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ENGLISH

FOR LAW STUDENTS

UNIVERSITY COURSE

Part I

2-nd edition

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ENGLISH FOR LAW STUDENTS is a part of the university course of legal English for academic purposes. It is addressed to law students of non-common law countries. It is aimed at teaching students to understand the language of English law, its fundamental concepts and institutions. Its goal is to enable students to deal with different types of legal texts, to become knowledgeable in current legal issues, to use proper English legal terms with regard to their own legal systems. The final objective is to stimulate students' interest in law and language. Although *English for Law Students* is designed as a part of the university course of legal English it can also be useful for students of the humanities, economics, social and political sciences, etc. in their self-study of English law and language.

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FOREWORD

English for Law Students is designed

- to meet the students' needs in acquiring both language through law and law through language;
- to strengthen their reading and writing skills;
- to develop the students' ability to analyse, summerise and interpret legal texts concerning particular legal area or issue;
- to introduce common law terms, concepts and institutions to the students of a different law system;
- to increase their competence in legal language usage;
- to provide thought provoking materials;
- to encourage analytical approach to and comparative studies of current legal issues and reforms;
- to equip students with linguistic tools to advance in their scholarly activity.

English for Law Students contains five UNITS: History and Sources of English Law, Constitution, Monarchy, Parliament, The Executive. Each unit includes a number of texts on a particular theme followed by LANGUAGE PRACTICE AND COMPREHENSION CHECK with TASKS ranging from word building to complicated legal vocabulary, grammar, syntax, discussion points. They focus on reading comprehension, speaking and writing activities. Each unit ends with the task to write an essay based on the texts of the unit on one of the exam questions.

The KEY at the end of the book gives the answers to some exercises.

The GLOSSARY provides definitions for most legal terms used in the units.

English for Law Students is designed for all those who strive for academic excellence and professional success.

UNIT I

HISTORY AND SOURCES OF ENGLISH LAW

TEXT 1

CASE LAW

The word source can mean several different things with regard to law, but for our purposes it primarily describes the means by which the law comes into existence.

English law stems from seven main sources, though these vary a great deal in importance. The basis of English law today is case law, a mass of judge-made decisions which lays down rules to be followed in future cases. For many centuries it was the main form of law and it is still very important today. However, the most important form of law, in the sense that it prevails over most of the others, is statute, or Act of Parliament, which today is the source of most major changes in the law. As well as being a source of law in their own right, statutes contribute to case law, since the courts occasionally have to interpret statutory provisions, and such decisions lay down new precedents. Delegated legislation is a related source, laying down detailed rules made to implement the broader provisions of statutes.

An increasingly important source of law is the legislation of the European Community, which is the only type of law that can take precedence over statutes in the UK, and is increasingly influencing the decisions of the courts in interpreting statutes.

Finally, custom, equity and obligations relating to international treaties are minor sources of law, though Britain's obligations under the European Convention on Human Rights have produced notable contributions to law reform.

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; roughly speaking, Dane law applied in the north, Mercian 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 hence 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.

When these 'itinerant justices' returned to Westminster, they were able to discuss the various customs of different parts of the country and, by a process of sifting, reject unreasonable ones and accept those that seemed rational, to form a consistent body of rules. During this process – which went on for around two centuries – the principle of *stare decisis* ('let the decision stand') grew up. Whenever a new problem of law came to be decided, the decision formed a rule to be followed in all similar cases, making the law more predictable.

The result of all this was that by about 1250, a 'common law' had been produced, that ruled the whole country, would be applied consistently and could be used to predict what the courts might decide in a particular case. It contained many of what are now basic points of English law – the fact that murder is a crime, for example.

The principles behind this 'common law' are still used today in creating case law (which is in fact often known as common law). From the basic idea of *stare decisis*, a hierarchy of precedent grew up, in line with the hierarchy of the modern court system, so that, in general, a judge must follow decisions made in courts which are higher up the hierarchy than his or her own. This process was made easier by the establishment of a regular system of publication of reports of cases in the higher courts. The body of decisions made by the higher courts, which the lower ones must respect, is known as case law.

Case law comes from the decisions made by judges in the cases before them (the decisions of juries do not make case law). In deciding a case, there are two basic tasks; first, establishing what the facts are, meaning what actually happened; and secondly, how the law applies to those facts. It is the second task that can make case law, and the idea is that once a decision has been made on how the law applies to a particular set of facts, similar facts in later cases should be treated in the same way, following the principle of *stare decisis* described above. This is obviously fairer than allowing each judge to interpret the law differently, and also provides predictability, which makes it easier for people to live within the law.

The judges listen to the evidence and the legal argument and then prepare a written decision as to which party wins, based on what they believe the facts were, and how the law applies to them. This decision is known as the judgment, and is usually long, containing quite a lot of comment which is not strictly relevant to the case, as well as an explanation of the legal principles on which the judge has made a decision. The explanation of the legal principles on which the decision is made is called the *ratio decidendi* – Latin for the 'reason for deciding'. It is this part of the judgment, known as binding precedent, which forms case law. All the parts of the judgment which do not form part of the *ratio decidendi* of the case are called *obiter dicta* – which is Latin for 'things said by the way'.

These are often discussions of hypothetical situations: for example, the judge might say 'Jones did this, but if he had done that, my decision would have been . . .' None of the *obiter dicta* forms part of the case law, though judges in later cases may be influenced by it, and it is said to be a persuasive precedent.

LANGUAGE PRACTICE AND COMPREHENSION CHECK

ACTIVE VOCABULARY

case	possible crime and its investigation by the police
court case	legal action or crime
case law	law as established by precedents
to stem from	to derive from, to originate
to lay down	to declare or start firmly
statute	law passed by a law making body
to interpret	to place a particular meaning on
precedence	the right to be put or dealt with before others, especially because of the greater importance
to take precedence	
to give precedence	
to apply the law	to effect; be directly related
justice	1. fair treatment (in law) 2. magistrate 3. title given to High Court judge
itinerant justice	traveling justice
evidence	the answers given in the court of law
judgment	a decision made by a court in respect of the matter before it

TASK I. *a) Complete the following sentences using the above words:*

1. This rule does not ... to your particular case.

2. The police do all they can to bring criminals to ... .
3. He passed ... on the guilty man.
4. ... ... were sent out to the countryside to check the local administration.
5. In the dispute over custody of the child, the court decided to ... ... to mother`s claims.
6. My ... against the local council will be heard today.
7. The police have a clear ... against the prisoner.
8. The witness gave her ... in a clear firm voice.

b) Discuss the following legal terms and Latin expressions:

- **Source of law** Something (such as a constitution, treaty, statute, or custom) that provides authority for legislation and for judicial decisions; a point of origin for law or legal analysis.
- **Ratio decidendi** [Latin 'the reason for deciding'] 1. The principle or rule of law on which a court's decision is founded. 2. The rule of law on which a later court thinks that a previous court founded its decision; a general rule without which a case must have been decided otherwise.
- **Obiter dictum** [Latin 'something said in passing'] A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive). Often shortened to dictum.
- **Stare decisis** [Latin 'to stand by things decided'] The doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation.
- **Precedent** 1. The making of law by a court in recognizing and applying new rules while administering justice. 2. A decided case that furnishes a basis for determining later cases involving similar facts or issues.

TASK II. *Complete the following table:*

Verb	Noun	Adjective
?	*?*	*different*
accept	*?*	*?*
?	*precedent*	*?*
?	*judge*	*?*
?	*evidence*	*?*
?	*?*	*predictable*
?	*report*	*?*
apply	*?*	*?*
?	*?*	*relevant*

TASK III. *Match the words on the left with their* ***synonyms*** *on the right:*

1. modern	**a**. affect, persuade, motivate
2. stem from	**b**. add, bestow
3. prevail	**c.** originate
4. vary	**d**. acquire, get
5.influence	**e.** consider, deal with
6. contribute	**f.** create, set up
7. treat	**g.** arise, come, derive
8. source	**h.** predominate
9. gain	**i**. justice
10. body of	**j**. accumulation, collection, mass
11. establish	**k.** change, deviate, differ
12. judge	**l.** present

TASK IV. *Match the words on the left with their* ***antonyms*** *on the right:*

1. accept	**a.** general, easygoing
2. gain	**b.** general, national
3. occasional	**c.** frequent, regular

4. particular	**d.** distinctive, unusual
5. common	**e.** reject
6. local	**f.** miss
7. obvious(ly)	**g.** hidden, obscure

TASK V. *Change the meanings of the words to the opposite by adding* ***negative prefixes****:*

relevant, important, effective, equality, legal, reasonable, rational, consistent, regular, predictable, relevant, representation

TASK VI. *Add adjectives to the following nouns and make up sentences with the word combinations to describe* ***case law:***

j------- precedent	l---- custom
b------ precedent	t--------- justice
p-------- precedent	i------- justice
l---- law	l---- argument
c----- law	w------- decision
j---- m---- law	l---- principle

TASK VII. *a) Compare the meanings of the words* ***various*** *and* ***different****:*

Different	able to be distinguished; unlike in nature, form or quality

Various	1. different; diverse (e. g. the modes of procedure were various; types so various to defy classification. 2. separate, several; more than one (come across various people; for various reasons.

b) Use ***different, differently, various*** *in the following sentences:*

1. It is useful to explore ... aspects of the democratic principle of the supremacy of the sovereign will of the people laid down in the Constitutional law.

2. To some extent the variation of law reflects ... social conditions and ... attitudes by the public toward similar problems.

3. ... justices use oral argument ... .

4. Both Canadian and British laws are ... from American jurisprudence in a way that directly impacts court reporting.

5. Cases scheduled for oral argument are handled quite ... .

6. There are ... ways of solving the problem.

7. For ... reasons it has not been possible to carry out improvements.

c) Find the sentences with ***different, differently, various*** *in the text and translate them.*

TASK VIII. *a) Fill in the gaps with the following words:* ***separate, differences, association, ruled, originally, single, substantial, similar, unitary.***

Characteristics of English Law

1. The United Kingdom is a ... State, not a federation of States.

2. Nevertheless, it does not have a ... system of law within that State.

3. There are ... systems operating in (i) England and Wales, (ii) Northern Ireland, and (iii) Scotland. Due to the closeness of the ... since the twelfth century between England and Wales on the one hand and Northern Ireland on the other, these countries have ... legal systems. There are, however, ... between the law of Scotland, influenced by Roman law, and that of the remainder of the United Kingdom, although since the Union with Scotland Act, 1707, these ... are now less marked on broad issues.

4. Two important links uniting the system are: *(a)* Parliament at Westminster is the supreme authority throughout the United Kingdom; *(b)* The House of Lords is the final court of appeal.

5. English law is one of the great legal systems of the world, and a ... proportion of it is ... today by laws that came ... from this small island.

b) Compare the definition of ***source of law*** *borrowed from Black's Law Dictionary and those offered by the two scholars:*

- 'The term 'sources of law' is ordinarily used in a much narrower sense than will be attributed to it here. In theliterature of jurisprudence the problem of 'sources' relates to the question: Where does the judge obtain the rules by which to decide cases? In this sense, among the sources of law will be commonly listed: statutes, judicial precedents, custom, the opinion of experts, morality, and equity. In the usual discussions these various sources of law are analyzed and some attempt is made to state the conditions under which each can appropriately be drawn upon in the decision of legal controversies. Curiously, when a legislature is enacting law we do not talk about the 'sources' from which it derives its decision as to what the law shall be, though an analysis in these terms might be more enlightening than one directed toward the more restricted function performed by judges. Our concern here will be with 'sources' in a much broader sense than is usual in the literature of jurisprudence, Our interest is not so much in sources of laws, as in sources of law. From whence does the law generally draw not only its content but its force in men's lives?' (Lon L. Fuller, Anatomy of the Law – 1968).
- 'In the context of legal research, the term 'sources of law' can refer to three different concepts which should be distinguished. One, sources of law can refer to the origins of legal concepts and ideas ... Two, sources of law can refer to governmental institutions that formulate legal rules ... Three, sources of law can refer to the published

manifestations of the law. The books, computer databases, microforms, optical disks, and other media that contain legal information are all sources of law'. (J. Myron Jacobstein & Roy M. Mersky, Fundamentals of Legal Research–1990)

c) Compare the definition of ***'precedent'*** *with the comments made by the scholars:*

- 'In law a precedent is an adjudged case or decision of a court of justice, considered as furnishing a rule or authority for the determination of an identical or similar case afterwards arising, or of a similar question of law. The only theory on which it is possible for one decision to be an authority for another is that the facts are alike, or, if the facts are different, that the principle which governed the first case is applicable to the variant facts'. (William M. Ule et al., Brief Making and the Use of Law Books – 1914)
- 'A precedent ... is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed the ratio decidendi. The concrete decision is binding between the parties to it, but it is the abstract ratio decidendi which alone has the force of law as regards the world at large'. (John Salmond, Jurisprudence 191 (Glanville L. Williams ed. – 1947))
- 'One may say, roughly, that a case becomes a precedent only for such a general rule as is necessary to the actual decision reached, when shorn of unessential circumstances'. (James Parker Hall, Introduction, American Law and Procedure – 1952)
- 'One may often accord respect to a precedent not by embracing it with a frozen logic but by drawing from its thought the elements of a new pattern of decision'. (Lon L. Fuller, Anatomy of the Law – 1968)

TASK IX. *Compare the following definitions of* ***common law*** *with the one given in the text. Which of them do you find the most precise?*

The body of legal principles evolved by judges from custom and precedent. ...Common law is contrasted with statute law, the written law of parliament to which it is complementary; with equity jurisdiction in Chancery; and with canon law, the law of the church.

Collins Dictionary of British History

1. The part of English law based on rules developed by the royal courts during the first three centuries after the Norman Conquest (1066) as a system applicable to the whole country, as opposed to local customs. The Normans did not attempt to make new law for the country or to impose French law on it; they were mainly concerned with establishing a strong central administration and safeguarding the royal revenues, and it was through machinery devised for these purposes that the common law developed. Royal representatives were sent on tours of the shires to check on the conduct of local affairs generally, and this involved their participating in the work of local courts. At the same time there split off from the body of advisers surrounding the king (the *curia* regis) the first permanent royal court – the Court of Exchequer, sitting at Westminster to hear disputes concerning the revenues. Under Henry II (reigned 1154–89), to whom the development of the common law is principally due, the royal representatives were sent out on a regular basis (their tours being known as circuits) and their functions began to be exclusively judicial. Known as *justiciae errantes* (wandering justices), they took over the work of the local courts. In the same period there appeared at Westminster a second permanent royal court, the Court of Common Pleas. These two steps mark the real origins of the common law. The judges of the Court of Common Pleas so

successfully superimposed a single system on the multiplicity of local customs that, as early as the end of the 12th century, reference is found in court records to the custom of the kingdom. In this process they were joined by the judges of the Court of Exchequer, which began to exercise jurisdiction in many cases involving disputes between subjects rather than the royal revenues, and by those of a third royal court that gradually emerged – the Court of King's Bench. The common law was subsequently supplemented by equity, but it remained separately administered by the three courts of common law until they and the Court of Chancery (all of them sitting in Westminster Hall until rehoused in the Strand in 1872) were replaced by the High Court of Justice under the Judicature Acts 1873–75. 2. Rules of law developed by the courts as opposed to those created by statute. 3. A general system of law deriving exclusively from court decisions.

A Dictionary of Law (fifth edition),
Oxford University Press

As distinguished from statutory law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs; and in this sense, particularly, the ancient unwritten law of England. In general, it is a body of law that develops and derives through judicial decisions as distinguished from legislative enactments...

Black's Law Dictionary (abridged sixth addition)

1. The body of law originating in England and the modern systems of law based upon it.
2. The unwritten law, especially of England, based on custom and court decisions rather than on laws made by Parliament.

Longman Dictionary of English Language and Culture

Unwritten law of England, applied by the national courts, purporting to be derived from ancient usage and judges' decisions.

The Concise Oxford Dictionary

TASK X. *Read the passage* **'How judicial precedent works'** *and explain what is meant by:*

a) following a case –
b) distinguishing a case –
c) overruling a case –
d) reversing a case –

How Judicial Precedent Works

When faced with a case on which there appears to be a relevant earlier decision, either by that court (if bound by itself), or a higher one, the judges can do any of the following:

Follow. If the facts are sufficiently similar, the precedent set by the earlier case is followed, and the law applied in the same way to produce a decision.

Distinguish. Where the facts of the case before the judge are significantly different from those of the earlier one, then the judge distinguishes the two cases and need not follow the earlier one.

Overrule. Where the earlier decision was made in a lower court, the judges can overrule that earlier decision if they disagree with the lower court's statement of the law The outcome of the earlier decision remains the same, but will not be followed. The power to overrule cases is only used sparingly because it weakens the authority and respect of the lower courts.

Reverse. If the decision of a lower court is appealed to a higher one, the higher court may change it if they feel the lower court has wrongly interpreted the law. Clearly when a decision is reversed the higher court is usually also overruling the lower court's statement of the law.

In practice the process is rather more complicated than this, since decisions are not always made on the basis of only one previous case; there are usually several different cases offered in support of each side's view of the question.

TASK XI. *Comment on the following QUOTATION:*

> **Custom, that unwritten law, by which the people keep even kings in awe.**
>
> Charles D'Avenant (1656–1714)

TEXT 2

HOW DO JUDGES REALLY DECIDE CASES?

The independence of the judiciary was ensured by the Act of Settlement 1700, which transferred the power to sack judges from the Crown to Parliament. Consequently, judges should theoretically make their decisions based purely on the logical deductions of precedent, uninfluenced by political or career considerations.

The eighteenth-century legal commentator, William Blackstone, introduced the declaratory theory of law, stating that judges do not make law, but merely, by the rules of precedent, discover and declare the law that has always been: '[the judge] being sworn to determine, not according to his private sentiments ... not according to his own private judgment, but according to the known laws and customs of the land: not delegated

to pronounce a new law, but to maintain and expound the old one'. Blackstone does not accept that precedent ever offers a choice between two or more interpretations of the law: where a bad decision is made, he states, the new one that reverses or overrules it is not a new law, nor a statement that the old decision was bad law, but a declaration that the previous decision was 'not law', in other words that it was the wrong answer. His view presupposes that there is always one right answer, to be deduced from an objective study of precedent.

Today, however, this position is considered somewhat unrealistic. If the operation of precedent is the precise science Blackstone suggests, a large majority of cases in the higher courts would never come to court at all. The lawyers concerned could simply look up the relevant case law and predict what the decision would be, then advise whichever of the clients would be bound to lose not to bother bringing or fighting the case. In a civil case, or any appeal case, no good lawyer would advise a client to bring or defend a case that they had no chance of winning. Therefore, where such a case is contested, it can be assumed that unless one of the lawyers has made a mistake, it could go either way, and still be in accordance with the law. Further evidence of this is provided by the fact that one can read a judgment of the Court of Appeal, argued as though it were the only possible decision in the light of the cases that had gone before, and then discover that this apparently inevitable decision has promptly been reversed by the House of Lords.

In practice, then, judges' decisions may not be as neutral as Blackstone's declaratory theory suggests: they have to make choices which are by no means spelt out by precedents.

Judges themselves still cling to the image of themselves as neutral decision-makers, even though they admit that there are choices to be made. In a 1972 lecture Lord Reid agreed that the declaratory theory was something of a 'fairytale', but argued that 'everyone agrees that impartiality is the first essential in any

judge. And that means not only that he must not appear to favour either party. It also means that he must not take sides on political issues. When public opinion is sharply divided on any question – whether or not the division is on party lines – no judge ought in my view to lean to one side or the other if that can possibly be avoided. But sometimes we get a case where that is very difficult to avoid. Then I think we must play safe. We must decide the case on the preponderance of existing authority'.

The caution extended even where there was 'some freedom to go in one or other direction'; in these cases 'we should have regard to common sense, legal principle and public policy in that order'.

Lord Reid made it clear that the first two criteria were unlikely to leave much room for the application of the third, but his reasoning fails to take into account the fact that common sense is by no means a fixed quality – it may be common sense to an employer, for example, that pickets should not be allowed to disturb those employees who want to work, and equally common sense to those pickets that they should be able to protect their jobs in any peaceful way possible. Common sense may be as much a value judgment as public interest.

LANGUAGE PRACTICE AND COMPREHAENSION CHECK

ACTIVE VOCABULARY

judiciary, to sack a judge, to make a law, to reverse a law, to overrule a law, precedent, to look up a case, to bring a case, to defend a case, to lose a case, to win a case, Court of Appeal, Appeal Court

TASK I. *a) Consult a dictionary to find the meanings of the words and word combinations from ACTIVE VOCABULARY.*

b) Use the above words and word combinations to complete the following sentences:

1. This intervention in another nation`s affairs has set a ... that we hope other nations will not follow.
2. The ... Court ... the original verdict and set the prisoner free.
3. He sued the newspaper for libel, but ... .
4. The boss ... my decision.
5. The ... has been consulted on the issue.
6. The case will be ... to court next week.
7. According to the existing practice, he should be ... for abusing his powers.

TASK II. *Add nouns to the following words according to the text:*

to sack a j ----	to pronounce a l--
to make a d-------	to look up a c---
to introduce a t-------	to bring a c---
to make a l--	to fight a c---
to defend a c---	to apply a p-------
to provide e-------	to maintain a l –
to follow a p-------	

TASK III. *Match the words on the left with their* ***synonyms*** *on the right:*

1. to offer	**a.** to presume, hypothesize
2. to make a law	**b.** to assert, to declare
3. statement	**c.** accurate, well-defined, explicit
4. to consider	**d.** to create, to establish
5. to presuppose	**e.** to contemplate, to judge
6. to pronounce	**f.** to come forward, to propose
7. precise	**g.** assertion, declaration

TASK IV. *Change the meanings of the words to the opposite by adding* ***negative prefixes****:*

pure, realistic, precise, equal, like, possible, agree, developed, logical

TASK V. *Change the following sentences using the words from the text so that the sense remains the same:*

1. Judges themselves *adhere* to the image of themselves as neutral decision-makers.
2. Everyone agrees that *neutrality* is the first essential in every judge.
3. The judge must not *form an alliance* with anyone.
4. The case must be decided on the *predominance* of existing authority.
5. The argument fails *to take into consideration* the fact that common sense is by no means a fixed quality.
6. The independence of the judiciary was *guaranteed* by the Act of Settlement 1700.
7. When deciding the case the lawyers could simply *search for* relevant case law.
8. Judges often have to make choices which are by no means *explained* in a detailed way by precedent.

TASK VI. *Read the following to prove that there is a considerable room for maneuver within the doctrine of precedent.*

We can see that there is a considerable room for maneuver within the doctrine of precedent. What factors guide judicial decisions, and to what extent? The following are some of the answers that have been suggested.

Dworkin: a Seamless Web of Principles

Ronald Dworkin argues that judges have no **real** discretion in making case law. He sees law as a seamless web of principles, which supply a right answer – and only one – to every possible problem. Dworkin reasons that although stated legal rules may 'run out' (in the sense of not being directly applicable to a new case) legal principles never do, and therefore judges never need to use their own discretion.

In his book *Law's Empire,* Professor Dworkin claims that judges first look at previous cases, and from those deduce which principles could be said to apply to the case before them. Then they consult their own sense of justice as to which apply, and also consider what the community's view of justice dictates. Where the judge's view and that of the community coincide, there is no problem, but if they conflict, the judges then ask themselves whether or not it would be fair to impose their own sense of justice over that of the community. Dworkin calls this the interpretive approach, and although it may appear to involve a series of choices, he considers that the legal principles underlying the decisions mean that in the end only one result could possibly surface from any one case.

Dworkin's approach has been heavily criticized as being unrealistic: opponents believe that judges do not consider principles of justice but take a much more pragmatic approach, looking at the facts of the case, not the principles.

Critical Theorists: Precedent as Legitimation

Critical legal theorists, such as David Kairys, take a quite different view. They argue that judges have considerable freedom within the doctrine of precedent. Kairys suggests that there is no such thing as legal reasoning, in the sense of a logical, neutral method of determining rules and results from what has gone before. He states that judicial decisions are actually based on 'a complex mixture of social, political, institutional, experiential and personal factors', and are simply legitimated, or justified, by reference to previous cases. The law provides 'a wide and conflicting variety' of such justifications 'from which courts pick and choose'.

The process is not necessarily as cynical as it sounds. Kairys points out that he is not saying that judges actually make the decision and then consider which precedents they can pick to justify it; rather their own beliefs and prejudices naturally lead

them to give more weight to precedents which support those views. Nevertheless, for critical legal theorists, all such decisions can be seen as reflecting social and political judgments, rather than objective, purely logical deductions.

Critical theory argues that the neutral appearance of so-called 'legal reasoning' disguises the true nature of legal decisions which, by the choices made, uphold existing power relations within society, tending to favour, for example, employers over employees, property owners over those without, women over men, and rich developed countries over poor undeveloped ones.

Griffith: Political Choices

In similar vein, Griffith argues that judges make their decisions based on what they see as the public interest, but that their view of this interest is coloured by their background and their position in society. He suggests that the narrow social background – usually public school and Oxbridge – of the highest judges, combined with their position as part of established authority, leads them to believe that it is in the public interest that the established order should be maintained: in other words, that those who are in charge – whether of the country or, for example, in the workplace – should stay in charge, and that traditional values should be maintained. This leads them to 'a tenderness for private property and dislike of trade unions, strong adherence to the maintenance of order, distaste for minority opinions, demonstrations and protests, the avoidance of conflict with Government policy even where it is manifestly oppressive of the most vulnerable, support of governmental secrecy, concern for the preservation of the moral and social behaviour [to which they are] accustomed'. As Griffith points out, the judges' view of public interest assumes that the interests of all the members of society are roughly the same, ignoring the fact that within society, different groups – employers and employees, men and women, rich and poor – may have

interests which are diametrically opposed. What appears to be acting in the public interest will usually mean in the interest of one group over another, and therefore cannot be seen as neutral.

Waldron: Political Choices, but Why Not?

In his book, *The Law,* Waldron agrees that judges do exercise discretion, and that they are influenced in those choices by political and ideological considerations, but argues that this is not necessarily a bad thing. He contends that while it would be wrong for judges to be biased towards one side in a case, or to make decisions based on political factors in the hope of promotion, it is unrealistic to expect a judge to be 'a political neuter – emasculated of all values and principled commitments'.

Waldron points out that to be a judge at all means a commitment to the values surrounding the legal system: recognition of Parliament as supreme, the importance of precedent, fairness, certainty, the public interest. He argues that this itself is a political choice, and further choices are made when judges have to balance these values against one another where they conflict. The responsible thing to do, according to Waldron, is to think through such conflicts in advance, and to decide which might generally be expected to give way to which. These will inevitably be political and ideological decisions. Waldron argues that since such decisions have to be made 'the thing to do is not to try to hide them, but to be as explicit as possible'. Rather than hiding such judgments behind 'smokescreens of legal mystery. . . if judges have developed particular theories of morals, politics and society, they should say so up front, and incorporate them explicitly into their decision-making'.

Waldron suggests that where judges feel uncomfortable about doing this, it may be a useful indication that they should re-examine their bias, and see whether it is an appropriate consideration by which they are to be influenced. In addition, if the public know the reasoning behind judicial decisions 'we

can evaluate them and see whether we want to rely on reasons like that for the future'.

TASK VII. *Make up the list of arguments put forward by the author of each legal theory. Complete the chart to arrange them:*

Name of the author	***Key ideas of the theory***	***Conclusion***
Waldron	1. Judges do exercise discretion. 2. Judges are influenced by political and ideological considerations.	?

TASK VIII. *The text below discusses the advantages and disadvantages of case law. Divide it into logical parts and entitle each of them. Discuss it in groups, add some arguments of your own.*

Advantages of Case Law and Judicial Precedent

Judicial precedent means litigants can assume that like cases will be treated alike, rather than judges making their own random decisions, which nobody could predict. This helps people plan their affairs. Case law is a response to real situations, as opposed to statutes, which may be more heavily based on theory and logic. Case law shows the detailed application of the law to various circumstances, and this gives more information than statute. The right-wing philosopher Hayek has argued that there should *be* as little legislation as possible, with case law becoming the main source of law. He sees case law as developing in line with market forces; if the *ratio* of a case is seen not to work, it will be abandoned, if it works it will be followed. In this way the law can develop in response to demand. Hayek sees statute law as imposed by social planners, forcing their views on society whether they like it or not, and threatening the liberty of the individual Law needs to be flexible to meet the needs of

a changing society, and case law can make changes far more quickly than Parliament. The most obvious signs of this are the radical changes the House of Lords has made in the field of criminal law, since announcing in 1966 that they would no longer be bound by their own decisions.

Disadvantages of Case Law

There are hundreds of thousands of decided cases, comprising several thousand volumes of law reports, and more are added all the time. Judgments themselves are long, with many judges making no attempts at readability, and the *ratio decidendi* of a case may be buried in a sea of irrelevant material. This can make it very difficult to pinpoint appropriate principles. The rules of judicial precedent mean that judges should follow a binding precedent even where they think it is bad law, or inappropriate. This can mean that bad judicial decisions are perpetuated for a long time before they come before a court high enough to have the power to overrule them. The fact that binding precedents must be followed unless the facts of the case are significantly different can lead to judges making minute distinctions between the facts of a previous case and the case before them, so that they can distinguish a precedent which they consider inappropriate. This in turn leads to a mass of cases all establishing different precedents in very similar circumstances, and further complicates the law. The advantages of certainty can be lost if too many of the kind of illogical distinctions referred to above are made, and it may be impossible to work out which precedents will be applied to a new case. Case law changes only in response to those cases brought before it, so important changes may not be made unless someone has the money and determination to push a case far enough through the appeal system to allow a new precedent to be created. Case law develops according to the facts of each case and so does not provide a comprehensive code. A whole series of rules can be built on one case, and if this is overruled the whole

structure can collapse. When making case law the judges are only presented with the facts of the case and the legal arguments, and their task is to decide on the outcome of that particular dispute. Technically, they are not concerned with the social and economic implications of their decisions, and so they cannot commission research or consult experts as to these implications, as Parliament can when changing the law. In the USA litigants are allowed to present written arguments containing socio-economic material, and Lord Simon has recommended that a law officer should be sent to the court in certain cases to present such arguments objectively. However, Lord Devlin considered that allowing such information would encourage the judges to go too far in making law. Changes made by case law apply to events which happened before the case came to court, unlike legislation, which usually only applies to events after it comes into force. This may be considered unfair, since if a case changes the law, the parties concerned in that case could not have known what the law was before they acted. US courts sometimes get round the problems by deciding the case before them according to the old law, while declaring that in future the new law will prevail: or they may determine with what degree of retroactivity a new rule is to be enforced. In *SW v United Kingdom*, two men, who had been convicted of the rape and attempted rape of their wives, brought a case before the European Court of Human Rights, alleging that their convictions violated Art. 7 of the European Convention on Human Rights, which provides that criminal laws should not have retrospective effect. The men argued that when the incidents which gave rise to their convictions happened, it was not a crime for a man to force his wife to have sex; it only became a crime after the decision in *R v R* (1991) The Court dismissed the men's argument: Art. 7 did not prevent the courts from clarifying the principles of criminal liability, providing the developments could be clearly foreseen. In this case, there had been mounting criticism of the previous law, and a series of cases which had chipped away at the marital rape exemption,