

ICLR
THE INCORPORATED COUNCIL OF LAW REPORTING
FOR ENGLAND & WALES



THE SOURCES OF ENGLISH LAW

XII SEMINARIO DE ESTUDIO COMPARADO DE SISTEMAS JUDICIALES Y DE COOPERACIÓN JUDICIAL INTERNACIONAL A TRAVÉS DEL LENGUAJE JURÍDICO

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The sources of English law

- **ENGLAND & WALES**: **common law**, **equity**, **case law**, **statute law, EU legislation, international agreements** (must be formally incorporated into English law before courts obliged to apply them; e.g. *European Convention on Human Rights and Fundamental Freedoms* –ECHR-, 1950 ➔ *Human Rights Act 1998*).

- **SPAIN**: **statute law, custom** (in default of an applicable law), **general principles of law + EU legislation, international agreements**. Case law (complementary).

The sources of English law

MOST REMARKABLE DIFFERENCES:

1. Common law, **Equity and Case law** are MAJOR sources of law in the English legal system.

2. International agreements must be formally incorporated into English law.

The sources of English law

- **1. COMMON LAW** (property, personal injuries, breach of contract).
- **2. EQUITY** (ownership, wills, intestate/testate successions, trusts).
- **3. STATUTE LAW** (Parliament: acts / statutes; statutory instruments).
- **4. CASE LAW** (The Judges → judge-made law).
- **5. EU LEGISLATION + INTERNATIONAL AGREEMENTS** (formal incorporation).

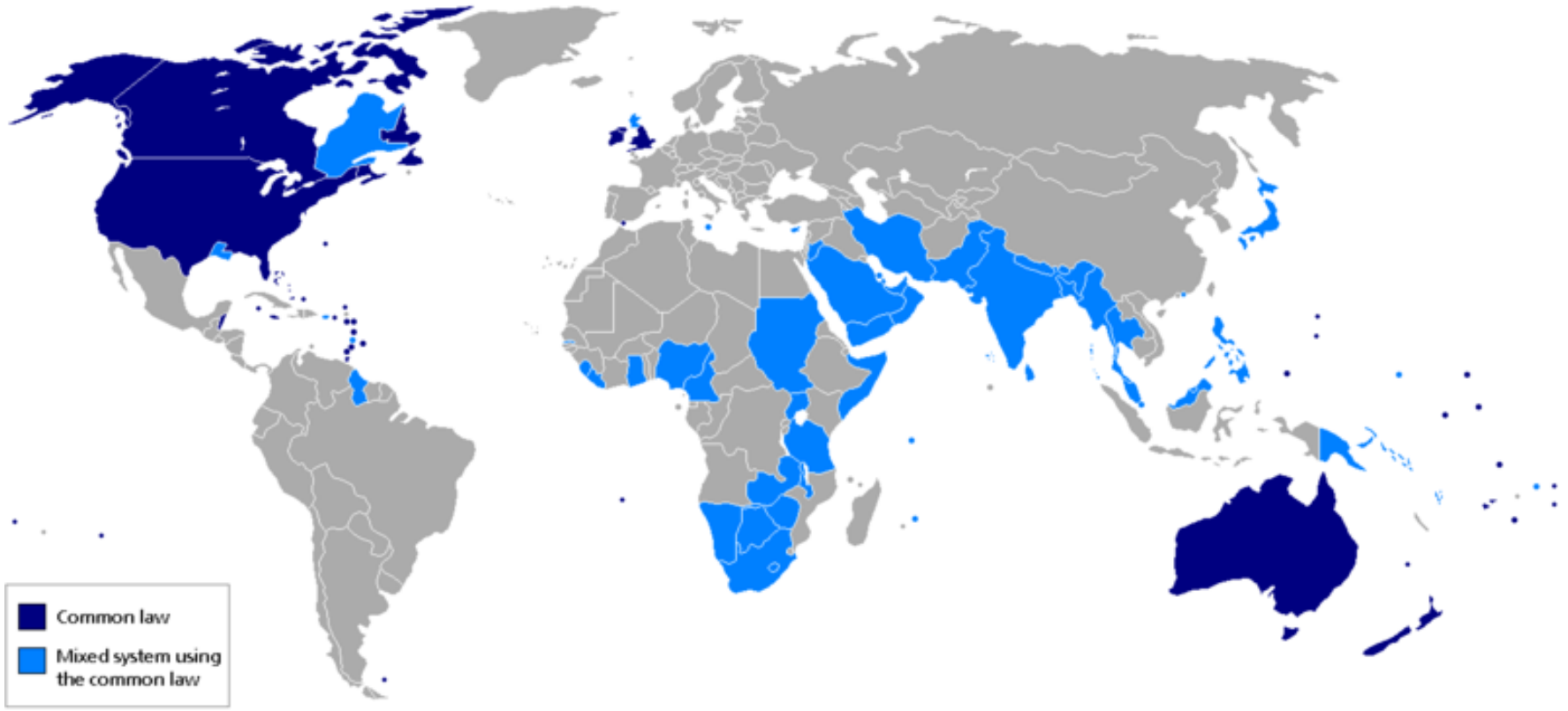
The sources of English law

- **NO WRITTEN CONSTITUTION AS SUCH, but constitutional changes:**

  - Devolution.
  - Human Rights Act 1998 (international legislation has to be formally incorporated into English law before courts are obliged to apply supranational laws).
  - Judicial appointments.
  - Reform of the office of Lord Chancellor in England and Wales.

COMMON LAW

Common law



Common law

- Judicial principles shared by lawgivers with recognition in the whole country → shared rules.
- Custom / tradition (or ‘usage’).
- Developed through courts’ decisions on: property, personal injuries, contracts and earliest torts (trespass, interference with goods). Also on criminal matters (murder, kidnapping, blackmail, etc.).

Common law

In common law systems (as against civil law systems) **JUDICIAL PRECEDENTS ARE BINDING** as opposed to persuasive.

Common law

- **THERE IS NO STATUTE MAKING MURDER ILLEGAL**. It is **a common law crime**, so although there is no written Act of Parliament making murder illegal, it is illegal by virtue of the constitutional authority of the courts and their previous decisions.
- Common law, however, can be amended by Parliament: for example, murder carries a mandatory life sentence today, but had previously allowed the death penalty.

Common law

- Common law and civil law systems:

  http://openlearn.open.ac.uk/mod/resource/view.php?id=208934

EQUITY

Equity

- Concepts, principles and remedies based on natural justice. Recognised & developed by Lord Chancellor.
- Originally related to property rights: possession, ownership of land → beneficial rights (trusts).
- End of XIXth century: relative merging of common law & equity (Chancery Court → HCJ).
- Conflict btw common law & equity: EQUITY IS TO PREVAIL.
- Courts at their discretion: grant or withhold equitable remedies.
  - Adjective: “equitable”.

Equity

EXAMPLE:

- Normal remedy for breaches in civil law rights → damages (common law).
- If claimant establishes defendant's behaviour represents permanent threat to his rights → injunction (equitable remedy).

Precedent in equity: not just what the judge thinks is fair & right but what was viewed reasonable in the past (on similar facts).

Equity

- Example of an equitable remedy in a civil action: Mahoney v. Mahoney (USA):
  - Mr. Mahoney gives up his job to do an MA. Mrs Mahoney pays all his expenses for a couple of years.
  - On the same day that he finishes the MA he files for divorce (he had an affair with another MA student).
  - Mrs Mahoney sued him but was not entitled to seek alimony because under New Jersey (statutory) law it is based on the concept of 'need' and she earned her living.
  - District Judge Pashman based his judgment not on need (statutory law) but on the principles of fairness, morality and decency (equitable principles) → he made Mr. Mahoney reimburse his ex-wife her expenditures for his education.
  - Mr. Mahoney appealed. The Supreme Court of New Jersey confirmed Judge Pashman's judgment based on equity.

Estoppel

- EQUITABLE ESTOPPEL, sometimes known as estoppel in pais, protects one party from being harmed by another party's voluntary conduct. Voluntary conduct may be an action, silence, Acquiescence, or concealment of material facts.

Estoppel

Legal rule of evidence (and not a cause of action) which (1) prevents a party from making an allegation or denial that contradicts what it had previously stated, or what has been legally established, as the truth, (2) supports a claim for damages of the party that had a good-faith reliance on a misleading representation of another party.

Estoppel

- Estoppel is closely related to the doctrines of waiver, variation, and election and is applied in many areas of law, including insurance, banking, employment, international trade, etc.

Estoppel

Because estoppel is so factually dependent, it is perhaps best understood by considering specific examples.

- Example 1: A city entered into a contract with another party. The contract stated that it had been reviewed by the city's counsel and that the contract was proper. Promissory estoppel applied to estop the city from claiming the contract was invalid.
- Example 2: The creditor unofficially informs the debtor that the creditor forgives the debt. Even if such forgiveness is not formally documented, the creditor may be estopped from changing its mind and seeking to collect the debt, because that change would be unfair.
- Example 3: A landlord informs a tenant that rent has been reduced, for example, because there was construction or a lapse in utility services. If the tenant relies on this notice, the landlord could be estopped from collecting the full rent.

COMMON LAW & EQUITY

Common law & equity

Comparing common law and equity

Common law	Equity
Originally operated the doctrine of *stare decisis* strictly. This meant the law did not develop even when it was obviously in need of change.	The Lord Chancellor in the Court of Chancery was not bound by precedent. Rules were established to ensure fairness was done.
Strict procedural rules were followed.	Rules and maxims of equity were developed. These were flexible to ensure even-handedness and fairness.
The only remedy available was damages.	Recognised the limits of usefulness of money and created new remedies including injunctions and order of specific performance.

Source: The Open University

STATUTE LAW

Statute law

Also “enacted law”

- Written laws or legislation passed by Parliament.
- (1) Acts of Parliament (statutes) + (2) delegated legislation (statutory instruments or SIs: ministerial orders, regulations, rules, local bye-laws, etc., approx.3,000 each year).
- On the increase the last few years.

Statute law

DELEGATED LEGISLATION

Statutory intruments: regulations made by government ministers and departments.

Bye-laws: made by local authorities to cover matters within their own area.

Orders in Council: laws made by and with the advice of Her Majesty's Privy Council (for example, to tranfer responsibilities between government departments).

Statute law

- Legislation since devolution forms several separate entities:
  - United Kingdom legislation: applies to the whole UK.
  - Scottish legislation.
  - Welsh legislation (Statutory Instruments only).
  - Northern Irish legislation.

Statute law

- Acts / statutes to amend, repeal or overrule previous acts.

Draft bill → bill → act / statute.

- Legislature (*poder legislativo*) vs. *Legislatura*: life of a Parliament (session) // term of office.

Statute law

PARTS OF AN ACT [see Dossier 2]:

- Short title.
- Long title.
- [Preamble].
- Enacting words + (royal assent or enacting formula).
- Text (body).
- Schedules (forms, illustrations, repeals effected, etc.).

CASE LAW

Case law

Body of law created by judges' decisions on individual cases.

Also called "judge-made law".

Case law

- **CONTINENTAL SYSTEM**: judges apply the law.
- **ENGLISH SYSTEM**: judges apply the law BUT also make the law (common law + equity).

- Judges apply their **KNOWLEDGE OF LEGAL PRECEDENT (stare decisis)** to the facts before them.

Case law

- "Case law develops on a case by case basis, and is based on the concept of 'binding precedent' – a system of law in which judges are bound by the decisions of higher courts" ("The Judiciary Web Page").

↓

High Court of Justice, Court of Appeal and House of Lords

(Leading cases)

NOT Crown Court (persuasive authority, not binding)

Case law: precedent

The system of precedent

Court	Other courts it binds	Other courts it must follow
European Court of Justice	All other courts on matters of EU law	None
°	°	°
European Court of Human Rights	All other courts on human rights issues (Section 2 1998 Human Rights Act)	None
°	°	°
House of Lords	All other courts in the English legal system	European Court of Justice on EU law
°	°	European Court of Human Rights on human rights issues
°	°	°
Court of Appeal	Itself (subject to some exceptions, e.g. *Young v Bristol Aeroplane Co. Ltd* (1944))	European Court of Justice, European Court of Human Rights and House of Lords
°	Divisional Courts	°
°	All other lower courts	°
°	°	°
Divisional Courts	Normally have to follow their own previous decisions	European Court of Justice, European Court of Human Rights, House of Lords and Court of Appeal
°	High Court	°
°	All other lower courts	°
°	°	°
High Court	County Courts	European Court of Justice, European Court of Human Rights, House of Lords, Court of Appeal, Divisional Courts
°	Magistrates' courts	°
°	°	°
Crown Court	Possibly magistrates' courts	European Court of Justice, European Court of Human Rights, House of Lords, Court of Appeal, Divisional Courts, High Court, i.e. all higher courts

Note that both the County Court and magistrates' courts do not create precedent. They are bound by the decisions of all higher courts.

Source: The Open University

Case law: leading cases

- **Negligence**

  - "Paisley snail case" or "Snail in the bottle case" [Scotland].

  - Concept of 'duty of care': Donoghue *v.* Stevenson 1932.



http://en.wikipedia.org/wiki/Donoghue_v._Stevenson

Case law

Law Reports

- Modern Law Reports (1865 - to present): Incorporated Council of Law Reporting.
- Earliest reports of particular cases: between 1275 & 1535 (Year Books).
- Because some cases lay down important legal principles, over 2,000 each year are published in law reports.

Case law

Law Reports

- The most respected series: *The Law Reports* (checked for accuracy with the judge who tried the case. Subseries:

Appeal Cases (containing decisions of the Court of Appeal, the House of Lords and the Privy Council)

Chancery Division (decisions of the Chancery Division of the High Court and their appeals to the Court of Appeal)

Family Division (decisions of the Family Division of the High Court and their appeals to the Court of Appeal)

Queen's Bench (decisions of the Queen's Bench Division of the High Court and their appeals to the Court of Appeal)

Case law

Weekly Law Reports (shortened version)

- Published by Incorporated Council of Law Reporting since 1953.
- Not reports of cases decided in the current week (as the name might suggest), but produced much more quickly than the Law Reports.
- They do not contain counsels' arguments, nor do they enjoy the benefit of judicial correction before printing.

Case law

All England Law Reports

- Produced by Butterworth's.
- Although they do enjoy judicial revision, they do not contain counsels' arguments .
- It is only ever permissible for lawyers to cite a case as reported in the All England reports if no report of the same case is available in the official reports; otherwise, the official report must always take precedence.

Case law

Other Law Reports

- *Solicitors' Journal* (Sol Jo or SJ).
- *New Law Journal* (NLJ).
- Other specialist legal journals.
- Reports in broadsheet newspapers: *The Times, Guardian* and *Independent* for example.
- European Law Reports.

Case law

Law Report abbreviations and neutral citation:

See Dossier 2

Case law

- Ratio decidendi:

  The ratio decidendi of each case will bind future cases on the same generic set of facts both horizontally and vertically.

- Obiter dicta ('passing comments' or comments 'by the way'):

  May be of persuasive authority but DO NOT constitute the precedent to be followed by inferior courts.

Case law

- Disadvantages:

  - Need to follow what may be an unfortunate precedent until it is changed by court that created it, by a superior court or by Parliament.

  - Amount of legal knowledge and research necessary to find cases which may have some application to issue in question. BUT a lot of help: http://www.hmcourts-service.gov.uk/cms/4174.htm; http://www.lawteacher.net/tortlawcases.php, etc.

DOCUMENTARY SOURCES

Documentary sources

- Ministry of Justice (legislation + procedural rules):
  http://www.justice.gov.uk/publications/legislation.htm
  http://www.justice.gov.uk/guidance/guidance.htm
- Office of Public Sector Information (Acts, Statutory Instruments, etc.):
  http://www.opsi.gov.uk/legislation/about_legislation.htm
- The UK Statute Law Database: http://www.statutelaw.gov.uk/
- UK Legislation: http://www.opsi.gov.uk/legislation/uk.htm
- *Halsbury's Laws of England*: covers statutory and common law, alphabetically arranged. Over 85 volumes. £6,115, 2008 (5th ed.).

Documentary sources

- Case law: Bailii (British and Irish Legal Information Institute): http://www.bailii.org/
- The Incorporated Council of Law Reporting for England and Wales (ICLR): http://www.lawreports.co.uk/
- Court Judgments: http://www.judiciary.gov.uk/judgment_guidance/judgments/index.htm
- House of Lords Judgments (to 30th July 2009): http://www.publications.parliament.uk/pa/ld/ldjudgmt.htm
- The Supreme Court decided cases: http://www.supremecourt.gov.uk/decided-cases/index.html
- Leading/Landmark cases in English Law: http://en.wikipedia.org/wiki/Leading_cases_in_English_law