Optimize Sources of Law 1

Hello and welcome to the Optimize English Legal System Podcast on Sources of Law. My name is Odette Hutchinson and I am a Senior Lecturer in Law and the Associate Dean for Teaching and Learning at Aston Business School.

In this podcast and the next we are going to consider the different sources of law in the English legal system. The English legal system is a common law system and there are a number of different sources of law within the ELS. It is important that you understand how our law comes into being. It is equally important that you understand the relationship between the different sources of law.

Broadly speaking we can categorise the different sources of law as follows:

- Law that derives from Parliament – that includes primary legislation and secondary or delegated legislation
- Law that derives from the courts – this includes common law and the law of equity
- Law that derives from the European Union
- Law that is created by the European Convention on Human Rights which was incorporated into domestic law by the Human Rights Act 1998

In addition to these sources of law there are a number of minor sources of law including custom and books of antiquity.

Let's start with a recap of EU Law. The United Kingdom joined the European Union 1973 following the passing of European Communities Act 1972. When we joined the EU, EU law become an important source of law in the English Legal System. The main forms of EU law are:

- The Treaties;
- Regulations;
- Directives; and
- Decisions.

Our membership of the EU has impacted on the sovereignty of Parliament. Section 2(1) of the European Communities Act 1972 incorporates EU law into the English Legal system and as such the UK must give effect to EU law. There are a number of cases that you can use to illustrate that the doctrine of parliamentary sovereignty has been impacted including Factortame.

You must be careful not to confuse the Council of Europe with the European Council. The clearly sound very similar but the Council of Europe is concerned with the European Convention on Human Rights. The European Council by comparison is an institution of the European Union. This is a common mistake that students make.

In terms of domestic legislation we can divide this into primary and secondary legislation. Be aware that the word legislation is an interchangeable term: the term Act of Parliament and statute can and probably will be used by your lecturer. You also need to be aware that the plural for legislation is legislation. So when you are referring to more than one piece of legislation you should still say legislation NOT legislations!

Legislation starts life as a Bill and becomes law by successfully passing through the legislative process, which involves a number of different stages in both the House of Commons and the House of Lords. Once a Bill has passed through the House of Commons and the House of Lords, the final stage is for it to receive Royal Assent.

Legislation is supreme in the English Legal System and that means that in the event that there is conflict between a common law rule, (or judge made law), it is the legislation that will prevail.

Secondary legislation is another important type of legislation in the English Legal System and that is Delegated Legislation. Delegated legislation is sometimes referred to as secondary legislation. Each year thousands of pieces of delegated legislation are passed. This form of legislation is the dominant form of legislation in the ELS in term of quantity. Delegated legislation is legislation that is passed under the authority of a Parent Act or Enabling Act. In effect this is an Act of Parliament that passes the authority to make legislation to another body such as an executive arm of government. It can take the following forms:

- Statutory Instrument
- Orders in Council
- By-laws

There are a number of advantages and disadvantages to the use of delegated legislation and you will need not only to familiarise yourself with the different types of secondary legislation. But you will also need to know the process by which the delegated legislation comes into being and the advantages and disadvantages of the use of it in the ELS.

Finally, you need to have an in-depth knowledge of how legislation (EU and domestic) legislation is interpreted. Statutory interpretation is a very popular examination area.

In the first place you will need to understand why it is important or why it may be necessary to interpret legislation – remember that the meaning of language is in the eye of the beholder! You will also need to be aware of the dominant approaches to statutory interpretation in the ELS and with regard to EU law.

You need to understand what is meant by the literal approach to statutory interpretation and the purposive approach to statutory interpretation. You will also need to outline the three rules to statutory interpretation. Those being:

1. The Literal Rule

2. The Golden Rule
3. The Mischief Rule

Don’t forget to give examples and explanations of each if you are answering an assessment question!

In addition to the three rules to interpretation the courts are also able to use internal and external aids to interpretation. You should in particular consider the inclusion of Hansard when you explain external aids to interpretation.

The courts can also use a number of rules of language and presumptions to aid them in interpreting a statute. Don’t forget that an important part of this particular aspect of the ELS syllabus is the extent to which judges make or create law and whether or not they should be doing this given their constitutional role.

Optimize Sources of Law 2

Hello and welcome to the Optimize English Legal System Podcast on Sources of Law. My name is Odette Hutchinson and I am a Senior Lecturer in Law and the Associate Dean for Teaching and Learning at Aston Business School.

In this podcast we are continuing our consideration of sources of law by examining the common law and the doctrine of binding judicial precedent. We will also consider the development of the common law and equity. And you will of course remember that the term 'the common law' has several different meanings!

The origins of the common law can be traced back to the Norman Conquest in 1066. At this point in history we did not have a unified legal system or central government. Different parts of the country decided disputes using custom and local practice to shape their decision-making. The common law and a unified legal system began to emerge as the King sent itinerant justices around the country to settle disputes. The itinerant justices filtered through the mass of different local laws to create a more efficient and consistent single approach to common problems.

Gradually however as the common law developed it became very ridged and individuals who were unable to resolve their disputes through the common law began to petition the King who eventually delegated responsibility for hearing these cases to the Lord Chancellor. The Lord Chancellor approached these cases not bound by the rules of the common law but according to good conscience. This is the emergence of Equity, which quickly developed as a mechanism to mitigate the harshness of the common law. If you are answering a question on the development of equity and the common law you should:

- Identify the difficulties with the common law
- The problems cased by two distinct systems
- Identify the remedies developed by the courts of equity
- Identify the maxims of equity – giving a handful of illustrations
- Identify how conflict between the common law and equity was resolved in the Earl of Oxford's case.

A good way to demonstrate the quality and currency of your knowledge in this area is to consider what significance equity has in the contemporary English legal system. You might consider areas such as:

- Trusts
- Mortgages

You will also need to consider the impact of the Judicature Acts 1873-75 – be careful here because assessment questions can frequently pose the question 'to what extent did the Judicature Acts fuse the common law and equity.' The Judicature Acts

did not fuse the common law and equity. These two bodies of law still exist in separate and distinct forms. The Judicature Acts merely fused the administration of these systems making common law and equitable rules and remedies available in all courts.

We are now going to move on to consider the doctrine of precedent. This is another popular examination area – and even if you do not need to answer an assessment question on precedent you will need a detailed understanding of the doctrine throughout your studies.

The doctrine of precedent is a cornerstone of the English legal system. In very basic terms it involves inferior courts following the previous decisions of the superior courts. This is if you like the general rule but in order to understand the doctrine of precedent you need to understand the following:

- Which courts are bound by the decisions of other courts – you will need a clear understanding of the court hierarchy here.
- Which courts have a self-binding rule. In other words which courts are bound by their own decisions
- What mechanisms exist if any to avoid a binding precedent. Here you will need to understand: Distinguishing; Overruling and Reversing.

In particular you must remember that the 1966 Practice Statement only applied to the House of Lords/Supreme Court. In reality this power to depart from their own previous decisions has been used sparingly and for more marks in an assessment make sure that you give an example!

You will also need to demonstrate an understanding of the significance of the Young and Bristol Areoplane cases and what exceptions it established, in addition to any additional exceptions that have been established subsequently.

You can introduce critical commentary by considering the relative advantages and disadvantages of the doctrine of binding judicial precedent. Its also important to remember the tension that exists in terms of the constitutional role of the judiciary – remember they are not democratically accountable – unlike Parliament and as such some may argue that they should not be making the law.

Optimize Criminal Justice

Hello and welcome to the Optimize English Legal System Podcast on criminal justice. My name is Odette Hutchinson and I am a Senior Lecturer in Law and the Associate Dean for Teaching and Learning at Aston Business School.

The criminal justice system is a complex but very interesting topic in most English legal system courses. In our chapter on the criminal justice system we have focused on police powers and miscarriages of justice. Slapper and Kelly has excellent detailed coverage of the criminal justice system and you should be guided by the emphasis of your course.

This area of the syllabus lends itself well to problem questions and essay style questions. To see the range and nature of questions in this topic area you might find it helpful to look at the English legal system Q&A book. This book is really helpful in terms of providing you with an idea of the look and feel of assessment questions but also the standard and degree of authority that needs to be integrated into answers to attract a good mark.

The Q&A series published by Routledge is a fantastic resource and the series covers all of the core topics in the qualifying law degree and the GDL. The series also covers lots of optional law subjects. It must be understood that the answers in this series are not a model answer to any question on a given topic though so memorizing answers with the aim of applying them to any question on a given topic is likely to result in a very disappointing mark – it could also give rise to a very serious cheating allegation.

In this chapter we considered miscarriages of justice, in terms of the meaning of the expression itself but also the root causes of miscarriages of justice. If you are answering a question on miscarriages of justice its really important to do default into a narrative describing lots of individual miscarriages of justice. You need to identify a selection that demonstrates different failures in the criminal justice system.

It is also important to consider the role of the Criminal Cases Review Commission since its inception. You can enhance the content of any assessment question here by looking at the composition, workload, limitations and criticisms of the CCRC.

Another key area in the criminal justice system is police powers. Common areas that are examined under this subheading include:

- Stop and Account
- Stop and Search
- Search of Premises
- Arrest
- Detention
- And Bail.

Your course may additionally consider the decision to prosecute and the different prosecution agencies. An important theme in relation to police powers is the balancing competing interests. The excise of police powers needs to carefully balance what are necessary and appropriate incursions into individual freedoms to ensure that the police can perform their function effectively in society against individual fundamental freedoms.

You will need to consider PACE and the Codes of Conduct in some detail in addition to legislation that has been introduced subsequently. A common mistake that students make in relation to stop and search is that they state that S.1 of PACE enables the police to search for drugs. This is incorrect, the power to search for drugs is found in s.23 of the Misuse of Drugs Act 1971. You are not expected to be able to list the full range of legislation that provides the power to stop and search to the police but demonstrating an understanding that it is not only a power under pace will attract more marks. It is worth however comparing like powers with like. What I mean by this is that s.1 of PACE and s.23 of the Misuse of Drugs Act 1971 are searches that are permitted where the Police have 'reasonable grounds for suspicion'. Searches that took place under s.44 of the Terrorism Act by contrast were searches that did not require reasonable suspicion. These searches under section 44 of the TA were challenged and have subsequently been held to be unlawful.

Questions on police powers or miscarriages of justice can frequently be linked to the 'right to a fair trial' and the final part of the chapter on miscarriages of justice considers the right to a fair trial. In this context you should consider the rules of natural justice and the provisions under the European Convention on Human Rights which was incorporated into English law by the Human Rights Act 1998. You should by this juncture understand that the topics in the English legal system are in many cases interrelated and interconnected. As such question spotting is a risky strategy all law students as it can frequently obscure these connections.

Optimize Juries

Hello and welcome to the Optimize English Legal System Podcast on Sources of Law. My name is Odette Hutchinson and I am a Senior Lecturer in Law and the Associate Dean for Teaching and Learning at Aston Business School.

I seem to have said the following several times, this is another popular examination area on most English legal system courses. It is a topic that is also a very popular topic with students.

The jury system is often referred to as a 'cornerstone' of the English Legal System. In most cases an assessment question will be focused on the jury system in the criminal justice system. However, juries are also a feature of the coroner's court system and can also be a feature of the civil justice system in a limited number of situations. A good student will recognize this!

If it is appropriate (and this will depend on the wording of the question that you have been asked), you can consider the limited role that juries play in civil cases and the coroner's courts. It is important to note that the role and function of the jury does vary somewhat depending on the context in which it is being used.

In terms of the key themes that you will need to consider in relation to this topic you should bare the following in mind:

- The role and function of the jury;
- The principle of random selection;
- Jury eligibility: Under this heading you need to consider the changes that were made under the CJA 2003 in particular. You will need to consider: eligibility; disqualification; discretionary excusal and dismissal;
- In terms of jury selection you will need to consider jury vetting and challenges.
- Independence of the jury

There are a number of critical issues in relation to the jury and a good quality textbook such as Slapper and Kelly The English Legal System will have very detailed coverage of some of these issues which can be broadly categorized in the following terms:

1. Racial composition of the jury
2. Secrecy of the Jury room
3. Competence of the jury in certain types of cases
4. Jury behavior

Your lecturer may have given particular emphasis to some of these critical issues and your revision strategy should be guided by the emphasis on your course. If you look on the legal databases such as Lexis and Westlaw you will find that there are countless articles that have been written that address some or all of these issues and

demonstrating to an examiner that you have engaged with academic material will always (if accurately articulated and relevant) attract more marks.

In particular you can consider the recent research conducted by Professor Cheryl Thomas – this is covered in some detail in Slapper and Kelly and in bullet point format in the Optimize Chapter on juries. Several of the critical issues previously outlined are overlapping which in many ways makes your revision work much more efficient.

As you approach your exams or the submission date for your assessment make sure that you are reading a good quality newspaper and paying close attention to the law section. This is a good way of displaying currency of knowledge both in terms of subject content but also in terms of preparing for questions that you might be asked if you decide to apply for vacation placements. In recent years there have been a number of very high profile cases that have addressed jury behavior particularly in relation to jury members use of information technology.