

Sources of English Law



Introduction

Importance of history: an unwritten constitution
accumulation of history

Institutional foundations of legal system and early
sources of law.

Qualifying the power of the monarchy

Range of sources of the unwritten constitution.

The importance statute law.

Defining common law.

How binding precedents are established.

Multi-layered constitutional and legal system.

Comparison with Germany

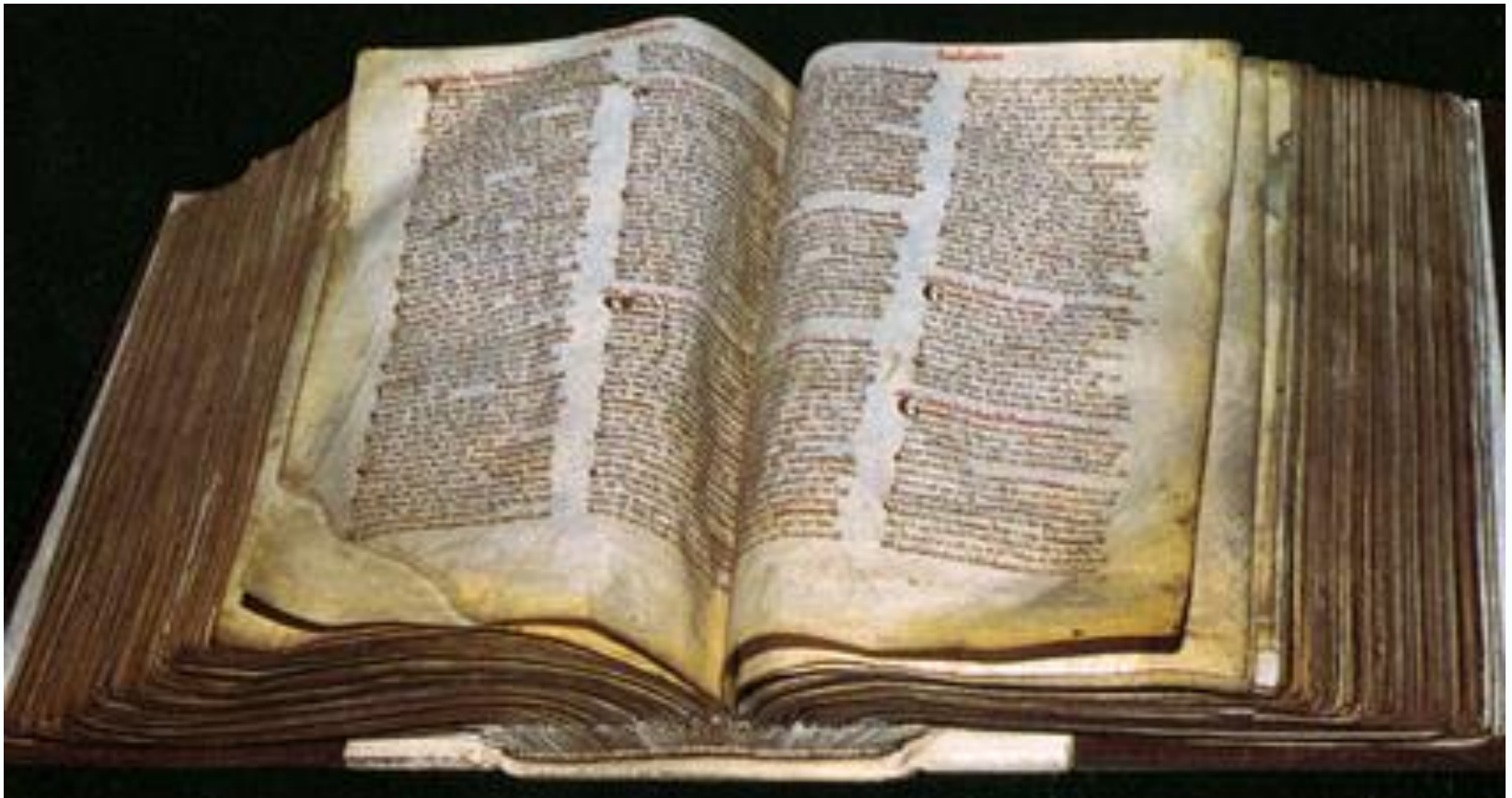
Bayeux tapestry depicting Norman conquest 1066



Tower of London: castle building a consolidation of Norman power



Doomsday book 1086: Law and administration -
inventory of the wealth of the Nation



Henry II



Origins of modern legal system

Henry II (1154-1189) established many features of common law, jury trial, legal uniformity by judicial circuits.

New remedies available in the kings own Royal courts (King/Queens bench division) and abolition of trial by ordeal.

This common law is enforced throughout the land by itinerant justices, professional administrators of the law, all trained in one school.

Inns of Court established at this time: still responsible for professional legal training of barristers.

The majority of judges are barristers with expertise in legal reasoning gained from many years in practice (rare for senior judges to be appointed below 45).

King John youngest son of Henry II



Magna Carta



Magna Carta 1215

Magna Carta sealed by King John. Forced on the King by the disaffected barons.

This set the founding principles for parliament and constitution but was never properly implemented.

It defined some rights, legal practices (fair trial) and 'good lordship' - Set out what subjects could expect from their monarch and superiors.

It placed real limitations on Royal Authority.

A committee of barons could overrule the King.

Due process of law is recognised from King downwards.

Granted rights to London and other towns.

Edward I taming Wales and Scotland



Henry VIII: self appointed head of protestant Church of England



Henry VIII and the English Reformation

- Failure to lawfully divorce Catherine of Aragon
- Following ex-communication by the Pope the Act of Supremacy 1534 made him supreme head of the Church of England;
- Nationalisation of the church was followed by the dissolution of the monasteries, with ecclesiastical income redirected for the benefit of the Crown.
- Religion became a central question for next two hundred years. Act of Uniformity 1559 established common prayer book and compulsory church attendance.
- Ecclesiastical courts operated alongside the King's Bench Common Law Courts and the Chancery Courts.
- Court of Star Chamber abolished in 1641 was developed as a political weapon.

Queen Elizabeth I



Charles I: Executed 1649 following defeat in
civil war



Oliver Cromwell: Lord Protector 1649-1660



Charles II: restoration of Monarchy



James II: Roman Catholic King forced off the throne



The English Revolution and the Path to Democracy

By the beginning of 17th century Parliament important, especially for taxation.

Charles I tried to raise taxation without Parliament e.g. Ship Money case. This attempt to rule without summoning parliament failed and led to national bankruptcy

Imposition of new prayer book in Scotland sparked rebellion. King eventually had to summon Parliament for the funds to raise an army. When Parliament refused King attempted to arrest 5 members during a sitting of the House of Commons.

Divine right of Kings called into question but he confronted Parliament rather than being prepared to negotiate.

Charles I was executed in 1649.

Oliver Cromwell becomes Lord Protector.

English Bill of Rights 1689

- William III and Mary II offered the throne in 1689 but with strict conditions attached:
- No army could be raised without parliamentary approval;
- Taxation required parliamentary approval;
- no special courts for political ends;
- freedom of petition guaranteed;
- free elections and annual parliaments;
- freedom of speech inside Parliament;
- protestant monarchy guaranteed, reinforced by Act of Settlement 1701.

Parliamentary privilege

The result of this clash is that Parliament was given the right to regulate its own proceedings.

The Speaker symbolically claims these privileges from the monarch at each opening of Parliament.

MPs enjoy freedom of speech, freedom from arrest.

No court can challenge what Parliament does.

1660 restoration of monarchy under Charles II

James II once again attempted to undermine the authority of Parliament with disastrous consequences.

What kind of English law?

- Writ system which was developed under Henry II adaptable to new situations. It was based on on a bureaucratized system of returnable writs. Writs framed the question to be put to a jury.
- Most law suits were heard in local common law courts.
- Judges of the King's Bench applied rules, often rigidly, to resolve disputes which formed the basis of precedent e.g. inheritance of land.
- Courts of Chancery based on fairness and justice developed from the personal jurisdiction of the Lord Chancellor and operated alongside the common law but was not bound by common law rules. Allegation of fact eventually replaced writs.
- Development of trusts to protect the interest of minors and women unable to hold property in their right.
- Injunctions as remedy increasingly available from mid sixteenth century.

Judicature Acts and the unification of law

- Distinct parallel systems of law: common law courts and chancery/equity were combined into a single system by a series of statutes from 1873.
- Chancery headed by the Lord Chancellor: placed emphasis on justice and remedies such as injunction and specific performance.
- Single writ based procedure became available and the courts were able to offer the appropriate remedy.
- Both common law and equity were based on binding precedent.

Why does the UK have an uncodified constitution?

The British Constitution is not contained in any one document nor is there such a thing as higher order law, entrenchment.

The Constitution evolved over time and this evolution was first about qualifying the absolute power of the King.

Magna Carta 1215 imposed limitations on Royal power.

Bill of Rights 1689 laid out basic rights but mainly recognised the shift of power from the King to Parliament. No taxation, army etc. without Parliament.

Great Reform Act 1832 important step in redistribution of seats and the grant of the right to vote.

Parliament Acts 1911 and 1949 imposed limitations on the powers of the House of Lords.

European Union Law

Bulmer v Bollinger [1974] - Lord Denning referred to EU law as: ‘an incoming tide which cannot be held back’ .

European Communities Act 1972 – s.2 (1), s.2 (2), s.2 (4) and s.3 (1)

Direct applicability of EU law in the UK from 1973.

Articles and regulations without further action, directives need to be implemented domestically.

S.3(1) decisions of ECJ used to interpret e.g. *Costa ENEL* case and EU supremacy doctrine.

R v S of S for Transport ex p Factortame Ltd (No 2) [1991]

The case concerned fishing rights. The Merchant Shipping Act 1988 - s.14 had established a new register of UK vessels which was only open to those who satisfied certain conditions, e.g., that vessels were at least 75% UK owned.

Claimants who were Spanish argued that the Act infringed the Treaty on grounds of discrimination on the basis of nationality.

House of Lords held that Community law had to be interpreted as meaning that a national court must set aside any measure of national law which precludes it from granting interim relief to protect rights which had been established under Community law. See Lord Bridge's judgment.

The courts clearly accepted the supremacy of EU law and the modification of the Diceyan approach. It spells the end of the doctrine of implied repeal.

How the Human Rights Act 1998 incorporates ECHR

- * Positive duty placed on public bodies under Section 6 as it is unlawful for them to act in a way which is incompatible with a convention right e.g., central government, local government, the police, immigration officers, prisons, courts and tribunals, companies exercising public functions.
- * Courts now required under section 2 to take into account ECHR jurisprudence but not directly bound by it.
- * Section 3 allows the court to interpret legislation so that it is given effect in a way that is compatible Convention rights. This is a very strong interpretative obligation which can have major impact.
- * Section 4 permits court to issue declaration of incompatibility if not possible to reconcile but parliamentary sovereignty unaffected so that legislation remains in force.

Sources of the Constitution

If we wanted to describe the UK constitution it would consist of a range of different sources.

Statute law: some are of central significance, see below

Common law e.g. *Entick v Carrington* [1765]

European Union law since 1973 – Multi-layered constitution

European Convention on Human Rights since HRA 1998 in force since October 2000.

Legal treatises e.g. works of Dicey/Bagehot etc.

Law and custom of Parliament, which regulates itself but is outside the jurisdiction of the courts

Royal Prerogative powers of the monarch, now normally exercised by ministers

Constitutional conventions of special importance to flesh in the missing bits.

What are constitutional statutes?

- Bill of Rights 1689 - limited powers of monarchy
- Act of Settlement 1701 - protestant succession
- Act of Union with Scotland 1707
- Reform Acts of 1832/1918 right to vote
- Parliament Acts 1911 - 1949 restricted powers of House of Lords.
- Statute of Westminster 1931.
- European Communities Act 1972.
- Devolution legislation e.g. Scotland Act 1998
- Human Rights Act 1998 incorporated ECHR
- Constitutional Reform Act 2005 – Supreme Court

Thoburn v Sunderland City Council [2003]

Laws LJ : 'In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental ... And from this a further insight follows. We should recognise a hierarchy of Acts of Parliament: as it were "ordinary" statutes and "constitutional" statutes'.

HS2 Case [2014] importance of constitutional statutes confirmed by the UK Supreme Court.

Constitutional conventions

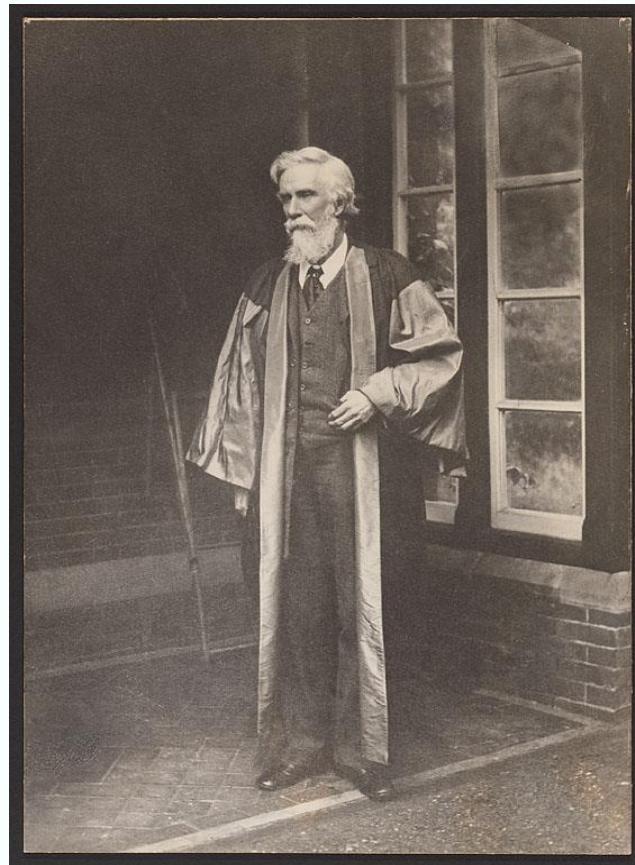
Conventions according to Dicey are:

customary rules which determine how the discretionary powers of the state were exercised:

‘...the “conventions of the constitution”, consists of maxims or practices which, though they regulate the ordinary conduct of the Crown, of ministers, and of other persons under the constitution, are not in strictness laws at all’, in particular, conventions unlike laws are not enforceable in the courts.

Conventions often determine the conduct of the political actors e.g. Crown, PM, ministers, civil servants, judges.

AV Dicey: Constitutional theorist



Dicey's Constitution still recognisable today

- Parliament has supreme authority to pass and repeal law which cannot be directly challenged. No entrenched constitution possible.
- But every citizen is nevertheless subjected to 'the rule of law' which ensures no punishment without law/control of discretionary power and equality before the law.
- Judges in the ordinary independent courts are responsible for protecting rights using the common law e.g. ***Entick v Carrington*** and ***M v Home Office*** but the courts do not have the power to override statute law only to interpret it.

Characteristics of the Constitution

- The historical constitution which developed incrementally through each of the events (and many more) mentioned here. Many of these aspects were enacted in statutory form.
- Heavy reliance on constitutional conventions, these are established rules of constitutional practice that determine conduct of the Queen, PM, ministers, civil servants and Parliament.
- Constitutional monarchy - the powers of the King or Queen have been qualified since Magna Carta. Now the role of the Queen is governed mainly by conventions e.g. Royal Assent to legislation guaranteed.
- Common law is a constitutional source. Where there is no other authority judge made law sets precedents that taken together form major parts of our law. Judges especially of the highest courts play a crucial role interpreting and applying the law, but there is no constitutional court.

Defining 'common law'

- Common law is a term used to categorise legal systems which have the common law method of binding precedent including UK, USA, Canada, Australia, India and other former British colonies.
- The common law is the law made by judges in the courts on the basis that higher courts and appellate courts set precedents in finding reasons for deciding cases. This ratio decidendi binds any court at a lower level on the same point of law.
- Important aspects of especially civil law are still dependent on judge made law e.g. contract and tort.
- Statute law prevails over common law e.g. tracts of law may be codified by statute e.g. most criminal law is now based on statute.

How common law is made

'....common law" refers to the way judges decide and have decided the cases that come before them in areas of activity not governed by Acts of Parliament' Waldron.

To understand case-law '... is to understand how it is that particular decisions by particular judges concerning particular parties to particular cases can be used in the construction of general rules applying to the actions and transactions of persons at large.' N MacCormick.

Law reporting

Supreme Court: all cases

Court of Appeal, Civil and Criminal, Divisional Court of QBD:
all cases

High Court and Administrative Court (civil) all recorded some cases reported

Generally not reported

County Court

Crown Court (higher criminal with jury)

Magistrates Court (criminal)

How to understand law reports?

- (1) the court which heard the case and when it was heard, this immediately establishes the level in the hierarchy of courts;
- (2) the main contested issues by providing a summary. At a glance it is possible to discover if there is likely to be anything of relevance to the case in hand;
- (3) the facts of the case before the court;
- (4) the decision of the court i.e. what the court held. Remember that another feature of the British adversarial system is that there has to be a winner and a loser. It may be hard to maintain that a precedent survives when the decision of the court goes clearly against it. This is not always true, as cases can be distinguished from each other e.g. on the facts.
- (5) all cases referred to in judgments i.e. what precedents were considered to support the outcome. Also, all cases cited or referred to in skeleton argument by counsel.
- (6) which court the appeal originated from and the previous outcome.
- (7) in full the judgments of the members of the (appellate) court. The *ratio decidendi* which is the binding passage will be contained in the judicial statements.

Hierarchy of courts

UK Supreme Court formerly House of Lords

Highest domestic appellate court which binds all inferior courts in the UK but not itself. Scope for judicial creativity to tackle manifest inadequacies in the law. Must follow EU law.

Court of Appeal (civil division) binds lower courts and it binds itself permitted to choose between its own conflicting decisions.

Per incuriam - if the earlier court failed to take everything into account (or gets the law wrong) the decision will not be binding

High Court binds lower courts but not itself (most of its decisions are unreported and therefore cannot form precedents).

Negligence: Donoghue v Stevenson

P becomes unwell after drinking from bottle of ginger beer containing a partly decomposed snail (Schnecke).

The question for the court was whether there could be a claim in tort rather than contract. This arose because it was not the man who purchased the drink who suffered the injury. Should a manufacturer be liable outside of the contractual liability that existed? Should there be a general right to sue in such circumstances?

George v Skivington (1869) important previous case:

'Unquestionably there was a duty towards the purchaser, and it extends, in my judgment, to the person for whose use the vendor knew the compound was purchased'.

Lord Atkin sees this as clear authority which is further supported in a number of subsequent judgments.

Dissenting versus majority judgments

Contrast dissenting interpretation of Lord Buckmaster where the same case is viewed as an isolated authority providing little support for this conclusion.

However, Lord Atkin held:

'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when directing my mind to the acts or omissions which are called into question'.

What principle has been established

Three elements used to establish liability in countless subsequent negligence cases:

- (1) it must be demonstrated by the plaintiff that a duty of care is owed by the defendant i.e., he can reasonably foresee his acts will affect the plaintiff;
- (2) the defendant was in breach of that duty by not having taken reasonable care;
- (3) that this breach of duty has caused the plaintiff to suffer loss or harm which is reasonably foreseeable by the defendant.

Statute law and common law

- Many areas of law are now codified in the sense that the main principles are set out in statutes. For example, company law, copyright law, aspects of contract law, criminal law.
- Drawing up the code will often include incorporating common law decisions. Statute law always prevails over common law.
- But the judges still set precedents in the way they interpret these statutes.
- EU law prevails over domestic law both statute and common law.
- Human Rights Act 1998 incorporates ECHR and gives judges special powers of interpretation to make all domestic law convention compatible.

Comparison with Germany

- Both nations members of EU with community law a major binding source of law.
- Both nations signatories of the European Convention of Human Rights and thus required to conform to same human rights norms as set out in convention and interpreted by Strasbourg Court.
- Germany has codified federal constitution which also sets out citizen rights and is based on a constitutional court which determines constitutional questions and the validity of law.
- UK has no written constitution. Parliament remains sovereign. Supreme Court can set precedents and determine devolution issues but not able to invalidate primary legislation.
- German general law is codified while in the UK a substantial part of the law is comprised of judge made decisions.

Basic reading

- P Leyland 'English Common Law: A Matter of Interpretation' 2014 Unpublished Paper.
- K Zweigert and H Kotz *Introduction to Comparative Law* (Oxford: OUP, 1996) 181ff.
- P Leyland *The Constitution of the United Kingdom: A Contextual Analysis*, (Oxford: Hart Publishing, 2012).
- The Oxford International Encyclopedia of Legal History entries on Common Law and Equity.
- P Harris *An Introduction to Law* (London: Butterworths, 2002).