to discriminate what is really relevant for tackling the problem from the general mass of information you have accumulated. In particular avoid the mistake of some students who, perceiving that the problem, involves, say, the adequacy of consideration, will start by saying "This problem is about consideration. Consideration means..... “and they proceed to write a long and learned essay-type answer on the doctrine of consideration. They will not attempt to relate any of this to the problem until perhaps their last sentence: "For these reasons John's action will probably fail". Apart from this last sentence, they could have been answering a question entitled "Write all you know about consideration". So address yourself to the problem facts, just as though you had an actual client who wants advice, not an abstract discourse.

Tactics : If you are asked to advise one side, look at the case from the side's standpoint. This raises questions of tactics as well as law. For example, it is not the best advice only to put forward a partial defence (e.g. provocation) when a complete defence (e.g. self-defence) is arguable also.

Liabilities : Advising one side does not mean ignoring or under-estimating authorities which tend to favour the other side. Face up to these realistically and try to distinguish or argue against them.

Subornation : It is not good advice (and is actually a crime!) to tell your client to change his story as related to you in the given facts; "My advice is that she should say she posted her letter on the Sunday" or "it would be better if he could suggest it was an accident".

Perfection : A well-concocted problem can have no guaranteed definite right answer. There could only be such an answer if substantially the same facts had come before a court and had been finally and authoritatively resolved; in which case there would be little point in setting the question save perhaps as a library exercise. Some students are at first a little disturbed to discover this legal fact of life. They should take comfort: by the same token, if their arguments are informed and reasonable, no one can say they are definitely wrong.

Prediction : It follows that what you should try to present is not an illusory right answer but an intelligent and reasoned prediction of what a court would say if the facts came before it. You do this by considering all the relevant authorities, their bearing on the facts, the direction in which the law has been moving, etc., so as to suggest how the court would view the case and hence what advice you should give. You must have at your fingertips all the tools of legal reasoning: the rules of statutory interpretation, hierarchy of precedent, ratio and obiter, distinguishing, etc. If a statute is involved it is vital that you refer to its actual words, not some paraphrase of them in your lecture notes. Cases which seem against you (or for you) when summarised in a lecture, footnote or headnote may not seem nearly so impressive when read closely.

Presentation : Much of the previous section on essay-writing is equally applicable to the presentation, of problem answers. It is permissible in answering problems to refer to the parties by their initials, which are usually distinctive. But don't use your own or other unofficial abbreviations, as you would in your lecture notes.

Humour : Although there may sometimes be a trace of humour in the parties' names or facts, there is not usually much scope for humour in answering problems.

Conclusion : Have the courage to give advice or to come to a positive conclusion.

After considering all the authorities and arguments both ways it is very feeble to end "it is difficult to say what a court would decide". That is why the problem was set!

You might as well say, as students have been known to, "My advice is that Mary should see a good solicitor".

Problem situations are rarely so evenly balanced that one cannot perceive a better and a worse opinion. Some of the following may come to the rescue.

- questions of policy,
- mischief-rule and other grounds for statutory interpretation,
- onus and standard of proof, etc.
- causation – direct – foreseeable etc
- allocation of responsibility – vicarious liability – contributory negligence
- distinguishing between similar cases on the facts
- changing social circumstances and very old laws
- indirect impact of Human Rights Legislation
- indirect impact of European Law

All else failing, it has been known for common sense to play a part in solving legal problems.

EXAMINATION AND ASSESSMENT

Examinations : Examinations remain the major method of assessing a student's progress. All of us have views as to whether they are a good idea or not. This is not the issue for discussion, what is, is that 80% 'of a student's marks come from the end of the year examinations and for that reason what are needed are guidelines as to the most efficient way of tackling them. By this stage in your education each of you will have developed a routine, but here are some general thoughts:

Before the Examination

1. Remember, one of the best aids of revision is to work consistently through the year. Yes, we all have to have a final effort but the more familiar you are with your subjects, the easier this will be.
2. Start revising in good time. You are the person who knows how fast or slow you learn so plan ahead.
3. Divide your time equally between your subjects.
4. Make a list of the topics in each subject and, on the basis of how much time and emphasis placed on them, classify them as of major or minor has been importance.
5. For some of you studying and revision may have to be fitted in around jobs and other commitments, nevertheless, try to revise in short periods. Four two-hour sessions is more efficient than one eight hour session.
6. Use past papers! Knowledge is not enough. You must also have the technique to answer the question. During the year your tutors will help you to develop this.

In the Examination itself

1. Make sure you have the correct date, time, place and subject. Remember, this is your responsibility.
2. Do you have all you need e.g. pens, statutes, watch etc.
3. Read the paper thoroughly: How many questions need you answer?
4. Decide on your choice of questions and quickly plan your answers.
5. Divide your time. You must answer the correct number of questions.

Assessed Coursework

- During the year, tutors will set assessed coursework. This counts towards 20% of your end of year mark.
- Coursework may be either essays or problems, and oral presentations.
- Remember, this is an opportunity to develop skills which examinations cannot.
- Coursework allows students to investigate an area in depth.
- It is not a chance to give back work which really consists only of your lecture notes.

TUTORIALS

PREPARATION, ATTENDANCE AND CONTRIBUTION at tutorials is vital if you wish to gain the maximum benefit from the course and success in exams / assessments.

Tutorials are an essential ingredient in your programme of study, if not **THE** essential ingredient. They represent the forum where **YOU** do the work e.g. ask and answer questions and tackle issues causing confusion. They should not be seen as a "rerun" of the lectures or a note-taking session.

PREPARATION means that you should have completed, understood and remembered the important points of the relevant readings in readiness for the tutorial.

You may be asked to prepare only selected questions on a specific topic, the reason being that the remaining questions merely provide further examples of issues raised issues which are already dealt with in the questions set. Students will generally be advised in good time of the questions to be prepared. This may be done in the previous tutorial or by means of notices displayed on the appropriate notice board.

HOW TO APPROACH TUTORIALS : SEE :-

- Kenny: "Studying Law",
- Glanville Williams: "Learning the Law";
- Masson, Neal and Newell: "How to Study Law";

GENERAL ADVICE ON TUTORIAL PREPARATION

1. Read back through your lecture notes on this subject.
2. Read the directed reading - textbooks, cases, articles etc. Bearing in mind the principles covered/stressed in lectures, make RELEVANT notes to expand the lecture. The reading should also serve to clear up any difficulties in understanding your lecture notes.
3. Direct the material to answering the questions set for tutorials. There are three ways that students tend to answer such questions.
   (i) answer in full as if the work is coursework.
   (ii) make notes directed at assisting them in answering oral questions in the tutorial.
   (iii) from memory - without notes.

If you have made notes you will have a permanent record, which will prove invaluable when preparing for the examination. The method you adopt should be the one that suits you best.

ALWAYS PREPARE FOR TUTORIALS – IF NOT YOU WILL LOSE OUT AND BY BEING ILL PREPARED YOU MAY DEPRIVE YOUR FELLOW STUDENTS OF AN EFFECTIVE TUTORIAL SINCE PARTICIPANTS BENEFIT FROM THE CONTRIBUTIONS OF OTHERS

FOCUS : Just before the tutorial, read through the material that you have prepared and get the basic concepts and ideas clear in your mind. Some students who answer tutorial questions in full are often handicapped because they have a mass of information and detail but fail to appreciate the essential points.

In the tutorial you should be able to identify relevant issues within the topic, within the questions and within the readings.

You must know the relevant legal principles (without reading them from a textbook) and be able to APPLY those principles and support them with relevant statutory or case law authority.

ATTENDANCE : This speaks for itself! However, attendance means showing interest in the subject. Don't just sit there and say nothing. Be alert and do not stare into space or out of the window. You may be asked the next question.

CONTRIBUTE : Don't be afraid that what you say may be wrong. have confidence. Tutors don't usually bite and prefer an answer to "I don't know". Never give the tutor reason to suspect that you have not prepared.

Avoid making generalised statements without the authority to back them up. Justify what you say by using legal principles and named authority. Law is a very detailed and often precise subject.

Be prepared to argue your point - after all that is what being a lawyer is all about!

AFTERWARDS : take Stock. How have your thoughts on this subject altered as a result of the tutorial? Are there any areas which need expanding in your notes?

Keep the lecture notes, tutorial notes and questions on a subject/topic together. Look at the past examination questions to see what issues within this topic the examiner prefers.

LECTURES

The lecture is the most effective and economical method of introducing new topics and providing guidance to essential further reading. The manner in which lecture material may be presented by staff is subject to continual refinement as legal knowledge advances and develops. Again, new technology means that use is often made of audio visual aids where this is appropriate. Many major legal texts have somewhere in the region of 1,000 pages. In 22-24 weeks it is obvious that lectures cannot cover all relevant material. Indeed, this is not their purpose. Lectures aim to introduce the various topics and outline or refer to the case law and legislation from which these principles are derived. Almost always, case lists and subject outlines will be provided to help you find this additional reading.

Although lecturing styles differ, do not try to take down every word. A good set of lecture notes should be a concise, clear record in your own words of the legal material discussed in that lecture. A system of headings will help you in this as will a clear method of abbreviation. Another useful practice is to write only on one side of the paper, this then allows you too use the other side for any additional notes you will have made by looking at text books, case reports and any appropriate journal articles.

By attending lectures you will have the great advantage of being able to see what areas of his or her course your lecturer emphasises or believes to be of the greatest importance - a great advantage when examination time arrives!

This has been only a brief outline of the lecture and how you as a student should approach them.

Many books contain detailed information but a particularly useful account can be found in

"SWOT Family Law" by Duncan J Bloy published by Blackstone Press.

All law students (not just family lawyers) will find Professor Bloy's comments on how to study and why of great use.

See also, Constitutional Law, Chapter 1, C.H.Spurin, **www.nadr.co.uk** : Publications / Public Law.

SOURCES OF LAW[2] : INTRODUCTION TO CASES AND STATUTES[3]

What is the meaning of 'common law' when it is contrasted with statute law?

Common law is used to describe all those rules of law that have evolved through the court cases – as opposed to those which have emerged from Parliament – over the past 800 years.

For example, case law. Before the Norman conquest, different areas of England were governed by different systems of law, often adapted from those of the various invaders who had settled there; for example, Dane law applied in the North, Mexican law around the Midlands, and Wessex law in the South and West. Each was based largely on local custom, and even within the larger areas, these customs, and henced the law, varied from place to place. The King had little control over the country as a whole, and there was no effective central Government.

When William the Conqueror gained the English throne in 1066, he established a strong central Government and began, among other things, to standardize the law. Representatives of the king were sent out to the countryside to check local administration, and were given the job of adjudicating in local disputes, according to local law.

By about 1250 a 'common law' had been produced, that ruled the whole of the country and would be applied consistently and could be sued to predict what the courts might decide in a particular case. This process was to be the crux of the English law.

The principles behind this 'common law' is still used today in creating case law. From the idea of Stare Decisis (let the decision stand) a hierarchy of precedent grew up, in line with the modern court system, so that, in general, a judge must follow a decision made in courts which are superior. This process was made easier to follow and confirm the common law through the publications of reported cases in the higher courts, known as case law.

Civil Law : A number of European countries including France, Germany, Switzerland and Austria have a **Code of Civil Laws**. This is a set of written laws which are carefully worked out to provide a statement of the leading rules on any given subject. The French Code is known as the 'Code of Napoleon', and was one of Napoleon's proudest achievements. Other countries which make extensive use of codes of laws include Egypt and Japan. The Republic of China has a Criminal Code, which came into force in January 1980, and work is well advanced in establishing the Civil Code.

Law and Equity - The Historical Development

Developed after the Norman Conquest. By the twelfth century, common law courts had developed which applied this common law. Civil actions in these courts had to be commenced by a writ, which set out the cause of the action or the grounds for the claim made.

New writs were created to deal with new circumstances, but in the 13 century this was stopped, after the Provisions of Oxford 1258 restricted the issue of writs for new types of actions.

The common law courts only offered one type of remedy: damages (compensation). Redress through the common law courts became prescriptive and restrictive.

Many people who could not obtain justice in the common law courts appealed directly to the King for him to intervene and grant them their rights. Most of these cases were referred to the King's Chancellor, who became known as the keeper of the King's conscience.

The Chancellor based his ideas on principles of natural justice and fairness, rather than on the strict following of previous precedents. Eventually a Court of Chancery came into being under the control of the Chancellor which operated these rules of fairness or equity.

Equity was not a complete system of law; it merely filled the gaps in the common law.

2 see further Ch 4 Constitutional and Administrative Law C.H.Spurin at : http://www.nadr.co.uk

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Problems with Equity and Common Law

1. Equity was initially very uncertain as each successive Chancellor had his own ideas of fairness and justice. This caused John Seldon, a seventeenth-century jurist, to say that equity varied with the length of the Chancellor's foot.
2. Litigants who wanted both an equitable remedy and the common law remedy of damages were obliged to take separate actions.
3. By the Nineteenth century the Chancery courts had become rigid in their approach to cases and also slow.

This overlapping of the two systems led to conflict. The common law courts would make an order in favour of one party and the Court of Chancery an order in favour of the other party. This conflict was finally resolved in the ***Earl of Oxford's case*** (1616) when the King ruled that equity should prevail. This rule was subsequently enacted in the Judicature Act of 1873-75.

In 1873-1875 the court structure was completely reformed with the common law courts and the court of Chancery being merged into one single system. However, equitable principles were still clearly recognised as being distinct from common law rules since the Judicature Act 1873 s.25 stated: "where there is any conflict or variance between the rules of equity and the common law … the rules of equity shall prevail." The key point was that all courts could now use equitable rules where suitable and all courts could both grant common law and equitable remedies.

Common law.	The principal remedy is **Damages** but is reinforced by injunctions (both preventive and mandatory) and declaratory judgements – e.g. void and avoidable contracts.
Equitable Remedies	
Injunctions	This orders the defendants to do or not to do something.
Specific Performance	This compels a party to fulfil a previous agreement
Rectification	This order alters the words of a document, which does not express the true intentions of the parties to it.
Rescission	This restores parties to a contract to the position they were in before the contract was signed in that the contract is rescinded – but note that rescission will not be permitted if third parties have acquired an interest in the subject matter – thereby preventing restoration.

What is the meaning of common law when it is compared to civil law?

This needs to be considered in the context of Civil Law, as in Roman law, which deals with continental law, codified law, and Civil Law which deals with private law in England and Wales, e.g., a civil action through the civil courts: personal injuries.

Does the phrase civil law have any other meanings?

What is the difference between public law and private law? Public law against the state and is classified as a criminal act, whilst a private law is a civil offence, i.e., a private wrong, for example, personal injuries.

CASE LAW

Aim: To understand how the doctrine of judicial precedent operates

Objectives: The student should be able to:

1. Use case law to find the law contained within a judgement.
2. Be able to apply the law to other sets of facts.
3. Interpret the ratio
4. Explain the hierarchy of the courts when dealing with precedent.

Stare Decisis : Binding judicial precedent involves case law and the fundamental element of stare decisis, which means following the decisions of previous cases. Accordingly, a judge will decide a case in the same way that another judge has decided a previous similar case; that is, like case should be treated alike.

Where judicial precedent is binding, a judge will have an obligation to follow a previous case, whether or not he or she approves of the decision. On some occasions, however, judicial precedent may not be binding but persuasive, and a judge will not have then be under the same obligation.

How Precedent Works : Past decisions in appellate (appeal) and High Court cases are powerful predictors of what the courts are likely to do in future cases given a similar set of facts. Most judges try hard to be consistent with decisions that either they or a higher court have made. This consistency is very important to a just legal system and is the essence of the common law tradition.

If you can find a previous court decision that rules your way on facts similar to your situation, you have a good chance of persuading a judge to follow that case and decide in your favour.

Ratio Decideni : A case is only a precedent as to its particular decision, ie it ratio decideni, and the law necessary to arrive at that decision. If, in passing, a judge deals with a legal question that is not absolutely essential to the decision, the reasoning and opinion in respect to this tangential question are not precedent, but non-binding obiter dicta: things said by the way. The ratio is not always easy to determine.

Headnote : The headnote will give you a clue to the ratio and will be found at the beginning of a case and generally consists of a short summary of the facts, what the parties were trying to obtain, the legal issues involved and then a number of paragraphs giving the ruling and brief summary of the reasons for so doing. The headnotes will usually also mention the previous case law followed, overturned or distinguished.

Persuasive Authority : If a previous case was decided by a lower court the higher court may use that case for analysis of the legal issues involved, it can provide guidance to the court. Judgements given in Commonwealth courts can be persuasive as although they are not binding they often concern law which is the same as English law. Decisions of the Privy Council are not binding but are highly persuasive. The Privy Council is the final court of appeal for some Commonwealth countries such as Hong Kong. It is a court made up of judges of our House of Lords, and so their views are thought to be well worth considering. As a general rule, the higher the court the more persuasive its opinion.

Reversing, Overruling and Distinguishing :

Overruling: When a principle of law laid down by a lower court is overturned by a higher court in a later different case, it is overruled

Reversing: When a case is taken on appeal and a higher court overturns the decision, it thereby reverses the decision.

Distinguishing: A case may be distinguished on the facts or the point of law involved. Accordingly, an otherwise binding decision is thereby avoided.

Judicial Precedent within the court hierarchy

European Court of Justice : With regard to matter of Community Law, decisions of the European Court of Justice bind English courts, including the House of Lords. Although it will generally follow its own previous decisions, the ECJ is not bound to do so.

House of Lords : The HL was bound by its own decisions until July 1966, the Practice Statement, released them from the constraints of precedent.

The Court of Appeal (Civil Division) : The CA is bound by the decisions of the HL, and it in turn binds the High Court and County Courts. As to whether the court is bound by its own decision, consideration must be given to some important cases:

Young v Bristol Aeroplane Co Ltd [1944] KB 718 it was decided that the court of appeal was bound by its own decisions subject to three exceptions:

1. Where there are previous conflicting decisions, the CA decides which decision to follow and rejects the other.
2. Where a CA decision cannot stand with a later decision of the HL
3. The court does not need to follow a CA decision that was given per incuriam (in error) that is through lack of care. This would involve the court being in ignorance of, or failing to consider, a relevant statutory provision or a binding precedent of the HL.

Court of Appeal (Criminal Division) : Inferior courts, including the divisional court of the Queen's Bench Division, are bound by the decisions of the Criminal Division of the CA. The Criminal Division regards itself as bound by decisions of the Civil Division of the CA, subject to the exceptions in Young v Bristol Aeroplane Co Ltd.

With regard to its own previous decision, however, precedent is not applied so rigidly because a person's liberty may be at stake.

Divisional Courts : They are bound by the House of Lords and the Court of Appeal in civil and criminal cases. They are usually bound by their own previous decisions, subject to the exceptions in Bristol Aeroplane case.

Crown Court : Bound by decisions of the HL, the CA and the divisional court of the QB. There is no obligations on a Crown Court judge to follow other Crown Court Judges.

County Courts and Magistrates' Courts : Their decisions are not binding and are not usually reported in the law reports.

Judicial Committee of the Privy Council : Not binding but persuasive.

Advantages and Disadvantages of the Doctrine of Binding Precedent

Advantages

- **Certainty**: a previous case must be followed.
- **Precision**: Achieved through the volume of precedent cases.
- **Flexibility**: Overruling and distinguishing.

Disadvantages

- **Rigidity**: must follow.
- **Bulk**: Complexity
- **Uncertainty**: HL may depart using the Practice Statement

Statutory Interpretation

Although Parliament makes legislation, it is left to the courts to apply it. Despite the fact that Acts of Parliament are prepared by expert draftsmen, there are many occasions when the courts find that the implications of a statute for the case before them are not at all clear. For example, a draftsman writing a statute banning men with facial hair from parks might write that

'men with beards or moustaches are prohibited from parks'.

Does this mean that a man who has a beard **and** a moustache would be allowed in? If the words and/or were used it would be clear, but the draftsman may have thought this was automatically implied.

Where a statute bans vehicles from the park, this obviously includes cars and lorries, but the courts may be asked to decide whether it also prohibited skateboards, bikes, or roller skates.

The use of an ambiguous word or phrase may have been deliberate, perhaps because the provision is politically contentious. The **European Communities Act 1972** was ambiguous about the position of UK legislation.

Alternatively, the facts of the case before the court were not foreseen when the legislation was produced. Thus, regarding the example of vehicles in the park, skateboards might not have been invented when the statute was drafted. It would be impossible to say that Parliament intended the term 'vehicles' to embrace skateboards, but since the court has to produce a result it will have to decide nonetheless whether or not the skate boards are included in the prohibition.

Finally, the wording is inadequate because of a printing, drafting or other error.

In any of these cases, the courts must try to discover how Parliament intended the law to apply to the case before them.

Once this is done, the interpretation given to a statute, or part of one, becomes part of case law in just the same way as any other judicial decision, and subject to the same rules of precedent - lower courts must interpret the statute in the same way, while higher ones may decide that the interpretation is wrong, and reverse the decision if it is appealed, or overrule it in a later case.

How are statutes interpreted?

Parliament has given the courts two main sources of guidance on statutory interpretation. The Interpretation Act 1978 provides certain standard definitions of common provisions, such as the rule that the singular includes the plural and 'he' includes 'she', while interpretation sections at the end of most modern Acts define some of the words used within them - the Police and Criminal Evidence Act 1984 contains such a section.

Apart from this very limited assistance, it has been left to the courts to decide what method to use to interpret statutes, and three basic approaches have developed, in conjunction with certain aids to interpretation.

Rules of statutory interpretation

The literal rule : This rule gives all the words in a statute their ordinary and natural meaning, on the principle that the best way to interpret the will of Parliament is to follow the literal meaning of the words they have used. Under this rule, the literal meaning must be followed, even if the result is silly: Lord Esher stated, in R v judge of the City of London Court (1982): 'If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The court has nothing to do with the question of whether the legislature has committed an absurdity'. Examples of the literal rule in use are:

Whitely v **Chapell** (1868). A statute aimed at preventing electoral malpractice made it an offence to impersonate 'any person entitled to vote' at an election. The accused was acquitted because he impersonated a dead person and a dead person was clearly not entitled to vote!

London and North Eastern Railway Co v **Berriman** (1946). A railway worker was knocked down and killed by a train, and his widow attempted to claim damages. The relevant statute provided that this was available to employees killed while engaging in 'relaying or repairing' tracks; the dead man had been doing routine maintenance and oiling, which the court held did not come within the meaning of 'relaying and repairing'.

Fisher v **Bell** (1961). After several violent incidents in which the weapon used was a flick-knife, Parliament decided that these knives should be banned. The Restriction of Offensive Weapons Act 1959 consequently made it an offence to 'sell or offer for sale' any flick-knife. The defendant had flick-knives in his shop window and was charged with offering these for sale. The courts held that 'offers for sale' must be given its ordinary meaning in law, and that in contract law this was not an offer for sale but only an invitation to people to make an offer to buy. The defendant was therefore not guilty of a crime under the Act, despite the fact that this was obviously just the sort of behaviour that Act was set up to prevent,

Advantages of the literal rule : It respects parliamentary sovereignty, giving the courts a restricted role and leaving law-making to those elected for the job.

Disadvantages of the literal rule *:* Where use of the literal rule does lead to an absurd or obviously unjust conclusion, it can hardly be said to be enacting the will of Parliament, since Parliament is unlikely to have intended an absurdity and injustice.

London and North Eastern Railway Co v **Berriman** is an example of literal interpretation creating injustice where Parliament probably never intended any, since the difference in the type of work being done does not change the degree of danger to which the workers were exposed.

In addition, the literal rule is useless where the answer to a problem simply cannot be found in the words of the statute.

The Law Commission in 1969 pointed out that interpretation based only on literal meanings *'assumes unattainable perfection in draughtsmanship'*; even the most talented and experienced draftsmen cannot predict every situation to which legislation may have to be applied. As **Ingman** notes, it also expects too much of words in general, which are at best *'an imperfect means of communication*'. The same word may mean different things to different people, and words also shift their meanings over time.

Zander, in his book ***The Law Making Process***, describes the literal approach as *'mechanical, divorced both from the realities of the use of language and from the expectations and aspirations of the human beings concerned ... in that sense it is irresponsible'.*

The golden rule : This provides that if the literal rule gives an absurd result, which Parliament could not have intended, then (and only then) the judge can substitute a reasonable meaning in the light of the statute as a whole.

It was defined by Lord Wensleydale in G**rey v Pearson** (1857): *'the grammatical and ordinary sense of the word is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further'.*

Examples of the golden rule in use are:
R v **Allen** (1872). S. 57 of the Offences Against the Person Act 1861 stated that 'Whosoever being married shall marry any other person during the life of the former husband or wife ... shall be guilty of bigamy'. It was pointed out that it was impossible for a person already married to 'marry' someone else - they might go through a marriage ceremony, but would not actually be married; using the literal rule would make the statute useless. The courts therefore held that *'shall marry'* should he interpreted to mean *'shall go through a marriage ceremony'.*

Maddox v **Storer** (1963). Under the Road Traffic Act 1960, it was an offence to drive at more than 30 mph in a vehicle 'adapted to carry more than seven passengers'. The vehicle in the case was a minibus made to carry eleven passengers, rather than altered to do so, and the court held that *'adapted to'* could be taken to mean '*suitable for'*.

Adler v **George** (1964). The defendant was charged under s. 3 of the Official Secrets Act 1920, with obstructing a member of the armed forces 'in the vicinity of any prohibited place'. He argued that the natural meaning of 'in the vicinity of' meant near to, whereas the obstruction had actually occurred in the prohibited place itself, an air force station. The court held that while in many circumstances 'in the vicinity'

could indeed only be interpreted as meaning near to, in this context it was reasonable to construe it as including being within the prohibited place.

Advantages of the golden rule The golden rule can prevent the absurdity and injustice caused by the literal rule, and help the courts put into practice what Parliament really means.

Disadvantages of the golden rule The Law Commission noted in 1969 that the 'rule' provided no clear meaning of an 'absurd result'. Since absurdity is judged by reference to whether a particular interpretation appears to be consistent with the general policy of the legislature, the golden rule may be seen as a less explicit form of the mischief rule.

The mischief rule : This rule was laid down in **Heydon's Case** in the sixteenth century, and provides that judges should consider three factors:

1 what the law was before the statute was passed;
2 what problem, or 'mischief', the statute was trying to remedy;
3 what remedy Parliament was trying to provide.

The judge should then interpret the statute in such a way as to put a stop to the problem that Parliament was addressing.

Examples of the mischief rule in use are:

Smith v **Hughes** (1960). The Street Offences Act 1958 made it a criminal offence for a prostitute to solicit potential customers in a street or public place. In this case, the prostitute was not actually in the street, but was sitting in a house, on the first floor, and tapping on the window to attract the attention of the men walking by. The judge decided that the aim of the Act was to enable people to walk along the streets without being solicited, and since the soliciting in question was aimed at people in the street, even though the prostitute was not in the street herself, the Act should be interpreted to include this activity.

Elliott v **Grey** (1960). The Road Traffic Act 1930 provided that it was an offence for an uninsured car to be 'used on the road'. The car in this case was on the road, but jacked up, with its battery removed, but the court held that as it was nevertheless a hazard of the type which the statute was designed to prevent, it was covered by the phrase 'used on the road'.

Royal College of Nursing v **DHSS** (1981). the 1967 Abortion Act stated that terminations of pregnancy were legal only if performed by a 'registered medical practitioner'. By 1972, surgical abortions were largely being replaced by drug-induced ones, in which the second stage of the process (attaching the patient to a drip), was carried out by nurses, under the instructions of a doctor. The House of Lords ruled that the mischief which the Act sought to remedy was the uncertain state of the previous law, which drove many women to dangerous back-street abortionists. It sought to do this by widening the grounds on which abortions could be obtained, and ensuring that they were carried out with proper skill in hygienic conditions, and the procedure in question promoted this aim, and was not unlawful. It was a controversial decision, with Lords Wilberforce and Edmund Davies claiming that the **House** was not interpreting legislation but rewriting it.

Advantages of the mischief rule The mischief rule helps avoid absurdity and injustice, and promotes flexibility. It was described by the Law Commission in 1969 as a *'rather more satisfactory approach*' than the other two established rules.

Disadvantages of the mischief rule – otherwise known as the **Rule in Heydon's Case.**

The rule was the product of a time when statutes were a minor source of law, compared to the common law. Drafting was by no means as exact a process as it is today, and the supremacy of Parliament was not really established.

At that time too, what statutes there were, tended to include a lengthy preamble, which more or less spelt out the 'mischief' with which the Act was intended to deal. Judges of the time were very well qualified to decide what the previous law was and what problems a statute was intended to remedy, since they had usually drafted statutes on behalf of the king, and Parliament only rubber-stamped them.

Such a rule may be less appropriate now that the legislative situation is so different and thus application of the rule may be considered to threaten the legislative supremacy of Parliament.

Aids to statutory interpretation

Whichever approach the judges take to statutory interpretation, they have at their disposal a range of material to help. Some of these aids may be found within the piece of legislation itself, or in certain rules of language commonly applied in statutory texts - these are called internal aids. Others, outside the piece of legislation, are called external aids.

Internal aids

The literary rule and the golden rule both direct the judge to internal aids, though they are taken into account whatever the approach.

The statute itself. To decide what a provision of the Act means the judge may draw a comparison with provisions elsewhere in the statute. Clues may also be provided by the long title of the Act or the subheadings within it.

Rules of language Developed by lawyers over time, these rules are really little more than common sense, despite their intimidating names. As with the rules of interpretation, they are not always precisely applied. Examples include:

Ejusdem generis General words which follow specific ones are taken to include only things of the **same kind**. For example, if an Act used the phrase 'dogs, cats and other animals' the phrase 'and other animals' would probably include other domestic animals, but not wild ones.

Expressio unus est exclusio alterius Express mention of one thing implies the exclusion of another. If an Act specifically mentioned 'Persian cats', the term would not include other breeds of cat.

Noscitur a sociis A word draws meaning from the other words around it. If a statute mentioned 'cat baskets, toy mice and food', it would be reasonable to assume that 'food' meant cat food, and dog food was not covered by the relevant provision.

Presumptions The courts assume that certain points are implied in all legislation, These presumptions include the following:

- statutes do not change the common law;
- the legislature does not intend to remove any matters from the jurisdiction of the courts;
- existing rights are not to be interfered with;
- laws which create crimes should be interpreted in favour of the citizen where there is ambiguity;
- legislation does not operate retrospectively: its provisions operate from the day it comes into force, and are not backdated;
- statutes do not affect the monarch.

It is always open to Parliament to go against these presumptions if it sees fit - for example, the European Communities Act 1972 makes it clear that some of its provisions are to be applied retrospectively. But unless the wording of a statute makes it absolutely clear that Parliament has chosen to go against one or more of the presumptions, the courts will assume that the presumptions apply.

In its 1969 report on statutory interpretation, the Law Commission pointed out that there was no established order of precedence in the case of conflict between the different presumptions; and that the individual presumptions were often imprecise in scope.

There is also room for debate as to why certain values are selected for protection and not others, and as to why there is disagreement among the judges as to the strength of the protection that ought to be accorded. For example, the presumption that existing rights are not to be interfered with serves to protect the existing property or money of individuals, but there is no presumption in favour of people claiming state benefits.

External aids to statutory interpretation - The mischief rule directs the judge to external aids, including the following.

Historical setting A judge may consider the historical setting of the provision that is being interpreted, as well as other statutes dealing with the same subjects.

Dictionaries and textbooks These may be consulted to find the meaning of a word, or to gather information about the views of legal academics on a point of law.

Reports Legislation may be preceded by a report of a Royal Commission, the Law Commission or some other official advisory committee. The House of Lords stated in **Black-Clawson International Ltd** (1975) that official reports may be considered as evidence of the pre-existing state of the law and the mischief that the legislation was intended to deal with.

Treaties and international conventions can be considered when following the presumption that Parliament does not legislate in such a way that the UK would be in breach of its international obligations.

Previous practice General practice and commercial usage in the field covered by the legislation may shed light on the meaning of a statutory term.

Hansard This is the official daily report of parliamentary debates, and therefore a record of what was said during the introduction of legislation. For over 100 years, the judiciary held that such documents could not be consulted for the purpose of statutory interpretation. During his career, Lord Denning made strenuous efforts to do away with this rule, and in **Davis** v **Johnson (**1978), justified his interpretation of the **Domestic Violence Act 1976** by reference to the parliamentary debates during its introduction. The House of Lords however rebuked him for doing so, and maintained that the rule should stand.

Pepper v **Hart** 1993 overturned the rule against consulting Hansard. The case involved a dispute between teachers at a fee-paying school (Malvern College) and the Inland Revenue, and concerned the tax which employees should have to pay on perks, benefits related to their job. Malvern College allowed its teachers to send their sons there for one-fifth of the usual fee, if places were available. Tax law requires employees to pay tax on perks, and the amount of tax is based on the cost to the employer of providing the benefit, which is usually taken to mean any extra cost that the employer would not otherwise incur. The amount paid by Malvern teachers for their sons' places covered the extra cost to the school of having the child there (in books, food and so on), but did not cover the school's fixed costs, for paying teachers, maintaining buildings and so on, which would have been the same whether the teachers' children were there or not. Therefore the perk cost the school little or nothing, and so the teachers maintained that they should not have to pay tax on it. The Inland Revenue disagreed, arguing that the perk should be taxed on the basis of the amount it saved the teachers on the real cost of sending their children to the school.

The reason why the issue of consulting parliamentary debates arose was that during the passing of the Finance Act which laid down the tax rules in question, the then Secretary to the Treasury, Robert Sheldon, had specifically mentioned the kind of situation that arose in **Pepper** v **Hart.** He had stated that where the cost to an employer of a perk was minimal, employees should not have to pay tax on the full cost of it**. The question was, could the judges take into account what the Minister had said?** The House of Lords convened a special court of seven judges, which decided that they could look at Hansard to see what the Minister has said, and that his remarks could be used to decide what Parliament had intended.

Although **Pepper** v **Hart** makes it clear that parliamentary debates can be used as evidence of parliamentary intention, there is still much debate as to how useful they can be, and whether they really can be considered to be good evidence of what Parliament intended. The following are some of the arguments for use of these sources:

Usefulness. Lord Denning's argument, advanced in **Davis** v **Johnson** (1978), was that to ignore them would be to 'grope in the dark for the meaning of an Act without switching on the light'. When such an obvious source of enlightenment was available, it was ridiculous to ignore **it -** in fact Lord Denning said after the case that he intended to continue to consult Hansard, but simply not say he was doing so.

The Human Rights Act 1998 incorporates into UK law the European Convention on Human Rights, an international treaty signed by a number of European countries, designed to protect basic human rights. In many countries the Convention has been incorporated into national law which means their courts can overrule legislation in conflict with it. This is not the case in the UK.

s.3(1) Human Rights Act requires that:

> *"So far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with the Convent Rights."*

This means essential that where statutory provision can be interpreted in more than one way, the interpretation which is compatible with the European Convention should be the one chosen.

s.2 Human Rights Act requires that in deciding any question which arises in connection with a right protected by the Convention, the courts should take into account any relevant judgments made by the European Court of Human Rights. If it is impossible to find an interpretation compatible with the Convention, the court concerned can make a declaration of incompatibility. This does not affect the validity of the statute in question, but it is designed to draw attention to the conflict so that the Government can change the law to bring it in line with the convention (The Act does not oblige the Government to do this). There is a special "fast track" procedure by which a Minister can make the necessary changes.

To clarify interpretation, when new legislation is made, the relevant Bill must carry a statement from the relevant Minister, saying either that its provisions are compatible with the Convention, or that even if they are not, the government wishes to go ahead with the legislation anyway. In the latter case, the Government would be specifically saying that the legislation must override Conventions rights if there is a clash, but clearly any government intent on passing such legislation would be likely to face considerable opposition and so would have to have a very good reason, in the eyes of the public, for doing so.

Other jurisdictions. Legislative materials are used in many foreign jurisdictions, including the USA and many other European countries. In such countries, these materials tend to be more accessible and concise than Hansard - it is difficult to judge whether they are consulted because of this quality, or whether the fact that they are consulted has encouraged those who produce them to make them more readable. It is argued that the latter might be a useful side-effect of allowing the judges to consult parliamentary materials.

Media reports. Parliamentary proceedings are reported in newspapers and on radio and television. Since judges are as exposed to these as anyone else, it seems ridiculous to blinker themselves in court, or to pretend that they are blinkered.

Law Outside England and Wales. Finding and using non-English law may be relevant when either making a comparative study of another country's legal system or making recommendations for reform. The common law system in England and Wales derived from the Norman French law, after the Norman Conquest.[4] When examining case law, particularly when you are following a case from first instance to appeal, it may be necessary to compare the application of the legal rules with another legal jurisdiction.

Certain jurisdictions may have persuasive authority in the English Courts, although not binding on English courts, the decisions from other common law countries – the United States, Canada, Australia and New Zealand being the most important – can be, and frequently are cited. Such American and Commonwealth cases are typically used where English authorities on a point are controversial, contradictory, weak or lacking altogether, for example, the tobacco industry and personal injury cases. Like English authorities, the weight attached to an American or Commonwealth case will depend on the level of the court and the reputation of the Judge or judges.

The Internet provides a vast pool of information and the following sites may help your research:

European Court of Human Rights Decisions : http://www.dhcour.coe.fr/
The full text of judgements is provided. When the first page comes up you need to scroll down the page to uncover the available options.

European Union Legislation : http://europa.eu.int/eur-lex/en/index.html
This site provides the full text of Union legislative provisions. It is not an easy site to use though life is easier if you have a very clear idea of what you want and a detailed citation.

European Court of Justice Decisions : http://europa.eu.int/cj/en/index.htm
For the full text, judgements, they are provided: when the first page comes up you need to scroll down the page to uncover the available options.

[4] William of Normandy 1066. Norman French – Mediaeval French. Normandy: a region and former province of NW. France with a coastline on the English Channel; given by Charles the Simple to Rollo, first Duke of Normandy, 912; United to England intermittently from the Norman Conquest 1204. Name of the English Royal House, included William I and II, Henry I and Stephen.

General Comparative Sources Of Law

Scotland : Historically, the Scottish legal system developed separately from the English common law, taking its roots instead from continental Roman-based civil law. However, it has been heavily anglicised because since 1707 its legislation has emanated from Westminster and its final court of appeal in civil cases has been the House of Lords.

Some Acts of Parliament, for example on taxation, apply to the whole of the United Kingdom, while others may apply to Scotland only. Even where Scotland has separate legislation, its provisions may be very similar to the equivalent statute for England and Wales except for translating technical terms or making adjustments for differences in procedure.

New legislation, even where it is the ultimate intention for Scotland and England to be similarly treated, may not be introduced into the two jurisdictions simultaneously. Scotland may be treated as a guinea pig and be subject to the new regime first (as happened with the poll tax), or Scotland may as an afterthought receive the benefit of an English statute simply with the addition of 'Scotland' in parentheses; for example there was a Housing Act 1988 and a Housing (Scotland) Act 1988. Alternatively, they may appear in another guise; for example parallel provisions to the Courts and Legal Services Act 1990 were applied to Scotland, together with a whole range of other unrelated measures, by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

How does precedent in Scotland apply in England and Wales and vice versa? Precedent in Scotland was a nineteenth century development made under English influence. Today case law is treated in Scotland in the same way that it is in England.

The decisions of the House of Lords in Scottish appeals are binding on the Scottish courts. As no Scots judges were appointed to the Judicial Committee of the House of Lords until 1866 and they have only been in a small minority since, the influence of English legal principles has been strong. As a result the same law may apply in Scotland as in England, even where there are no statutory provisions. This is exemplified by **Donoghue v Stevenson** which was a Scottish appeal.

The decisions of the other English courts are not binding on Scotland but may be highly persuasive, and the reverse applies in England, particularly where an identical statutory provision has to be construed. Scottish decisions on quantum of damages in personal injury cases and on sentencing, as in England, do not operate as a binding precedent but may provide useful illustrations for the English lawyer as much as for the Scottish lawyer.

Isle of Man : The island is able to pursue in its own fiscal policies because it is not part of the United Kingdom and has its own legislature, the Tynwald, which has a long history. Nonetheless it is a dependency of the United Kingdom, which acts on behalf of the island in external matters such as foreign affairs and defence, and Acts of Tynwald receive Royal assent. Not all legislation, however, is made by the Tynwald. Many Acts of the United Kingdom Parliament extend, with the consent of Tynwald, to the Isle of Man. The normal procedure for this is different from the way the United Kingdom statutes are extended to Scotland and Northern Ireland. Instead of simply incorporating an extension provision directly into the statue, an enabling power is inserted under which an Order in Council can be made (often incorporating certain local adaptations and modifications) after the consultative process has been completed. Such Orders in Council are United Kingdom Statutory Instruments. The Isle of Man is not a member of the European Union as such but has a special arrangement under Protocol 3 of the United Kingdom's treaty of accession so that it is treated as part of Europe for the purposes of customs and the free movement of goods. Although it has its own indigenous legal traditions based on Norse customary law, modern Manx[5] law largely follows English common law as well as statue law.

Channel Island : The Channel Islands have a similar constitutional status to the Isle of Man and similar importance as tax havens. However, their legal systems derive from Norman law, the islands having originally been part of the Duchy of Normandy. The customary law adapted from the old Normal Coutumes is still a source of law, together with legislation and the decisions of the courts. Much of the materials, especially the older ones, are in French.

5 Celtic language.

The Channel Islands comprise the two bailiwicks[6] of Jersey and Guernsey each with their own legislatures, courts, and government. Alderney and Sark are dependencies of Guernsey, but are distinct jurisdictions with their own legislatures and legal customs.

The name of the body that is both legislature and government is 'The States' in three of the four jurisdictions; in Sark it is 'The Chief Pleas'. The position of the islands vis-à-vis. The European Union is similar to the Isle of Man: they are not member states but are treated as being within the Communities for the purpose of customs and free movement of goods, but not for the free movement of persons and services.

As with the Isle of Man, the usual means nowadays of extending United Kingdom statutes to the Channel Islands is by Orders in Council issued as United Kingdom Statutory Instruments. But whereas the Acts of Tynwald receive Royal Assent, the primary legislation of the States is sanctioned by Her Majesty by Orders in Council; these orders are made in the exercise of the prerogative power and so should not be confused with Orders in Council that are United Kingdom SIs. 'The States' can also legislate in certain areas without Royal sanction, either under general powers given by Order in Council (for example the power given to the Jersey States to make 'Regulations' of no more than three years duration) or in Guernsey under a residual common law power to legislate.

The United States : The American legal education system places a great emphasis on legal research and consequently there are quite a number of detailed American publications on it. A good starting point is the following website: http://www.lawsource.com/also. Try the following icon: **Introduction to the legal system: United States; Canada and Mexico**, which is an interesting site. Another site which will allow you to carry out legal research when conducting a comparative study is: http://www.ipu.org/english/parlweb.htm. This site gives you the opportunity to visit different web sites (alphabetically) of national parliaments. Once you have made your choice you then have a variety of options to choose from in accordance with your topic/research.

The complexity of the United States legal literature is a consequence of the federal legal system: the researcher has to cope not only with the mass of federal law but also the law of each individual state. While the law may often be similar from state to state because their courts follow similar common law principles (disregarding the anomalous position in the mixed jurisdiction of Louisiana) and their legislatures may adopt model laws such as the Uniform Commercial Code, variations, sometimes quite radical ones, do occur.

Each State has a large measure of Sovereignty, subject to the national application of federal statutes and the requirements imposed nationally by the United States Constitution. The common law, which was exported by the British when they colonized North America, eventually overcoming competition from the French and other nations, has led to the development of different common law rules in different states, notably in such areas as torts and criminal law. The different application of the common law has been influenced by the social and economic interests to which the judiciary had to pay attention to within a State, for example, a large industrialized State with a very large urban population would be very different from a largely agricultural economy.

United States Federal Courts – while each set of state courts has inherited the law-making power of the common law this is not true of the United States Federal Courts. These courts are creatures of the US Constitution, possessing only jurisdiction and powers expressly conferred by that Constitution. However, in practice, this does not produce any strking difference in the adjudicatory style of the federal courts. For example, the Consitution confers powers on federal courts to decide maritime and admiralty cases. In exercising this power, the federal courts have always drawn upon ancient common law precedents in the maritime area. Thus, in applying statutory federal law, the federal courts over time have naturally built up a large body of precedent and thus tend to proceed in a traditional common law manner. This is particularly evident in the interpretation of the Constitution, where the Supreme Court, while strictly bound by the constitutional provisions, often confronts a case where broad and vague constitutional language does not point to an obvious resolution. In these cases, the Court relies heavily on its own precedents and previous opinions in a classical common law manner.

[6] Districts (jurisdictions)

LEXIS is an important research tool available. LEXIS was in origin an American system and the vast bulk of federal and state legislation and case law (and many law reviews) is available in full text, and accessible in just the same way as the English materials. However, this has been superseded by Westlaw and Lawtel. Although it does not normally present great difficulties, the English researcher should bear in mind differences in spelling and usage in both legal and ordinary American English. The spelling point is particularly pertinent to LEXIS searching, where, for example, to search for the word offence instead of offense would derail a search strategy.

American Law Report : The official *United States Supreme Court Reports*, cited simply as US, go all the way back to 1790. The *Lawyers' Edition*, cited L Ed, covers the entire series and is published by Lawyers' Co-operative. *The Supreme Court Reporter* (S Ct), published by West as part of its National Reporter System, starts in 1882.

The sheer volume of American case law means that LEXIS is unquestionably one of the best research tools, along with Westlaw and Lawtel. But there are printed sources. *The American Digest*, consolidated up to 1896 and thereafter in decennial, and more recently five yearly chunks, is the main way to find cases by name or subject. Between consolidation it is kept up to date by the *General Digest* issued monthly and cumulated into bound volumes issued three times a year.

Commonwealth : In order to keep up to date with recent changes in political and constitutional developments and other factual information on particular countries take a look in the *Commonwealth Yearbook (HMSO)*.

Australia : Primary federal legislation is passed as Acts of the Parliament of the Commonwealth of Australia.

Law Reports. The Australian court system is complex. The supreme federal court is called, somewhat confusingly for the English Lawyer, the High Court of Australia. It also hears appeals from the state supreme courts. Beneath the High Court of the federal system is the Federal Court, but state courts also have federal jurisdiction in certain areas. There are also the federal Family Court and specialist tribunals.

The authorised reports of the High Court are the **Commonwealth Law Reports** (CLR), ie the Commonwealth of Australia. Advance reports of High Court cases are published as the Australian Law Journal Reports, issued with the journal but paginated and bound separately. Since 1984 the authorised reports of the Federal Court have been the Federal Court Reports (FCR). Before that date decisions of the Federal Court were included in Federal Law Reports (FLR). The Federal Law Reports no longer cover the Federal Court itself, but report cases decided by state courts exercising federal jurisdiction, courts of the two territories, the Family Court of Australia, and federal tribunals.

Roughly equivalent to the All England Law Reports, are the Australian Law Reports (ALR) which report cases from all the courts covered by the series mentioned above.

LEXIS coverage of Australian cases is limited to headnotes of cases in Australian Law Reports from 1973 (including Australian Capital Territory Reports, and from 1979 when they started Northern Territory Reports.

Canada : Like Australia there are both federal and provincial materials to cope with; an added complication is that the legal system of Quebec is a mixed , following civil law adapted from the French law in some private law matters but following common law in other matters. The position in Quebec has also resulted in an official policy of bilingualism throughout the country.

Publication of law reports in Canada is prolific, and there is considerable duplication of coverage. The commercially published Dominion Law Reports is the main general series covering both federal and provincial courts. There are official series for the Supreme Court and Federal Court, series for each of the provinces, regional series covering cases from groups of provinces, and an increasing number of subject-based reports.

As with Australia, **LEXIS** coverage is very limited: at present cases from Ontario Court of Appeals from 1986 and cases from Ontario Court of Justice (General Division from September 1990 and Divisional Court from March 1990)

European Countries : European Community law is as much part of the law of this country as the laws passed by the United Kingdom Parliament (see earlier handout on Europe and Sovereignty of Parliament). For this reason, UK legal sources should, and often will, include references to the relevant EC rules. However, because this is not always so and because EC law is organised in a different way from English law, as a law student, you need to become familiar with the sources of EC law. You may access information on EC law through the European Documentation Centre, which is part of the European Information Relay Network. Further information is available at: www.cec.org.uk

Europa (www.europa.eu.int) is the main EU website on the internet, providing a wealth of information from the EU institutions. It contains 1.5 million pages. From EUROPA, it is possible to access the home pages of all the EU institutions and their departments. Overview of the activities of the EU and links to legislation and key official documents are available, along with links to official databases such as CELEX, SCAD and ECLAS (found vial "Information Sources").

Having accessed EUROPA and selected the language of your choice, you will find that the opening page of EUROPA presents seven sections: "News" sections provides access to recent press releases, details of events and entries on current "key issues". The "activities" section provides a very useful overview of the current policy areas of the EU. There are links to legislation and case law by subject and to the European Commission Director-General responsible for each subject area. Summaries of the main policy areas of the EU with details of key legislation are included on EUROPA (www.europa.eu.int/scadplus/scad_en.htm)

CELEX is the official multilingual legal database of the EU. It is the key source for legislation and case law. It will often be the first source to use. It contains the full text of the treaties, the Official Journal L series, and the European Court Reports, along with the full text of the merger decisions of the Commission. CELEX is available via EUROPA.

EUR-LEX - In 1998, the EU launched a daily up date service called EUR-Lex (www.europa.eu.int/eur-lex/en), providing access to both legislation and cases law.

The Official Journal. Published by the European Communities, is the official and authoritative source of legislation. It carries the text of proposed and enacted legislation and official announcements, as well as information on the activities of Community institutions.

For the British lawyer the law across the Channel may pose greater difficulties than the law, discussed above, across the Atlantic or across the globe. Few undergraduates (and Postgraduate Diploma in Law students) study Roman Law nowadays, which traditionally would have given some insight into **civil law systems**, and few English Lawyers have a knowledge of European languages of the standard necessary to read legal texts. Nonetheless, the law of European countries is assuming ever greater importance.

Codification. A distinct feature of civil law systems is that much of their legislation is codified. Virtually all European countries will have a civil code, a criminal code, a code of civil procedure, a code criminal procedure and a commercial code. Many other more specialised areas may have codes – France has over 50 separate codes. Usually they are available from commercial publishers in annotated from. These may be small pocket-sized books, like the well-known French series ***Petits codes Dalloz.***

French legislation is available on **LEXIS**, which includes the full text of several series of French Law Reports as from various dates since 1959. Also, there is lawtel, Westlaw and the above websites outlined.

How to Trace if EC Legislation is Still in Force. An example: find out if Directive 90/387/EE.C., dealing with the establishment of the internal market for telecommunications service, is still in force. By using the number through EUR-Lex. Restrict your search to the section "Legislation in force". EUR-lex displays the text of the directive along with links to any amending legislation and the consolidated text. The reference to the appropriate issue of the Official Journal is also given. If the legislation is not in force, it does not appear.

How to know if a proposal has become law. For example, to find out whether or not a Commission's proposal for a directive on parental leave has become law there are two websites,

- **The Legislative Observatory (OEIL)** on the European Parliament pages (wwwdb.europarl.eu.int/dors/oeil/en), or
- **PreLex** on the EUROPA pages (www.europa.eu.int/prelex).

How to Trace whether a Directive has been implemented in the UK : Directives, once adopted by the Council of the European Union, must be implemented by Member States by the most appropriate method for each country. In the UK, this is generally done by passing an Act of Parliament or issuing a statutory instrument. Member States are given a set period of time in which to do this.

CELEX is the main source for information on implementing legislation of Member States.

Finding a Court of Justice Judgment if you Have the Reference : Searching CELEX on either the case number, or one or both of the party names, finds the full text of the case.

Global legal searches

If you want to find out about the domestic laws of another country the following website may well provide the answer

http://www.gksoft.com/govt/en/world.html

Countries are listed alphabetically.

Links to a wide range of overseas sources are law can be located in the links section of the NADR web site

http://www.nadr.co.uk

LAW REFORM IN THE UK

A legal system cannot stand still, but must adapt to social change and society's needs. Thus, laws made in the Nineteenth Century may not be workable in today's society.

For example, in the early part of the Twentieth Century married women were legally considered the property of their husbands, while, not much earlier, employees could be imprisoned for breaking their employment contracts.

The above examples are not acceptable today and when the law may be out of step with social conditions, or simply ineffective, there are a range of ways of bringing about change. Some of these changes have already been dealt with and discussed during the early part of your course. Therefore, for the sake of brevity, they will only be outlined whilst focusing on other areas of law reform.

Judicial Change

Case law may bring about change, for example, in the case of **R v R in 1991** the House of Lords declared that a husband who has sexual intercourse with his wife without her consent may be guilty of rape.

Before this decision, the law on rape within marriage was based on an assertion by the Eighteenth Century Jurist **Sir Matthew Hale**, that 'by marrying a man, a women consents to sexual intercourse with him, and may not retract that consent.'

Lord Keith stated that Hale's assertion reflected the status of women within marriage in his time, but since then both the status of women, and the marriage relationship had completely changed. The modern view of husband and wife as equal partners meant that a wife could no longer be considered to have given irrevocable consent to sex with her husband; the common law was capable of evolving to reflect such changes in society, and it was the duty of the court to help it do so.

In practice, however, such major reforms are rarely produced by the courts, and are not adequate as the main organ for law reform.

Parliament

The majority of law reform is brought about by Parliament. It is done in four ways:

1. **Repeal** of old and/or obsolete laws.
2. **Creation** of completely new law, or adaptation of existing provisions to meet new needs.
3. **Consolidation**; when a new statute is created, problems with it may become apparent over time, in which case further legislation may be enacted to amend it. Consolidation brings together successive statutes on a particular subject and puts them into one statute. For example, the legislation in relation to companies was consolidated in 1985.
4. **Codification**; where a particular area of law has developed over time to produce a large body of both case law and statute law, a new statute may be created to bring together all the rules on that subject (case law and statute) in one place.

   That statute then becomes the starting point for cases concerning that area of law, and case law, in time and builds up around it.

   The Criminal Attempts Act 1981 and the Police and Criminal Evidence Act 1984 are examples of codifying statutes.

Pressure for Reform

Pressure Groups

Groups concerned with particular subjects may press for law reform in those areas - for example charities such as Shelter; Help the Aged and the Child Poverty Action Group; professional organisations such as the Law Society and the British Medical Association; business representatives such as the Confederation of British Industry. Justice is a pressure group specifically concerned with promoting law reform in general.

Pressure groups use a variety of tactics, including lobbying MPs, gaining as much publicity as possible for their cause, organising petitions, and encouraging people to write to their own MP and/or relevant Ministers. Some groups are more effective than others: size obviously helps, but sheer persistence and knack for grabbing headlines can be just as productive - the anti-porn campaigner Mary Whitehouse almost

single-handedly pressurised the Government to create the Protection of Children Act 1978, which sought to prevent child pornography. The amount of power wielded by the members of a pressure group is also extremely important - organisations involved with big business tend to be particularly effective in influencing legislation.

Political Parties

Some of the most high-profile legislation is that passed in order to implement the Government party's election manifesto, or its general ideology - examples include the privatisation of gas and water and the creation of the Poll Tax by the Conservative Government which began in 1979.

The Civil Service

Although technically neutral, the civil service nevertheless has a great effect on legislation in general. It may not have a party political goals, but various departments will have their own views as to what type of legislation enables them to achieve departmental goals most efficiently - which strategies might help the Home Office control the prison population, for example, or the Department of Health make the NHS more efficient. Ministers rely heavily on senior civil servants for advice and information on the issues of the day, and few would consistently turn down their suggestions.

Treaty Obligations

The UK's obligations under the treaties establishing the European (Union) Community and the European Convention on Human Rights (see Humans Rights Act 1998) both influence changes in British law.

Public Opinion and Media Pressure

As well as taking part in campaigns organised by pressure groups, members of the public make their feelings known by writing to their MPs, to ministers and to newspapers. This is most likely to lead to reform where the ruling party has a small majority. Public opinion and media pressure interact; the media often claims to reflect public opinion, what do you think? What appears to be a major epidemic of a particular crime may in fact be no more than a reflection of the fact that once one interesting example of it hits the news, newspapers and broadcasting organisations are more likely to report others. An example of this is the rash of stories during 1993 about parents going on holiday and leaving their children alone, inspired by the film 'Home Alone'. Leaving children alone like this may have been common practice for years, or it may be something done by a tiny minority of parents, but the media's selection of stories gives the impression of a sudden epidemic of parental negligence that, without any research into the extent of the problem, could easily whip us sufficient public concern to prompt legislation.

Agencies of Law Reform

Much law reform happens as a direct response to pressure from one or more of the above sources, but there are also a number of agencies set up to consider the need for reform in areas referred to them by the Government. Often problems are referred to them as a result of the kind of pressures listed above. The **Royal Commission on Criminal Justice 1993** was set up as a result of public concern and media pressure about high-profile miscarriages of justice, such as the Birmingham Six and the Guildford Four.

The Law Commission

Established in 1965 as an independent body set up by Parliament (along with another for Scotland). The Law Commission is a permanent body, comprising five people drawn from the judiciary, the legal profession and legal academics. In practice, the chairman tends to be a High Court Judge, and the other four members to include a QC experienced in criminal law, a solicitor with experience of land law and equity, and two legal academics. They are assisted by legally-qualified civil servants.

The Commission's task is "to take and keep under review all the law with which [it is] concerned with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law" (Law Commissions Act 1965).

The Commission works on topics referred to it by the Lord Chancellor, and also general reform programmes agreed from time to time by Parliament. Its job also includes advising other bodies concerned with law reform.

Where the Commission is working on substantive law reform, it produces a 'Working Paper', detailing the present law on the relevant subject, criticisms of it, and options for change, with a provisional view of the options it prefers. This is circulated to a wide range of interested parties (though unlike the Australian Law Reform Commission, it tends not to hold public meetings), and their views are sought. Following this, a final report is produced, with a draft Bill (prepared by parliamentary draftsmen temporarily transferred to the Commission).

There is some chance of proposals from the Commission becoming legislation if the subject concerned comes within the jurisdiction of the Lord Chancellor's Department; there is less chance if they concern other departments, particularly the Home Office and the Department of the Environment.

You will find further information on the Law Commission at: **http://www.open.gov.uk/lawcomm/**

Performance of the Law Commission

One of the principal tasks for the Commission at its inception was codification, and this programme has not on the whole been a success. The Commission's programme was ambitious: in 1965 it announced that it would begin codifying family law, contract, landlord and tenant, and evidence. Attempts in the first three were abandoned - family in 1970, contract in 1973 and landlord and tenant in 1978. Evidence was never begun.

Codification

Do you believe codification would solve the inherent problems with the common law and statute law?

Supporters say it would provide accessibility, comprehensibility, consistency and certainty. A code allows people to see their rights and liabilities more clearly than a mixture of case law and separate statutes could, and should encourage judges and others who use it to look for and expect to answers within it.

Critics say a very detailed codification could make the law too rigid, losing the flexibility of the common law. This would lead to problems for the courts when attempting to interpret the code, so creating a new body of case law around it which would defeat the object of codification and make the law neither more accessible nor more certain. It may be that the Law Commission's failure to codify the law signifies a problem with codification, not with the Law Commission.

The Law Reform Committee

This part-time body, set up in 1952, comprises judges, lawyers and academics, as well as civil service assistance. It considers problems of civil law which are referred to it by the Lord Chancellor.

Performance of the Law Reform Committee

In practice, the Law Reform Committee largely considers fairly narrow issues requiring technical solutions rather than radical changes. Its contributions to law reform include proposals implemented in the Occupiers' Liability Act 1984, and a report on limitation periods which led to the Latent Damage Act 1986.

The Criminal Law Revision Committee

The CLRC is the criminal law counterpart to the Law Reform Committee, responsible to the Home Secretary rather than the Lord Chancellor, and includes the Director of Public Prosecutions (DPP) as well as judges and academics. The CLRC is the criminal law counterpart to the Law Reform Committee, responsible to the Home Secretary rather than the Lord Chancellor, and includes the Director of Public Prosecutions (DPP) as well as judges and academics. For its 1984 report on sexual offences, it was advised by a policy advisory committee, which included probation officers, a consultant psychiatrist, a social worker and a sociologist.

Performance of the Criminal Law Revision Committee

The Theft Acts 1968 and 1978 are generally thought of as the CLRC's greatest achievement. The legislation effectively codified the previous law in this area, aiming for a fundamental reconsideration of the principles underlying this branch of the law to be embodied in a modern statute.

The CLRC was also responsible for a report into the criminal justice system, which stated that the system had shifted much too far in favour of defendants' rights. It recommended a string of measures designed to tip the balance back in favour of the prosecution, including abolishing the right to silence (see the Criminal Justice and Public Order Act 1994 sections 34 to 39), on the grounds that 'it is as much in the public interest that a guilty person should be convicted as that an innocent person should be acquitted.'

Royal Commission

These are set up to study particular areas of law reform, usually as a result of criticism and concern about the area concerned. They are made up of a wide cross-section of people: most have some expertise in the area concerned, but usually only a minority are legally qualified. The Commissions are supposed to be independent and non-political.

A Royal Commission can commission research, and also take submissions from interested parties. It produces a final report detailing its recommendations, which the Government can then choose to act upon or not. Usually a majority of proposals are acted upon, sometimes in amended form.

In recent years the following Royal Commissions have included the 1979 Royal Commission on Legal Services, the 1981 Royal Commission on Criminal Procedure, and the Royal Commission on Criminal Justice, which reported in 1993.

Performance of the Royal Commissions

These have had mixed success. The 1978 Royal Commission on Civil Liability and Compensation for Personal Injury produced a report that won neither public nor Government support, and few of its proposals were implemented.

The Royal Commission on Criminal Procedure has most of its recommendations implemented by the Police and Criminal Evidence Act 1984, but subsequent criticisms of PACE mean this is less of a success than it appears.

Public Enquiries

Where a particular problem or incident is causing social concern, the Government may set up a one-off temporary committee to examine possible options for dealing with it. Major disasters, such as the Hillsborough football stadium disaster and the sinking of the ferry Herald of Free Enterprise, events such as the Brixton Riots; and advances in technology, especially medical technology, such as the ability to fertilise human eggs outside the body and produce 'test tube babies' may all be investigated by bodies set up especially for the job. These usually comprise individuals who are independent of the Government, often with expertise in the particular area. Academics are frequent choices, as are judges - Lord Scarman headed the enquiry into the Brixton riots.

Public enquiries consult interested groups, and attempt to reach a consensus between them, conducting their investigation as far as possible in a non-political way. In the case of disasters and other events, they may try to discover the causes, as well as making recommendations on legislation to avoid a repeat.

Performance of the Public Enquiries and other Temporary Committees

These rely to a great extent on political will, and the best committees in the world may be ineffective if they propose changes that a government dislikes. Lord Scarman's investigation into the Brixton Riots is seen as a particularly effective public enquiry, getting to the root of the problem by going out to ask the people involved what caused it (his Lordship, then retired, shocked his previous colleagues by taking to the streets of Brixton and being shown on television chatting to residents and cuddling their babies). His proposals produced some of the steps towards police accountability in PACE. The Civil Justice Review was also instrumental in bringing about reform, though views on the success of the changes are mixed.

Problems with Law Reform Agencies

There is no obligation for the Government to consult the permanent law reform bodies, or to set up Royal Commissions or other committees when considering major law reforms.

The Government has no obligation to follow recommendations, and perfectly well thought out proposals may be rejected on the ground that they do not fit in with a Government's political position.

Royal Commissions and temporary committees are disbanded after producing their report, and take no part in the rest of the law-making process. This is in many ways a waste of the expertise they have built up.

EUROPEAN LAW[7]

AIMS OF THE EUROPEAN COMMUNITIES

The original aim of the first treaty signed, the **Treaty of Paris**, was to create political unity within Europe and prevent another world war.

Its object was to mould Europe into a single prosperous area by abolishing all restrictions affecting the movement of people, of goods and money between member states, producing a single market of over 350,000,000 people, available to all producers in the member states. This, it was hoped, would help Europe to compete economically with Japan and the United States, the member states being stronger as a block than they could possibly he on their own.

The 1986 Single European Act was a major step towards this goal, setting a target of 1992 for the abolition of trade barriers between member states. The practical effect of this is that, for example, a company manufacturing rivets in Leeds, with an order from a company in Barcelona, can send the rivets all the way there by lorry, without the driver having to fill in customs forms as he or she crosses every border. The rivets will be made to a common EU standard, so the Spanish firm will know exactly what they are going to receive, while any trademarks or other rights over the design of the rivets will be protected throughout the member states. Just as goods can now move freely throughout the Community, so can workers; for example, a designer from Paris can go and work in London, or Milan, or Dublin, with no need for a work permit and no problem with immigration controls.

Along with these closer economic ties, it is intended that there should be increasing political unity, though there is some disagreement - particularly, though not exclusively, in Britain - as to how far this should go. The Treaty of Maastricht, signed in 1992, was a significant move in this direction; it outlined the aims of a single currency, joint defence and foreign policies, and inter-governmental cooperation on justice and home affairs, but when and how far these aims will be achieved is still a matter of debate.

The proposed European Constitution (launched in Athens 2003) furthers these objectives and seeks to build upon the current developments in enlargement initiated by the Nice Treaty.

INSTITUTIONS OF THE EUROPEAN COMMUNITIES

THE EUROPEAN COMMISSION

The Commission is composed of twenty members, called Commissioners, who are each appointed for four years by general agreement with the member states. They must be nationals of a member state, and in practice there tends to be two each from the largest states - France, Germany, Italy, Spain and the UK - and one from the rest. However, the Commissioners do not represent their own countries; they are independent, and answerable as a group to the European Parliament. The idea is that the Commission's commitment to furthering overall Community interests balances the Council of Ministers, whose members represent national interests. Only the European Parliament can dismiss Commissioners before the end of their four-year term.

The Commission's role includes formulating proposals for new Community policies, which are put forward to the Council for turning into legislation; almost all EU legislation begins with proposals from the Commission. It is also responsible for ensuring that EU legislation is **carried out**, and will investigate alleged breaches by member states, and where necessary bring them before the European Court. In some circumstances it has its own law-making powers, delegated by the Council. It is assisted in all these functions by an administrative staff, which has a similar role to that of the civil service in the UK.

THE COUNCIL OF MINISTERS :

The Council of Ministers has traditionally been the supreme legislative body in the EU, and its role is to take the broad policies of the Treaties and formulate them into more concrete rules. The Council does not have a permanent membership - in each meeting, the members, one from each country, are chosen according to the subject under discussion (so, for example, a discussion of matters relating to farming would usually be attended by the Minister of Agriculture of each country). Presidency of the Council rotates among the member states every six months.

[7] See also Chapter Three. Constitutional and Administrative Law. C.H.Spurin. www.nadr.co.uk

Although it is the Council which has most legislative power, generally it cannot act on its own initiative but must wait for proposals from the Commission. The Treaties lay down different voting arrangements for different kinds of Council decisions. The most important areas require a unanimous vote, but most decisions are passed on a 'qualified majority'. In this system, each country has a certain number of votes: France, Germany, Italy, and the United Kingdom have ten; Spain has eight; Belgium, Greece, Portugal and The Netherlands have five; Denmark, Ireland and Finland three; Luxembourg two. A decision requiring a qualified majority can only be taken with the support of a specified number of votes (which varies according to the type of decision being made), and this number is calculated to ensure that the larger states cannot force decisions on the smaller ones.

The Council may be questioned by the European Parliament, but the chief control is exercised by member states' own national governments over their ministers who attend the Council.

THE EUROPEAN COUNCIL

Heads of State or Government and Foreign Ministers of member states evolved an informal convention of twice-yearly summit meetings to discuss important issues. Much of the high-profile EU business tended to be done at these meetings, which have now been recognized and formalized as the European Council by Article 2 of the Single European Act 1986. They are now required to take place twice a year and, when discussing Community matters, have the same powers as the Council of Ministers, though the two are technically separate.

THE EUROPEAN PARLIAMENT

The Parliament is (currently) composed of 518 members (MEPs), who are directly elected in their own countries. In Britain they are elected in the same way as MPs, and each represent a geographical area, though these are much larger than those of MPs, since there are only 81 MEPs for the whole country. Elections are held every five years.

The individual member countries are each allocated a number of seats, roughly according to population, though on this basis the smaller countries are over-represented. Members sit in political groupings rather than with others from their own country.

The European Parliament examines Commission proposals before they are discussed by the Council, and in many important matters the Council consults with the Parliament before enacting any legislation. Under the original EEC Treaty, its role in this process was merely advisory and supervisory, and the Council could pass legislation regardless of objections from the Parliament. However, the **Single European Act** and the **Maastricht Treaty** increased the powers of the Parliament, so that it can now veto legislation in certain areas, including environmental protection, health, education, consumer protection and transport. In addition, a 'Cooperation procedure', which applies particularly to legislation concerning the harmonization needed for the single market, allows the Parliament to give a 'second reading' to Council proposals, and requires more formal communication between them.

There is also another area in which the Parliament is given a greater say: the Community budget. The Council places the draft proposals for the budget before the Parliament which has power, acting by majority vote, to reject it.

THE EUROPEAN COURT OF JUSTICE (ECJ)

The ECJ has the task of supervising the uniform application of Community law throughout the member states. It is important not to confuse it with the European Court of Human Rights, which deals with alleged breaches of human rights by countries who are signatories to the European Convention on Human Rights. It is completely separate, and not an institution of the European Community.

The ECJ, which sits in Luxembourg, has fifteen judges, appointed by agreement among member states, for a period of six years (which may be renewed). The judges are assisted by eight advocates-general, who produce opinions on the cases assigned to them, indicating the issues raised and suggesting conclusions. These are not binding, but are nevertheless usually followed by the Court. Both judges and advocates-general are chosen from those who are eligible for the highest judicial posts in their own countries.

Most cases are heard in plenary session, that is with all the judges sitting together. Only one judgment will be delivered, giving no indication of the extent of agreement between the judges, and these often consist of fairly brief propositions, from which it can be difficult to discern any *ratio decidendi.* Consequently, lawyers seeking precedents often turn to the opinions written by the advocates-general. Since September 1989 the full ECJ has been assisted by a new Court of First Instance to deal with specialist economic law cases. Parties in such cases may appeal to the full ECJ on a point of law.

The majority of cases heard by the ECJ are brought by member states and institutions of the Community, or are referred to it by national courts. It has only limited power to deal with cases brought by individual citizens, and such cases are rarely heard.

The ECJ has two separate functions: judicial, deciding cases of dispute; and supervisory.

The judicial role of the ECJ : The ECJ hears cases of dispute between parties, which fall into two categories: proceedings against member states, and proceedings against EC institutions.

Proceedings against member states may be brought by the Commission, or by other member states, and involve alleged breaches of Community law by the country in question. In **Re Tachographs: EC Commission** v **UK** (1979), the ECJ upheld a complaint against the UK for failing to implement an EEC regulation making it compulsory for lorries used to carry dangerous goods to be fitted with tachographs (devices used to record the speed and distance travelled, with the aim of preventing lorry drivers from speeding, or from driving for longer than the permitted number of hours). The Commission usually gives the member state the opportunity to put things right before bringing the case to the ECJ.

Proceedings against EU institutions may be brought by member states, other EU institutions and in certain circumstances, by individual citizens or organizations. The procedure can be used to review the legality of EU regulations, directives or decisions, on the grounds that proper procedures have not been followed, the provisions infringe the Treaty or any rule relating to its application, or powers have been misused.

ECJ DECISIONS CANNOT BE QUESTIONED IN UK COURTS.

The supervisory role of the ECJ : Article 177 of the Treaty of Rome provides that any court or tribunal in a member state may refer a question on EU law to the ECJ if it considers that 'a decision on that question is necessary to enable it to give judgment'. *The object of this referral system is to make sure that the law is interpreted in the same way throughout the Community*

A reference must be made if the national court is one from which there is no further appeal So in Britain, the House of Lords must refer such questions, while the lower courts usually have some discretion about whether or not to do so; the Article 177 procedure is expensive and time consuming, often delaying a decision on the case for a long time, and so lower courts have been discouraged from using it. Consequently attempts have been made to set down guidelines by which a court could determine when a decision would or would not be necessary.

In **Bulmer** v **Bollinger** (1974), the Court of Appeal was asked to review a judge's exercise of discretion to refer a question under Article 177. They pointed out that the European Court could not interfere with the exercise of a judge's discretion to refer, and **Lord Denning** set down guidelines on the points, which should be taken into account in considering whether a reference was necessary. He stated that no reference should be made:

1. Where it would not be conclusive of the case, and other matters would remain to be decided.
2. Where there had been a previous ruling on the same point.
3. Where the court considers that point to be reasonably clear and free from doubt.
4. Where the facts of the case had not yet been decided.

Denning's guidelines are narrower than those issued by the ECJ and have probably been the reason why fewer references are made under Article 177 from the UK than from any other member state. The further up the English court system a case has to go before it is submitted for a ruling, the less likely it is that it will ever be submitted, since few litigants have the resources to pursue a case that far. Where referral is

requested by a party in the case and refused, that party cannot appeal to the ECJ, only to a higher English court.

Where a case is submitted, proceedings will be suspended in the national court until the ECJ has given its verdict. This verdict does not tell the national court how to decide the case, but simply explains what the Community law on the matter is. The national court then has the duty of making its decision in the light of this.

Regardless of which national court submitted the point for consideration, a ruling from the ECJ should be followed by all other courts in the Community - so theoretically, a point raised by a county court in England may result in a ruling that the highest courts in all the member states are to follow. Where a ruling reveals that national legislation conflicts with Community law, the national government usually enacts new legislation to put the matter right.

The court's decisions can be changed only by its own subsequent decision or by an amendment of the Treaty, which would require the unanimous approval of member states through their own Parliaments. Decisions of the European Court cannot be questioned in English courts. This principle has limited the jurisdiction of the House of Lords as a final appellate court.

An illustration of the use of Article 177 is the case of **Marshall** v **Southampton Area Health Authority** (1986). Miss Marshall, a dietician, was compulsorily retired by the Authority from her job when she was 62, although she wished to continue to 65. It was the Authority's policy that the normal retiring age for its employees was the age at which state retirement pensions became payable; for women this was 60, though the Authority had waived the rule for two years in Miss Marshall's case. She claimed that the Authority was discriminating against women by adopting a policy that employees should retire at state pension age, hence requiring women to retire before men. This policy appeared to be legal under the relevant English legislation but was argued to be contrary to a Council directive providing for equal treatment of men and women. The national court made a reference to the ECJ asking for directions on the meaning of the directive. The ECJ found that there was a conflict with United Kingdom law, and the UK later changed its legislation to conform.

It is important to note that the ECJ is not an appeal court from decisions made in the member states. It does not substitute its own decisions for those of a lower court (except those of its own Court of First Instance). It will assist a national court at any level in reaching a decision, but the actual decision remains the responsibility of the national court.

When parties in an English case talk of taking the case to Europe, the only way they can do this is to get an English court to make a referral for an Article 177 ruling, and they may have to take their case all the way to the House of Lords to ensure this.

Each member state enforces the judgments of the European Court through its own enforcement system, and the European Court has no machinery for the enforcement of its judgments in or against member states.

The Court of justice in its advisory capacity may also give its opinion as to whether proposed agreements between the Community and non-member states or international organizations are likely to violate the Treaties.

SOURCES OF EUROPEAN LAW

The **European Communities Act 1972** provided that from 1 January 1973 the UK had new sources of law: the European Communities Treaties themselves, plus the various types of legislation made by the EEC. Rulings of the ECJ also affect English law (see above).

These are sources of law only in the areas in which the EU is concerned, which currently comprise agriculture and fishing, companies, competition, free movement of workers and goods, education, consumer policy, health, and the environment.

TREATIES

These are the highest source of EU law, and as well as laying down the general aims of the Communities, they themselves create some rights and obligations. Any provision in an EU Treaty which clearly creates rights or imposes obligations on individuals, business and governments can be relied on and used in

argument just as if they were UK statutes. For example, Article 119 of the EEC Treaty provides that 'men and women shall receive equal pay for equal work'. In **Macarthys** v **Smith** (1979), Article 119 was held to give a woman in the UK the right to claim the same wages as were paid to the male predecessor in her job.

Other Treaty provisions which can be used in this way include the prohibition on discriminations between workers which restrict their free movement between member states; the right to set up in business in another state under the conditions laid down for nationals of that state; and the right of equal pay for equal work.

These provisions give citizens of member states rights against governments (described as the provision having vertical effect), and against other citizens and organizations (described as having horizontal effect). They take precedence over any inconsistent UK law.

Treaty provisions setting out aims and policies, rather than establishing clear rights or duties, require detailed legislation to be made before they can be enforced in the member states.

REGULATIONS

A regulation is the nearest Community law comes to an English Act of Parliament. Regulations apply throughout the Community, usually to people in general, and they become part of the law of each member nation as soon as they come into force, without the need for each country to make its own legislation.

Regulations must be applied even if the member state has already passed legislation which conflicts with them.

In **Leonesio** v **Italian Ministry of Agriculture** (1973), a regulation to encourage reduced dairy production stated that a cash premium should be payable to farmers who slaughtered cows and agreed not to produce milk for five years. Leonesio had fulfilled this requirement, but was refused payment because the Italian constitution required legislation to authorize government expenditure. The ECJ said that once Leonesio had satisfied the conditions, he was entitled to the payment; the Italian government could not use its own laws to block that right.

DIRECTIVES

Directives set out objectives to be achieved by member states, leaving the states themselves to implement the objectives by making their own national legislation. If member states fail to do this within a specified time limit, the directive can be directly applied either by national courts or by the ECJ.

This means that in general, directives do not create individual rights until translated into domestic legislation. However, several cases have made inroads into this principle. First, it was held in **Marshall** v **Southampton Area Health Authority** that directives may have vertical direct effect (meaning direct effect against governments) where the directive creates individual rights, and the content of the rights can be clearly ascertained from it.

In such cases, directives can be used against not just governments themselves, but institutions of governments, to establish rights where directives have not been implemented at all, or where legislation is in conflict with them. Organs of the state include those made responsible by the state for pursuing public functions under state control, of which health authorities were considered to be one; had Miss Marshall's employer been a private company, she would not have been able to rely on the directive in the same way.

In **Van Duyn** v **Home Office** (1974), the Home Office refused Van Duyn permission to enter the UK, because she was a member of a religious group, the Scientologists, which the Government wanted to exclude from the country at the time. Van Duyn argued that her exclusion was contrary to provisions in the Treaty of Rome on freedom of movement. The Government responded by pointing out that the Treaty allowed exceptions on public policy grounds, but Van Duyn then relied on a later directive, which said that public policy could only be invoked on the basis of personal conduct, and Van Duyn herself had done nothing to justify exclusion. The case was referred to the ECJ, which found that the obligation conferred on the Government was clear and unconditional, and so created enforceable rights.

The reasoning behind this approach was explained in **Publico Ministerio** v **Ratti** (1980), where the ECJ pointed out that member states could not be allowed to rely on their own wrongful failure to implement directives as a means of denying individual rights.

Directives have no horizontal direct effect (so they do not give individuals rights against each other). However, where UK legislation is in conflict with a directive, a complainant cannot simply invoke the directive in court, but can apply for judicial review against the relevant minister. If successful, the offending UK legislation will be ineffective.

In addition, the case of **Italy** v **Francovich** (1992) established that where a government fails to implement a directive within the specified time limit, a person who is caused loss by that failure can sue for damages.

The directive with which the case was concerned required states to set up a scheme to ensure that employees received outstanding wages if their employer became insolvent. The Italian Government failed to set up such a scheme, and when Francovich's employer went bust, he lost wages, and there was no scheme to compensate him.

In this case, the directive did not have direct horizontal effect because it was not clear and unconditional, but the ECJ held that even so, Francovich had a right to damages from the Italian Government. Such damages would, it said, be payable wherever the purpose of a directive is to confer rights on individuals, those rights can be identified from the words of the directive, and there is a causal link between the member state's failure to implement the directive, and the citizen's loss.

It is possible that the same rule may apply where a government appears to implement a directive, but in fact misinterprets its purpose, so that the domestic legislation does not implement it properly, though no case on this point has arisen, yet!

A further development in this area is the case of **Marleasing SA** v **La Comercial Internacional de Alimentation SA** (1992), where the ECJ held that national courts should, so far as possible, interpret national legislation so that it conforms with directives. In **Webb v EMO Air Cargo** (1993), the House of Lords pointed out that this had to be done 'without distorting the meaning of the domestic legislation', and that an interpretation consistent with a directive could only be made where the words of the domestic legislation could support it, but this still means that there may be cases where individuals may be able to horizontally enforce rights contained in a directive even before it has been implemented by legislation.

ECJ DECISIONS

A decision may be addressed to a state, a person or a company and is binding only on the recipient. For example, the EU might make a decision requiring British Rail (or its equivalent) to increase the number of trains it runs through the channel tunnel, and that decision would affect only BR.

RECOMMENDATIONS AND OPINIONS

The Council and the Commission may issue recommendations and opinions, which, although not to be disregarded, are not binding law.

HOW DOES EU LAW AFFECT THE UK? :

Membership of the EU has had a number of effects on UK law and our legal system. Above all it provides a new source of law in England and Wales. **s2(4) European Communities Act** provides that English law should be interpreted and have effect subject to the principle that EC law is supreme; this means that EU law now takes precedence over all domestic sources of law. As a result, it has had a profound effect on the rights of citizens in this country, and in particular, on the rights of employees and of women. In **R** v **Secretary of State for Employment ex parte Equal Opportunities Commission** (1994), the House of Lords found that parts of the Employment Protection (Consolidation) Act 1978 were incompatible with EU law on equal treatment for male and female employees, because the Act gave part-time workers fewer rights than full-timers. Since most part-time workers were women, this was held to discriminate on the basis of sex, and the UK Government was forced to change the law, and greatly improve the rights of part-time workers.

THE ROLE OF DOMESTIC COURTS WHEN DEALING WITH EU LAW

Because EU law takes precedence over domestic legislation, the role of the courts has changed as a result of membership of the Community. Before the UK joined the EEC, statutes were the highest form of law, and judges had no power to refuse to apply them. Now however, they can in fact they should - refuse to apply statutes which are in conflict with directly effective EU law.

The leading UK case is **R** v **Secretary of State for Transport ex parte Factortame (1990).** It arose from the fishing policy decided by member states in 1983, which allowed member states to limit fishing within twelve miles of their own shores to boats from their own country, and left the remainder of the seas around the Community open to fishing boats from any member state. In addition, to preserve stocks of fish, each state was allocated a quota of fish, and required not to exceed it.

Soon after the new rules were in place, the UK Government became concerned that Spanish fishing boats were registering as British vessels, so that their catches counted against the British quota rather than the Spanish, and genuine British fisherman were therefore getting a smaller share. The Government therefore passed the **Merchant Shipping Act 1988,** which contained provisions to prevent the Spanish trawlers taking advantage of the British quota.

Spanish boat owners challenged the Act, claiming it was in conflict with EU law on the freedom to set up business anywhere in the Community, and the House of Lords agreed. They stated that **s 2(4) European Communities Act 1972**

> *'has precisely the same effect as if a section were incorporated in ... [the 1988 Act, saying] that the provisions with respect to registration of British fishing vessels were to be without prejudice to the directly enforceable Community rights of nationals of any member state . . .'.*

The decision was criticized as compromising the rights of the UK Parliament to make law for this country, but the House of Lords was firm in dismissing such complaints, pointing out that it was very clear before the UK joined the Community that doing so would mean giving up some degree of sovereignty over our own law, and that this was accepted voluntarily when the UK joined the Community.

> *'Under... the Act of 1972, it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law. . .'.*

The role of the courts is also affected by the principle stated in **Marleasing,** that they should, wherever possible, interpret statutes in accordance with directives (which as we have seen, do not generally have direct effect). This means that the courts now have a new external aid to consider when interpreting statutes, and should take notice of it wherever they can do so without straining the words of the statute.

The operation of the UK courts is also affected by the supervisory jurisdiction of the ECJ, as explained above, and this gives a further source of law, since the courts of all member states are bound by ECJ decisions on the interpretation and application of EC law.

