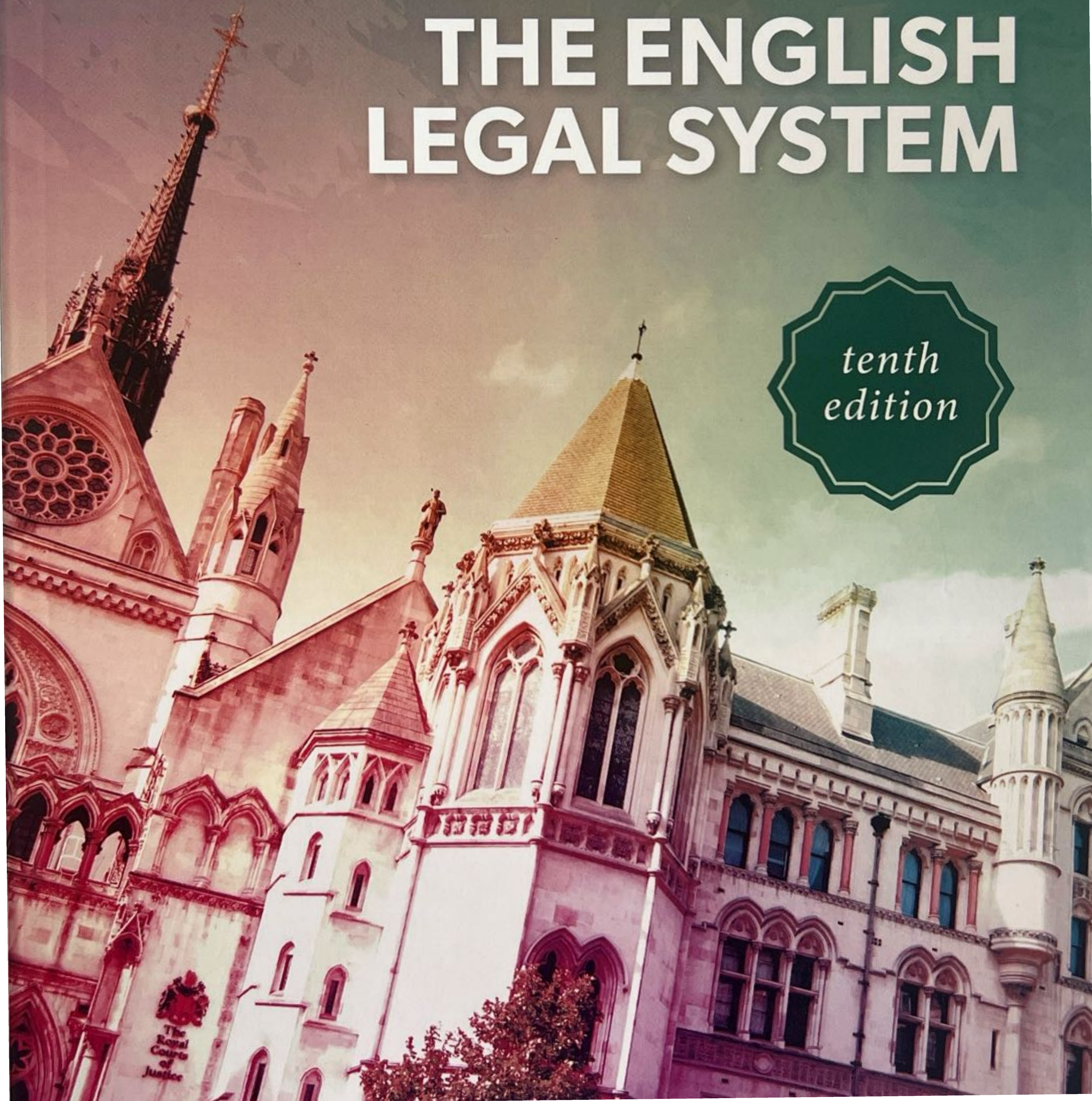


OXFORD

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THE ENGLISH LEGAL SYSTEM

*tenth
edition*



As usual, thanks are due to a number of people in respect of this edition. We acknowledge the assistance of the Crown Prosecution Service, HM Courts and Tribunals Service and the Ministry of Justice. We would also like to thank our anonymous reviewers who have provided invaluable feedback and helped us to ensure the book is as valuable as possible to the widest number of students studying a range of English Legal Studies courses. Thanks also to the team at Oxford University Press for their support on this new edition and our editors Helen Swann, Amy Chang, and Zan Carter.

We hope you find this book interesting and that you find it a useful addition to your legal studies. As always, we welcome your feedback on anything that can be improved.

AAG and
Lancaster
February 2024

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Guide to the Book

The English Legal System is enriched with a range of features designed to help support and reinforce your learning. This guided tour shows you how to fully utilize your textbook and get the most out of your study.

Learning outcomes

Each chapter begins with a bulleted outline of the main concepts and ideas you will encounter. These serve as a helpful signpost to what you can expect to learn by reading the chapter.

By the end of this chapter you will be able to

- Define the United Kingdom.
- Identify how many legal systems exist in the United Kingdom.
- Begin to understand the concept of law and how it differs from mere rules.
- Begin to think about 'systems' and understand the structure of the English Legal System.

Examples

Everyday scenarios explain and illustrate how a particular law or legal practice would apply in a real-life situation.

Example Private and public law

PRIVATE LAW

Rhiannon agrees with Alison to purchase twenty-four bottles of wine for £150. When Rhiannon comes to collect them, there are only ten bottles. She wants the full £150. If not resolved amicably it is quite possible to go to court, with Rhiannon suing Alison for breach of contract. This is a classic example of private law as it is a dispute between two individuals and does not involve the state in its sovereign capacity.¹⁷

Questions for reflection

Why was a particular decision reached in a certain case? Is the law on this point rational and coherent? Is the English Legal System fit for purpose? Questions for reflection encourage you to think about contentious issues and critique the law.

COMPLICITY

The *Accessories and Abettors Act 1861* is a good illustration of different meanings. The provision makes it clear that a person can be a principal offender by acting in one of four ways:

1. aiding
2. abetting
3. counselling
4. procuring

Case Box R v A

The case of *A* concerned the construction of s 41 of the Criminal Justice Act 1988, which purported to prevent the victim of a sexual offence from disclosing their previous sexual history. This provision was widely welcomed in the context of a number of cases where rape convictions were overturned on appeal due to their complete sexual history, including number of partners, being disclosed in public. Parliament believed

Case boxes

Real-life cases demonstrate the way in which legal concepts are used in practice: the facts and decisions are presented to assist you in understanding why the court reached its decision and what the wider implications are.

3

Domestic Sources of Law: Case Law

By the end of this chapter you will be able to:

- Define the principles of *stare decisis*.
- Apply the doctrine of precedent to cases.
- Differentiate between binding, overruling, and distinguishing precedents.

Introduction

The previous chapter introduced the concept of domestic sources of law and it was noted that sources can be divided into primary and secondary sources. Of the primary sources, parliamentary material is supposed to be the most important, the courts merely implementing the will of Parliament. Often this is expressed as Parliament making the law and the courts applying it but this is not strictly true. It was noted that decisions of the superior courts are a primary source of material in their own right, and this is because England and Wales has a common-law-based tradition, i.e. decisions of the court can amount to law in the same way as statutes do. It is not just minor matters where the common law becomes involved, quite a significant amount of constitutional law is by convention or through common law, but murder, arguably the most important criminal offence, is a common-law offence. You will not find a statutory definition of murder but it is instead left to the courts to define.

Even where Parliament has passed a law it falls to the courts to decide what the law means and how it will be applied. In the previous chapter, it was noted that the courts have created a series of statutory rules to assist them in interpreting the law but in order to ensure that there is certainty in the law the courts have themselves developed rules on how courts must act when presented with a case. These rules are known as *stare decisis* although the common term of 'precedent' has gained favour. These rules have created a hierarchy of the courts and an understanding of how the courts must act when presented with a previous decision.

3.1 Reporting of cases

It has already been noted that the English Legal System is a common-law-based system, which means that historically much of the law was a product of the common law rather than statutes. Even now that statutes are more usual the role of the courts is to interpret the law and many of the common-law rules continue to apply.

At the heart of the common-law system is the system of *stare decisis*, or precedent as it is also known. The term *stare decisis* can be translated as 'let the decision stand' and is designed to bring certainty to the law. The basic proposition of this doctrine is that a case should normally be dealt with in the same way as previous cases were by the courts and that the law can only be changed according to the hierarchy of the courts. How this works in practice will be examined in this chapter but the first issue to consider is how we know what the law is.

One can get the impression that the system of *stare decisis* has a long and distinguished history and to an extent it does. However, until comparatively recently the system was somewhat haphazard because few cases were ever reported. How could the doctrine be applied therefore? A judge who tried a Chancery case in Preston might not be aware of a similar case that was heard in Plymouth three months earlier. If they were decided differently then it would appear that rather than having a consistent approach to law we would have the exact opposite.

The earliest known reports were known as the 'Year Books' and these date back to the thirteenth century (and can still be seen at the Squire Law Library at the University of Cambridge) but very few cases were reported. Those cases that were mentioned tended to be extremely important cases rather than matters that were considered in typical court cases. Also, the reports took a considerable time to be reported which did not contribute to a careful analysis of precedent. In the sixteenth century, a series of private reports started to be published. These were reports published by individual reporters and normally cited by reference to their name. A principal difficulty with these reports, however, was that there was no sense of order as to what was reported; it tended to depend on the particular idiosyncrasies of the reporters. There was also considerable doubt as to the accuracy of the reporters as there were no rules and regulations that either required a reporter to check the accuracy of reports, or indeed specified what qualification the reporters needed to have, if any. That said, private reports continue to be available albeit in a changed format (see 3.1.1.2).

Eventually it was decided that if reports were to be produced then it was important that they contributed to, rather than detracted from, the consistency of law. In 1865, the Inns of Court and Law Society, who regulated the legal profession (see Chapter 10), created a new body, the *Council for Law Reporting* and in 1870 it became an incorporated body taking the name, *Incorporated Council of Law Reporting for England and Wales*, the name it continues to be known by today. The patronage of the professions, particularly the Inns of Court where the Masters of the Bench (who are in charge of the Inn) were frequently members of the judiciary (see 10.2.1.2), ensured that the Council succeeded and that its reports became authoritative; indeed, even today (as will be seen) reports produced by the Council should be cited in preference to any other series.

If the Year Books and private law reports marked the first age of law reporting and the creation of the *Incorporated Council* marked the second age, we are now in the third age. We now live in the era of the internet and as you will no doubt be aware a

significant number of judgments can now be obtained freely and easily from the net. The Law Reports, in all their various guises, never pretend to be able to report every case that occurs in the senior courts but with the internet this is getting to be possible. For example, let us look at the Supreme Court. The series of *Cases* did not report every case heard by its predecessor, the House of Lords, but on 14 November 1996 every judgment of the House of Lords (and subsequently the Supreme Court) has appeared on the internet. To a lesser extent this can also be done with the Court of Appeal. Whilst not every judgment of the Court of Appeal is on the internet, the majority are, particularly in the Criminal Division where an appeal against conviction, and certainly considerably more than would have been reported in the traditional law reports.

The courts themselves have mixed emotions about the use of ICT to report judgments. On the one hand they have facilitated their use through the provision of neutral reports (see 3.1.2), but on the other hand the courts have argued that it is sometimes inappropriate to refer to too many cases. Perhaps the most notable criticism was given by the Lord Chief Justice in *R v Erskine*.¹ The Lord Chief Justice provided a historical perspective on reporting² and emphatically restated a principle first enunciated by Viscount Mansfield in 1641: 'if it is not necessary to refer to a previous decision of [the] court, it is unnecessary to refer to it'.³ This has been followed up by the Lord Judge who stated that electronic cases should 'not usually be cited unless it contains a relevant legal principle not found in reported authority'.⁴

3.1.1 Printed series

It has been noted that a number of printed series exist. The Incorporated Council for Law Reporting is responsible for many of these but a number of private reports, normally produced by recognized legal publishers, are also to be found.

3.1.1.1 Incorporated Council

Judgments reported by the *Incorporated Council* should normally be cited in preference to any other series.⁵ The reports produced by the Council are fully authoritative in that the judges who gave the judgment will check the draft to see whether it is accurate and can indeed change the wording of a judgment they handed down if necessary. The reports (apart from the *Weekly Law Reports*) also contain the names of counsel which whilst not forming any part of the judgment can be of assistance in identifying the reasoning of the court.

There are three principal series operated by the *Incorporated Council* which are the *Law Reports*, the *Weekly Law Reports*, and the *Industrial Cases Reports*. The *Industrial Cases Reports* which is a specialist report. In addition, other series are now also produced including the *Business Law Reports* and the *Public and Third Sector Law Reports* but of lesser importance. Of the three main series the *Law Reports* are considered as the definitive reports for the reasons already set out and they are divided into three series each of which has a different abbreviation and colour (see Table 3.1).

1. [2010] 1 WLR 183.
2. *R v Erskine* [2010] 1 WLR 183, 201.
3. *ibid*, 202.
4. *Practice Direction (Citation of Authorities)* [2012] 1 WLR 780.
5. See *ibid*.

Table 3.1 The Law Reports

Series	Abbreviation	Colour ⁶
Appeal Cases	AC	Brown
King's ⁷ Bench Division	KB	Green
Family Division ⁸	Fam	Blue
Chancery Division	Ch	Red

It is important to note that the titles do not necessarily reflect exactly what their contents are. One of the most common mistakes for law students to make is to think that the *Appeal Cases* series deals with the appellate courts, most notably the Court of Appeal. In fact, only matters now heard in either the Supreme Court or Judicial Committee of the Privy Council are reported in that series.⁹ A significant proportion, and perhaps even the majority, of cases reported in the *King's Bench Division* series are not heard in the King's Bench Division of the High Court of Justice but are decisions of the Court of Appeal (Criminal Division), certain decisions of the Court of Appeal (Civil Division), Employment Appeals Tribunal, Consistory Courts,¹⁰ and judgments of the Court of Justice of the EU.¹¹ Similarly, the Family Division and Chancery Division reports encompass decisions of the Court of Appeal (Civil Division) and European Court of Justice that originated in those divisions.

The *Weekly Law Reports* are so called because they are generally published weekly but this is not for the fifty-two weeks of the year, nor are they produced in the same week as the judgment was handed down (discussed later). There are traditionally three volumes of the *Weekly Law Reports* and it is intended that those reported in volumes 2 and 3 will normally be (eventually) published in the *Law Reports*. That said, it is important to note that this is only an intention and it will not necessarily always occur, in part because by the time a report is produced it may have been considered on appeal.¹² The *Weekly Law Reports* (abbreviated to WLR) are produced much more quickly than the *Law Reports*, in part because they are not checked by judges prior to being published. Accordingly, there may be slight differences between the reports. The speed at which they are produced is also reflected by the fact that the arguments of counsel are not contained in the report either.

6. The reports will either be bound in this colour or will be bound all in beige with the spine including the Division framed by the relevant colour. This tends to be a less popular method of binding now.

7. When the sovereign is a Queen then it is automatically the Queen's Bench Division and the abbreviation QBD is used.

8. Prior to 1972 this series was known as the Probate Division and carried the abbreviation P. In that year, however, the Family Division of the High Court of Justice was established and the series was retitled.

9. It previously reported decisions of the House of Lords and the Judicial Committee of the Privy Council.

10. These are ecclesiastical courts established by the Church of England. Each diocese has a Chancellor who presides over the consistory court. Nowadays, the vast majority of cases relate to 'faculties' which are permissions to alter the material content of a church (including its building, windows, or other features that could have a permanent effect on the church).

11. It is unlikely that these cases will continue to be reported in this way since the right to petition the Court of Justice of the EU about a British case has now lapsed (see *European Union (Withdrawal) Act 2018*, s 6(1)(b)).

12. e.g. *Davis v Johnson* is reported at [1978] 2 WLR 182 but it has never been reported in the *Law Reports* because it was superseded by the House of Lords ruling on that case: see [1979] AC 264.

3.1.1.2 Other series

A number of other series exist all of which are private reports. In order to have reports within the courts, the reports must be prepared by a qualified lawyer (see 3.1.1.1). The exception of the *All England Law Reports*, the series tend to be specialist in nature, reporting a narrow range of cases. The primary reason for this is that it is not possible to compete with the Council, especially given the preferential treatment awarded by the courts. Where a practitioner wishes to access specialist material, however, it is unlikely that the general law reports will contain many of the cases as they will not be considered 'important' enough. The principal series are referred to in Table 3.2.

Table 3.2 Common abbreviations for Law Reports

Series	Abbreviation
All England Law Reports	All ER
Criminal Appeal Reports	Cr App R
Criminal Appeal Reports (Sentencing)	Cr App R (S)
European Human Rights Reports	EHRR
Family Court Reports	FCR
Family Law Reports	FLR
Knight's Industrial Reports	KIR
Local Government Law Reports	LGLR

Not every report will necessarily be official in that the judges may not necessarily have the opportunity to review them prior to publication, although the better reports do allow this. Also, very few of these reports will contain the arguments of counsel, the argument for omitting these being that they do not form part of the judgment.

3.1.1.3 Newspapers and journals

Before leaving the printed series, it is worth noting that it is not only specialist publications that report cases but that a limited number of newspapers and journals do too. *The Times* has long been considered the leading daily newspaper for lawyers, in part because it contains law reports usually on an almost daily basis. The reports are highly abridged and would normally only be referred to in court in highly exceptional circumstances (because the case would ordinarily be reported by a series in due course). In contrast to the reporting series already discussed, the words of the judge are not reported verbatim but are simply abridged. The principal advantage of these reports, however, is that the reports are normally produced within days of the judgment being handed down, something that not even the weekly reports can manage.

Legal periodicals also sometimes report cases and perhaps the two most obvious examples of this are the *Solicitors' Journal* and the *New Law Journal*. Both series suffer the same drawbacks as *The Times* in terms of their detail, but the speed in which they are reported continues to make them a particularly useful resource.

3.1.1.4 A note on dates

Although all law reports contain a date where the report is carried in print rather than electronically, it is likely that there will be a delay between the judgment being handed down and the report being produced. It is a convention that rather than using the date of the judgment, the year will normally be taken from the report.

Example *R v G and R*

The judgment in the leading case of *R v G and R* was handed down by the House of Lords on 16 October 2003. However, it was reported in the *Appeal Cases* series at [2004] 1 AC 1034 and could, therefore, be abbreviated as *R v G and R* (2004).

Of course, nothing is simple and some reports are produced earlier than others, most notably the *Weekly Law Reports*. This may mean that there are different years.

Example More about *R v G and R*

The case of *G and R*, discussed earlier, is also reported at [2003] 3 WLR 1060. However, the year can be taken from whichever series you refer to. It could also, therefore, be referred to as *R v G and R* (2003).

Printed reports do not include every case and occasionally there may be a significant delay in reporting a decision. Where a report is particularly late then it would be wiser not to adopt this convention. Perhaps the classic example of this is *Regal (Hastings) Ltd v Gulliver* where the judgment was handed down on 20 February 1942; it was reported by the *All England Law Reports* at [1942] 1 All ER 378 but the official *Law Reports* did not report the case for another twenty-five years ([1967] 2 AC 134)!

3.1.2 Internet sources

The growth in electronic reports led to an increase in the number of unreported cases that were being presented to the courts. Traditionally, these were referred to by their case name or the year and 'unreported'. It was difficult for all counsel and the courts to keep track of the cases and clearly as more judgments were becoming available it was preferable for a standardized form to be introduced.

In *Practice Direction (Judgments: Form and Citation)*,¹³ Lord Woolf CJ issued a direction that transformed the way that judgments were presented. All judgments would now follow a standard pattern with each paragraph being numbered sequentially through the judgment. Also each case would be assigned a neutral citation number so that even unreported cases could be readily indexed, identified, and retrieved. Initially, the practice was restricted solely to the Court of Appeal and (the then) Divisional Court of the Queen's Bench Division but it was later extended to the High Court.¹⁴ The House of Lords, Privy Council, and now Supreme Court also follow the system.

13. [2001] 1 WLR 194.

14. See *Practice Direction: Supreme Court: Judgments: Neutral Citations* [2002] 1 WLR 346.

The citation has three elements to it: the date, the court code, and the case number. Each number is assigned sequentially by the relevant courts in order of its appeal. The codes are as follows:

Supreme Court	UKSC
House of Lords	UKHL
Privy Council	UKPC
Court of Appeal	
Criminal Division	EWCA Crim
Civil Division	EWCA Civ
High Court of Justice	
Administrative Court ¹⁵	EWHC Admin or EWHC (Admin)
King's Bench Division	EWHC (KB)
Chancery Division	EWHC (Ch)
Family Division	EWHC (Fam)
Specialist Courts of the High Court	
Patents Court	EWHC (Pat)
Commercial Court	EWHC (Comm)
Admiralty Court	EWHC (Admity)
Other courts	
Family Court ¹⁶	EWFC
Court of Protection	EW COP

The code EW stands for England and Wales whereas UK is used for the Supreme Court (which has jurisdiction across the United Kingdom) and the Privy Council. Whilst the Privy Council's cases will now no longer originate in the United Kingdom, this convention remains. Rather confusingly, there remains some uncertainty where the case number is sometimes found. Where the court code does not include parentheses then the number occurs immediately after the code, whereas where parentheses are used then the case number is placed immediately after the code but before the court code which is placed in parentheses.

Example Neutral citations

The 123rd case in the Court of Appeal (Civil Division) for the year 2003 would be written as [2003] EWCA Civ 123, whereas the 45th case to be decided in the Chancery Division of the High Court during the year 2003 would be written as: [2003] EWHC 45 (Ch).

15. Also known as the Divisional Court of the King's Bench Division.
16. Typically, only decisions of a High Court judge (or acting judge of the High Court) sitting in the Family Division will be reported.

Neutral citations should usually be used at least once even in reported cases and the (printed) reports should not renumber the paragraphs, but use the ones assigned in the judgment. Where a paragraph is being referred to the number is placed in square brackets.

Example Neutral citations—paragraphs

To refer to the 13th paragraph in the (fictional) case of *Smith v Jones*, which has the neutral citation number [2003] EWHC 45 (QB), the following format is used:

[2003] EWHC 45 (QB) at [13].

3.1.3 Reporters

So far it has been recognized that cases are often reported but who reports them? The short answer is qualified lawyers. Traditionally, cases were reported by barristers and the vast majority of reporters continue to be barristers. In part, this was because of the historical divide between the professions (see 10.2.1) with barristers having the exclusive right to litigate in the superior courts. It was thought that as only a barrister could litigate in the superior courts that only a barrister would fully understand the procedure and detail of the cases in sufficient detail to report the matter. However, the *Courts and Legal Services Act 1990* ended the Bar's monopoly on accessing the superior courts and s 115 of that Act provides that a law report by a solicitor or other person with a senior courts qualification shall have the same authority as one by a barrister. Accordingly, the position is now that either a solicitor or barrister can act as an official law reporter. It is important to note that the reporter, regardless of which profession he belongs to, must be fully qualified, i.e. have the right (even if they do not avail themselves of it) to conduct litigation in the higher courts.

3.2 Hierarchy of courts

The system of precedent depends on there being a hierarchy of courts. It is necessary to identify the structure of the courts in order to understand how precedent works. Figure 3.1 sets out a basic understanding of the English Legal System. It can be seen that the Supreme Court is at the very top of the structure and the magistrates' courts are at the bottom. The position of the European Court of Human Rights (ECtHR) is somewhat complicated and different texts will place it at different levels of the system. The ECtHR is linked by a broken line to reflect the fact that technically the ECtHR does not bind any court nor is it reached by an appeal per se (see Chapter 5 for an explanation of this). However, the UK has traditionally operated on the basis of following the rulings of the ECtHR, and so it must rank highly in the structure.

Before the withdrawal from the EU, the Court of Justice of the EU (CJEU) was often found alongside the Supreme Court. This was because the UK was bound by treaty to follow the judgments of the Court of Justice, and domestic law gave effect to that.¹⁷ However, domestic courts are no longer required to follow decisions of the Court of Justice,¹⁸ and so it does not form part of the structure of the courts. However, it will remain a source of law due to the fact that many of the laws passed while in the EU remain in force. This will be discussed at 4.2.

17. *European Communities Act 1972*.

18. *European Union (Withdrawal) Act 2018*, s 6(1)(a).

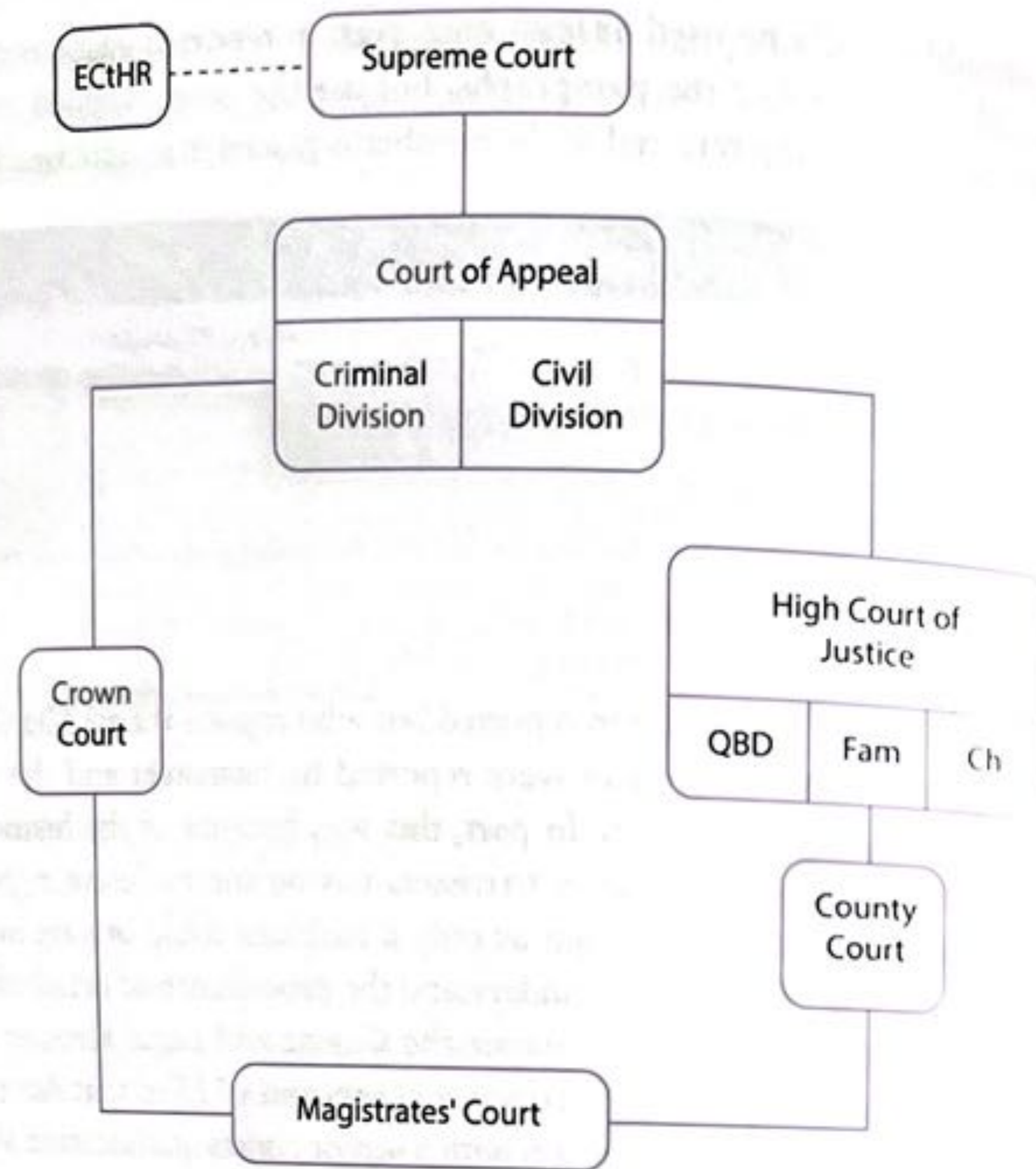


Figure 3.1 The hierarchy of the courts

The hierarchical principle means that each court will act in accordance with its position in the hierarchy and has responsibilities to those above and below it. When and how courts can act will be discussed later although it should be noted that the lower courts (i.e. those below the High Court) do not play any role in *setting* rather than *following* precedent.

3.3 Legal principles

Not every statement of a superior court will necessarily amount to a precedent. In the system of precedent applies only to a narrow part of any case—the legal decision for a case. Harris notes that this is a significant limiting factor as in the vast majority of cases, including appellate cases, there will be no dispute as to the law but rather a dispute as to the facts.¹⁹ In those situations, no precedent will arise as decisions do not bind courts.

Example Facts vs Law

Parliament creates the (fictional) *Motor Vehicle in the Park Act 2015*, which states that a person is guilty of an offence if he drives a vehicle powered by a motor in a public park. Edith is stopped by the police after driving her electrically powered wheelchair through the park.

19. Rupert Cross and JW Harris, *Precedent in English Law* (4th edn, Clarendon Press 1991) 40.

The district judge trying the case decides that an electric wheelchair is a vehicle powered by a motor and as she drove it in the park convicts her. Edith appeals to the High Court and they decide that permitting wheelchairs to be brought within the legislation would be 'absurd' and contrary to other parliamentary statutes. Applying the 'golden rule' of statutory interpretation (see Chapter 2) they quash the conviction and hold that the purpose of the legislation was to stop motor vehicles (cars, vans, etc.) driving through the park and that a wheelchair could not be considered a 'motor vehicle' because although it may be driven by a motor it was not a vehicle but a disability aid.

Whether Edith was driving and whether she was in the park are decisions of fact. Whether a wheelchair amounts to a 'vehicle powered by a motor' is a matter of law as it requires the law to be interpreted. In this situation, the decision of the High Court that a wheelchair is not a motor vehicle will become a precedent as it is a decision of law.

However, in a case many apparent decisions of law may be made but some of them may not be binding as they do not form part of the decision of the case. In the earlier example, the High Court held that the mischief of the Act was to stop cars and vans being driven in the park. This must be a legal rather than factual point but it does not form part of the decision of the case as Edith's case did not involve a car or van; it is an ancillary legal point.

The two types of legal statement identified previously are known as the *ratio decidendi* and *obiter dictum*. The *ratio decidendi* is the legal reasoning for the decision and forms the binding precedent, *obiter dicta* are legal opinions that did not go to the decision but are, in essence, side comments on legal issues.

3.3.1 Ratio decidendi

At the heart of precedent is the notion of the *ratio decidendi* as it is this which will form the binding precedent. The term is often shortened to just *ratio* and notwithstanding the fact that there is a retreat from the use of Latin in law the term remains in use.

The *ratio* is sometimes presented as being an easy principle. It is the binding element of the case and it is the reason for this case. Simple. Except it isn't. Judges do not often signpost why they have reached their decision and so there may be several reasons why they have reached their decision. Does that mean that there are multiple *ratios*? Also, who decides what the *ratio* is? Judges do not say 'the *ratio* of this case is ...' and it is for the later courts to try and ascertain what it is. Thus, it is quite possible that what a later judge declares to be the *ratio* of a case might actually be a different proposition than what the judge giving the initial judgment intended.

Identifying the *ratio* is even more difficult where there is more than one judge pronouncing judgment. Whose judgment forms the *ratio*? It has been suggested that where there are multiple judgments it is possible that there will be no *ratio*²⁰ although not everyone agrees with this and Harris has suggested that every case must have a *ratio* but it does not follow that there must be only one *ratio*.²¹ It is submitted that Harris must

20. James Holland and Julian Webb, *Learning Legal Rules* (9th edn, OUP 2016) 192 citing Lord Justice Jacob.

21. Richard Cross and JW Harris, *Precedent in English Law* (4th edn, Clarendon Press 1991) 48.

be correct since the term *ratio* denotes that there must be a reason for the decision just that identifying precisely what that definition is can be difficult.

The difficulties caused by multiple judgments can perhaps be best illustrated by reference to cases. In *R (on behalf of R) v Durham Constabulary*,²² the issue was whether a juvenile offender must consent to being given a formal reprimand or final warning rather than being prosecuted. The decision of the House of Lords that no consent was required was unanimous but Lady Hale disagreed radically with Lord Bingham on the reasons for this. What is the *ratio* of this case? Arguably, in this particular case, it was the reasoning of Lord Bingham because a clear majority of the Lords backed his arguments but does this necessarily follow? In this case, there were three 'primary' judgments that conflicted on some aspects: what happens if the other judges agree with the comments of the other judgments even though they say slightly different things (as arguably happened in *R v Ireland; R v Burstou*?²³)

These complications are one reason why in some jurisdictions only a single *ratio* is given (most notably the US Supreme Court).²⁴

So how do we define the *ratio*? Unfortunately, there is no easy answer and nobody has suggested a foolproof method. As you read more cases you will begin to understand their structure and logic better, meaning that it is likely you will be able to identify a possible *ratio* almost subconsciously but proving that it is the *ratio* will be difficult. To the extent it is irrelevant because it is for a court to determine what the *ratio* of a case is not you (be it now as a student or later as a solicitor or barrister) but it is important that you recognize what *could* amount to a *ratio* so that you can extrapolate how a judge will rule. If you can identify a thread as the *ratio* you can then as a lawyer seek to persuade your tutor the answer is *x* because you can point to the development of the law that a judge is *bound* to act in a particular way (discussed later) or in an essay.

Despite these difficulties some have attempted to show how you can identify a *ratio*. The two most common theories put forward are those proposed by Wambaugh and by Goodhart.

3.3.1.1 Wambaugh's test

The first possible method of identification is to use the test formulated by Wambaugh. Harris reproduces the earlier text of Cross in considering this work.²⁵ The test is complicated in that it is presented in the negative. It also does not identify the *ratio* but allows a reader to test whether their supposition of what the *ratio* is could be correct. The test, at its most basic level, is that one identifies the supposition of law that the reader believes is a *ratio* and then reverses its meaning.²⁶ The reader then asks whether the outcome of the case would have been the same. If the answer is 'no' then the proposition can only be *obiter* and not the *ratio*.

A difficulty with Wambaugh's test is, however, that it does not work particularly well where there is more than one possible *ratio*. For example, it could be decided that the *ratio* of the example earlier is that a vehicle required for the conveyance of a disabled person is exempt from the legislation. If this proposition was reversed it would

22. [2005] UKHL 21.

23. [1998] AC 147.

24. Where the court is divided then there will tend to be a single majority verdict and a separate *ratio* for each dissenting judgment. As a dissenting judgment will not count towards the *ratio*, this means there is no possibility of a *ratio* contradicting each other on the *ratio*.

25. Richard Cross and JW Harris, *Precedent in English Law* (4th edn, Clarendon Press 1991) 52.

26. *ibid.*, 52.

obviously lead to Edith's case being decided differently but is this the *ratio*? Arguably, if it does then had Edith not had an electric wheelchair but a quad bike to allow her to move around then are we saying the court would still acquit? It would seem unlikely and yet according to Wambaugh's test is possible. Harris argues that this is a difficulty with the test: it is very good at identifying what *is not* a *ratio* but it is not particularly efficient at identifying what *is* the *ratio* unless there is only a single possible reason,²⁷ and as has been pointed out already this is perhaps unlikely.

Example Edith

Let us return to the earlier example of Edith. What is the *ratio* of the High Court in that case?

The first possible *ratio* of the case is that only cars and vans are classed as 'motor vehicles'. We reverse the proposition (cars and vans are not classed as motor vehicles) and ask ourselves whether the same decision would have been made in respect of Edith. The answer must be 'yes' because the case did not concern either a car or van and so that proposition will not be the *ratio*.

The second possible *ratio* is that wheelchairs are not motor vehicles. If we reverse our proposition (wheelchairs are motor vehicles) then we need to ask ourselves if the decision would be the same. The answer must be 'no' because the law prohibits the use of motor vehicles so they would have to acquit. Accordingly, the proposition that 'wheelchairs are not motor vehicles' may be the *ratio* of that case.

3.3.1.2 Goodhart's test

The more authoritative test is that which was put forward by the theorist Goodhart. His test is based on the premise that it is possible to identify the *ratio* by examining the material facts of the case that set the precedent. The logic behind this premise is that all decisions are necessarily based on the analysis of facts and is in line with the comments of Lord Halsbury, the then Lord Chancellor, who has stated that 'a case is only authority for what it actually decides'.²⁸ Harris, reproducing the work of Cross in commenting on this case, notes that his Lordship was not stating that a case has no binding power beyond its decision but rather was indicating that precedent only applies where the material facts are similar.²⁹ We will return to this proposition when examining how to escape precedent (3.4.2), but it does validate the premise of Goodhart that an analysis of some facts could reveal the *ratio*.

Not all the facts of a case will be relevant in the search for a *ratio*, indeed a significant proportion of them are unlikely to be critical. Goodhart, therefore, refers to the need to find 'material' facts which are those that go to the central issues of the case. Goodhart himself, however, noted that one particular difficulty with this theory is that it will be for the judge to decide what the material facts are and this may not necessarily be an objective approach to deciding such facts.³⁰ Whether something is a 'material' fact depends on whether it is essential to the decision of the case.

27. *ibid.*, 56–7.

28. See *Quinn v Leatham* [1901] AC 495, 506.

29. Richard Cross and JW Harris, *Precedent in English Law* (4th edn, Clarendon Press 1991) 57–8.

30. Arthur Goodhart, *Essays in Jurisprudence and the Common Law* (CUP 1931) 11.

4

International Sources of Law

By the end of this chapter you will be able to:

- Understand the key sources of law in international law.
- Identify the ways in which international instruments influence the law.
- Understand how EU law will continue to influence UK law post-Brexit.
- Understand the role of the Council of Europe.

Introduction

This book is about the English Legal System. Chapter 1 explained why this book should, more properly, be known as the 'Legal System of England & Wales', but law does not operate solely within territorial boundaries. The United Kingdom sits within a global arena, and its legal systems must recognize this. The United Kingdom is part of international groupings (e.g. the United Nations, the Council of Europe, NATO) and has bilateral agreements with several countries. This chapter considers how these international agreements influence the English Legal System.

This chapter is divided into three sections. The first relates to international law. As will be seen, this is an elusive concept, and there is not always agreement as to what international law is, or what it does. The second and third sections will consider the United Kingdom's relationship with its nearest neighbours, Europe. The United Kingdom has recently left the European Union but, as will be seen, its law will continue to influence UK law for some time. Some would suggest that EU law is a question of supranational rather than international law, but both our entry to, and exit from, the EU was a result of the basic instrument of international law, a treaty. The final part of the chapter will consider the Council of Europe, which is separate from the EU, and whose *European Convention on Human Rights* is increasingly important within English law, partly as a result of the *Human Rights Act 1998*. Both the ECHR and the HRA 1998 will be considered more extensively in Chapter 5.

4.1 International law

The first issue to consider is international law. What is international law, and does it even exist? Unlike domestic law, it is difficult to identify what the exact framework of international law is. There are principles, but not all countries will necessarily accept the various definitions. If law is the rules that hold (domestic) society together, then international law can be said to be the rules that hold communities together. It is about how countries interact with each other, and the rules of doing so.

The reason why 'does it even exist?' was included above is that it is difficult to identify what international law is. Over 200 years ago, Carl von Clausewitz stated that war is the continuation of politics by other means. The same is probably true of law. As will be seen in this chapter, politics, law, and war probably all exist on the same plane. Arguably, this is true of domestic law too. The executive and the legislature of a country is inherently political. Many would argue that the judiciary are too, indeed this concept lending itself to a seminal piece of work in legal academia in England and Wales.¹ However, in domestic legal systems it is possible to identify the institutions of a country. There is (typically) a legislature, an executive and a judiciary. We can identify who is in which, what the relationship between each are, and what the rules governing that relationship are, and where they can be found.

The same is not true of international law. There is no global legislature. There is no global executive. There is no global judiciary. So, how does law exist without these concepts? Where does international politics end and law start? As will be seen, some argue that war is the ultimate way of enforcing international law. But not all war is lawful, although, as will be seen, some suggest that the concept of 'laws of war' is absurd.

We can identify some common principles that are at the heart of international law. There may be disagreements as to how these are defined and nuanced, but the basic structures and principles are present. Like in many legal systems, this is because time allows the concepts to emerge. Shaw, who is probably the leading scholar of international law in the United Kingdom, notes that modern international law emerged approximately 400 years ago, but many of its principles date back thousands of years.² Perhaps the earliest concept is that of agreement. Two states agree to trade with one another. A document (now known as a Treaty) would be produced that would set out how this relationship would work, what it would cover, and (eventually) how disputes would be resolved.

4.1.1 Actors in international law

In Chapter 1, it was noted that law could be divided between public law (the relationship between the state and an individual or individual body) and private law (the relationship between two or more individuals). In international law, the actors are usually the countries themselves, and not an individual.

1. John AG Griffiths, *Politics of the Judiciary* (Fontana 1977) 764. This book's final edition was the 5th edition (Fontana Press 1997).

2. Malcolm Shaw, *International Law* (8th edn, CUP 2017) 10.

⚡ STATES

It is usual in international law to refer to 'states'. While some countries, most famously the United States, have states within them, the term 'state' means the legal entity of the country. So, for example, it was noted in Chapter 1 that the United Kingdom consists of four countries but the actual 'state' is the United Kingdom in its entirety.

Individuals are rarely the subject of international law. Instead, the subjects of the instruments are states themselves. So, for example, an individual cannot point to a right within a particular instrument and say, 'I have been denied this' without it first forming part of domestic law. International law places burdens onto the individual state although this may, ultimately, lead to domestic law making those rights accessible.

The exception to this is international criminal law. The title of this type of law would make one believe that it concerns international instruments relating to criminal acts. That is only partly true. The majority of instruments that deal with criminal law do not exist within the field of international criminal law, but ordinary international law (known as public international law), because the instruments do not criminalize the individual. Instead, they require the state to enact domestic legislation which will ultimately, criminalize a person.

⚡ CRIMINAL LAW IN ORDINARY INTERNATIONAL LAW INSTRUMENTS

The *United Nations Convention on the Rights of the Child* (UNCRC) is an instrument that has been signed by every country in the world and ratified by all bar the United States. The UNCRC commits countries to a series of minimum rights for childhood.

Protocols (i.e. optional additions) to the UNCRC exist. One of which is the *Optional Protocol on the sale of children, child prostitution and child pornography*.³ This is an instrument that commits signatory states to protecting children from commercial child sexual exploitation. It establishes a series of criminal offences relating to these forms of exploitation. However, it does not establish criminal liability for individuals. Instead, it commits states to enact domestic offences that, as a minimum, meet the standard set out in the optional protocol.

It can be seen, therefore, that the international instrument does not criminalize an individual, but, instead, commits states to introduce domestic legislation that will ultimately criminalize individuals.

International criminal law is an area that deals with crimes that are so terrible that they infringe the basic standards of humanity. It is where the law recognizes that there were not just individual crimes, but that they are crimes that undermine global peace and security. They are largely restricted to war crimes and crimes against humanity (e.g. genocide). Perhaps the most famous example of these acts being the subject of criminal law is the Nuremberg Trials after the Second World War which, realistically, led to the establishment of international criminal law.⁴

3. A/RES/54/263 (opened for signatures 25 May 2000, entered into force 18 January 2002).
4. Malcolm Shaw, *International Law* (8th edn, CUP 2017) 290.

The Nuremberg Trials were established by the victors of the Second World War, but recent tribunals have been established under the auspices of the United Nations. The *International Criminal Tribunal for the Former Yugoslavia* was established by the UN Security Council (4.1.3.2), acting under the powers of the United Nations Charter. This meant that, for example, individual countries were not obliged to consent to have their citizens tried by this tribunal.⁵ A permanent International Criminal Court (ICC) has now been established to investigate and try suspects. This has proven controversial, and its actions will be considered later (4.1.5.1).

4.1.1 Private international law

Before leaving this introduction to international law, the distinction between private and public international law should be noted.

Public international law is, in essence, ordinary international law and it is that which people typically refer to when talking about 'international law'. It is, as has been noted, the legal relationship between states and how they interact with each other. Private international law is different. It concerns international agreements with domestic disputes. It is sometimes referred to as 'conflict of laws' and is, in essence, the rules that govern which legal system a dispute will be litigated in when there is an international element. This will not be discussed in this book.

Example Private international law

Debbie, an English citizen, marries Robert, an Australian in Dubai. They then live in Switzerland for fifteen years. Debbie discovers that Robert has been conducting an extra-marital affair and she returns to England. She seeks a divorce.

Private international law will govern in which country the divorce petition should be lodged (England, Dubai, or Switzerland).

4.1.2 International bodies

As will be seen, international law can apply to a bilateral agreement ('treaty') between two countries. However, it can also regulate groupings or entities of states. Perhaps the most obvious of these is the United Nations (4.1.3) but regional groupings exist too. Perhaps the most notable of these are:

- **Council of Europe.** The Council of Europe (CoE) predates the European Union, with it being established in 1948 (*Treaty of London*) in the aftermath of the Second World War. Its primary focus is on human rights and the rule of law. Its most famous instrument is the *European Convention on Human Rights* (ECHR). This will be considered in 4.3 later.
- **African Union.** The African Union (AU) was established in 1963, with the production of a Charter. Eventually it has spread to encompass fifty-five countries across the continent of Africa. In modern times, it has established a series of treaties

5. *ibid*, 292.