



**University of
Zurich** ^{UZH}

Institute of Law

Principles of Common Law Case Law Method and Precedent, Role of Judges and Juries

Principles of Common Law

22 September 2020

Lecture 2

Prof. Dr. Kern Alexander



Case Law Method, Precedent, and Role of Judges – Lecture 2

- Rule of Law
- Rule of Law
- Royal Prerogative
- Judicial Review
- Human Rights
- The Trial
- Common law – judge made law
- Doctrine of precedent
- Challenges of judge made law
- Statutory Intervention
- Statutory Interpretation



Rule of Law (≈ État de Droit ≈ Rechtsstaat)

- Very British – no real definition, mainly a feeling
- Aristotle: “The rule of law is preferable to the rule of any individual.”
- Bracton (13th C): “The King shall not be subject to men, but to God and the law: since law makes the King”. (analogy to “*manners maketh the man*”). No absolute monarchs or dictators.
- Moral principles: what is the law for, what purpose does it serve, relationship to freedom, order, HR.
- Dicey’s liberal politics: supremacy of regular law against arbitrary power, equality before the law, and the rights of individuals are not set out in a “constitutional code”, but in ordinary private law
- Raz, virtues of RL: all laws *and their making* should be prospective, clear, accessible, stable; independence of the judiciary, open and accessible courts, checks and balances between the branches
- *Entick v Carrington* (1765): case about civil liberties. Four King’s messengers broke into the home of a writer, seized his pamphlets and broke his possessions. Entick sued for trespass.
 - Argument of the defence: the messengers acted on a warrant of the Secretary of State
 - Held: there was no authority for that warrant, a man’s property rights are sacred under UK law
 - Principle: a private citizen may do anything he wishes unless the law forbids it, a public body may only do that which the law allows it to do. The law did not allow that warrant, “*the books were silent*”.



Sovereignty of Parliament

- Dicey: “Parliament has the right to make and unmake and law whatever.”
- Developed over time to gradually limit the powers of the King (no revolution).
- No person can override or set aside the legislation of Parliament.
- No Parliament can bind future Parliaments.

Challenges

- Shared or limited sovereignty with international law and EU Law
- No Parliament can bind future Parliaments – so the sovereignty of Parliament is not absolute - paradox
- If each generation can make new laws, it limits the power of any generation to entrench their laws.
- Problem with *lex posteriori* in dualistic system.
- Example: in theory, Parliament could make a law that says that “*all babies born on a Tuesday must be put to death.*” But constitutional principles and international human rights obligations prevent that.
- Will come back to this on Brexit – see next lecture.



The Royal Prerogative

- Royal Prerogative = body of authorities, privileges and immunities exclusive to the Crown alone as head of the State and of the executive. In theory, in the UK – subject to no restriction.
- By convention, most of these rights are executed by her government, the Prime Minister and his Cabinet, in her stead (eg. Prime Minister goes to international conferences for «heads of state»)
- Current functions that have stayed with the head of state:
 - Constitutional:
 - appointment of the Prime Minister (by convention: leader of the party with the majority in the House of Commons)
 - signing and dissolving Statutes (by convention, always signs a Bill and acts on the advice of her Prime Minister regarding dissolving).
 - Public engagement and ceremonial to the national community
 - Symbolic and representative of their country to the international community



Judicial review

- The rule of law requires that all government action be legally authorised. *Ultra vs intra vires*
- Suspicious of wide discretionary power → judicial safeguards against abuse
- Issues: review of actions by *public authorities* only, standing to sue
- Separation of powers: review *not* appeal, judiciary may defer matters to political decision-making (new law)
- Grounds for judicial review (*GCHQ* case 1985):
 - Illegality of the action – the law regulates decision-making, even discretion must be *intra vires*
 - Irrationality of the action / unreasonableness – outrageous defiance of logic or accepted moral standards. Judges should be able to tell, otherwise there is something wrong with the system
 - Procedural impropriety – failure to observe basic rules of natural justice, procedural fairness not followed, denial of justice, bias in the decision (ECHR: independent and impartial tribunal)
 - New: s. 6 HRA 1998 – if the action of the public authority violated the ECHR
 - Must engage Convention right, must be interference, interference must be unlawful and disproportionate
- Dealt with in standard courts, no division for administrative courts (French system)
- Judicial Review Procedure in the Civil Procedure Rules (made under Act of Parliament)



Human Rights

- European Convention on Human Rights, UK signed 1950, ratified 1951, in effect since 1953
 - e.g: Articles 5, 6 and 7 promote crucial requirements of the rule of law: they prohibit arbitrary executive detention, require fair procedures in the determination of criminal charges and civil rights, and prohibit retrospective criminal penalties.
- No national legislation to incorporate and give effect to the Convention until Human Rights Act 1998
- The Act makes it unlawful for UK public authorities to act in a way that contravenes *certain* rights guaranteed in the Convention and gives the individual standing to sue the authority in a UK court.
- S. 3 HRA requires legislation to be given effect in a way that is compatible with the ECHR. If it cannot be interpreted that way, the court will make a “declaration of incompatibility” (s.4 HRA) – rarely used.
- One of the ways to get judicial review from UK courts.
- The legislation is still valid and operative, but the declaration *allows* Parliament to *consider* changing it – without any obligations.
- Parliamentary sovereignty: freedom to leave the Convention. But while still in, must obey.
- Prisoners’ right to vote: saga of almost 10 cases, judgment always against the UK, putting off change.

http://www.echr.coe.int/Documents/FS_Prisoners_vote_ENG.pdf



The Trial

- The trial in the UK and US is adversarial = the judge observes the lawyers for the prosecution and defence or claimant and defendant present their cases, cross-examine witnesses (more theatrical)
- In most civil law systems, the trial is inquisitorial = the lawyers give the judge case files beforehand and then the judge presides over the case and asks questions
- Trial by jury (in the UK now limited to mainly criminal law cases and defamation in tort) = it is (still) the right of an Englishman to be tried by a jury of his peers. Jury usually asked to assess whether the behaviour of the defendant was «reasonable».
- Very strong attachment to the «reasonable man standard» in both UK and US.



Judge made law

- The judiciary in the UK is fiercely independent – the slightest hint of bias is a scandal
- Like the US – the UK Supreme Court Law Lords are known by name and style of judgment (conservative, liberal, family, controversial...)
- Every judge in the court formation may have a separate opinion on the case – and all are published
- Consequence: different judges can arrive to the same conclusion through different legal avenues
- In every judgment:
- **Ratio decidendi** – the rationale for the decision – the point and the reasoning in the case that determines the judgment and the principle that the case establishes. Binding on lower courts
- **Obiter dicta** – additional information – literally «by the way» remarks said in passing. Not officially binding but influential under English common law.



Doctrine of Precedent

- Idea that the ruling in one case should be taken as authority in similar cases
- Binding precedent – lower courts are bound by the decisions of higher courts
- Binding court decisions (remember only *ratio decidendi*, not *obiter dicta*):
 - definitely Supreme Court (or old House of Lords decisions),
 - Court of Appeal decisions for High Court
 - High Court for lower courts, although less strong – we often say «this is only a High Court decision» – which means we are waiting for a decision from a higher court on the same topic
- Courts are bound by their own same-level decisions BUT they can:
- **Distinguish** – when a court does not want to follow precedent and notes that there are distinguishing details about the facts that make the judgment sway the other way.
- **Reverse** – when a court decides that their own decision or that of a lower court has to be changed



Judge made law – challenges 1

Much more flexible and adaptable but also less entrenched – can lead to issues such as:

- *Re London Wine* (High Court) – trust declared for some bottles of wine out of a batch, but without segregation. Some bottles were destroyed – the trust **failed** for lack of certainty of subject matter (property not segregated from the rest in the cellar) and beneficiary did not get anything
- *Hunter v Moss* (Court of Appeal) – trust declared for shares in a company, **upheld** although the property was not segregated from the other shares = subject matter uncertain.
- But **does not expressly reverse** the High Court judgment.
- So now **legal problem**: we have two decisions that conflict on their face.
- We **distinguish** (even though the Court did not) between fungible (=interchangeable) property, like shares in a company and infungible property (wine, gold bars, puppies). We would tend to use the Court of Appeal decision BUT *Hunter v Moss* is inconsistent with insolvency policies (*Re Lehman Brothers International*).



Judge made law – challenges 2

Consideration (Contract Law)

Stilk v Myrick (1809) (High Court) – a promise to do what you are already bound by contract to do is not valid = past consideration is not valid. Sailors contracted to perform work on the ship and then some deserted. Those who stayed were promised more money if they did what they were originally supposed to do (past consideration). Could not then force the captain to pay them more (old contract).

Vs

Williams v Roffey Brothers (1989) (Court of Appeal) – promise to pay the workers more if they stuck to contract terms they had already agreed to before. This time, the workers could enforce that promise.

- No official reversal of *Stilk v Myrick*, which is still valid law. We say that *Williams* is an exception when there is a «factual benefit» for the promisee that the work be completed (artificial consideration)



Judge made law – challenges 3

Bishopsgate Investment Management v Homan (Trusts Law):

- Background: tracing in trusts means following the property even if it changes form: house put on trust, sold, follow money into bank account, money buys painting, painting sold at auction.
- Careful: follow the line of property, not the actual house. The beneficiary may want the money.
- Bishopsgate (1994): pension money held on trust was put into overdrawn accounts (so it vanished). The beneficiaries wanted to put an equitable charge on the money and thus take priority over the unsecured creditors of the employer, owner of the accounts.
- Question: is backwards tracing possible? So the money has vanished but we still put a charge on it
- One judge said impossible, the other judge said maybe, the third agreed with both...
- Result: “*the answer seems to be no*”. Point of the story: **the law is unclear**.
- But careful – principle that “*a case is only authority for what it actually decides*”