

Practice questions for Chapter 3 – Domestic sources of law

Essay question

'The English legal system's reliance on the doctrine of precedent has resulted in the law becoming rigid, outdated and slow to respond to change. The advantages of a system of precedent are far outweighed by the disadvantages.'

Do you agree with the above quote? Provide reasons for your answer.

Introduction

- Begin by pointing out that, while statute law may be the primary form of law in the English legal system, statute needs to be interpreted and this is a principal function of the judges. Further, in several areas of the law, little legislation exists, and so much of the law will be case law. The point to note is the importance of case law in the English legal system.
- Briefly explain what a system of precedent is. You may want to mention that our system of precedent is based on the phrase *stare decisis* ('keep to what has been decided previously'), or the more accurate full version *stare rationibus decidendis* ('keep to the reasoning of what has been decided previously').
- You may also want to mention what it is about a case that is binding, namely the reasoning of the judges (the *ratio decidendi*). However, keep this brief.
- Point out that, in answering this question, the advantages and disadvantages of the doctrine of precedent will be discussed. You can either discuss the advantages and then the disadvantages or, as was done in *Card & James'* at p 86, you could discuss the advantages and disadvantages together. The latter approach is arguably better as it provides a more critical, evaluative structure.

Certainty and predictability

- Theoretically, a system of precedent should make the law more certain and predictable. In theory, anyone can look at a binding precedent and obtain a good idea as to how a particular case will be decided. In this sense, a doctrine of precedent does not only settle disputes – it can also help avoid disputes in that, before embarking upon an act, a person can examine the precedent and discover whether the act in question is unlawful or not.
- The same benefit applies to those considering legal action – the person considering legal action, or his lawyer, can examine the precedent, and discover whether or not it is worth commencing proceedings. The result is that fewer pointless cases reach the courts.
- In practice, however, a system of precedent can also result in uncertainty. The ability of judges to distinguish precedent adds an element of uncertainty into the law as litigants will not be aware of whether the facts of their case will warrant distinguishing a binding precedent.

Efficiency

- It is often argued that a system of precedent can make a legal system more efficient. As noted above, in theory, anyone can look at a binding precedent and obtain a good idea as to how a particular case will be decided. A person considering engaging in an act can look to a precedent and determine

whether or not his act is lawful. If his act is not lawful, he will not engage in it. Accordingly, the person has avoided litigation by examining the precedent.

- Similarly, a person considering commencing legal proceedings, can consult the relevant precedent and determine his likelihood of success. If the likelihood is low, he may decide not to commence proceedings. Accordingly, precedent prevents cases with little chance of success making it to court.
- However, it is submitted that these arguments are naïve and unrealistic. A person wishing to discover a definitive legal position may have to wade through many cases, some of which may be lengthy and complex. He will also have to determine the *ratio* for these cases. For most laymen, these tasks will be impossible. Indeed, discovering a definitive statement of law is often difficult (or even impossible) for legal practitioners.

Flexibility

- It could be argued that a system of precedent makes the law flexible as judges can continually adapt the law to meet changing circumstances. If a binding precedent becomes out of date, it can be overruled and a more appropriate precedent established. Certainly, when compared to legislative reform, reform of a binding precedent appears more straightforward.
- However, these benefits do not always result, and our system of precedent can, in some cases, result in the law becoming rigid and inflexible. Lower courts must, unless the precedent can be distinguished, apply the precedent, even if it results in an unjust or inappropriate result. There are many examples of judges expressing their regret at having to arrive at a particular decision based on a precedent that they are compelled to follow.
- A binding precedent can only be created, reformed or updated if a case involving similar facts or points of law reaches a court that has the power to reform the precedent. If such a case does not reach the appropriate court, or if Parliament is not willing to legislate in that area, out of date precedents may survive well beyond their appropriate lifespan. In this sense, a doctrine of precedent can preserve bad law (a classic example being the perpetuation of the marital rape exemption which was ultimately abolished (albeit in an unsatisfactory manner) by the House of Lords in *R v R*).
- The result is that countries with a system of precedent tend to be conservative, and tend to favour the past and the *status quo*. Such countries can be slow to respond to change.

Problem question

Explain how the doctrine of precedent would operate in the following situations:

- The Court of Appeal is hearing an appeal. There are two previous Court of Appeal decisions on the issue and they were both decided on the same day – but their decisions conflict. How should the Court proceed?
- An either-way offence is being heard summarily in a magistrates' court. There is a decision of the Crown Court that involves similar facts. Are the magistrates' obliged to follow the decision of the Crown Court?
- The Supreme Court is hearing an appeal concerning a point of law involving devolution. There is a previous decision of the Judicial Committee of the Privy Council. Is the Supreme Court bound by the decision of the Judicial Committee of the Privy Council?
- The High Court is hearing a case. There is a Court of Appeal decision on the issue, but it is arguable that this decision is inconsistent with a decision of the European Court of Justice. Must the High Court follow the decision of the Court of Appeal?
- The Divisional Court of the Queen's Bench Division is hearing an appeal. There is a previous decision of the Divisional Court on the issue. Does the current Divisional Court have to follow the decision of the previous Divisional Court?

The Court of Appeal is hearing an appeal. There are two previous Court of Appeal decisions on the issue and they were both decided on the same day – but their decisions conflict. How should the Court proceed?

- The Court of Appeal is usually bound by its own decisions. However, the case of *Young v Bristol Aeroplane Co Ltd*¹ established a number of exceptions to this rule. For our purposes, the relevant exception is that where two previous Court of Appeal decisions conflict, then the Court must choose which of the two cases to follow. The case not followed is automatically overruled.

An either-way offence is being heard summarily in a magistrates' court. There is a decision of the Crown Court that involves similar facts. Are the magistrates' obliged to follow the decision of the Crown Court?

- Rulings of the Crown Court establish persuasive precedent only. Accordingly, its decisions are not binding on any court, so the magistrates would not be required to follow the Crown Court's decision.

The Supreme Court is hearing an appeal concerning a point of law involving devolution. There is a previous decision of the Judicial Committee of the Privy Council. Is the Supreme Court bound by the decision of the Judicial Committee of the Privy Council?

- Before the 1st October 2009, the Judicial Committee of the Privy Council was the highest court in the land in relation to devolution issues, and its decisions bound even the Appellate Committee of the House of Lords.
- However, the Supreme Court (which came into operation on the 1st October 2009) has assumed the devolution function of the Judicial Committee of the Privy Council. Accordingly, as the Supreme Court is now the final appeal court in relation to devolution issues, it is not bound by the decisions of the Judicial Committee of the Privy Council.

The Court of Appeal is hearing an appeal. There is a previous Court of Appeal decision on the issue, but it is arguable that this decision is inconsistent with a decision of the European Court of Justice. Must the Court of Appeal follow its previous decision?

- Generally, the Court of Appeal is bound by its own decisions. Although not overtly established, it is likely that a Court of Appeal decision will not be binding on itself if it is inconsistent with a decision of the European Court of Justice.
- This is because the European Communities Act 1972, s 3(1) imposes a duty on all domestic courts to either refer cases involving EU law to the ECJ or, if no referral is made, to determine cases in accordance with the principles and decisions of the ECJ.

The Divisional Court of the Queen's Bench Division is hearing an appeal. There is a previous decision of the Divisional Court on the issue. Does the current Divisional Court have to follow the decision of the previous Divisional Court?

- Decisions of a Divisional Court are generally binding on other Divisional Courts. The exceptions contained in *Young v Bristol Aeroplane Co Ltd*² that apply to the Court of Appeal also apply to a

¹ [1944] KB 718 (CA).

² [1944] KB 718 (CA).

Divisional Court in civil cases. In criminal cases and cases involving judicial review, a Divisional Court can depart from its own decisions where it feels the previous decision was 'plainly wrong.'

- However, there is nothing to indicate that the exceptions would apply here, so the Divisional Court would have to follow the decision of the previous Divisional Court.