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# Law and society: Scottish legal heroes

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Head of Intellectual Property, The Open University

# Contents

# Introduction and guidance

## Introduction and guidance

Welcome to this badged open course, *Law and change: Scottish legal heroes*.

The free course lasts eight weeks, with approximately three hours of study each week. You can work through the course at your own pace, so if you have more time one week there is no problem with pushing on to complete another week's study.

This course explores the legal system in Scotland and considers how individuals, institutions and organisations have made a difference by challenging the law or legal system.

You learn about the law-making process in Scotland, explore how the legal system has been influenced by change and consider how law has been used to respond to developments in society. Scots laws and lawyers have influenced development of laws on a national, regional and global level and you explore examples of this influence.

Following this course, you will also be able to explain and demonstrate a number of skills, including problem solving, argument and reasoning.

After completing this course, you should be able to:

- understand the complexity of issues in law-making and application
- discuss how laws reflect the society within which they are made
- explain the role of individuals and institutions in effecting legal change.

## Moving around the course

In the 'Summary' at the end of each week, you can find a link to the next week. If at any time you want to return to the start of the course, click on 'Course content'. From here you can navigate to any part of the course. Alternatively, use the week links at the top of every page of the course.

It's also good practice, if you access a link from within a course page (including links to the quizzes), to open it in a new window or tab. That way you can easily return to where you've come from without having to use the back button on your browser.

## What is a badged course?

While studying *Law and change: Scottish legal heroes* you have the option to work towards gaining a digital badge.

Badged courses are a key part of The Open University's mission *to promote the educational well-being of the community*. The courses also provide another way of helping you to progress from informal to formal learning.

To complete a course you need to be able to find about 24 hours of study time, over a period of about 8 weeks. However, it is possible to study them at any time, and at a pace to suit you.

Badged courses are all available on The Open University's OpenLearn website and do not cost anything to study. They differ from Open University courses because you do not receive support from a tutor. But you do get useful feedback from the interactive quizzes.

## What is a badge?

Digital badges are a new way of demonstrating online that you have gained a skill. Schools, colleges and universities are working with employers and other organisations to develop open badges that help learners gain recognition for their skills, and support employers to identify the right candidate for a job.

Badges demonstrate your work and achievement on the course. You can share your achievement with friends, family and employers, and on social media. Badges are a great motivation, helping you to reach the end of the course. Gaining a badge often boosts confidence in the skills and abilities that underpin successful study. So, completing this course should encourage you to think about taking other courses.


# How to get a badge

Getting a badge is straightforward! Here's what you have to do:

- read each week of the course
- score 50% or more in the two badge quizzes in Week 4 and Week 8.

For all the quizzes, you can have three attempts at most of the questions (for true or false type questions you usually only get one attempt). If you get the answer right first time you will get more marks than for a correct answer the second or third time. If one of your answers is incorrect you will often receive helpful feedback and suggestions about how to work out the correct answer.

For the badge quizzes, if you're not successful in getting 50% the first time, after 24 hours you can attempt the whole quiz, and come back as many times as you like.

We hope that as many people as possible will gain an Open University badge – so you should see getting a badge as an opportunity to reflect on what you have learned rather than as a test.

If you need more guidance on getting a badge and what you can do with it, take a look at the OpenLearn FAQs. When you gain your badge you will receive an email to notify you and you will be able to view and manage all your badges in My OpenLearn within 24 hours of completing the criteria to gain a badge.

Get started with Week 1.

# Week 1: Law making in Scotland

## 1 The Scottish legal system

Laws form the basis for regulating the society we live in, therefore legal systems tend to reflect the values and aspirations of the society within which they operate. The quotation below highlights the role and importance placed on the independent legal system within Scotland and helps illustrate how valued that independence is.

> Scotland's legal system is a vital public service. Each and every day it protects individual rights, settles day-to-day disputes, and ensures that crimes against person or property are punished. This strong and enduring system has been a cornerstone of Scottish life for centuries. Today, that proudly independent legal system is as important to our daily lives as it has ever been. Society is changing. Public scrutiny is high. The national and international context ever more complex and challenging. That is why it must continue to change and reform to better meet the challenges of modern laws and modern life.
>
> Cathy Jamieson MSP Justice Minister, 2004 Factsheet on the legal system (Scottish Executive, 2004)

Figure 1 illustrates the range of the sources of law in contemporary Scotland. Many of these have their roots in history and you explore the historical sources and legal history of Scotland in subsequent weeks.

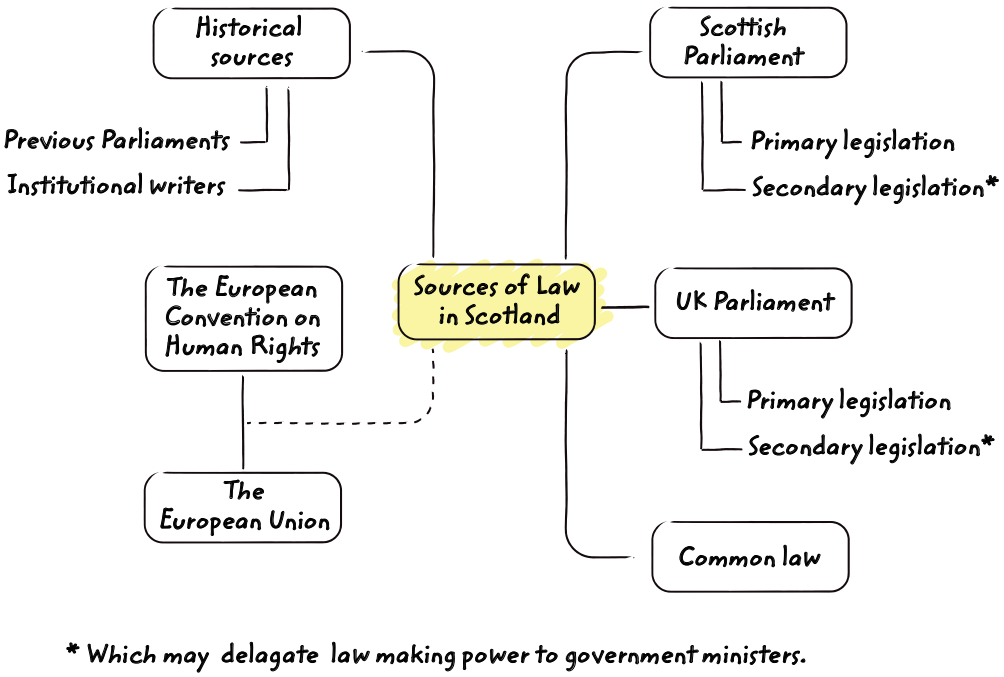



**Figure 1** Sources of law

## 1.1 Thinking about law

Law affects us all on a daily basis. It is inextricably linked with our lives. It is seldom out of the news and is often portrayed in film and drama. Listen to the following audio in which one of the course authors, Carol Howells, shares some thoughts on law and legal systems.

Audio content is not available in this format.

Before moving on to the next section you should attempt Activity 1 which asks you to think about words you associate with law making.

### Activity 1 Words associated with law making

Allow about 5 minutes

Take a look at Figure 2 and identify the words that you associate with law making. Make a brief note of the reasons why you choose those words.


**Figure 2** Words associated with law making

*Provide your answer...*

Comment

There is no one answer to this activity. Words (and images) we associate with law making are affected by our own individual experiences. Law can be seen as very traditional and associated with expensive costs, lengthy delays and arguments. It is often associated with negative perceptions and its history does little to assist this.

Law, however, can be used as a driver or tool for change. It can be used to make a difference. For example, think about how law has been used to change the law on our right to vote in parliamentary elections and how this has been used to promote democracy. In 1831 Scotland had a population of around 2.3 million and 4,500 men were entitled to vote in parliamentary elections. In 2017 out of a population of 5.4 million people, more than 4 million have the right to vote in parliamentary elections. The change was achieved through Acts of Parliament (the Parliament of Great Britain, the UK Parliament and Scottish Parliament).

Acts of Parliament:

- gradually extended the right to vote in parliamentary elections to the male population (and not based solely on property ownership)
- created the secret ballot vote
- extended the right to vote to the female population
- more recently, altered the age at which you can vote in parliamentary elections from the age of 18 to 16 (in elections for the Scottish Parliament).

These changes in turn reflected changes in society and were driven by individuals passionate about the need for change, for fairness and equality.

In Section 2 you look at the institutions to which the state has given law making powers within the current legal system.

# 2 The Scottish Parliament

The current Scottish Parliament was created by the Scotland Act 1998. This Act forms one of three significant constitutional statutes underpinning the process of devolution within the UK and, in addition, the constitution of the UK itself.

The process of devolution took place when the UK Parliament transferred a number of its law making powers to new law making bodies (legislatures) in Scotland, Wales and Northern Ireland. Whilst the process and outcome of devolution differed in the three nations, the process of devolution was a response to calls for change from the Nations.

The current Scottish Parliament first sat in May 1999. It has power to legislate for Scotland on devolved matters. Its law making powers are found in the Scotland Act 1998 and have been extended over the past decade in further responses to both political and social change.

There are three key points to think about in relation to law making of the Scottish Parliament:

1 legislative competence

2 legislative consent motions

3 the law making process itself.

## 2.1 Legislative competence

Legislative competence is a way of determining whether an Act of the Scottish Parliament has been produced within the powers of the Scottish Parliament. The Scotland Act 1998 transferred power to legislate (make laws) from the UK Parliament to the Scottish Parliament. The Scottish Parliament has power to make law on any matter that is not reserved. The areas on which it can make law are known as devolved matters. A list of these can be found in Box 1.

**Table 1 Devolved matters – what is devolved and when was it devolved?**

| Devolved | Dates on which it was devolved |
|---|---|
| Agriculture, forestry and fishing | All areas were devolved in 1998 under the Scotland Act 1998. |
| Education and training | All areas were devolved in 1998 under the Scotland Act 1998. |
| Elections to the Scottish Parliament | This area was devolved in 2012 and 2016. |
| Environment | Most areas were devolved in 1998. Energy efficiency schemes were devolved in 2016. |
| Health and social services | These areas, including the NHS, funding, health education, health services, medicine, public health and mental health were devolved in 1998. Social work was devolved in 1998. Social security benefits were devolved in 2016. |
| Housing | All areas, including policy and building control were devolved in 1998. Land use planning was devolved in 1998. |

| | |
|---|---|
| Law and order | Areas including civil justice, civil law and procedure, courts, criminal justice, criminal law and procedure, police, debt and bankruptcy, family law, freedom of information, legal aid, legal profession, licensing law and property law were devolved in 1998. The drink drive alcohol limit was devolved in 2012. Railway policing was devolved in 2016. |
| Local government | This area was devolved in 1998 and the local government franchise was added in 2016. |
| Sport and the arts | This was devolved in 1998 and includes support for creative industries, Creative Scotland, national gallery, library and museum collections, national performing companies, sportscotland and major events. |
| Some forms of taxation | Scottish Variable Rate of Income Tax was devolved in 1998. In 2016, the partial assignment of VAT revenues was given and in 2012, powers were given to set the Scottish Rate of Income Tax (SRIT), Land and Buildings Transaction Tax and Landfill Tax. |
| Many aspects of transport | Aspects of transport including passenger rail franchise, road signs, speed limits, air passenger duty were devolved in 2016. (Most powers over aviation, shipping and road traffic law are reserved as is HGV and bus driver, vehicle and operator licensing). |
| Welfare | Including social security benefits such as Disability Living Allowance, Personal Independence Payment, Carer's Allowance, Severe Disablement Allowance, Discretionary Housing Payments and Winter Fuel Payments, fuel poverty schemes were devolved in 2016. |

(Scottish Parliament, n.d.)

Section 29 of the Scotland Act 1998 contains a limit on the power of the Scottish Parliament to legislate. This is known as the limit of 'legislative competence' and is an important factor in the law making process of the Scottish Parliament. Legislative competence is defined according to five criteria:

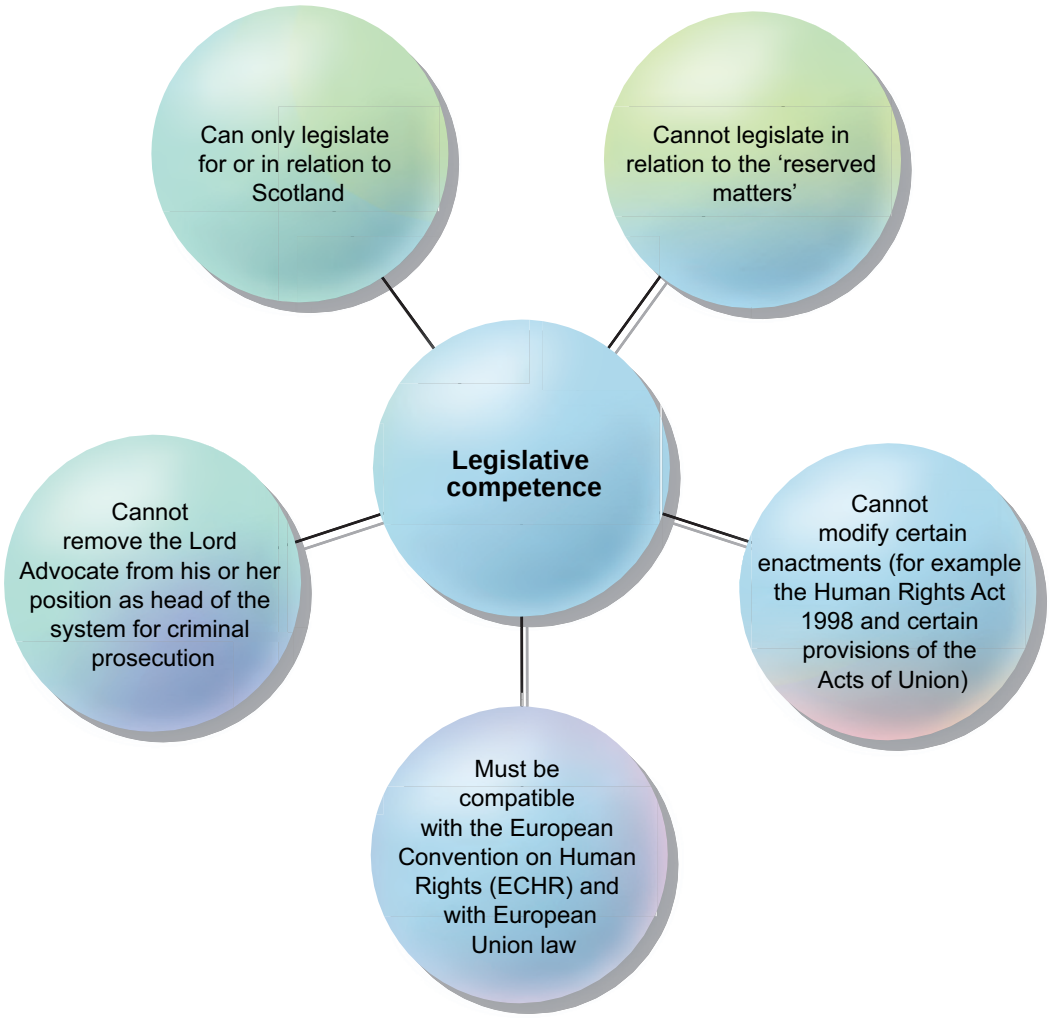



**Figure 3** Legislative Competence of the Scottish Parliament

The concept of legislative competence is important because the Scotland Act 1998 requires the legislative competence of any Bill (a draft law) to be assessed before it is introduced in the Scottish Parliament. It also provides an opportunity for legislative competence to be challenged after a Bill is passed but before it can become law. If an Act is outside the legislative competence of the Scottish Parliament then it is void and unenforceable.

**Draft Legislative Consent Motion**

13. The draft motion, which will be lodged by the Minister for Transport and Islands, is:

"That the Parliament agrees that the relevant provisions of the Laser Misuse (Vehicles) Bill, which completed House of Lords report stage on 27 February 2018, relating to the creation of a new offence regarding the misuse of lasers in relation to vehicles, so far as these matters fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament."

Scottish Government
March 2018

**Figure 4** Legislative consent motion

## 2.2 Legislative consent motions

The Scottish Parliament can agree that the UK Parliament should legislate for Scotland on devolved matters. Such agreements can save time and the need for separate and similar legislation in both the Scottish and UK Parliaments.

In practice there are five uses of legislative consent motions which have emerged. These are set out in Figure 5.

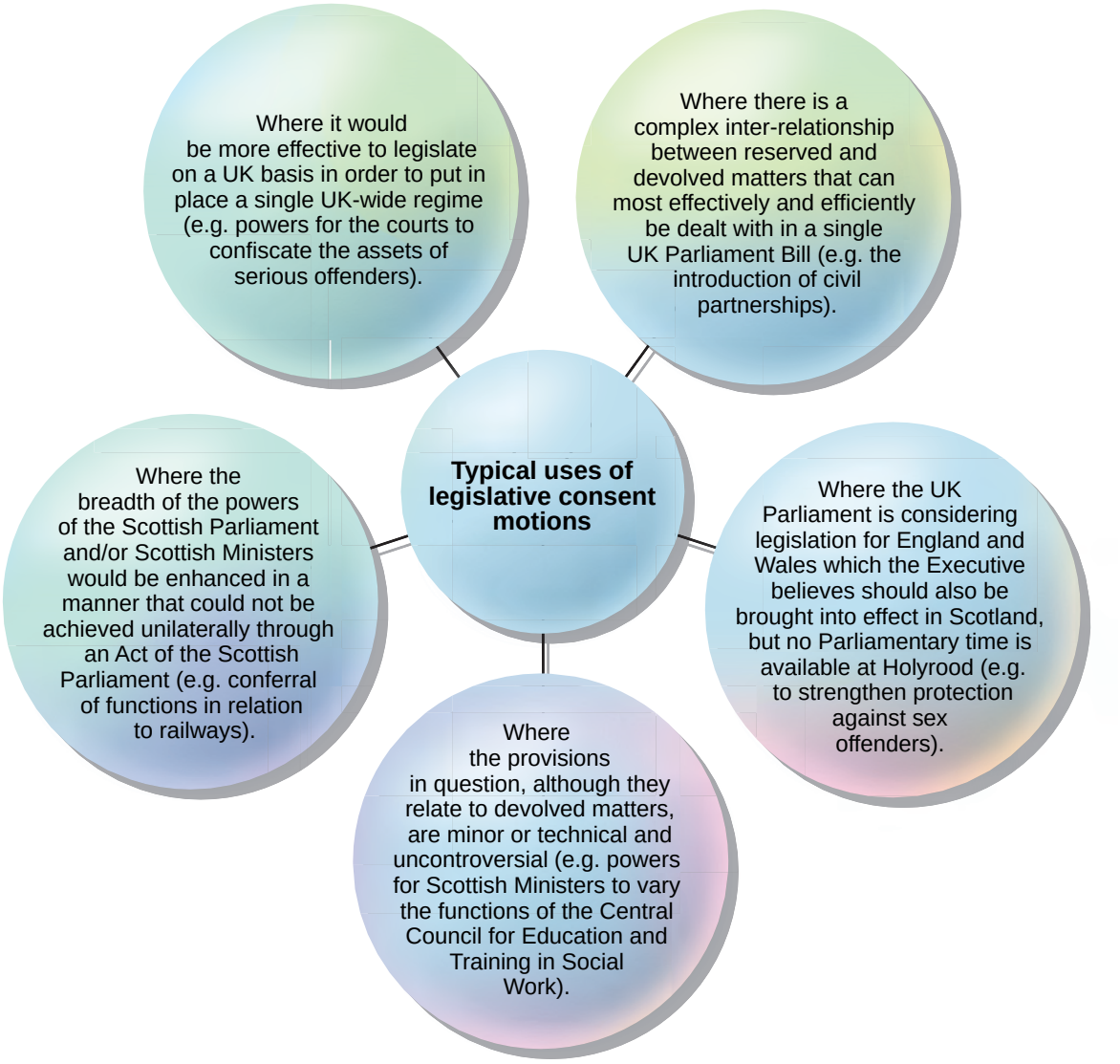



**Figure 5** Uses of legislative consent motions

## 2.3 Law making in the Scottish Parliament

The Scotland Act 1998 provided minimum requirements for the process to be followed by the Parliament in creating law by considering and passing Bills.

When a Bill is introduced to the Parliament there are three stages that it must go through. There is then a process of Royal Assent.

- Stage 1 involves consideration of the general principles of the Bill by the parliamentary committee designated to deal with it. The committee will report back to Parliament and, if Parliament agrees to the Bill's general principles, it will be referred back to the committee.
- Stage 2 entails detailed consideration of the Bill, including any amendment proposed to it by the Executive and MSPs.

- Stage 3 is where final consideration of the Bill takes place and the Parliament votes on whether or not the Bill should be passed.

One of the unique features of the Scottish Parliament is its openness. There are processes for wide consultation, an open evidence process at committees, and members of the public and interested parties are able to liaise directly with MSPs to lobby for amendments to a Bill. The Scottish Parliament has received international recognition for this level of openness.

A Bill, once passed, must be submitted by the Presiding Officer of the Scottish Parliament for Royal Assent. This is done after a period of four weeks.

During that time, the Bill may be subject to legal challenge by the Advocate General for Scotland, the Lord Advocate or the Attorney General, and may also be subject to an order made by the Secretary of State. The Presiding Officer may, however, submit the Bill for Royal Assent after less than four weeks if notified by all three Law Officers and the Secretary of State that they do not intend to exercise their powers of legal challenge.

Royal Assent, when the Bill becomes an Act, is treated as taking place at the beginning of the day on which Letters Patent signed by the Monarch are recorded in the Register of the Great Seal by the Keeper of the Registers of Scotland.

**Figure 6** Great seal of Scotland

# 3 The UK Parliament and law making

The UK Parliament as we know it today stems from 1801 and it legislates on reserved matters (and also on devolved matters where the Scottish Parliament has passed a legislative consent motion).

There are a number of reserved matters:

- the constitution

- foreign affairs
- defence
- international development
- the Civil Service
- financial and economic matters
- immigration and nationlity
- misuse of drugs
- trade and industry
- aspects of energy regulation (eg electricity, coal, oil and gas and nuclear energy
- aspects of transport (eg regulation of air services, rail and internationanl shipping
- employment
- social security.
- abortion,genetics, surrogacy, medicines
- broadcasting
- equal opportunities.

Law making in the UK Parliament is a very different process to that in the Scottish Parliament. Unlike the Scottish Parliament, the UK Parliament has two chambers, the House of Commons and the House of Lords. The House of Commons is democratically elected. The House of Lords is not an elected body and its function is to refine and add to law.

An Act of the UK Parliament also starts off as a Bill, which, if approved by a majority in the House of Commons and the House of Lords, becomes an Act of the UK Parliament.

## Table 2 Summary of law making process in the UK Parliament

| Bill starting in the House of Commons | |
|---|---|
| First reading | The title of a Bill is read out and copies of it are printed but no debate takes place. There will be a vote on whether the House wishes to consider the Bill further. |
| Second reading | The general principles contained in the Bill are debated. Frequently, the second reading stage is the point at which public attention becomes drawn to the proposal through press coverage and, on occasion, vociferous campaigns for and against the Bill by groups affected by it. At the end of this debate a vote is taken; a majority must be in favour of the Bill in order for it to progress any further. |
| Committee stage | At this stage a detailed examination of each clause of the Bill is undertaken by a committee of between 16 and 50 MPs. The committee subjects the Bill to line-by-line examination and makes amendments. The committee which carries out these discussions comprises representatives of the different political parties roughly in proportion to the overall composition of the House. Often there will be a government majority on the committee; however, an attempt is made to ensure representation by minority parties. The membership of the committee will usually be those with a special interest in, or knowledge of, the subject of the Bill under consideration. (For Finance Bills the whole House of Commons will sit in committee.) |
| Report stage | A Bill that has been amended in committee stage is reviewed by the House where it started. The amendments will be debated in the House and accepted or rejected. Further amendments may also be added. |

| | |
|---|---|
| Third reading | This is the final vote on the Bill. It is almost a formality since a Bill which has passed through all the stages above is unlikely to fail at this late stage. In fact, in the House of Commons there will only be a further debate on the Bill if at least six MPs request it. In the House of Lords amendments are sometimes made at this stage. |
| If a Bill started life in the House of Commons it is now passed to the House of Lords where it goes through all of the stages outlined above. If the House of Lords makes amendments to the Bill, it will go back to the House of Commons for that House to consider those amendments.<br><br>With some exceptions, the House of Commons and the House of Lords must finally agree on the text of a Bill. | |

The monarch formally assents to a Bill in order for it to pass into law. Royal Assent has never been withheld in recent times. Queen Anne was the last monarch to withhold a Royal Assent, when she blocked a Scottish Militia Bill in 1707 as she feared a Scottish militia might be turned against the monarchy.

The monarch signs what are known as Letters Patent which announce that their assent has been given. Alternatively, the monarch signs a document known as a commission which commands certain Lords, known as Royal Commissioners, to let both Houses of Parliament know that Royal Assent has been given. Once Royal Assent has been given, the Bill is an Act of the UK Parliament.

Following Royal Assent, the Act of the UK Parliament usually comes into force on midnight of that date. However, there has been a growing trend for Acts of the UK Parliament not to come into force immediately. Instead, the Act itself either states the date on which it will come into force or responsibility passes to the appropriate Government minister to fix the date when the Act will come into force. In the latter case, the Government minister will bring the Act into force by issuing a commencement order.

Before devolution, all Bills affecting Scotland were introduced in the UK Parliament. Some of those Bills were limited in extent to Scotland, while others applied to the whole of the United Kingdom (although often with some distinct provisions applicable only to Scotland).

# 4 Common law

Following the Acts of Union (the Scottish Parliament's Union with England Act 1707 and the English Parliament's Union with Scotland Act 1706 which created the Parliament of Great Britain) common law became an integral part of the legal system in Scotland. Precedent forms the basis of the common law and the doctrine of binding precedent is also known as the doctrine of *stare decisis*, which is Latin meaning 'to stand by/adhere to decided cases', i.e. to follow precedent. In other words, once a legal principle is decided in one case it should be followed in similar future cases.

The doctrine of binding precedent refers to the fact that, within the hierarchical structure of the courts, the decision of a higher court will be binding on a lower court. In general terms, this means that when judges try cases they will check to see if a similar situation has come before a court previously. If a precedent from a similar situation exists and it was set by a court of equal or higher status to the court deciding the new case, then the judge in the present case should follow the legal principle established in the earlier case. Where the precedent is from a lower court in the hierarchy, the judge in the new case may not

follow but will certainly consider it. You will consider a famous Scottish case which has set a precedent across the globe in Week 4.

## 4.1 Statutory interpretation

Another important role played by the judiciary is that of statutory interpretation. Whilst the meaning of law in legislation (also referred to as Acts or statutes) should be clear and explicit, this is not always achieved. Many cases come before the courts because there is a dispute over the meaning of a word in legislation. Courts then have to determine the meaning of that word.

**Figure 7** High Court of Justiciary, **Figure 8** UK Supreme Court

# 5 Summaries of sources of law making

Figure 9 provides a summary of sources of law making which are based in the UK and have relevance to Scotland.

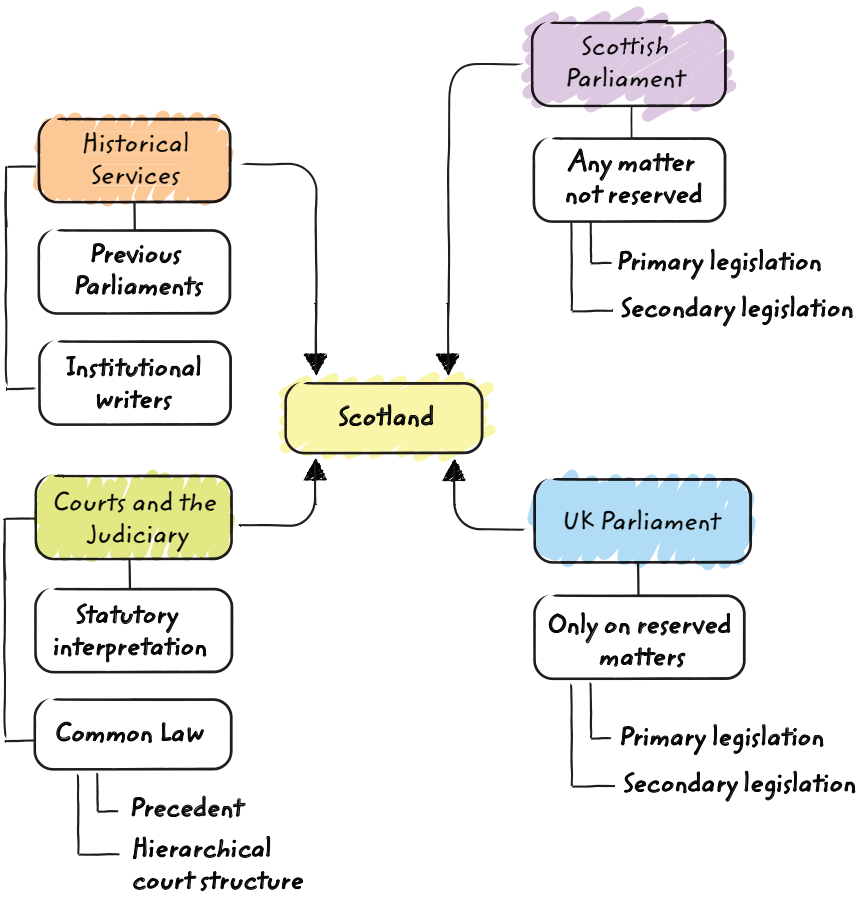



**Figure 9** Summaries of sources of law making

# 6 International law

International law covers many areas, but here we are using the term to refer to international agreements made by states. Two such international agreements have a direct and significant impact on citizens in Scotland. These are the European Convention on Human Rights and Fundamental Freedoms (commonly referred to as the European Convention on Human Rights or ECHR) and the UK's decision to join the European Economic Community (EEC).

Since the ending of the Cold War and collapse of communism, much of Europe has been relatively stable. It is easy to forget that those two international agreements, the ECHR and EEC (and the institutions with which they are associated) arose out of the desire to create a climate of stability, harmony, prosperity and cooperation within Europe. At their core was the desire to prevent the horrors, as well as social and economic impact, which had occurred during World War II from being repeated anywhere in Europe. No city or community in Europe had been untouched.

Following the end of World War II, boundaries were redrawn across Europe and millions of displaced citizens had to re-establish their lives. Politicians strove to rebuild Europe seeking to ensure peace and stability. They worked together with the aim of ensuring that such events would never happen again. It is easy to overlook these ambitions when discussing the functioning of the agreements in our modern and much changed world.

Interactive content is not available in this format.
**Figures 10–18** Images of the devastation of cities across Europe

# 6.1 The ECHR

The ECHR is an international Treaty which is divided into sections known as Articles. States that have ratified the ECHR must provide a minimum level of protection of the rights contained in the ECHR. Individuals who consider that a state has breached its obligations (and who have exhausted all possible remedies within the court system of that state) can seek redress before the European Court of Human Rights.

The UK played a key role in drafting the ECHR and became the first nation to ratify it. At that time the UK regarded the development of human rights protections within Europe as an important part of its foreign policy.

### Table 3 Summary of rights in the ECHR

| Article of ECHR | Right |
|---|---|
| 2 | Right to life |
| 3 | Right to be free from torture and from inhuman and degrading treatment |
| 4 | Freedom from slavery and enforced labour |
| 5 | Liberty of the person |
| 6 | Right to a fair trial |
| 7 | Freedom from retrospective punishment |
| 8 | Right to respect for private and family life, home and correspondence |
| 9 | Freedom of thought, conscience and religion |
| 10 | Freedom to receive and impart ideas and information |
| 11 | Freedom of association |
| 12 | Right to marry and found a family |
| 13 | Right to an effective remedy |
| 14 | Right to enjoy other Convention rights without discrimination |

Some of the rights within the ECHR can be limited. For example, the right to private life (Article 8), freedom of thought, conscience and religion (Article 9), freedom of expression (Article 10) and freedom of assembly (Article 11) may all be restricted if the limitations are prescribed by law, are neccessary in a demoratic society and fulfill certain criteria set out for restrictions.

**Figure 19** The European Court of Human Rights

There are occasions when rights guaranteed in a particular Article of the ECHR conflict with rights entrenched in other provisions of the ECHR. For example, the right to freedom of expression frequently collides with the right to private life. In such cases, the conflicting interests need to be considered and a fair balance has to be struck between them. Rights enshrined in the Convention therefore also have inherent limitations.

To learn more about the work of the European Court of Human Rights watch the following video: **The European Court of Human Rights**

## 6.1.1 The ECHR and UK

Before the Human Rights Act 1998, the rights enshrined in the ECHR were not directly enforceable in the Scottish courts or other courts in the UK; they were technically part of international law. Citizens wishing to seek protection from an alleged breach of the ECHR were required to exhaust all domestic remedies before petitioning the European Court of Human Rights in Strasbourg. This often meant incurring considerable expense and long delay.

### **Box 2** Which institution?

A common misconception (which is often mirrored by reports in the media) is that the Council of Europe, the European Court of Justice and ECHR are the same as the EU institutions and the Court of Justice of the European Union. They are not. The EU institutions and Court of Justice of the European Union are quite different. The UK's membership of the EU (and therefore the jurisdiction of the Court of Justice of the European Union) arose from different (and later) international treaties.


**Figure 20** and **Figure 21** Words associated with human rights

## 6.1.2 The Human Rights Act 1998

The Human Rights Act 1998 significantly increased the relevance of the ECHR to lawmakers' interpretation of existing law in the UK and the Scottish courts (and other UK courts). The Human Rights Act 1998 makes it unlawful for a public body to act incompatibly with ECHR rights. It allows for a case to be brought in a UK court or tribunal against the public body if it acts incompatibly with ECHR rights.

Both the Scottish and UK Parliaments must now scrutinise proposed legislation for compliance with the main provisions of the ECHR. The Scottish Parliament cannot pass legislation which is incompatible with Convention rights. If it tries to do so, the legislation can be challenged as outwith legislative competence and therefore void (it is not law).

In the case of UK Parliamentary legislation which is regarded as incompatible with ECHR rights, courts do not have the right to overturn the legislation although they can make a declaration of incompatibility. It is for the UK Parliament to amend the legislation to bring it into line with ECHR rights.

Finally, Scottish courts and tribunals (in fact all UK courts and tribunals) must take account of Convention rights in all cases that come before them. This means, for example, that they must develop the common law in a way which is compatible with Convention rights.

# 6.2 The European Union

The UK joined the European Economic Community (EEC) on 1 January 1973. The UK was not one of the original founding members even though it had played a significant role in World War II, in the establishment of the Council of Europe, in drafting of the ECHR and seeking peace in Europe. In 1946 the Prime Minister of the UK, Winston Churchill famously gave a speech in which he declared that 'We must build a kind of United States of Europe.' It is easy to forget now that at that time in the UK rationing, which had been introduced during the war, was still in place (rationing finally ended at midnight on 4 July 1954).

Although the UK was initially reluctant to join the EEC (which led to what we now know as the EU), its success meant that UK Governments felt it to be in the UK's best interest to join. Following a number of attempts, membership was finally achieved in 1973. At the time the UK was suffering economic stagnation and an uncertain economic future. Membership has, however, never been universally popular across the UK. One of the reasons often given for this is that EU laws could be binding on the UK without having been approved or discussed by the UK Parliament.

There are a number of key EU institutions:

- the European Commission
- the Council of the European Union (Council of Ministers)
- the European Parliament
- the Court of Justice of the European Union.

These institutions complement each other in their legislative functions in order to deliver a body of law that applies to all the member states. The European Council brings together the EU leaders and sets the EU's political agenda. The European Council does not pass laws and should not be confused with the Council of the European Union which has law-making powers.

## **Box 1** An overview of the EU

The European Union is a unique economic and political union between 28 European countries that together cover much of the continent.

The EU was created in the aftermath of the Second World War. The first steps were to foster economic cooperation: the idea being that countries that trade with one another become economically interdependent and so are more likely to avoid conflict.

The result was the European Economic Community (EEC), created in 1958, and initially increasing economic cooperation between six countries: Belgium, Germany, France, Italy, Luxembourg and the Netherlands. Since then, a huge single market has been created and continues to develop towards its full potential.

## From economic to political union

What began as a purely economic union has evolved into an organisation spanning policy areas, from climate, environment and health to external relations and security, justice and migration. A name change from the European Economic Community (EEC) to the European Union (EU) in 1993 reflected this.

The EU is based on the rule of law: everything it does is founded on treaties, voluntarily and democratically agreed by its member countries.

The EU is also governed by the principle of representative democracy, with citizens directly represented at Union level in the European Parliament and Member States represented in the European Council and the Council of the EU.

## Stability, a single currency, mobility and growth

The EU has delivered more than half a century of peace, stability and prosperity, helped raise living standards and launched a single European currency: the euro. In 2012, the EU was awarded the Nobel Peace Prize for advancing the causes of peace, reconciliation, democracy and human rights in Europe.

Thanks to the abolition of border controls between EU countries, people can travel freely throughout most of the continent. And it has become much easier to live, work and travel abroad in Europe.

The single or 'internal' market is the EU's main economic engine, enabling most goods, services, money and people to move freely. Another key objective is to develop this huge resource also in other areas like energy, knowledge and capital markets to ensure that Europeans can draw the maximum benefit from it.

## Human rights and equality

One of the EU's main goals is to promote human rights both internally and around the world. Human dignity, freedom, democracy, equality, the rule of law and respect for human rights: these are the core values of the EU. Since the Lisbon Treaty's entry in force in 2009, the EU's Charter of Fundamental Rights brings all these rights together in a single document. The EU's institutions are legally bound to uphold them, as are EU governments whenever they apply EU law.
(European Commission, n.d.)

The EU has been an important source of law in the UK in particular areas, for example:

- **Employment** Over the last 20 years the EU has been responsible for many of the key developments in employment and equality law. In 1997 the Labour Government adopted the EU Social Charter and this has resulted in an increasingly comprehensive framework of anti-discrimination laws, family-friendly rights in the UK and also the establishment of a minimum wage and maximum working hours.
- **Consumer protection** Most notably the Consumer Protection Act 1987 which introduced no-fault liability for consumers who are injured by defective products. Also The Unfair Terms in Consumer Contracts Regulations 1999 (which aims to provide protection from misleading provisions in consumer contracts, such as use of small and illegible print, the imposition of unreasonable penalties on consumers and the use of clauses which allow the seller to exclude liability.
- **Trade** The laws made by the EU are often technical or commercially orientated with the aim of ensuring freedom of trade. For instance, the UK law on insider dealing (which prohibits people who have confidential and price-sensitive information from

using the information to make a profit from buying and selling shares) derives from a European Directive.

Interactive content is not available in this format.
**Figures 22–27** The main institutions of the EU

## 6.3 The UK and EU

The question of whether the UK should be a member of the EU has always polarised public opinion. In 1975, the Labour Government of Harold Wilson held a referendum asking people to vote on the UK's continued membership of the EEC, 67% of voters voted 'yes' to remaining in the EEC. On 23 June 2016, David Cameron's Conservative Government held a referendum also asking people to vote on the UK's continued membership of the EU: 48% of the UK population voted to remain and 52% to leave. In that referendum the voters of Scotland voted 38% to leave and 62% to remain.

Following the referendum the UK Government triggered Article 50 and the UK is scheduled to leave the EU on 29 March 2019. Negotiations began in the summer of 2017 and are ongoing. The UK Government is leading negotiations and the position of the devolved administrations, including that of the Scottish Government, is complex. EU laws cover devolved matters over which the devolved jurisdictions have law making powers (and under the terms of the devolution settlements, exclusive jurisdiction). The UK Government is however determined to be the participant in leading negotiations with the EU and it remains unclear, following exit from the EU, what new powers (if any) will be exercised by the devolved legislatures (including the Scottish Parliament) and what role the devolved administrations will play.

## 6.4 Summaries of European influences on law making in Scotland

Figure 26 summarises the impact of the ECHR and EU (until Article 50 takes effect) on law making in Scotland.

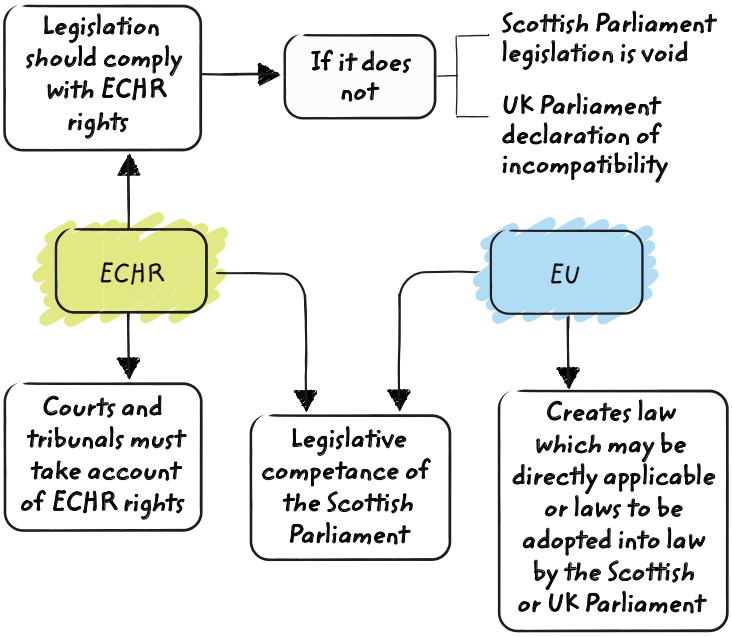



**Figure 28** Summary of the impact of the ECHR and EU on law making in Scotland

# 7 Government ministers

Listen to this audio which explores the different types of legislation that exist and explains how law making powers may be delegated by either the Scottish of UK Parliaments.

Audio content is not available in this format.

Overviews of law making often overlook the fact that delegated legislation (also referred to as subordinate or secondary legislation) is used to give ministers, both of the Scottish and UK Governments, power to make law. In some cases they have quite significant power which has been delegated to them by the Scottish or UK Parliaments.

In terms of sheer volume the most significant source of law within the UK is delegated legislation. Acts of Parliament (Scottish or UK) frequently delegate law making powers to ministers. The Acts (known as primary legislation) set out the general framework and delegate the power to make detailed legally enforceable provisions to ministers. The powers given to ministers range from technical matters, such as altering the level of a fine, to fleshing out Acts with greater detail. Such delegated legislation allows a government (whether Scottish or UK) to make changes to a law without needing to push through a completely new Act of Parliament.

In the case of UK ministers there is often a lack of detailed scrutiny as the processes for scrutinising and making delegated legislation in the UK Parliament are more complex than those of the Scottish Parliament. The House of Lords has a committee process for the scrutiny of delegated legislation and considers over 1200 pieces of delegated legislation a year. The House of Commons does not have a similar process.

The Committee system used in the Scottish Parliament does not mirror that of the UK Parliament. It is more open and transparent and the committee process is more firmly entrenched in the law making process.

Many arguments are made in support of this method of law making as it saves parliamentary time and allows expertise to be drawn upon in making detailed regulations. However it means that much of our law is being developed without full parliamentary scrutiny or wider public discussion. One of the concerns expressed about the plans for exiting the European Union relates to the use of delegated legislation with some commentators estimating that about 15,000 new laws may be made in this way.


**Figure 29** Words associated with delegated legislation and scrutiny

# 8 This week's quiz

Check what you've learned this week by taking the end-of-week quiz.

Week 1 quiz

Open the quiz in a new window or tab and then come back here when you've finished.

# Summary

You have explored the main law making institutions in contemporary Scotland and considered the main sources of law. Together they help create the Scottish legal system. Significant constitutional change took place in 1998 with the establishment of the new Scottish Parliament with its own law making powers. That Parliament has been responsive to the needs of those living, working and conducting business in Scotland. Further significant change will take place following the negotiations over the UK's planned exit from the EU. It is too early to identify what the result of that change may be and whether Scotland, having voted to remain, will achieve a unique settlement which differs from other nations within the UK.

After studying this week you should be able to explain :

- law making in contemporary Scotland
- the roles of the Scottish and UK Parliaments in law making
- international sources of law, the European Convention on Human Rights (ECHR) and EU.

Next week you will consider historical sources of law in Scotland.

You can now go to Week 2.

# Week 2: An overview of the legal history of Scotland

## 1 Law and medieval Scotland

Some of the earliest influences on law and the legal system in Scotland include native customs, Norse law and Welsh law. With the establishment of the kingdom and state of Scotland, however, things began to gradually change.

In the reign of David I (1124–1153) a number of systems and institutions were put in place in an attempt to maintain order across all of Scotland. Justice was administered in the name of the monarch (as it still is today). A number of institutions found in the legal system today, such as sheriffs and the 15-person jury system, have their roots in medieval Scotland and the reforms of David I.

**Figure 1** David I of Scotland

During this time, travelling judges (justiciars) were established. They were appointed to hear criminal and civil matters and were usually chosen from the ranks of the senior nobility. Ownership of land and estates also came with responsibilities. Those may have been to the monarch, to justice, to protect property, to provide armed men for an army or to tenants and servants. How these responsibilities were undertaken was dependent on the nature and political leanings of the individual noble. Nobles were often subjective rather than objective in the use of their power. Appointments to senior positions within a

state (or the church) from the ranks of nobility was common across Europe at the time. Those with power, wealth and influence had control over both the legal system and political system. Law was seen as a tool to resolve disputes but was also used to wield power and protect the interests of the selected few. In most countries, those working the land, servants and women had little say in the laws of the land and their development.

The courts, presided over by justiciars, were held infrequently and are not now regarded as having been very effective (the nobles often had other matters to manage in an era of warfare, crusades, changing political alliances and instability). Alongside the justiciars, local courts also developed. From the fourteenth century, powers of regality were granted to local nobles and churchmen who were trusted to administer justice in the name of the monarch. Regality enabled those so empowered to exercise jurisdiction in respect of serious crimes (rather than wait for the justiciar's court). Whilst varying in their effectiveness they were at least held on a more regular basis. Some records of these courts exist and indicate that a number of them were successful in achieving their task of providing justice. These courts lasted for a number of centuries with the final ones being abolished in 1746. A further layer within the system of administering justice were the barony courts. These courts, where lesser landowners dispensed justice, dealt with minor criminal and civil matters.

At a local level, Scotland was divided into sheriffdoms. Sheriff courts were established where the sheriff, as the King's Officer, administered civil and criminal justice in the King's name. This system of local justice, established at the time of David I, still underpins the legal system today.

Burgh courts were originally established as centres of royal influence and were supervised by an officer (chamberlain) in the King's household, and were presided over by provosts. At the time monarchs were beginning to realise and acknowledge the role that trade could play in enhancing taxes and revenues and therefore their income and power. However, as trade developed and merchants began to gain economic influence, power and independence, a process of gradual change began to take place in the system.

A feudal system of land ownership was also introduced (and continued to be the basis for land ownership until relatively recent times). This system was developed from one originating in Normandy.

This structure of administering justice (and land ownership) mirrored the structure of society at that time. Once established, many of the positions designed to administer justice were handed down in a hereditary way (through the ranks of noblemen and barons).

The monarch, nobility and church were not, however, the sole participants in the system of justice; as the origins of the jury system can also be traced back to this time. Adult males who had a title to land could be selected for jury service in the sheriff and burgh courts. Tenants could be required to attend the barony courts.

Through this system of administering justice, an attempt was being made to keep order, to provide access to and to dispense justice. At this time much of the population was illiterate and many did not have access to justice to enforce their rights. They would, however, if they had broken the law in some way, have felt the full force of justice against them. One of the other issues of the time was that 'justice' was dependent on individual nobles or clergymen. Decisions provided by them varied as their approach often reflected their own values and interests.

In subsequent centuries, political developments in Europe lead to the formation of an alliance between Scotland and France against England. As a consequence, in the fourteenth century, France and other European countries became a dominant influence

on the legal system in Scotland. Initially, this resulted in the legal system in Scotland having a much closer association with the continental legal systems based on Roman law (civil law systems) than on the English common law system. This is one of the aspects which gives the Scottish legal system its uniqueness today.

## 1.1 The *Regiam Majestatem*

The *Regiam Majestatem* is an exceptional document worthy of an individual mention. It provides a unique record of the law in Scotland in medieval times. Although it is not clear either how or why this collection of laws was brought together into one document, it became an authoritative source of the law (with parliament ordering its publication in the early seventeenth century). Drawing on sources including native Scots law, canon and Roman law and a collection of early English laws it provides a rare example, and insight, into the nature and content of laws which had been written down (customary laws at the time were rarely written but relied on the spoken word and custom). It is also important as it provides a record from an era when many other important documentary records were destroyed during invasions by the English monarchs Edward I (1239–1307) and Edward III (1312–1377).

Whilst the accuracy of the laws and different editions have been questioned by legal researchers and scholars, the *Regiam Majestatem* had significant influence on the development of the Scottish legal system. Originally written by hand, the first royal licence for its printing was issued by James IV (1488–1513) in 1507. This helps illustrate the importance placed upon it. (The first Act of Parliament was printed in 1542). The development of the printing press made documents and information more readily and more cheaply available. This helped spread new ideas and information to a wider population.

REGIAM
MAJESTATEM,
LIBER PRIMUS.
PRÆFATIO (a).

*Regi duo sunt necessaria; Arma, quibus Hostes debellet; Leges, quibus Subditos pacificè regat.*

EGIAM Majestatem, non solùm armis contrà

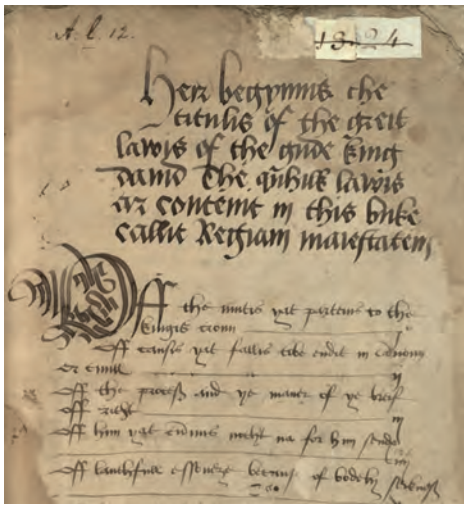


**Figure 2** Printed copy of the *Regiam Majestatem* **Figure 3** Handwritten copy of the *Regiam Majestatem*

## 1.2 Canon law

For many centuries the Church of Rome, through its canon law, had great influence on the law and administration of justice in Scotland. This influence extended throughout

geographical Europe and the great European powers of the time, for example, France, England, Spain and the Holy Roman Empire. The Church had significant power and wealth playing a central role in society and daily life. It also played a key role in the administration and development of the law, with ecclesiastical courts being responsible for the administration of canon law. The route of appeal from the ecclesiastical courts went directly to Rome; no other courts had the power to hear appeals.

Canon law covered many areas of civil jurisdiction from domestic relations to wills and succession and influenced other areas such as contract law. Canon law was influenced by Roman law. Roman law had developed a system of rules which recognised certain rights and obligations. Individuals gained certain rights but in return had certain duties to fulfil.

This influence of the Church of Rome ended quite abruptly with the Reformation. The Reformation was a religious conflict between Catholics and Protestants which began with a protest in 1517 by Martin Luther. In subsequent decades Europe was torn apart by religious wars. Scotland was no exception.

In the early sixteenth century, the Catholic Church dominated everyday life in most European countries including Scotland. Education, welfare, health and discipline were bound up with the church. By the end of that century, Scotland was led by a Protestant monarch. Life revolved around the Kirk where manners and discipline were seen as leading to an orderly and godly life. From the 1550s onwards religion continued to influence developments in the law and administration of justice but it did so in quite different ways.

## 1.3 The traditional ‘divine right of kings’

Around this time new ideas began to emerge with challenges being made to the traditional idea of the ‘divine rights of kings’ (that the right of monarchs to rule came directly from the will of God). In his writings, George Buchanan, a Renaissance scholar and tutor to James VI introduced the idea that the ancient Kings of Scotland had been elected and not divinely appointed. Monarchs were therefore subject to the law of Scotland. If a monarch broke their contract with the people, then in law, the people were entitled to depose that monarch. Whilst this idea emerged at a time when reasons to depose Mary Queen of Scots were being discussed, it was subsequently rejected by her son James VI. In later centuries the idea of the ‘divine rights of kings’ was replaced by ideas of democracy and rebellion.



**Figure 4** George Buchanan, **Figure 5** Mary Queen of Scots, **Figure 6** James VI

## Activity 1 The development of the Scottish legal system

Allow about 10 minutes

Take a few moments to reflect on what you have learnt and answer the following questions:

1 What aspects of the development of the Scottish legal system in medieval times did you find most surprising?

*Provide your answer...*

### Comment

There is no correct answer, it will depend on your own perceptions and knowledge. When we asked colleagues they produced a range of answers including the number of early influences on the legal system and the institutions that have survived and evolved into the current legal system.

2 What words from Section 1 would you identify as having relevance to the current legal system?

*Provide your answer...*

### Comment

The words you may have identified with the current legal system include the following:

- rights and responsibilities
- jury
- justice administered in the name of the monarch
- the sheriff courts
- access to justice
- dispensing justice
- jurisdiction

- appeals
- administrating justice.

# 2 Power, legislation, society and change

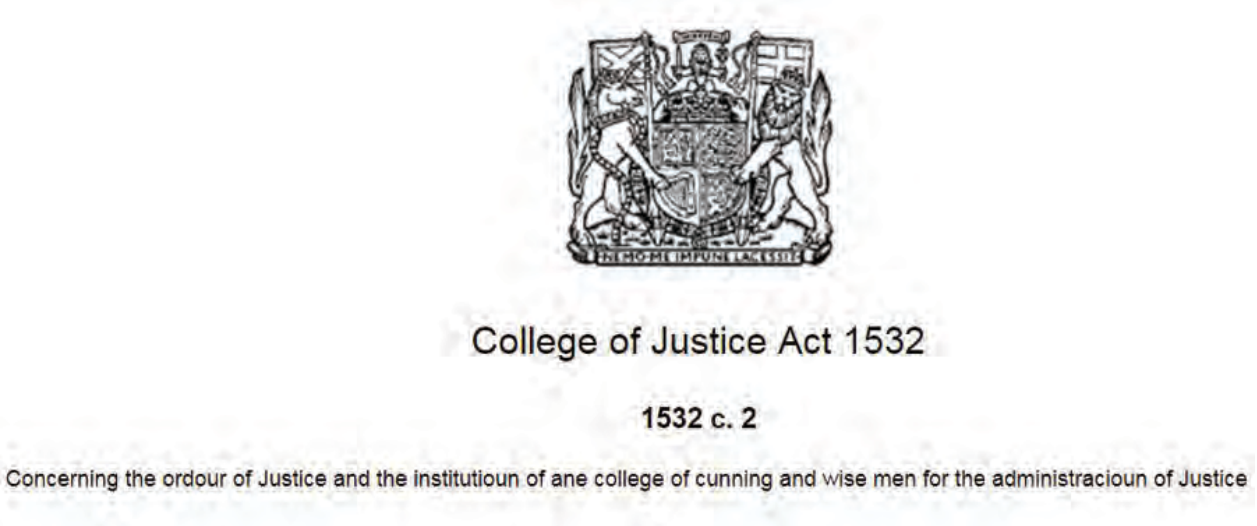
In this section you explore a number of significant developments in the legal system. Many of these developments reflect the changes taking place in Scottish society at the time and were achieved through acts of the original Scottish Parliament. These acts helped to shape and create the Scottish legal system as we know it today and despite being passed in very different times many centuries ago they continue to have relevance in today's more modern twenty-first century society.

## 2.1 The emergence of a professional judiciary

There are a number of points in the history of the courts where significant and far-reaching change took place. In medieval times, a number of courts with varying powers had emerged and by the start of the sixteenth century, a complex system for administering justice was in place. In addition, the possibility of applying to the monarch directly further complicated matters.

The year 1532 is one of the key dates in the legal history of Scotland. In this year the College of Justice was established and the Court of Session was created. The legal system was transformed as the judicial activities of the monarch's council and justiciars evolved into a formal court structure.

The College of Justice was established by the College of Justice Act 1532 and consisted of some 15 judges supported by clerks. Whilst their work and roles have evolved over the centuries, the College of Justice still plays a key role today.



College of Justice Act 1532

1532 c. 2

Concerning the ordour of Justice and the institutioun of ane college of cunning and wise men for the administracioun of Justice

**Figure 7** The College of Justice Act 1532 explanatory purpose

The explanatory purpose of the Act may seem strange to us and helps illustrate the fact that the meaning of words can change over time. Whilst the words administration of justice are still in use, the word ‘cunning’ now has a slightly different usage.

The Court of Session covered civil matters and became a final court of appeal. Its purpose was to deliver justice to the subjects of the monarch. The Court of Session subsequently gained powers to make laws which enabled the expedient delivery of justice through what were known as Acts of Sederunt (these now take the form of Scottish statutory instruments).

The Court of Session provided Scotland with a Supreme Court staffed by professional judges and legal clerks. As the Court of Session established itself, a secular legal profession also began to emerge. To assist them in their work a new requirement for professional legal writing emerged. This led to the practicks. The practicks were a form of early written reports of decisions in legal cases (the earliest case appearing in Sinclair’s practicks is 1541). These were the forerunner of formal law reports and the institutional writings.

Changes in the law itself began to emerge with the development of increasingly sophisticated principles in land and contract law and the subsequent inclusion or reform of the law through Acts of the parliament.

**Figure 8** Depiction of the inauguration of the Court of Session in 1532 Parliament House

## Box 1 **Modern definitions**

**College of Justice** Created in 1532, it consisted of the Lords of Council and Session (the judges of the Court of Session) who are the Senators of the College of Justice, the Faculty of Advocates, the clerks to the Signet (later the Writers to HM Signet, a Society of solicitors) and the macers (the court officer who carried a mace before the judges). It may now be said to consist of the senators, Advocates, Writers to the Signet, Solicitors to the Supreme Courts, Macers and Supreme Courts staff.

**Senator of the College of Justice** Judges of the Court of Session and the High Court of Justiciary, the supreme courts of Scotland, are appointed by HM Queen as senators of the College of Justice created in 1532.

(Judicial Office for Scotland, 2017)

Administering the law was still a matter for the monarch's justice but the civil aspects were now on a firmer and more obvious footing. Reform in criminal matters was to follow. Whilst we still speak of administering justice on behalf of the crown today, the medieval beliefs in the divine rights of monarchs have significantly changed. The gradual development of the law and evolution of the legal system helps illustrate this with its move towards parliamentary lawmaking and the development of a court system with a professional judiciary.

## 2.2 A changing society: monarchs and church

The social and political changes which took place in the sixteenth century saw the erosion of the power of the Church of Rome. The growth and spread of Protestantism had a strong influence on the government and society in Scotland to the extent that by the 1560s the jurisdiction of the Church of Rome had ended and canon law began to play a lesser role as the Scottish courts took over the laws relating to marriage, legitimacy and succession.

Another factor impacting on the legal history of Scotland was the increased scope in the jurisdiction of the monarchy. In 1603 James VI, King of Scotland, also became the King of England (Elizabeth I of England had died childless and James VI was offered the crown). Whilst this united the two countries, with the union of the crowns in1603, both retained their individual and independent legal systems.

**Figure 9** Elizabeth I

**Figure 10** James VI

James VI called leading Scottish nobles down to London for regular meetings, and the Scottish privy council continued to convene in Edinburgh to manage day-to-day affairs. Meetings of the Scottish Parliament became increasingly rare. This fostered an increasing sense of isolation amongst the Scottish population who became cut off from their familiar and very hands-on monarchy. This, however, also provided an opportunity for the development of a new identity for Scotland.

Over the following decades, James VI and his successors became even less attuned to the interests of Scotland. Charles I relied on the advice of a handful of Scottish nobles living in London, creating a communications gap that allowed a surge of discontent to take him by surprise in 1637. By 1641, rebel Scots had forced Charles to concede powers to the Scottish parliament in Edinburgh. The settlement stated that the king's officers were to be chosen by Scots, with parliament to meet at least every three years. But the instability created in England and Ireland by Scotland's war with their shared king triggered rebellion in Ireland and civil war in England.

Following civil war and the execution of Charles I, the English and Scottish Parliaments took different routes. The English Parliament declared England as a republican commonwealth. The Scottish Parliament recognised Charles II as their King. Oliver Cromwell (as head of the new republican commonwealth and known as 'Lord Protector') carried out a military and constitutional campaign against Scotland. In 1651, the Scottish army were beaten and the Commonwealth government (the government established in England following the execution of Charles I) announced that no parliament, other than the Parliament of England, was to meet. Charles II was no longer King of Scotland. Scotland was granted the right to send 30 Members of Parliament (MPs) to Westminster (where the Parliament of England sat). The English Parliament at Westminster became a collective commonwealth of England, Scotland, Wales and Ireland. The Scottish legal system was suspended before being gradually restored. Scotland had been incorporated into a union.

Following the restoration of the monarchy in 1660 the Scottish Parliament was re-established in 1660. Scotland regained its independent legal system and the reigning monarch ruled through a series of commissioners. This period was then followed by what is known as the 'glorious revolution' of 1688–1689, which established a constitutional monarchy and limited the power of the monarch. It led to a period where Scotland and its parliament became more independent. At this time the first of the institutional writers began to emerge. They are discussed in Section 3.1.

## 2.3 Records and land ownership

The Registration Act 1617 is another key development in the legal history of Scotland. It established a system of recording land ownership unique to Scotland. The Act provided for the recording of all deeds transferring land ownership within Scotland and was followed by the Registration Act 1681. Together these Acts have created a history of all land transactions in Scotland since the seventeenth century.

The Registers of Scotland celebrated their 400-year anniversary in 2017. You can find out more about their history by exploring the Registers of Scotland timeline. Land registration in England began in 1862.

## 2.4 The High Court of Justiciary

Another key event and development in the history of Scottish legal institutions was the establishment of the High Court of Justiciary in 1672. This court continues to play an important role in the legal system in Scotland today. It is the final court of appeal in criminal matters and its creation cemented the separation of cases into civil and criminal matters which had begun in 1532.

**Figure 11** The High Court of Justiciary

## 2.5 The union

During the 1690s, economic conflict existed between Scotland and England. Scottish plans to set up a trading colony in the New World meant competition with the East India Company (which was supported by the English Government). The Darien scheme aimed to create a link between trading in the Pacific and Atlantic Oceans with the establishment of a port at the Isthmus of Darien (the area now known as Panama). The intention was that this would generate wealth through trade and provide an opportunity for Scots to settle on a new continent. Many thousands of ordinary Scottish citizens invested in the scheme. The investment totalled about half of the national capital, £500,000. The first ship set sail in 1698 and the settlers renamed the land Caledonia. Within months many of the settlers were sick and over 400 were dead. Further ships were sent. Of the sixteen ships that set sail only one returned. More than 2,000 lives were lost. The loss of £500,000 almost bankrupted the Scottish economy.

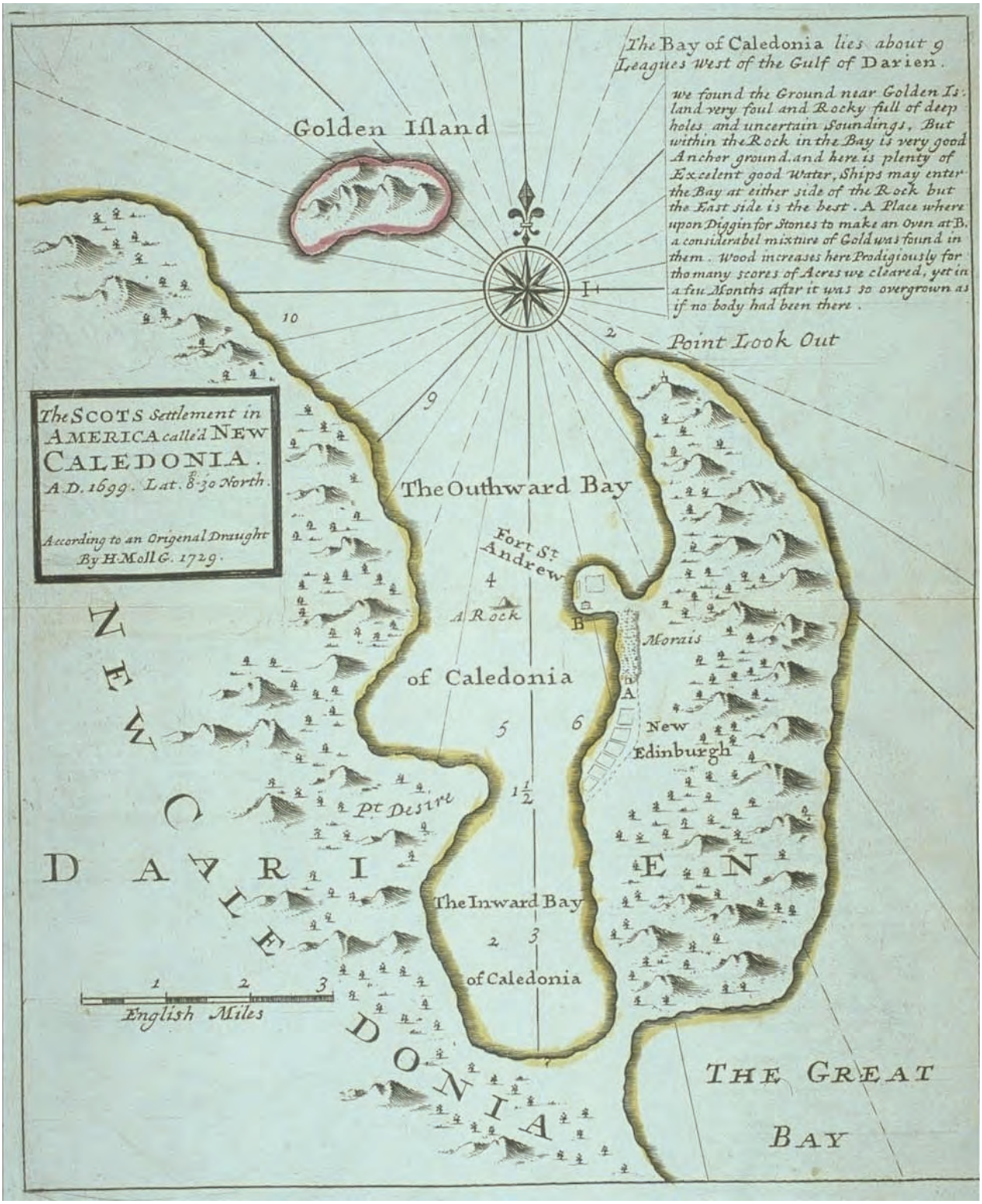



**Figure 12** Map of New Caledonia

This economic debacle, coupled with poor harvests, led to the dissolution of the Scottish Parliament and created a climate in which a union with England could be tolerated. Some saw the advantage in such a union as it would create a large free trade area: in fact the largest free trade area in Europe. Others passionately argued against such a union. A treaty was however drawn up and considered by each Parliament. The English Parliament passed the Union with Scotland Act 1706 and the Scottish Parliament the Union with England Act 1707. These Acts abolished the separate Parliaments of Scotland

and England and created one single Parliament at Westminster. Scotland gained 45 seats in the new 558 seat British House of Commons and sent 16 peers to sit in the House of Lords. The Act of Union became operative on 1 May 1707. The following October, the first Parliament of Great Britain sat at Westminster.

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| Artist | Ana Collins | Date | 05/12/2017 |
| GMD | x | Date | |
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| App | | Version | |

**Figure 13** The Treaty of Union

However, in spite of the Treaty of Union, the unique and separate Scottish legal system was retained. Scotland kept its separate judicial and court system including the Scottish Courts of Session and judiciary and legal offices such as the Lord Advocate.

The new Parliament of Great Britain was empowered to make new laws for Scotland, and to reform old laws where necessary. A new court was introduced into the legal system, the House of Lords in Westminster. Although many had argued that appeals in Scottish cases to the House of Lords from the Court of Session should not be allowed as few of the Law Lords in the House of Lords would have any expertise in Scots law, in the end, appeals were permitted, but in limited circumstances.

# 3 Other influences

By 1800, the influence of Roman law within Scotland was in decline. The Napoleonic Wars meant that it had become more difficult to study Roman law on the continent. The Court of Session had now been in existence for over 250 years and a substantial body of Scots case law now existed. However, the influence of English law had also been growing over the past 80 years as a result of the Act of Union 1707. Civil law and statute had been key to the development of Scots criminal law in the seventeenth century. Their influence was now in decline.

Humanism was the ascendant culture in Scotland in the seventeenth century. High levels of literacy in Scotland also led to the spread and discussion of new ideas. In the eighteenth century developments such as the 1689 Revolutionary Settlement and Act of Union 1707 introduced the Royal House of Hanover, Presbyterian Church government and union with England. A more Calvinist utilitarian orientated culture began to develop.


**Figure 14** Victorian School

You explored common law in Week 1, and following the Act of Union 1707, its influence began to impact and influence the development of the system.

Society also has a role to play in influencing laws that are applied and developed. Watch the following video in which Sir David Edward reflects on an example of the link between law, its application and the society within which the law operates.

Video content is not available in this format.

## 3.1 The institutional writers

In the seventeenth and eighteenth centuries, lawyers wrote books setting out the principles and norms on which Scots law was based. They became known as the institutional writers. Their works have been given a special status and form an important source of Scots law. Written over a period of 150 years they include:

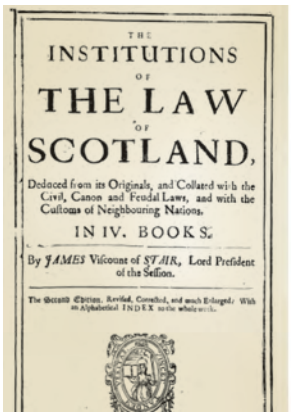
- Viscount Stair, *The Institutions of the Law of Scotland (1681)* – generally regarded as the greatest of the institutional writings.
- Sir Thomas Craig, *Jus Feudale* (1655)
- Sir George Mackenzie*, The Laws and Customs of Scotland in Matters Criminal* (1678)
- Sir George Mackenzie, *Institutions of the Law of Scotland* (1684)
- Lord Bankton, *An Institute of the Law of Scotland* (1751–1753)
- Lord Kames, *Principles of Equity* (1760)
- John Erskine, *An Institute of the Law of Scotland* (1773) and perhaps also his *Principles of the Law of Scotland* (1759)
- Baron David Hume, *Commentaries on the Law of Scotland Respecting the Description and Punishment of Crimes* (1797)

- George Joseph Bell, *Commentaries on the Law of Scotland and Principles of Mercantile Jurisprudence* (1804) and *Principles of the Law of Scotland (1829)*
- Archibald Allison, *Principles of the Criminal law of Scotland* (1833).

Stair, Bell and Erskine are the most well-known of these. In the 1660s, Stair brought together the elements of customary, feudal and Roman law into one system based on legal principles and philosophy in his leading work *The Institutions of the Law in Scotland* (1681). His work provided the first systematic statement of private law.

The relevance of the institutional writers can still be seen today. In their response to the Carloway Review (2012) the Senators of the College of Justice commented:

> Scottish criminal law did not arrive at its present state overnight. The modern law is the product of centuries of development during which the law has grown and matured organically, partly through the analytical works of institutional writers, partly through experience of practical problems in the courts, and partly in response to emerging problems, political pressures and sometimes to controversial cases.
>
> (Judicial Office of Scotland, 2012)


THE
INSTITUTIONS
OF
THE LAW
OF
SCOTLAND,
Deduced from its Originals, and Collated with the Civil, Canon and Feudal Laws, and with the Customs of Neighbouring Nations.
IN IV. BOOKS.
By JAMES Viscount of STAIR, Lord President of the Session.


SIR GEORGE MACKENZIE.

**Figure 15** Early copy of the institutions of the Law of Scotland, **Figure 16** James Dalrymple, 1st Viscount Stair , **Figure 17** Sir George Mackenzie

## 3.2 Legal education

The development of university courses in law has been inextricably linked to the admission requirements to the professions set by the Faculty of Advocates. During the seventeenth century, a recognition of the need for professional law teaching had begun to grow. By the start of the eighteenth century, it was possible to be admitted to the Faculty of Advocates by examination (until 1750 entrants could choose to be examined on either civil law or on Scots law).

Professional law teaching began in universities and in private colleges run by advocates. Chairs in teaching Scots Law were founded in Glasgow (1714) and Edinburgh (1722). The institutional writings of both Stair and Mackenzie were widely used as textbooks during those early years. Erskine taught by lecturing on the Institutions and in 1759 he published his own *Principles of the Law of Scotland.*

The works of the institutional writers were used in teaching for much of the following century. Mackenzie (published in 1678) also became Dean and an examiner of entrants to the Faculty of Advocates. His work and political influence as Lord Advocate is regarded as having paved the way for law as a university subject in Scotland. In his work he gave statutes absolute precedence. This was influenced by his political and constitutional beliefs, in particular his belief in the royal prerogative. This belief led to his exile during the Glorious Revolution of 1688. Royal prerogative meant that only the monarch could make law, and it was no longer a 'fashionable' political belief. Society was changing rapidly as beliefs in democracy, freedom and liberty came to the fore. The old order was being challenged and the legal system and constitutional arrangements were beginning to reflect this. Today, it would be difficult to imagine someone going into exile from Scotland because of their constitutional beliefs.

Legal education today retains some of the features developed in those early years and the training within the profession states that law degrees should:

> Foster the culture and values of the Scottish legal tradition – recognising the fundamentally distinct nature of Scots law and the Scottish legal system, and its adherence to high ethical standards – whilst teaching this comparatively in its practical UK, EU and International law context.
>
> (The Law Society of Scotland, 2017)

## 3.3 The Scottish Parliament

In Week 1 you learnt about the powers of the Scottish Parliament established by the Scotland Act 1998. Activity 2 asks you to explore the history of previous Scottish Parliaments.

### Activity 2 History of the Scottish Parliament

(Allow 20 minutes)

The interactive timeline below highlights a number of Acts of key importance to Scottish history, and enables you to access and explore original copies. Reference is also made to a number of individuals who held key positions or sought changes in the law.

History of Scotttish Parliament timeline

You should now spend some time exploring the timeline. You do not need to explore every detail; look at some of the key dates and explore the events which are of interest to you. Make a note of anything you find interesting or surprising.

#### Comment

The course authors found a number of items on the timeline of interest. These included:

- the language used in the early Acts of Parliament; how wordy they were and how individuals were often referred to with reference to their location or estate
- that Acts only began to be recorded in Scots from 1424 (previously Latin had been used)

- how Parliament had worked to ensure that the monarch ruled and worked within the laws of Scotland from late medieval times (1445)
- when the first opposition to the ruling political party began to emerge (1669)
- the length of time it took for 'one person one vote' to emerge (1928) when voting reforms began in 1832. That women gained to right to vote in 1918.

# 4 This week's quiz

Check what you've learned this week by taking the end-of-week quiz.

Week 2 quiz

Open the quiz in a new window or tab and then come back here when you've finished.

# Summary

During this week you learnt about a number of events key to the legal history of Scotland and the development of the Scottish legal system. What has been provided here is an overview designed to build on your Week 1 studies and set them in context. It links to subsequent weeks where you explore examples of cases, legislation, regulations, individuals and organisations who have made a contribution to the development of the legal system in Scotland, and in many cases, beyond.

After studying this week you should be able to:

- explain a range of historical events relevant to the development of the legal system
- describe the role of the institutional writers
- understand how the current legal system emerged from its historical roots.

Next week you will consider what factors may play a role in influencing and shaping legal systems.

You can now go to Week 3.

# Week 3: Influencing and shaping legal systems

## 1 Law and society

Law is not static, neither are the mechanisms which have evolved to enable it to develop and change. Law is not made in isolation as it represents the society and culture within which it is developed, made and applied. Weeks 1 and 2 considered the current legal system as well as key highlights from the legal history of Scotland and help illustrate these points. What, though, is 'law' and what role does it play in society?

There are a number of different ways in which 'law' can be explored. All of these help with an investigation of the meaning and role of 'law'. As you work through the next few sections, make a note of the ideas that resonate with your own understanding of 'law' and reflect on the reasons for this resonance.

### 1.1 Rules and society

The society in which we live is one in which rules, whether in the form of law or otherwise, play a very important part. Rules govern everything that we do and provide a means by which we, as human beings, can live together in a society. Laws are one form of rule and exploring the nature of rules helps provide a foundation on which to build an understanding of 'law'.

We come across many forms of rules in everyday life, for example, of grammar, arithmetic, the Highway Code, when to ring the emergency services, walking along a pavement, paying for goods purchased or meeting friends. Among the commonest kinds of rule we encounter every day are 'social rules'. These rules are ones which guide the way we relate to each other in social situations and within our communities. They are ones we tend to learn through experience, from family, carers and friends, in childhood, and as we enter into the world of adult and work relationships. They are like the rules of our native language, which we tend to learn through listening and repetition rather than being taught. However, the fact that the rules of social life are not written down for us does not mean that we cannot recognise them, especially when they are broken.

Often rules are expressed in neutral language, but nevertheless they reflect the prevailing values of the time and culture in which they were formulated.



**Figures 1 and Figure 2** Signs with rules aimed at regulating behaviour

## 1.2 Law as a system of rules

All rules are made for a reason. They are designed to ensure that their target audience acts, or refrains from acting, in a certain way. That audience could be sovereign states (bound by international treaties to which they are signatories), members of the general public (bound by Acts of Parliament, local by-laws, etc.), children at school (bound by rules of attendance and discipline), players of a sport (bound by the rules of that sport's governing body), participants in a court trial (bound by the rules of evidence and procedure), or a set of friends (bound by the social rules of their group). You can probably think of many other examples.

All of these examples of rules share some common features as they:

- generally relate to a form of conduct and provide guidance about that conduct
- prescribe what a person must/must not do, may/may not do, can/cannot do
- guide and serve as standards of the behaviour expected in certain situations
- can be used to justify a decision or action and it is generally possible to go to a text (such as an Act of Parliament, a contract, rules of a sport, the written decision of a court, or the holy book of a particular religion) which specifies what the rule is.

In addition:

- the authority of a rule is generally accepted and observed by those to whom it applies
- formal sanctions, such as punishment, exclusion or the payment of compensation, may be applied if the rule is broken.

Rules become legal rules or 'law' when they carry the authority of the state behind them. Think about the following rules:

- A school may have a rule about not running in the corridor. This is a rule exercised by the school to ensure that students and teachers can move safely around the school.
- A driver on the public road must obey the rule about stopping at a red traffic light. The absence of such a rule would lead to chaos on the roads and would be dangerous.


**Figure 3** School rules

**Figure 4** Public road rules

The difference between the first rule about not running in the corridor and the second rule about the red traffic light is that this rule is a law that was made by Parliament (with the authority of the state) and is enforced by the courts of law. If a driver breaks the law by driving through a red traffic light they may find themselves being punished by a court of law (Section 36 Road Traffice Act 1988).

Laws are a distinct type of rule which constitutes an official code that has the backing of the state.

# 1.3 Perceptions of law

Our ideas about ‘law’ are shaped through images and encounters, and these also affect our expectations of law. They also have an impact on our reaction to legal intervention, law makers, law breakers and law enforcers.

## Activity 1 Thinking about ‘law’?

Allow about 10 minutes

(a) Write down any words, images or phrases you associate with ‘law’ in the textbox below.

*Provide your answer...*

(b) Once you have compiled a list, see if you can separate your observations into positive and negative attributes, adding these to the table below.

| Positive attributes | Negative attributes |
|---|---|
| *Provide your answer...* | *Provide your answer...* |
| *Provide your answer...* | *Provide your answer...* |
| *Provide your answer...* | *Provide your answer...* |
| *Provide your answer...* | *Provide your answer...* |
| *Provide your answer...* | *Provide your answer...* |

### Comment

There is no right answer to this activity. It will have provoked a range of responses and ideas about law. Traditional images of law often involve a statue of a female figure wearing a blindfold with scales in one hand and a sword in another. The blindfold represents impartiality, scales the weighing of evidence and the sword used to convey authority and the idea that justice can be swift. More modern images in the media tend to concentrate on crimes, violence, police officers, court cases, offenders, victims, issues raised by use of social media and the internet, investigations and environmental pollution. Legal cases are often used as the basis for film and serialised dramas. These all build a picture of law and the legal system, a picture which may not reflect reality.

Whether you thought a word or image had positive or negative attributes will depend on your own views and personal experience and your studies on this course will either reinforce or challenge your initial views. Your impressions, pre-existing knowledge and personal values all affect your engagement with the ‘law’ and being able to identify and

think about this at an early stage in your studies provides you with a basis on which to build.

The word cloud in Figure 5 contains words that a number of our colleagues identified when we asked them to think of words they associated with law. It is not intended to be an exhaustive list but rather an illustration of the range of words and responses that can be given to the question 'write down any words you associate with 'law'.


**Figure 5** Words associated with 'law'

Law has an image problem, which, while not entirely undeserved, needs to be addressed in a society where there are concerns about inequality of access to law. This has clear implications for promoting social justice. Understanding 'law' and its role can be empowering. The course authors hope that through your exploration of the examples of 'law' and the work of individuals and organisations in later weeks you will gain an appreciation of the role played by law and by the individuals and organisations who have pursued and sought change using the 'law' and legal system to achieve their aims. Over the centuries, the 'law' has been used as a driver or response to change in many areas. It has been the tool of choice for many who have campaigned and worked to ensure that changes within society take place. The changes sought have been many and include equality, land rights, workers' rights, education, health, taxes, technology, transport, citizen's rights, communication, cultural property, medical treatment, the right to rule and right to govern. We hope that the examples you explore will help inspire you to think about a matter you would like to see changed and to think about how that might be achieved.

# 2 The role of law

Some writers and academics think that law is best understood by considering the role it plays in society. In the twentieth century, a number of different theories about its purpose were espoused.

The role of law within society can be considered in a number of different ways, for example, the influences which shape the laws of that society, the relationship between law

and order within a society and how laws are shaped by the values of the society within which it develops.

Aspects of each of these can be seen in the examples used throughout the course.

## 2.1 Influences shaping law

When considering what function law has in society, it is important to consider that law is a product of the society in which it is created and applied. Many influences shape the law. The cultural, religious, political and moral values and norms of a society are all important factors. These factors also make an important contribution to an ordered society. In Week 2, you saw how the contextual influences helped shape the legal system.

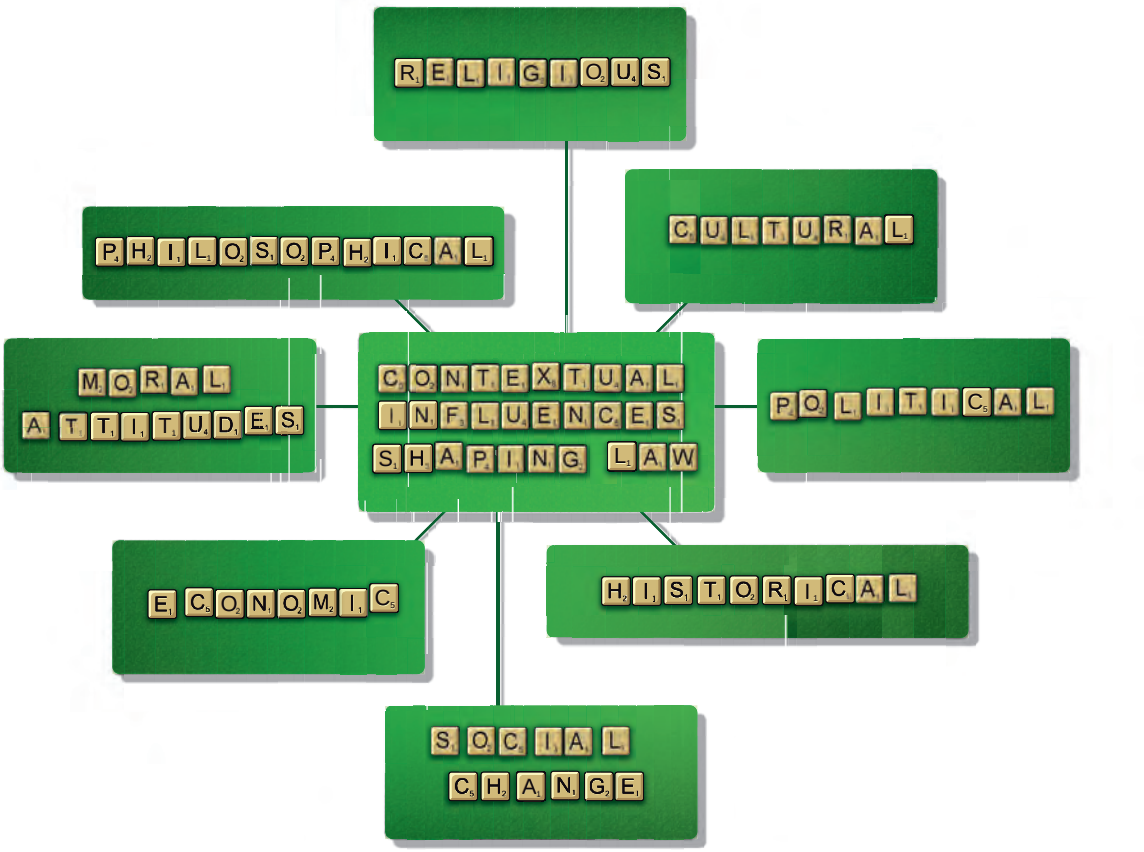



**Figure 6** Contextual influences shaping law

Within a society, non-legal institutions, such as those of religious, cultural, economic, business or political institutions, as well as family structures encourage the maintenance of order. The law operates in conjunction with these institutions in different contexts.

# 2.2 Law and order in context

Law is regarded as a formal mechanism of social control. It creates legal obligations and rights that are enforceable, adjudicates disputes and settles conflicts in a peaceful and regulated way. There is considerable support for the view that the main aim or purpose of law is to provide a sufficient degree of order so that society can function.

You will now explore the ideas of law as a mechanism for achieving political, economic, public and social order.

## 2.2.1 Political order

Law underpins the political order of a state. The constitution of a country sets out the system of government. It provides rules on the way the country is to be governed and the way in which laws are to be created, and creates a justice system (a legal system) which applies and enforces the law.


**Figure 7** A constitution sets out the system of government

## 2.2.2. Economic order

In developed societies, law provides the regulatory framework that enables the functioning of the economy. Law sets out the principles on which businesses are created and operate. It recognises legally enforceable agreements in the form of contracts, and creates and applies specialist rules of trading for different industrial sectors. Employment laws regulate the supply of labour, and health and safety regulations provide protection from exploitation.

## 2.2.3 Public order

Maintaining public order and security is regarded by many as one of the most important functions of law, as without public order it is difficult, if not impossible, for a society to function.

### Activity 2 Public order in law

Allow about 10 minutes

Think about what is meant by public order. Identify some situations where public order is threatened. How is public order maintained and who is responsible for maintaining it? Make some notes on your ideas in the box provided.

*Provide your answer...*

### Comment

You will probably have identified that public order entails ensuring people can go about their daily lives in peace without the threat of violence. It allows society to function peacefully. You may have identified some different examples of threats to public order, such as riots and demonstrations. It could be political or religiously motivated demonstrations that occur from time to time.

You also may have recognised that one of the functions of the police is to maintain public order. In Scotland there are a range of public order laws designed to control the conduct of public meetings and demonstrations. There are also laws that impose criminal liability on those who commit public order offences, such as rioting and looting.

Demonstrations and protests can however play an important role in society. Through demonstrations and protests many changes in the law have been made. When the vast majority of society had no say in parliamentary lawmaking (as they did not have the right to vote) it was one of the few ways in which their voices could be heard.

One of the more recent demonstrations was that of the ‘Democracy for Scotland’ vigil, which lasted over five years, only ending when it was clear that a new Scottish Parliament would be established and the democratic deficit in areas such as lawmaking would be addressed. The museum of Scotland has a number of exhibits recognising the contribution that such events have made to Scottish history, society and lawmaking.


**Figure 9** Vigil for a Scottish Parliament

Modern democratic societies subscribe to the principle that there is a balance to be struck, and public order should not be maintained at the expense of people's freedom to express their opinions and beliefs in public, and to assemble to protest peacefully. These are important ingredients of freedom of expression in a democracy and need to be protected by the law.

However, some people believe that a person should be free to say anything, even if it offends certain sections of society or incites people to violence and hatred. The legal limit on what is deemed acceptable for people to say and do in public varies in and between different societies and cultures and has evolved over the years. Law has to maintain the balance between maintaining public order and providing freedom of expression and assembly, which allows people to demonstrate their opinions, but this is not always an easy balance to maintain.

## 2.2.4 Social order

Law is a key ingredient in the way society is organised and operates. Society comprises a complex network of institutions, customs, values and social and economic forces which determine how people interact and live together. Within a society there are considerable differences in individual ability, education and wealth. Some of these are the result of birth; others are due to inequality of opportunity. The question is whether law helps to reinforce the status quo and protect entrenched interests in society, or whether it acts as a force for social mobility. This is a controversial and complex issue. The concept of social justice is concerned with the inequalities of economic wealth in society, and with encouraging social mobility and equality of opportunity.

Law is, in many ways, an instrument of the government of the day. Government policy in areas such as education, employment, taxation, social benefits and the economy affects whether the laws which put the policy into practice are socially or economically progressive. Law has the potential to affect social order so that it is more inclusive and fair, as is demonstrated by the way in which changes in the law have promoted equality over the last 100 years.

### Box 1 Reflections on the role of law in the progress of equality

At the beginning of the nineteenth century, few people in the United Kingdom had the right to vote. In 1884, male property owners were enfranchised; however, men who were not property owners and women could not vote. The Representation of the People Act 1918 gave all males over 21 the right to vote and gave women the right to vote if they were 30 years or over and a property owner or a graduate voting in a university constituency. Women's voting rights were still not the same as men's and full electoral equality (known as universal suffrage) did not occur until 1928.

Over the last 50 years it has become unlawful to discriminate against another person on grounds including race, ethnic origin, sexual orientation, disability, gender reassignment, sex, pregnancy and maternity, religion or belief, marriage and civil partnership and age in their access to education, employment and services. The principle of equal pay was also introduced; the law prohibits discriminatory treatment between women and men in their terms and conditions of employment.

However, inequality persists. Women and minority groups are still under-represented in areas such as politics and business. It is evident that legal intervention is not enough on its own and other social and economic factors also affect people's opportunities.

Since World War II, the UK has developed a state welfare system which provides access to education, health care and social benefits. These schemes are regulated by complex legal and administrative frameworks governing the provision of, and access to, these services and benefits. There are frequent complaints about the fairness of access to these services. For instance, there are often allegations made in the media and by interest groups of the existence of a postcode lottery for access to life-saving treatment and drugs.

## 2.3 Laws and values

Rules (including laws) express values (both implicitly and explicitly) and people are more likely to comply with a rule (or a law) which expresses a value to which they are committed. For example, you may have heard about the poll tax riots which took place in the UK in 1990. Those riots started because a significant number of taxpayers and others thought that the tax, which was not based on a person's ability to pay, was unfair.

### Activity 3 Thinking about values

Allow about 15 minutes

In the left-hand column of the table you will see eight statements. Below, we have set out a number of values which tend to be associated with 'law'. Put the value you would associate with each of the statements next to the one which most clearly reflects that value.

## Values

Liberty, Security, Autonomy, Dignity, Privacy, Fairness, Equality, Freedom of Expression

Privacy

People should not have to carry identity cards.

Liberty

People who have not been convicted of a criminal offence should not be held in custody.

Dignity

People should not be punished in public.

Freedom of Expression

People should be able to say what they want to say.

Equality

People of different ethnic backgrounds should be treated no differently from each other.

Security

People suspected of links with terrorist organisations should be held in custody.

Fairness

People charged with a criminal offence have the right to put their defence.

Autonomy

People should be able to decide on their own medical treatment.

### Comment

Your completed table should look like this.

| **Statement** | **Value** |
|---|---|
| People should not have to carry identity cards. | Privacy |
| People who have not been convicted of a criminal offence should not be held in custody. | Liberty |
| People should not be punished in public. | Dignity |
| People should be able to say what they want to say. | Freedom of Expression |
| People of different ethnic backgrounds should be treated no differently from each other. | Equality |
| People suspected of links with terrorist organisations should be held in custody. | Security |
| People charged with a criminal offence have the right to put their defence. | Fairness |
| People should be able to decide on their own medical treatment. | Autonomy |

When filling in the table, you may have been aware of the fact that although each of the statements expresses one clear value, those values may conflict with each other. For example, security, which a community may value because it emphasises the importance of physical safety, may conflict with the value of liberty (of people suspected of terrorist links).

Similarly, the value of freedom of expression, which allows newspapers to publish intimate stories about people, may conflict with the value of privacy of individuals.

One of the problematic aspects of rules (including laws) is that they may advance one value at the expense of another.

# 3 The rule of law

The rule of law is a concept which is regarded as underpinning both our constitution and an effective and fair legal system. At its simplest level, the rule of law states that no one is above the law. As you have seen from your studies in Week 2 this is a relatively modern concept as originally monarchs regarded themselves as absolute, ruling by divine right and with absolute authority. Parliaments and citizens had limited, if any, authority or power.

The fight for democracy, openness, equity and justice underpin the legal history of Scotland and the current legal system reflect the principles which underpin rule of law. Take a few moments to think about how much you value the principles as you work through the next sections think about the role of law in its contemporary context.

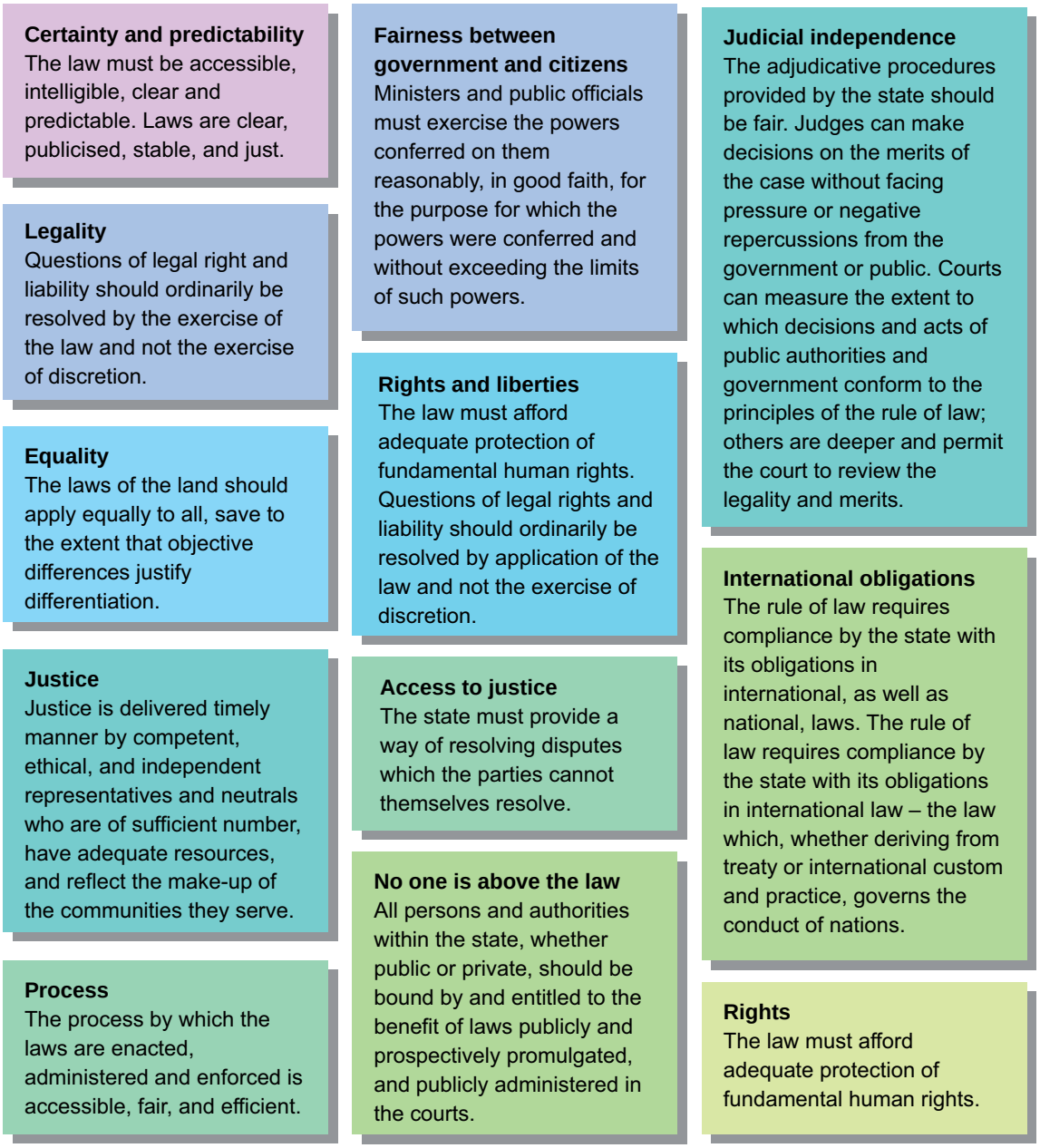



**Figure 10** Principles underpinning the rule of law

The rule of law is becoming more commonly talked about both in the UK and the international arena. It is regarded as a crucial mainstay of international relations, for democracy, stability and economic growth. Within Scotland (and the UK as a whole), however,concerns over access to justice and transparency are increasing. The outcomes of exiting the European Union on a nation that voted to remain are unclear, as are the powers that the UK Government may seek to retain. These all go to the heart of the rule of law and their impact has yet to be fully realised.

# 4 Legal systems and law

Many dictionary definitions of law, justice systems or legal systems include the need for authority of the state. This authority is imbued in the institutions that create and enforce

law, and for sanctions that are imposed when laws are broken. This then leads us to think about the essential features of a legal system. A legal system is required to make, apply and enforce the law. A legal system may therefore have some of the following characteristics:

- a legislature, such as a parliament, to make laws
- institutions that are responsible for investigating situations where someone claims that the law has been broken
- a means of applying and interpreting the law to resolve legal disputes
- procedural rules that specify how laws are made, interpreted and applied
- specific laws covering a range of topics – for example, equality, consumers, employment, business, education, government, housing, banking, tax and local authorities.

The definition of law that is used for the purposes of this course is:

Law is a set of rules created by state institutions which make laws through the authority of the state. The laws have sanctions which are recognised by the state and enforced by state-authorised bodies.

This definition highlights some of the important characteristics of lawmaking and the enforcement of the law:

- only certain institutions can make law
- the authority of the state is needed to enable those institutions to make law
- sanctions exist for breaking the law
- the sanctions are imposed by those given state authority to do so.

### Activity 4 Reflections on 'law'?

Allow about 10 minutes

In Activity 1 you were asked to write down words associated with law. Are there any new words you would now add? Have your perceptions of 'law' been changed or re-enforced by your studies of Weeks 1, 2 and 3?

*Provide your answer...*

#### Comment

The words we associate with 'law' and our perceptions will differ and reflect how we have been introduced to, or experienced, the law. As you have seen, 'law' can be seen from many different viewpoints and its role may change depending on the society within which we live. Despite the fact that it is inextricably linked with our lives, many of us see law more from a remote perspective, through drama and news reports, and are not fully engaged with the role and influence of law and its impact on our everyday lives. Those that work in the 'law' or become involved in the legal system often have specific reasons for doing so. Their experiences will impact their perceptions in differing ways. Law, as said earlier, often has a negative reputation but it can be used as a force for positive change. This is something we will explore in later weeks.

On occasion, laws have to deal with aspects of our lives that we may have strong feelings about. It is recognised that one of the skills that students of law are expected to develop is to recognise that in such situations they need to remain impartial. This

means any personal feelings are put to one side. The law is interpreted and applied as it is written. However, many individuals enter the legal professions, or seek changes in the law, as they want to make a difference and have passionate beliefs about rights, equality and justice. You will learn more about this in later weeks.

# 5 This week's quiz

Check what you've learned this week by taking the end-of-week quiz.

Week 3 quiz

Open the quiz in a new window or tab and then come back here when you've finished.

# Summary

This week explored the idea of law. Through activities you were asked to think about your own perceptions of the law. You explored the different ways in which law can be viewed before thinking about a definition of legal system and law. In subsequent weeks you will build on this knowledge as you think about cases, laws, individuals and events that have helped shape the law in some way.

After studying this week you should be able to:

- explain the link between law and the society in which it is developed
- understand how certain words have become associated with law and legal principles
- discuss what role you believe law plays in society.

Next week you will consider a Scottish legal case in which an afternoon outing to a café in Paisley led to unforeseen and far-reaching consequences.

You can now go to Week 4.

# Week 4: Influence on a global scale: snails and ginger beer

## 1 Background

There is a well-established principle that you should treat your neighbour as you would treat yourself. 'Your neighbour' is anyone who, in your daily life, you come into contact with or even anyone who might be affected by your actions. This principle means that you ought not to act carelessly, or negligently, in a way that you could foresee might harm someone else. It is thanks to a Scottish case that this principle has become a general principle of law.

The case which established it as a legal principle and first laid down the elements of the tort of delict (more widely known as negligence in other jurisdictions) was *Donoghue v Stevenson* 1932 SC (HL) 31; [1932] AC 562.

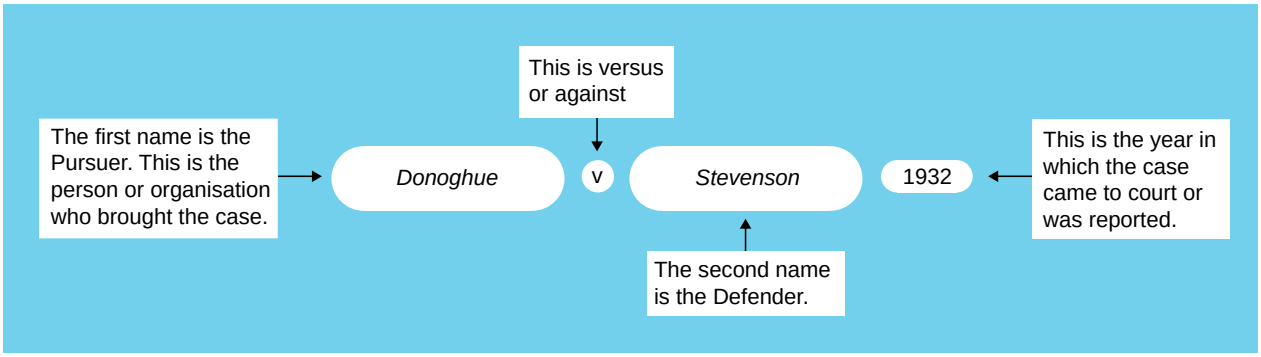



**Figure 1** Citing cases

The case is known to students of law in many countries; especially to those living in common law based jurisdictions as it heralded the right to make a common law claim in negligence. The principle established in the case has been exported from Scotland and adopted in various forms throughout the common law legal world community.

During this week you will encounter a number of legal terms and references. It is more legalistic in its tone as it explores a court case from the early part of the last century. Some of the words and terminology used will be unfamiliar to you and if at any point you are unsure of the meaning of a word you should consult the legal glossary provided on the Judiciary of Scotland website. or a good dictionary.

## 1.1 The facts

Mrs May Donoghue travelled from Glasgow to Paisley on 26 August 1928: a Sunday which fell during the annual trades' holiday for the working people of the city. Paisley was a popular resort. At that time she living in a flat at 49 Kent Street in the heart of Glasgow around seven or eight miles away. During her visit to Paisley she went to the Wellmeadow Café with a friend.

**Figure 2** Mrs Donoghue

It was late in the evening. The proprietor of the cafe was Francis Minchella. He sold, among other things, ice cream and fizzy drinks. Every lawyer and law student can recall or, at least, thinks they can recall what happened next, but it is always sensible to check one's recollection against the primary material. The primary source for this case can be found in a leather bound book in the Parliamentary Archives under the reference 1 Vol 873. File reference HL/PO/JU/4/3/873. It can also be found online at http://www.scottishlawreports.org.uk/resources/dvs/donoghue-v-stevenson-report.html. However, you are not expected to access and read the full report for the purposes of this course. You will explore a number of extracts from the case report during your studies of this week. Now attempt Activity 1.

## Activity 1 Finding the facts

Allow about 20 minutes

The pleading from May Donoghue the pursuer (the person making the claim for damages) is set out below. Read the pleading and summarise the key elements of the claim.

> At or about 8:50 pm on or about 26th August 1928, the pursuer was in the shop occupied by Francis Minchella, and known as Wellmeadow Café, at Wellmeadow Street, Paisley, with a friend. The said friend ordered for the pursuer ice-cream, and ginger beer, suitable to be used with the ice-cream as an iced drink. Her friend, acting as aforesaid, was supplied by the said Mr Minchella with a bottle of ginger-beer manufactured by the defender for sale to members of the public. The said bottle was made of dark opaque glass, and the pursuer and her friend had no reason to suspect that the bottle contained anything else than the aerated water. The said Mr Minchella poured some of the said ginger-beer from the bottle into a tumbler containing ice-cream. The pursuer then drank some of the contents of the tumbler. Her friend then lifted the said ginger-beer bottle and was pouring out the remainder of the contents into the said tumbler when a snail, which had been, unknown to the pursuer, her friend, or the said Mr Minchella, in the bottle and was in a state of decomposition, floated out of the said bottle. In consequence of the nauseating sight of the snail in such circumstances, and of the noxious condition of the said snail-tainted ginger-beer consumed by her, the pursuer sustained ... shock and illness
>
> […]
>
> The said Mr Minchella also sold to the pursuer's friend a pear and ice. The said ginger beer bottle was fitted with a metal cap over its mouth. On the side of the said bottle there was pasted a label containing inter alia, the name and address of the defender, who was the manufacturer. It was from this label that the pursuer's said friend got the name and address of the defender." (Cond. 3) "The shock and illness suffered by the pursuer were due to the fault of the defender. The said ginger beer was manufactured by the defender and his servants to be sold as an article of drink to members of the public (including the pursuer). It was, accordingly, the duty of the defender to exercise the greatest care in order that snails would not get into the said bottle, render the said ginger beer dangerous and harmful, and be sold with the said ginger beer. Further, it was the duty of the defender to provide a system of working his business that was safe, and would not allow snails to get into his ginger beer bottles (including the said bottle). Such a system is usual and customary, and is necessary in the manufacture of a drink like ginger beer to be used for human consumption. In these duties the defender culpably failed and pursuer's illness and shock were the direct result of his said failure in duty. The pursuer believes and avers that the defender's system of working his business was defective, in respect that his ginger beer bottles were washed and allowed to stand in places to which it was obvious that snails had freedom of access from outside the defender's premises, and in which, indeed, snails and slimy trails of snails were frequently found. Further, it was the duty of the defender to provide an efficient system of inspection of said bottles before the ginger beer was filled

into them, and before they were sealed. In this duty also the defender culpably failed, and so caused the said accident. The defender well knew, or ought to have known, of the frequent presence of snails in those parts of his premises where the ginger beer bottles were washed and dried, and, further, ought to have known of the danger of small animals (including snails) getting into his ginger beer bottles. The pursuer believes and avers that the said snail, in going into the said bottle, left on its path a slimy trail, which should have been obvious to anyone inspecting the said bottle before the ginger beer was put into it. In any event, the said trail of the snail should easily have been discovered on the bottle before the bottle was sealed, and a proper (or indeed any) inspection would have revealed the presence of the said trail and the said snail, and the said bottle of ginger beer with the snail in it would not have been placed for sale in the said shop. Further, the defender well knew, or in any event ought to have known, that small animals like mice or snails left in aerated water (including ginger beer), and decomposing there, render aerated water exceedingly dangerous and harmful to persons drinking the contaminated aerated water. Accordingly, it was his obvious duty to provide clear ginger beer bottles, so as to facilitate the said system of inspection. In this duty also the defender culpably failed, and the said accident was the direct result of his said failure in duty. If the defender and his said servants had carried out their said duties the pursuer would not have suffered the said shock and illness.

(Donoghue v Stevenson [1932] AC 562, 31)

*Provide your answer...*

### Comment

An important part of legal study is skills. These include the ability to write concise summaries of the facts and law. There are rarely model answers and the example that follows highlights the key facts and issues.

May Donoghue, drank a bottle of ginger beer purchased for her by her friend at a cafe in Paisley. The bottle contained the decomposed remains of a snail and was manufactured by the defender Mr Stevenson. The bottle was opaque in colour and sealed so the snail could not be detected until Mrs Donoghue had already consumed a large part of the ginger beer. She claimed to suffer from shock and severe gastroenteritis as a result of the incident.
The contract of sale to purchase the ginger beer was between Mrs Donoghue's friend and the shop owner. There was no direct contractual relationship between Donoghue (herself) and Stevenson (the manufacturer). Although the official reports do not refer to it there appears to have been an action directed against the retailer. Proceedings against the retailer seem to have been abandoned at an early stage because of the fact that the bottle was opaque and the retailer had not had any chance of examining its contents. Therefore, the judges had to decide whether Stevenson owed a duty of care to Donoghue. Was the relationship between them sufficiently close that Stevenson should be required by law to exercise a certain degree of care in carrying out particular tasks? Specifically, when Mr Stevenson manufactured a bottle of ginger beer, sealing it in a container in such a way that it would not be possible to inspect it before drinking it, and knowing that it would be drunk by a consumer, was he required by law to take reasonable care to ensure that the consumer was not injured by the contents of the bottle?

**Figure 3** Example summary of the key facts in *Donoghue*

When reading the pleadings in Activity 1 you might have thought that the facts of the case were somewhat ordinary, perhaps even moderately amusing (if unpleasant for May Donoghue). It is not the factual background which resulted in the case gaining common-law-wide infamy. It is well known because of the legal principle established when the case reached the House of Lords, 'the neighbour principle'. That legal principal is found in the judgment of Lord Atkin; an Australian born Welshman who became a Law Lord.

In order to understand why the legal principle emerged it is necessary to look at the issue on which an appeal was made from the decision of the Court of Sessions (in Edinburgh) to the House of Lords (in London). That issue was whether, in the absence of a contractual relationship between a producer of a product and its user, a producer could be liable to pay damages for any harm suffered by the user which resulted from a fault in the product brought about by carelessness.

## 1.2 Information often omitted by standard law texts

Walter Leechman was Mrs Donoghue's solicitor. The presence of foreign bodies in Scottish ginger beer bottles was a surprisingly regular phenomenon in the late 1920s, and Leechman had previously litigated such claims. These previous cases concerned dead mice floating in the bottom of ginger beer bottles. He represented the consumers of the mouse-flavoured ginger beer when they sued the manufacturer in delict. One of the cases was successful at first instance but the other was dismissed.

The dismissed claim was appealed. It became the conjoined appeals in *Mullen v AG Barr & Company Limited* [1929] SC 461 (Ct Sess) [Barr] 461. The appeal was heard by the Court of Session over the course of three days in early March 1929. The pursuers in *Mullen* had argued at first instance (when the case was first heard in the lower courts) that negligence could be inferred from the mere presence of the dead mice in the ginger beer bottles. This argument failed decisively on appeal against the decision of the lower court (the original judgment of the lower court was appealed to the Court of Session). A majority in the Court of Session also held that, in the absence of a contractual relationship between the parties, even if the pursuers had been able to prove negligence on the part of the manufacturer, no duty of care would have been owed by the manufacturer to the ultimate consumer except where:

- firstly, the manufacturer knew that the product was dangerous as a result of some defect and that fact was concealed from the purchaser (in which case the manufacturer would be guilty of negligence or, in appropriate cases, even fraud); or,
- secondly, where the manufacturer was the producer of goods which were dangerous per se (the judgments give the example of explosives) and failed to warn the purchaser of this fact.

It is worth noting that lawyers for the pursuers in *Mullen* sought, unsuccessfully, to persuade the Court of Session that the ginger beer manufacturer could be equated with a dealer in gelignite (a dangerous product). This was because the law accepted a duty was owed, outside of a contractual relationship, by the producers of inherently dangerous products to uses of those products.

No doubt there was a reason why the mouse cases could not themselves have gone to the House of Lords. If Leechman had not had May Donoghue's case on the back burner, who knows for how long the law might have remained as the Court of Session had declared it. Was it just lucky for May Donoghue that she consulted perhaps the only solicitor in the world who would not only have taken her case, but have taken it to the highest court in the land? No one knows. Judgment in the *Mullen* appeals was delivered on 20 March 1929. A mere 20 days later May Donoghue commenced her proceedings in the Court of Session.

At the initial hearing, Stevenson maintained that the case against him was irrelevant and should be struck out without further hearing of the facts. His grounds for the strike out application were that he did not owe any legal duty to Mrs Donoghue as she had not any contract with him to buy the ginger beer. The Lord Ordinary declined to dismiss the action there and then. He held that there was a legal right to make such a claim (there was a legal cause of action in the absence of a contract). Accordingly, he ordered a the trial to enquire and proof the facts (i.e. to prove whether there actually was a snail in the bottle and whether May Donoghue had fallen ill as a result of drinking from the bottle).

The Lord Ordinary was Lord Moncrieff. He is the unsung hero of the case as his decision gave Mrs Donoghue's legal team hope that a contractual relationship was not necessary to establish liability. He made this decision in the face of formidable legal authority to the contrary.


**Figure 4** Lord Moncrieff

Lord Moncrieff's decision was successfully appealed by Mr Stevenson, to a higher Scottish court. That court held that there was no difference between a mouse and a snail: in other words, the case of the snail was indistinguishable than the case of the mouse. Donoghue then appealed further to the House of Lords, then the highest court in the UK for civil cases from Scotland, where she won.

As a result of the decision of the House of Lords, the judgment of Lord Moncrieff was restored. May Donoghue had established that she had a claim recognised in law.

> The *Paisley and Renfrewshire Gazette*, describing Mrs Donoghue as Mrs Macalister (her maiden name), succinctly reported the outcome of the House of Lords proceedings as: 'Appeal allowed: Snail in Ginger Beer Case'. In order to succeed in her action May Donoghue now needed to prove her factual case at trial. Such a trial would hear witnesses in order to determine whose version of the facts was true: The facts to prove would be the presence of the snail in the

> bottle; the negligence of Stevenson; the illness that she had suffered by consuming the snail-flavoured ginger beer.
>
> (McBryde, 1990)

The return of the case to the Court of Session was listed to take place in January 1933. On 12 November 1932, however, David Stevenson died. The case never went further. The estate of Stevenson settled. The answer, therefore, to the question – what really happened in the café – is that we will never know. There was no trial. No witnesses gave evidence. No decision on the alleged facts was ever reached. A factual determination and, perhaps, a snail were missing. One year later, Stevenson's executors were listed as third-party defenders to the case. However, the claim was settled out of court in December 1934 for, according to Leechman's son, £200 of the £500 originally claimed. This was a significant sum at that time. Clearly Leechman's decision to take on the case had been a brave one, but one with a happy outcome.

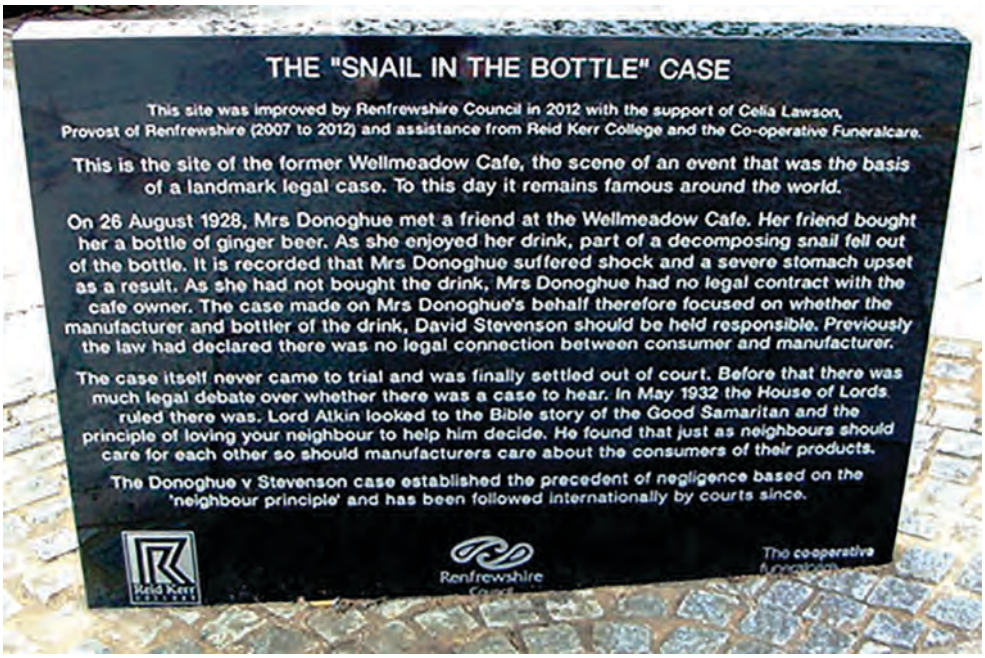



**Figure 5** Picture of the memorial to Donoghue v Stevenson, at the site of the Wellmeadow Café

Stevenson's legal team had been pessimistic about their client's prospects in the Lords. Leading counsel representing Mr Stevenson (Mr Normand K.C.) later wrote to Lord Macmillan, 'I personally thought that the House of Lords would decide as they did in fact decide, but that we had a very strong case on the facts. If the case had gone to proof I think it would have been fought and possibly on the issue whether there was a snail in the bottle ...'. (This letter appears in Lord Atkin's private papers at Gray's Inn (file reference AK1/JUD/1/1) and a speech by Lord Justice MacKinnon (file reference ATK1/JUD/1/1, also referred to in Lewis, G Lord Atkin (Hart Publishing, 1999)). Mr Normand K.C. suggested that the Dean of the Faculty of Advocates also believed that Stevenson would lose in the House of Lords. As Mr Normand K.C. indicated, Donoghue's case was taken through the courts on a point of law: whether she had a claim in negligence. The messy and rather banal facts were not allowed to get in the way. It could be that the team were aware of the fact that the situations in which delict provided a remedy to a harmed person had fallen out of step with the human requirements of the age.

# 2 The importance of *Donoghue*

In terms of the emerging social and economic conditions of the consumer society at the time, the development of the delict (negligence) in this way was humanising. The concept of relations giving rise to a general duty of care provided a vehicle for judges to consider what acceptable conduct is and what unacceptable conduct is. Since *Donoghue*, the instances in which a duty has been established have included omission to care for persons for whom responsibility has been assumed, liability for a range of products which have caused harm, harmful conduct on the roads and harmful misstatements. Also, the range of the types of injury to which the duty not to harm apply have extended from physical to psychiatric harm. In some jurisdictions the courts have gone further to include harmful transmission of computer viruses.

## 2.1 Social economic conditions

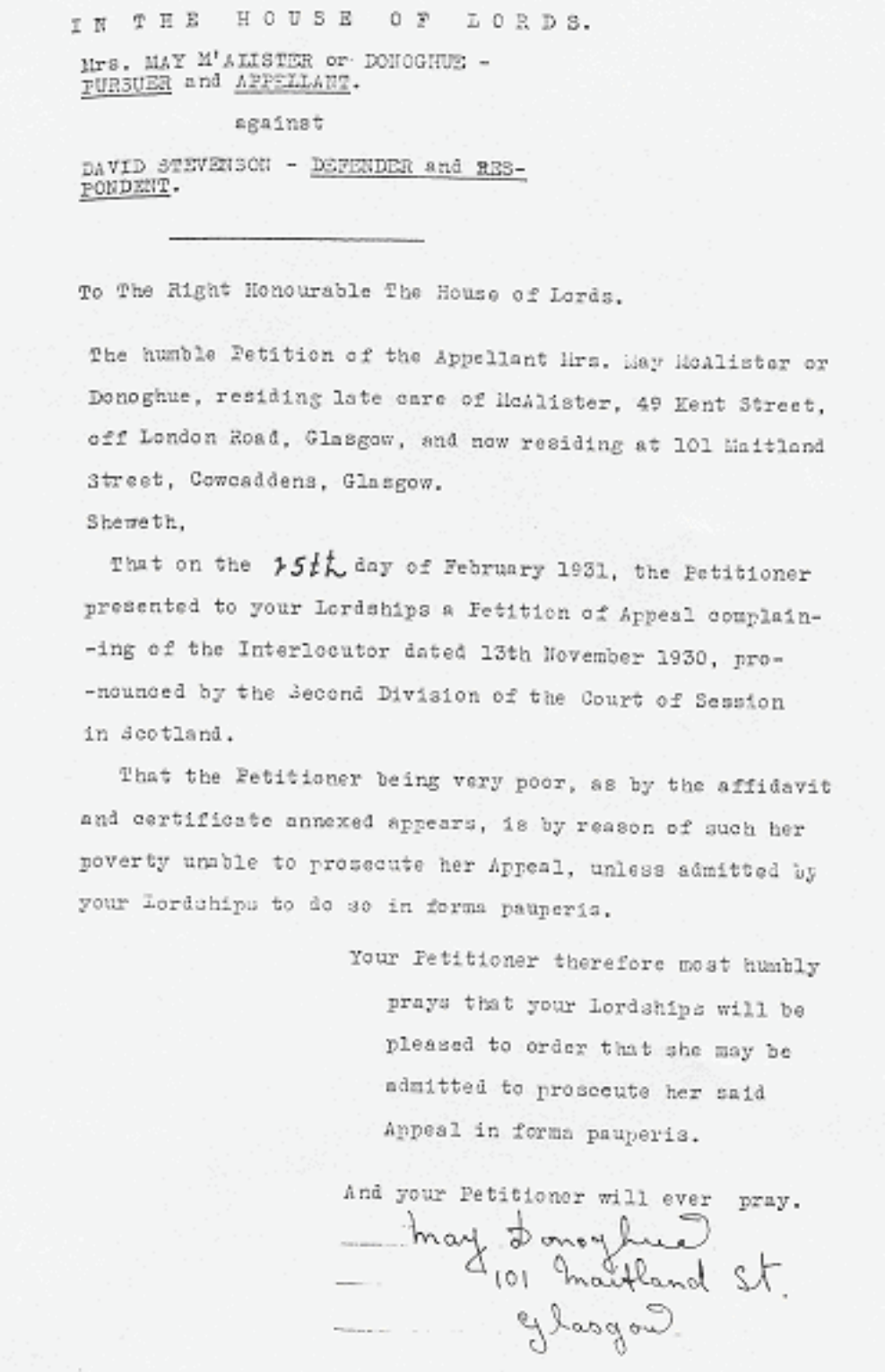
Social and economic conditions in the 1930s were quite tough and there are three interesting aspects evident in how the appeal was managed and conducted.

The first aspect was: why did such a small claim in monetary terms (in today's value it was worth only £27,400) end up in the highest appeal court? The answer to this seems to lie in Leechman's doggedness in establishing a legal principle which reflected society's needs and enabled the law to catch up with changes to economic interactions and social condition of the age, i.e. the beginnings of a modern consumer society. Another aspect in the same question was aiding poor litigants.

That leads to the question: how did May Donoghue afford the cost of an appeal all the way from Scotland to London? The journey from Scotland to London and into the House of Lords cannot have been an easy one. It must have appeared overwhelmingly expensive in terms of legal and other costs. Not only did she have to retain counsel who were willing to act without reward, but she had also to gain for herself the status of pauper, for otherwise she could not afford to pay the sum into the House of Lords needed as security for costs. Some assistance was offered by her legal team who agreed to work *pro bono* (without charge). It is fair to assume that one of their reasons for this was because they believed that law was not isolated from social history and needed to provide principles relevant to the burgeoning consumer age. Other assistance came in what we would now call legal aid. May Donoghue asked the House of Lords to waive costs as she was poor; to be declared a pauper (*forma pauperis*).

The progress of May Donoghue's petition to be allowed to appear in *forma pauperis* is recorded in the House of Lords' journal. It was supported by an affidavit in which she swore, 'I am very poor. I am not worth five pounds in all the world'. Attached was a certificate of poverty signed by the minister and two elders of her church.

On 17 March 1931, her petition came from committee to the assembled House, consisting of the Lord Chancellor, Lord Sankey, the Duke of Wellington, two bishops, two marquises, twenty-four earls, sixteen viscounts, and eighty-eight barons, among them Lord Atkin of Aberdovey. In such distinguished company, May Donoghue was declared to be a pauper, with all the privileges attaching to that status before their Lordships' House that she did not have to pay any costs.



IN THE HOUSE OF LORDS.

Mrs. MAY M'ALISTER or DONOGHUE - PURSUER and APPELLANT.

against

DAVID STEVENSON - DEFENDER and RESPONDENT.

---

To The Right Honourable The House of Lords.

The humble Petition of the Appellant Mrs. May McAlister or Donoghue, residing late care of McAlister, 49 Kent Street, off London Road, Glasgow, and now residing at 101 Maitland Street, Cowcaddens, Glasgow.

Sheweth,

That on the 15th day of February 1931, the Petitioner presented to your Lordships a Petition of Appeal complaining of the Interlocutor dated 13th November 1930, pronounced by the Second Division of the Court of Session in Scotland.

That the Petitioner being very poor, as by the affidavit and certificate annexed appears, is by reason of such her poverty unable to prosecute her Appeal, unless admitted by your Lordships to do so in forma pauperis.

Your Petitioner therefore most humbly prays that your Lordships will be pleased to order that she may be admitted to prosecute her said Appeal in forma pauperis.

And your Petitioner will ever pray.

May Donoghue
101 Maitland St.
Glasgow

**Figure 6** The petition

The second aspect was: what prompted Leechman to take the chance of appealing outside Scotland? It might be that he believed he had better prospects of success there; in any event he had exhausted all avenues of appeal in Edinburgh. Of significance is the fact that the majority in the House of Lords were the three judges with non-English roots: Celtic majority. As already noted, Lord Atkin was born in Australia and educated in Wales. Lords MacMillan and Thankerton were Scots. The two minority judges who would have dismissed the grounds of appeal were impeccably English.

It may be just that Leechman was hoping that his chances of success would be greater with the stronger equity background of the judges in the House of Lords than in the Court of Sessions. Leechman believed that his father would have felt that Donoghue stood a better chance in London than she had in Edinburgh:

> ‘My father did not have such a high opinion of the Scottish judges of the time, even in the Appeal Court here. He felt that the judges in the House of Lords, being English and Scottish and using ‘equity’ as part of their base ... would be more equitable in their decision .’
>
> (Taylor, 1983).

Perversely, in fact, equity had little to do with the majority judgment. Lord Atkin’s neighbour principle was almost self-consciously placed to be in the line of existing authority. We can see this in his reasoning. After asking himself, ‘Who, then, **in law** is my neighbour?’, [emboldening added] he immediately states, ‘The answer seems to be ... ’; in using these words he is acknowledging there are judicial sources of authority for what should be the answer.

The third aspect was Mrs Donoghue’s legal status. May Donoghue is referred to in the 1932 Appeal Cases as ‘McAlister (or Donoghue) (Pauper)’. Other reports of her case refer to her as ‘May Donoghue’, and also ‘M’Alister’. She was born May McAllister, on 4 July, 1898, spent her whole life in the poorer districts of Glasgow, had a twelve-year marriage and four children, only one of whom, a son, survived infancy. Strangely, by the time of her death, on 19 March 1958, May chose to be known neither as Donoghue, nor McAlister, nor McAllister, nor M’Alister, nor indeed as May, but as ‘Mabel Hannah’, these being her mother’s names.

## 2.2 Reactions to the case

Mrs Donoghue won her legal point in the House of Lords. Although the reaction to the Law Lords’ decision was predictably mixed, there was more support than criticism among the legal community; it was celebrated as a necessary step forward in the law of delict (negligence) and as a decision that brought the law more in line with contemporary social and economic sensibilities.

In the *Law Quarterly Review*, the eminent Sir Frederick Pollock praised the ‘Scots Lords’, including Lord Atkin, for ‘overriding the scruples of English colleagues who could not emancipate themselves from the pressure of a supposed current of authority in English Courts’.

Insofar as the decision bore on public consciousness, there was welcome approval. Whereas the newspaper, *The Scotsman*, wrote that the decision ‘should be welcomed by the public’.

The *Law Times* said that the decision was ‘revolutionary’ and represented a ‘radical change’ in tort law that was ‘strictly in accord with the needs of modern economic times’. This illustrates the perception at the time for the need to shape the relationship between legal doctrine and social conditions.

# 3 The global influence of *Donoghue*

Expansions and contractions of the duty of care in the law of delict (negligence) and applications to new factual situations in the decades since 1932 have always been measured against *Donoghue* and Lord Atkin's neighbour principle in particular. The speeches in the House of Lords were delivered on 26 May 1932.

Within a few short years, the language of Lords Atkin, MacMillan and Buckmaster had become common currency throughout the common law jurisdictions of the British Commonwealth and USA, where, in a number of instances, expansions of the duty of care in negligence significantly exceeded the *ratio* in *Donoghue*. Those extensions were, among others, to find a duty of care not to cause property damage, physical injury and psychiatric injury. In some jurisdictions the scope of a duty of care in negligence has be expanded wider than others. What follows is an anecdotal survey of negligence in other jurisdictions.

## 3.1 USA

You may have read or heard about instances of significant damages being awarded in the USA where a very wide concept of to whom a duty of care is owed has developed. A famous case was *Liebeck v McDonald's Restaurant* (1995) WL 360309 (Bernalillo County, N.M. Dist. Ct. 1994).

As part of his judgment in *Donoghue* Lord Atkin cited Benjamin N. Cardozo in *MacPherson v Buick Motor Co* in support of his view. In this 1916 case a wooden wheel fell off a car causing injury. The defendant had manufactured but not sold the car. The case was heard in New York Court of Appeals where Cardozo noted:

> 'If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequence to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. That is as far as we need to go for the decision of this case . . . . If he is negligent, where danger is to be foreseen, a liability will follow.'

This case sparked a national debate about tort reform in the US and is one of the most famous modern (international) day examples of a product liability suit. The jury awarded the plaintiff (in Scotland the term is 'pursuer'), Mrs Liebeck, an 80-year-old woman who spilled a McDonald's coffee on herself, $2.7 million in punitive damages (the amount was later reduced to $480,000 by the judge). There was a public outcry at the outrageous sum awarded by the jury. However, the full facts were not well known. The press focused on a headline that would generate maximum public interest – that a woman who spilled coffee on herself hit the jackpot. This presented only a partial picture and few people ever learnt about the full details of the injury or about McDonald's conduct in handling the claim which the trial judge described as 'reckless, callous and wilful'.

What is also less reported was the fact that McDonald's was serving its coffee 30 degrees higher than allowed by state law. McDonald's had been warned about this by the Arizona

inspectors over 10 times before, as at this temperature, the coffee would cause a third-degree burn in two to seven seconds. Other documents obtained from McDonald's showed that from 1982 to 1992, the company had received more than 700 reports of people burned by McDonald's coffee to varying degrees of severity. McDonald's had settled claims arising from scalding injuries for more than $500,000.

Since *Liebeck*, major vendors of coffee in the USA, including Chick-fil-A, Starbucks, Dunkin' Donuts, Wendy's and Burger King have also been defendants (defenders) in similar lawsuits over coffee-related burns.

## 3.2 Canada

In Canada, non-contractual liability for negligent acts had actually been recognised more than a decade earlier than that in which *Donoghue* was heard. In *Buckley Mot* (1919), 50 DLR 408 (NSSC) a decision of the Nova Scotia Supreme Court, a manufacturer of a chocolate cream candy bar featuring powdered glass as an unintended extra ingredient was successfully sued in negligence by an injured consumer on the basis of a general 'duty to the public' not to sell such a dangerous article, even though the sale was not directly to the public. Essentially, the judge extended the 'dangerous article' exception to include normally harmless articles that were dangerous because of faulty manufacture, rather than just those articles (such as firearms and poisons) that were of an inherently dangerous kind.

Soon after *Donoghue*, Canadian law came to recognise and expand the existence of a duty of care in many situations in which a consumer has been injured by a food product. For example, a bakery owes a duty to a person who eats its bread and a dairy company to consumers of its chocolate milk.

In Canada, it has been held that it is not only consumers who lie in the contemplation of manufacturers or processors of food products. A duty of care is also owed to those who handle these products, regardless of whether consumption actually takes place. For example, in *Cohen v. Coca-Cola* [1967] SCR 469 a bottler was liable for the injuries suffered by a restaurant employee when one of its bottles exploded in his hand while he was stocking a refrigerator.

There are even Canadian decisions in French that cited with approval Donoghue. In *Claudais c. La Ferme St. Laurent Ltée*, CSM 500-05-005996-72, October 17, 1975, Meyer J (unreported), a decision of the Cour Supérieure du Québec, involving a mouse in butter, Mr Justice Meyer said:

> La Cour croit bon de mentionner la décision dans la fameuse cause anglaise de *M'Allister (or Donoghue) v. Stevenson* (1932), A.C. 562, où la Chambre des pairs a décidé que, selon le droit écossais ou anglais, dans le cas d'aliments vendus par le manufacturer à un distributeur dans des circonstances qui empêchent le distributeur, ou l'ultimate acheteur ou consommateur, de découvrir par l'inspection un vice ou une défectuosité, le manufacturier á un devoir légal vis-á-vis l'ultimate acheteur ou consommateur d'agir comme un bon pére de famille et de voir á ce que l'article soit libre de tout vice ou défectuosité pouvant nuire á la santé. Il s'agissait en l'occurrence de la consommation d'une bouteille de soda contenant un escargot.

The case report is in French because, whilst Quebec is in Canada, the only official language is French. This is the translated text:

> The court thinks it worth mentioning the decision of the famous English case of M'Allister (or Donoghue) v Stevenson (1932), AC 562, where the House of Lords ruled that, under Scottish or English law, in the case of food sold by the manufacturer to a distributor in circumstances that prevent the distributor, or the ultimate buyer or consumer, from discovering by inspection a flaw or defect, the manufacturer has a legal duty concerning the ultimate buyer or consumer to act in a prudent and responsible manner and see if the article is free from any flaw or defect that may be dangerous. This occurrence involved the consumption of a bottle of soda containing a snail.

Surely May Donoghue would be surprised to know that the story of her case has not only been told across the world, but told in the French language!

## 3.3 New Zealand

Over the years in Scotland, England and Wales, the courts have sought to restrict the scope of when a duty of care is owed; in New Zealand a more expansive view is allowed. Indeed, for personal injuries the principle has been put on a statutory footing. As early as 1972, the Accident Compensation Act came into force which provided a scheme to compensate anyone injured in an accident, whether caused by fault or not.

In relation to economic losses, the New Zealand courts have held that the limitations to the scope of the neighbour principle drawn by the House of Lords in *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) do not apply in New Zealand. This view has subsequently been upheld by the Privy Council in a building case which held that the New Zealand courts were entitled to follow their own path in this regard: *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA); appeal dismissed [1996] 1 NZLR 513 (PC).

More recently New Zealand courts have grappled with the notion of whether the neighbour principle can extend to computer users and viruses transmitted carelessly.In the context of electronic commerce, issues of proximity or neighbourhood are especially problematic. Who is one's 'neighbour' in an electronic world?

The real issue in the context of electronic commerce is whether there are any policy considerations that would justify limiting the scope of a duty of care based on the formulation in *Anns v London Borough of Merton* [1978] AC 728. One of the issues which the courts have addressed in that regard is the seriousness of harm that will be caused and the seriousness of the foreseeable consequences: *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants Limited* [1992] 2 NZLR 282 (CA) 295.

## 3.4 Australia

As early as 1936, only four years after the decision in *Donoghue,* the concept of negligence was further expanded in the Australian case of *Grant v Australian Knitting Mills* [1936] AC 85. In this case the manufacturers failed to remove a chemical irritant from their woollen underwear. Grant, upon wearing the undies, contracted dermatitis. He then sued Australian Knitting Mills for damages.

The Court used *Donoghue* as a persuasive precedent and expanded the legal principles established in *Donoghue* to include all manufacturers. It also clearly set out the elements necessary to prove in order for an action in negligence to be successful. The court stated that it must be shown:

- that a duty of care was owed by the defendant to the pursuer (claimant)
- there was a breach of that duty owed through the pursuer not acting to the standard expected
- that damage was suffered as a result of that breach.

# 4 This week's quiz

It's time to complete the Week 4 badged quiz. It is similar to previous quizzes, but this time instead of answering five questions there will be fifteen.

Week 4 compulsory badge quiz

Remember, this quiz counts towards your badge. If you're not successful the first time, you can attempt the quiz again in 24 hours.

# Summary

In this week you explored one of the best known cases in common law. You learnt about the case, its background and the far-reaching consequences which flowed from what had been a simple afternoon outing involving two friends. You also considered the reasons why the case was taken to the highest court on appeal and how the judgment enabled the law to more readily reflect social and economic conditions of the time. You have also become familiar with legal terminology.

After studying this week you should be able to:

- explain the lead up to decision in *Donoghue v Stevenson* [1932] AC 562
- explain the sources used by Lord Atkin in reaching his decision
- explain the way in which neighbour principle as outlined by Lord Atkin has been acknowledged in other jurisdictions.

You can now go to Week 5 where you will explore the work and role of the judiciary and learn about legal reasoning.

# Week 5: Judges

## 1 Judicial precedent

In Week 4, you considered aspects of *Donoghue* and learnt how this Scottish case became the first case in the United Kingdom to lay down the elements of the delict of negligence (the tort of negligence). As part of your exploration of legal reasoning used you will explore how the judges in that case came to their conclusions.

In earlier weeks you explored a number of keystone principles reinforcing the rule of law. The rule of law is a concept that underpins the UK's constitution and democratic government. The principles state that laws need to be transparent, certain and consistent. They should also be consistently and fairly applied. In Scotland (which has both a civil and common law tradition), the principles are buttressed by the doctrine of judicial precedent (*stare decisis)* providing certainty and consistency.

Figure 1 is interactive. Click on each word to learn more about why these words are ascoaited with the rule of law.

Interactive content is not available in this format.
Figure 1 The rule of law

Judicial precedent has two principles. Firstly, that a court is bound by the decisions of any court that is higher or, sometimes, of equivalent level in the hierarchy of courts. Secondly, that like cases should be treated alike. Once a decision has been reached in one case it can be relied on in all subsequent cases which have similar facts as an accurate statement of the law.

Judicial reasoning consists of both *ratio* and *obiter* passages. The *ratio* and *obiter* are statements that can be identified within a judgment. The statement which outlines the principle of law on which the decision is based (the reason for the decision) is known as the *ratio decidendi* of the case (*ratio* for short). However, identifying *ratio* is not always straightforward as a judge may also make statements which are peripheral. These are known as *obiter dicta* – things said in passing (*obiter* for short).

Section 2 now explores the reasoning process used by judges in reaching their decisions and which forms the basis for judicial precedent.

**Figure 2** Judicial procession Scotland and **Figure 3** Judicial procession UK Supreme Court

# 2 A brief introduction to legal reasoning

Good legal reasoning requires logical argument. One form of logical argument is syllogism. In syllogistic reasoning, one proposition is deduced from two or more others. The proposition that is deduced is the conclusion and the statements from which it is inferred, or derived, are called premises.

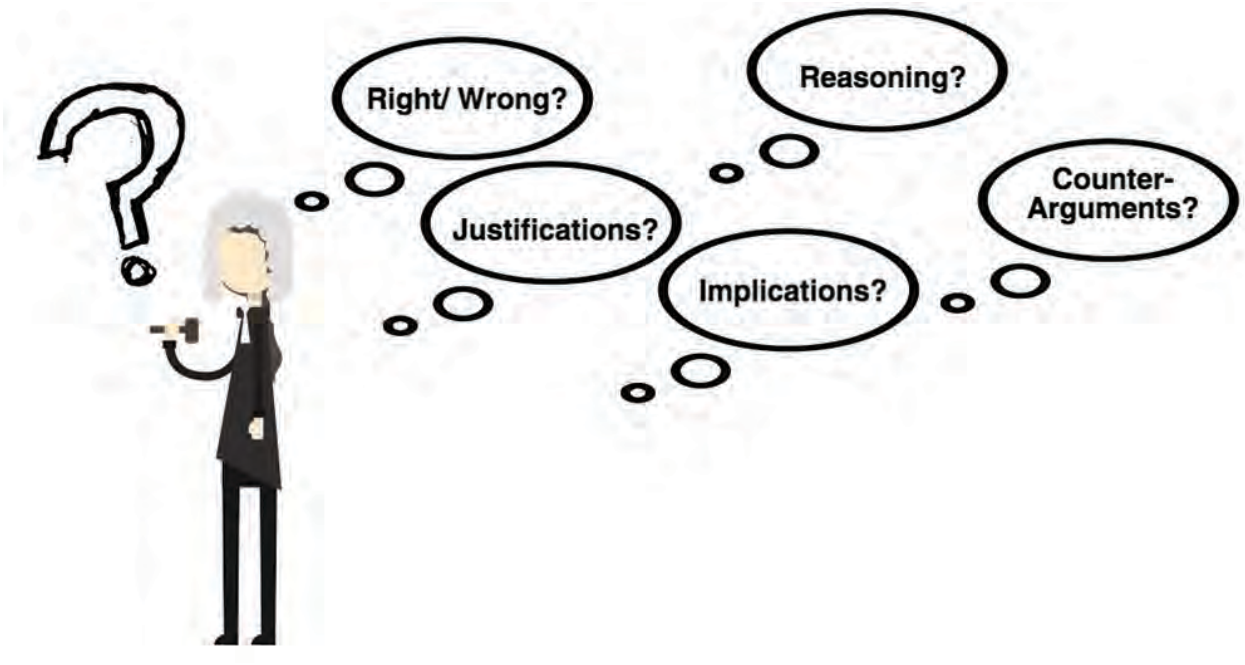



**Figure 4** Thinking about legal reasoning

In legal arguments, the first premise (sometimes known as the major premise) is generally a statement of law. In order to find the major premise, you need to look in the judgment for abstract statements of legal rules. You then need to uncover the minor premises. These are statements of facts which the judge considers relevant to the conclusion drawn. The judge's conclusion draws together the general statement of law with the statement of fact and, therefore, explains how the general rule applies to the particular facts. This is known as applying the law to the facts and is an essential part of legal reasoning. The steps in legal reasoning can be broken down as in Figure 5.

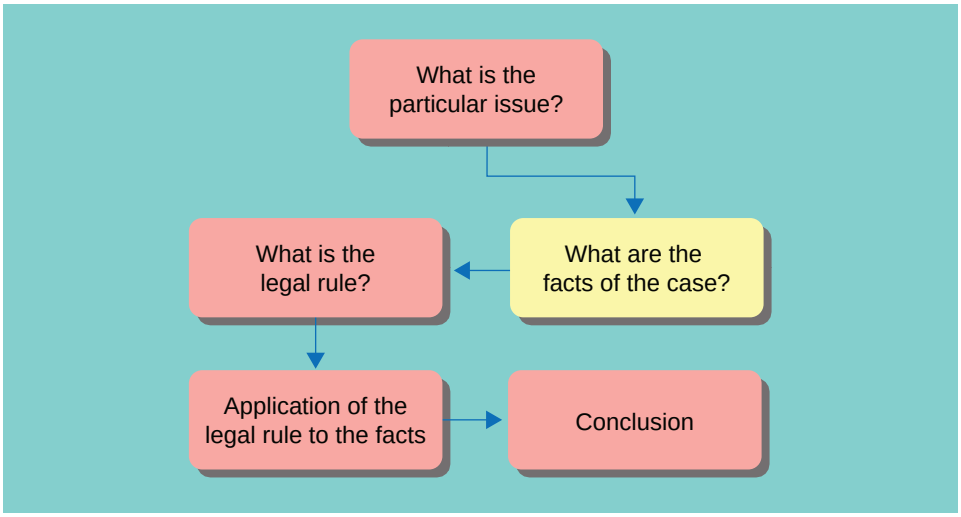



**Figure 5** Simple steps in legal reasoning

### Activity 1 Syllogistic reasoning

(Allow about 5 minutes)

Using the information you have been given on syllogistic reasoning, consider the following statements. Organise the statements using syllogistic reasoning.

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#### Comment

The correct syllogism is:

Premise 1 – All cats are mammals.

Premise 2 – All mammals are animals.

Premise 3 – All cats are animals.

It is certainly true that some mammals can fly but there are no flying cats. The fact that cats are mammals and that some mammals can fly does not prove that cats are capable of flying. The premises can be true but the conclusion is false, it is not a syllogism.

It is worth noting here, however, that in reality identifying reasoning and legal principles is not always straightforward, as judges often do not specifically state on which legal principle they are relying. In addition, if there is more than one judge in a case, for example because it is a case being heard on appeal, then the judges may all reach the same conclusion but express the legal principle in slightly different ways. To consider how

legal reasoning works in practice, Section 3 considers the judgments in *Donoghue* and explores the reasoning used.

# 3 Legal reasoning and *Donoghue*

In *Donoghue* the neighbour principle was used to establish a duty of care even where there was no contractual relationship between the parties. In subsequent cases, the scope of the neighbour principle has vexed many a judge. This is partly due to two factors:

- the different ways in which the majority judgments in the case expressed the neighbour principle
- the range of factual circumstances in cases which subsequently tried to apply the neighbour principle.

To explore the legal reasoning used in *Donoghue* you will now examine aspects of the pleadings and judgments.

**Figure 6** Who is your neighbour?

## 3.1 Stevenson's pleadings

There were a number of legal issues which confronted the law lords. The legal issue in dispute put by Stevenson's counsel as grounds for opposing Donoghue's claim was:

> *The general rule was that a manufacturer owed no duty to a consumer with whom he had no contract.*
>
> (*Donoghue v Stevenson* [1932] AC 562, p. 34)

In Week 4 you considered the restricted circumstances in which delict recognised a legal responsibility not to act negligently.

### Activity 2 The exceptions

(Allow about 15 minutes)

Read this fuller extract of the submissions made on behalf of Stevenson, the defender and respondent in the House of Lords in the case. Consider the submissions and make a list of the circumstances in which negligence might give rise to legal responsibility to others.

> *The general rule was that a manufacturer owed no duty to a consumer with whom he had no contract. To this rule there were two well recognised exceptions–(1) where the article was dangerous in itself; (2) where the article was known to the manufacturer to be dangerous for some reason or other. The present case did not fall within either of these exceptions, and the appellant was trying to introduce into the law a third exception, viz., goods intended for human consumption and sent out by the manufacturer and sold to the consumer in a form in which examination was impossible.*
>
> (*Donoghue v. Stevenson* [1932] AC 562, p. 34)

#### Comment

Stevenson's counsel acknowledge the following circumstances in which negligence might give rise to legal responsibility to others as:

- where the product is an inherently dangerous one, such as fireworks
- where the manufacturer knew it was dangerous.

## 3.2 Donoghue's pleadings

The pleadings submitted on behalf of the pursuer (and appellant in the House of Lords), Mrs Donoghue, foreshadowed what is now the necessary elements of the delict of negligence, namely there is:

- a duty of care
- a breach of that duty by not acting to the standard of care expected of a person holding that duty
- a breach having caused loss or injury.

These are shown in Box 1.

## Box 1 Extract from the submission of the legal team for the pursuer

'The said ginger beer was manufactured by the defender and his servants to be sold as an article of drink to members of the public (including the pursuer). It was, accordingly, the duty of the defender to exercise the greatest care in order that snails would not get into the said bottle, render the said ginger beer dangerous and harmful, and be sold with the said ginger beer. Further, it was the duty of the defender to provide a system of working his business that was safe, and would not allow snails to get into his ginger beer bottles (including the said bottle). Such a system is usual and customary, and is necessary in the manufacture of a drink like ginger beer to be used for human consumption. In these duties the defender culpably failed and pursuer's illness and shock were the direct result of his said failure in duty.

The pursuer believes and avers that the defender's system of working his business was defective, in respect that his ginger beer bottles were washed and allowed to stand in places to which it was obvious that snails had freedom of access from outside the defender's premises, and in which, indeed, snails and slimy trails of snails were frequently found. Further, it was the duty of the defender to provide an efficient system of inspection of said bottles before the ginger beer was filled into them, and before they were sealed. In this duty also the defender culpably failed, and so caused the said accident.

The defender well knew, or ought to have known, of the frequent presence of snails in those parts of his premises where the ginger beer bottles were washed and dried, and, further, ought to have known of the danger of small animals (including snails) getting into his ginger beer bottles. The pursuer believes and avers that the said snail, in going into the said bottle, left on its path a slimy trail, which should have been obvious to anyone inspecting the said bottle before the ginger beer was put into it. In any event, the said trail of the snail should easily have been discovered on the bottle before the bottle was sealed, and a proper (or indeed any) inspection would have revealed the presence of the said trail and the said snail, and the said bottle of ginger beer with the snail in it would not have been placed for sale in the said shop.

Further, the defender well knew, or in any event ought to have known, that small animals like mice or snails left in aerated water (including ginger beer), and decomposing there, render aerated water exceedingly dangerous and harmful to persons drinking the contaminated aerated water. Accordingly, it was his obvious duty to provide clear ginger beer bottles, so as to facilitate the said system of inspection. In this duty also the defender culpably failed, and the said accident was the direct result of his said failure in duty. If the defender and his said servants had carried out their said duties the pursuer would not have suffered the said shock and illness.'

(*Donoghue v Stevenson* [1932] AC 562, p. 32)

Now attempt Activity 3 where you explore these elements further.

## Activity 3 The duty proposed

(Allow about 20 minutes)

Using the information in Box 1, drag and drop the sentences into an order that reflects the test for liability proposed by the pursuer's legal team.

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Comment

This is the correct order, based on the information in Box 1.

- In production a manufacturer must take reasonable care to ensure, through a safe system, that it is not contaminated by foreign bodies.
- A reasonable system includes an efficient system of inspection of the product that would discover contamination before it is distributed.
- The injury (shock and illness) must have been caused by the manufacture's failure to exercise reasonable care.

# 4 The House of Lords' decision

The judges in the House of Lords who sat in *Donoghue* were split three to two in their decision. As noted in Week 4, the majority (the ones that allowed Mrs Donoghue's appeal) were all, or considered themselves to be, Celtic (two Scottish and one Welsh). Lord Buckmaster, who had served as Lord Chancellor and who was resolutely English, delivered the leading dissenting judgment. It was read to the House by the other dissenting judge, Lord Tomlin, who was also English and delivered a short judgment largely fully concurring with Lord Buckmaster.

For the majority, Lord Atkin expounded the neighbour principle. In laying down this principle he said this:

> *'The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour? Receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in my contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.'*
>
> (*Donoghue v Stevenson* [1932] AC 562, p. 44)

You can see how syllogistic reasoning is used here.

- First (major) premise – you must take reasonable care to avoid acts or omission which may injure your neighbour.
- Second (minor) premise – your neighbour is a person whom you can reasonably foresee is one closely and directly affected by your acts.

- Conclusion – a manufacturer should reasonably foresee that a consumer might be harmed if it does not take care in production to do or omit anything which might harm a consumer.

This conclusion creates a legal principle in which a duty is owed by a broad range of persons, to a wide-ranging class of persons in numerous situations.

Whilst it is uncontroversial that the case firmly established that under the delict of negligence a duty of care can be owed in the absence of a contractual relationship, more controversial is the scope of the persons to whom that duty of care is owed. Some of this difficulty is compounded by the different approaches to that principle in each of the judgments.

# 5 Finding the *ratio* in *Donoghue*

In this section we are interested in the *process of* reasoning used by the law lords.

Identifying the *ratio* of *Donoghue* is not an easy task – even with the benefit of the succinct headnote which appears in the law report. But the *case* is a good illustration of how logical reasoning is transformed into legal reasoning because even though each judge attempted to answer the same question, using the same set of facts, and by looking at previously decided cases, the route each judge took to reach his conclusion was different.

Now attempt Activity 4 which is in two parts.

### Activity 4 Finding the *ratio*

(Allow about 25 minutes)

#### Part 1

Read the extracts from the judgments of Lords Macmillan, Atkin and Thankerton, the three ‘majority’ judges who agreed that Mr Stevenson owed a duty of care to Mrs Donoghue.

(a) Identify the points that the extracts set out below have in common and identify any additions or limitations mentioned by the judges.

(b) Identify any additions or limitations mentioned. For example, they all mention that what is manufactured is a product or an article, but while Atkin does not narrow it down further than this, Macmillan limits it to ‘food and drink’ and Thankerton specifies ‘article of drink’ only. The agreed part is the most restricted definition of the product, which is a drink.

Extracts from the judgments in *Donoghue*:

#### Lord Macmillan

I have no hesitation in affirming that a person, who for gain engages in the business of manufacturing articles of food and drink intended for consumption by members of the public in the form in which he issues them, is under a duty to take care in the manufacture of these articles. That duty, in my opinion, he owes to those whom he intends to consume his products. He manufactures his commodities for human consumption; he intends and

contemplates that they shall be consumed. By reason of that very fact, he places himself in a relationship with all the potential consumers of his commodities, and that relationship, which he assumes and desires for his own ends, imposes upon him a duty to take care to avoid injuring them.

(*Donoghue v Stevenson* [1932] AC 562, p. 71)

### Lord Atkin

A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him, with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

(*Donoghue v Stevenson* [1932] AC 562, p. 57)

### Lord Thankerton

The respondent, in placing his manufactured article of drink upon the market, has intentionally so excluded interference with, or examination of, the article by any intermediate handler of the goods between himself and the consumer that he has, of his own accord, brought himself into direct relationship with the consumer, with the result that the consumer is entitled to rely upon the exercise of diligence by the manufacturer to secure that the article shall not be harmful to the consumer.

(*Donoghue v Stevenson* [1932] AC 562, p. 59)

*Provide your answer...*

#### Comment

There are a number of points that the three extracts had in common. These are:

- the object is a drink
- a manufacturer
- intended for the consumer / placed on the market
- in the original form/ to exclude interference / examination
- duty of care owed to the customer

A number of additions and / or limitations were mentioned.

- in relation to the object as a drink. Macmillan mentions food and drink; Atkin talks about products in general
- Thankerton describes the duty of case as an entitlement 'to rely upon the exercise of diligence by the manufacturer'.

## Part 2

Having completed Part 1, and, using the points the extracts from the three judges have in common decide which of the following statements best suits the ratio. Then, in the

box provided, put togther a short statement that might be a possible agreed *ratio* for the case.

(a) A manufacturer owes a duty to take reasonable care that the consumer is not injured as a result of a snail in a bottle of ginger beer.

(b) A manufacturer owes a duty to take reasonable care that the consumer is not injured by a foreign body in a container.

(c) A manufacturer owes a duty to take reasonable care that the consumer is not injured by defective products.

(d) A manufacturer of a drink who intends it for the consumer in its original form, and manufactures it in such a way to exclude the possibility of interference or examination prior to being consumed, owes a duty to take care to the consumer.

(e) A person owes a duty to take reasonable care that they do not commit any act which they could reasonably foresee as harming another person.

*Provide your answer...*

### Comment

Clearly option (a) is too specific to the facts and creates an unrealistically narrow ratio to be applied in later cases. The fact of the snail might not be material in subsequent cases – it might be a mouse or some broken glass.

Option (b) is wider but still limits the ratio to foreign bodies in containers – what if the foreign body was in a sandwich, or it was a harmful chemical in the product?

Option (c) is more useful – it creates a legal principle that could be used in a range of less restricted situations.

Option (d) is wider and does not move beyond the legal responsibility of manufacturers.

Option (e) is more general and akin to the neighbour principle. It was the one followed in later cases but was later restricted with additional elements, such as it must be fair, just and reasonable to impose a duty as it was found to be too wide and allow too many claims.

What is not too wide as a possible ratio will look something like option (d), which was:

> A manufacturer of a drink who intends it for the consumer in its original form, and manufactures it in such a way to exclude the possibility of interference or examination prior to being consumed, owes a duty to take care to the consumer.

This option is reasonably similar to the shorter of the explanations offered by their Lordships. A wide ratio such as the ‘neighbour principle’ is often resisted because it can lead to unforeseen consequences and might be found to apply to unintended situations.

Activity 4 produced one example of what the *ratio* for *Donoghue* might be. Hopefully you will have seen that finding a single ratio (one binding legal principle) is not straightforward.

How to interpret the judgments is even more confusing when the *obiter dicta* comments of the judges that surround the *ratio* are taken into account. You will see this very clearly in

the next section, where we will consider how the lords in *Donoghue* used previous case law in their reasoning.

# 6 Use of legal sources in the judgments

We have noted, in Section 4, that Lord Atkin was at pains to anchor his neighbour principle to legal precedent which was syllogistic, for he stated that:

> … *the lawyer's question, Who is my neighbour**? receives a restricted reply**. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? **The answer seems to be…*** [emphasis added].
>
> (*Donoghue v Stevenson* [1932] AC 562, p. 44)

To try to find out what the law was, the Lords looked at previous cases. They did not agree about whether the specific question raised by Donoghue had already been decided in these cases, or even which cases might be used as precedents to determine what the law is. They looked at lots of different cases between them, and used different issues to distinguish which cases were most relevant and why.

**Figure 7** Illustration of the court proceedings in *Donoghue*

Whilst Lord Atkin gave the leading judgment, Lords Thankerton and Macmillan made other comments despite agreeing with Atkin's decision and most of his reasoning. Lord Thankerton's judgment was quite brief, adding only a couple of points to Lord Atkin's. Lord Macmillan's judgment is longer in that he considers some of the issues in detail.

The approaches of Lords Atkin and Buckmaster are summarised below.

## Box 2 Lord Atkin's leading judgment

Lord Atkin felt that there were no authoritative general statements in the cases of the law in relation to when one person owes a duty to another outside of contract. Instead, the courts had dealt with a number of specific situations and relationships between people in previous cases and had tackled and categorised these individually as they came along. Atkin thought that the law should not be pigeonholed into a number of special classes where a duty was owed. Rather, there must be a general principle that applied to all of the cases based on something that was common among them. He based this first on the idea of the law being required to give remedies for obvious social wrongs. He went so far as to suggest he might not apply case law that denied the pursuer a remedy in situations such as *Donoghue.*

Fortunately, it did not prove necessary for Atkin to disapply precedent case law because he was able to find a general principle in the previous cases upon which the duty of care in negligence is based; in particular *Heaven v. Pender*. This is the neighbour principle, which he also derived from the broader moral and social imperative to love your neighbour. Atkin thought the cases that had denied a duty of care involved an insufficiently close (or unforeseeable) relationship between the two parties. To reinforce this, Atkin emphasised the legal rule that only the *ratio* in these cases was binding. Any *obiter* comments that might deny a duty of care were only persuasive (as they did not form part of the *ratio*, they were not binding on subsequent cases) and were often drawn too widely.

By this reasoning Atkin was able to distinguish a number of cases that might have been seen as analogous. He claimed that these cases were only about the duty of care under a contract, or fraud (where the manufacturer *knew* of a product defect), rather than negligence. He also did not think that the law had so far only allowed exceptions to the general rule that there was no duty of care in certain, specific circumstances involving inherently dangerous objects (such as a gun) and physical proximity (where, for example, the person injured was on the property of the person who owed the duty of care). Atkin saw these alleged 'exceptions' as examples of a wider concept of negligence, rather than the only instances where a duty was enforced. He was able, as a result, to at least claim he was following the cases rather than introducing a new principle into the common law.

## Box 3 Lord Buckmaster's dissenting judgment

Lord Buckmaster adopted an almost completely opposite interpretation of the existing cases to Lord Atkin. Elsewhere he called the reliance on *Heaven v Pender* a plank in a shipwreck, seized upon by others who sought to extend the law of negligence in the face of other overwhelming authority. He argued that the general rule was that there was no duty of care owed to a third party outside of a contract. The exceptions to this were for objects dangerous in themselves (such as a gun) and defects that were known to the manufacturer (fraud). He then dealt with the very few cases, mainly with *obiter* statements, which might be seen to support a duty of care in other cases such as that in *Donoghue*.

While he thought some of these could be used to impose a duty of care on Stevenson, he also considered them contrary to the clear line of decisions and felt they 'should be buried so securely that their perturbed spirits shall no longer vex the law' (*Donoghue v Stevenson* [1932] AC 562, p.577).

He saw those cases where physical proximity was involved as belonging to a clearly different category and argued that the established distinction between dangerous and non-dangerous objects in the case law would be 'meaningless' if the duty of care existed all along in both cases. He also said the logical consequences of imposing a duty would extend to all types of objects and to all people who lawfully used them. In this, Buckmaster implied it would not be socially or economically acceptable for manufacturing businesses to be open to claims from such a wide group of people as if a duty was imposed.

These two contradictory interpretations and applications of previous cases raise a number of questions about the process of reasoning used.

## 6.1 The place of the neighbour principle in the *ratio*

Lord Atkin's 'neighbour principle' is a wide-ranging principle that goes beyond the specific facts of the case. So, arguably, it was not part of its *legal* reasoning. This means it was not necessary to reach the decision that Stevenson owed a duty of care to Donoghue.

We might alternatively argue that even though it is not a strictly *legal* principle, it was necessary for his decision – we have noted in Section 4 that Lord Atkin deduced it partly from a higher, moral principle. However, the concept of the *ratio* of a case maintains the fiction that only legal reasoning has been applied.

> Although commentators have focused attention on the neighbour principle, it is striking that neither Lord Macmillan nor Lord Thankerton made any reference to the neighbour principle or to anything much like it. Lord Thankerton did state that he entirely agreed with the speech of Lord Atkin and that he could not usefully add anything to it, but was careful to make it clear that this was because of Lord Atkin's treatment of the English case law (rather than because he had been won over by use of the neighbour principle).
>
> (*Donoghue v Stevenson* [1932] AC 562, p. 604).

Lord Thankerton's reasoning was couched in more limited terms. Lord Macmillan came a little closer to the neighbour principle in the closing passages of his speech:

> In the present case the respondent, when he manufactured his ginger beer, had directly in contemplation that it would be consumed by members of the public. Can it be said that he could not be expected as a reasonable man to foresee that if he conducted his process of manufacture carelessly he might injure those whom he expected and desired to consume his ginger-beer?
>
> (*Donoghue v Stevenson* [1932] AC 562, p. 620)

However, this is not the neighbour principle in the form advocated by Lord Atkin and applied in later cases. What is significant is that Lord Macmillan opened the doors to a general duty of care.

The principle that a duty of care exists where a person reasonably foresees that his acts or omissions will be likely to result in damage to another is a more restricted answer to the lawyer's question than that found in the Gospels.

Activity 5 asks you to think about how you may develop your own legal argument.

### Activity 5 Write your own legal argument

(Allow about 20 minutes)

Using the facts set out below, write your own legal argument as to why the pursuer should succeed in the case against the surveyor (the defender). You should try and keep you argument to 100 words.

Alex Campian (defender) was asked to survey and value a house that Shelia Stewart was wanting to purchase. Shelia Stewart told Alex Campian that she needed to raise a mortgage in the region of £150,000 and that the bank was insisting that the house have a value of more than £180,000. The survey took place and the report valued the house at £250,000. As the survey was for the mortgage valuation, the contract of survey was between Alex Campian and the mortgage company. The mortgage company paid the surveyor's fee; not Sheila Stewart. Relying on this report Sheila Stewart decided to go ahead with the purchase at that price, but later discovered that at the time of the valuation it was only really worth £200,000 as substantial repairs were necessary to make the building safe to live in. She incurred, therefore, a financial loss of £50,000.

*Provide your answer...*

#### Comment

There is no one precise correct answer.

One way of putting it might be: a valuer should foresee that a person relying on its accuracy might be harmed if reasonable care is not taken in compiling the report and is liable to that person for any losses they incur.

## 6.2 Was this new reasoning?

As a result of the importance given to the judgment in *Donoghue*, in the decades that followed you might think that the neighbour principle, expounded in the case, was revolutionary. But, in legal terms, it was already fully formed and had a number of disparate sources.

The first source, was a passage in a mid-eighteenth-century legal tract: *An Introduction to the Law Relative to Trials at Nisi Prius* (Buller, 1790). The second source was the decision of the Court of Appeal in *Heaven v Pender* (1883) 11 QBD 503 (QB).Thirdly, a decision by Justice Benjamin Cardozo in the New York Court of Appeals in *MacPherson v. Buick Motor Company*(1916) 217 NY 382. Fourthly, the parable of the Good Samaritan in the Gospels (Luke 10: 25–37). It was to the Gospel of St Luke that Lord Atkin gave most (but not all) of the credit for his formulation of the duty of care in negligence.

# 7 Scottish judges

Just as *Donoghue* has had a significant impact on the development of the law on delict (negligence) globally, Scottish judges have also had a significant impact on the development of other areas of the law. Scotland appointed the first female law lord in 1996 (Lady Hazel Cosgrove to the Supreme Court in Edinburgh). In 1992 Lord Hope of Craighead (first Deputy President of the UK Supreme Court) permitted an experiment in televising trials in Scottish courts for documentary purposes.

**Figure 8** From top left to right; Lord Reid, Lord Mansfield, Lord Hope, Lord MacKay, Lord Jauncey, Lord Brian Gill, Lady Cosgrove, Lord Hodge and Lady Stacey

There are many Scottish judges who have made significant contributions to the Scottish legal system and Scots law and more widely. Figure 8 includes a few examples. Lady Cosgrove has been mentioned previously. She was the first female law lord and received an OBE in 2004 for services to the criminal justice system in Scotland.

Having been educated both in Scotland and England **Lord Mansfield** was called to the English Bar in 1730. Regarded as the most outstanding British jurist of his time he advanced commercial law, modernised the court system, reformed the way in which judgments were given and generally worked to make the system of justice more effective and less costly. Following the Acts of Union he became known for his work in the House of Lords. He held several key legal positions and his decision in Somersett's case is probably his best known. In that case held that slavery had no basis in common law, a decision which helped pave the way for the abolition of slavery. Whilst his achievements are well known in legal and political circles in the 21st century he was portrayed in the 2013 film Belle.

**Ian Robertson** contributed greatly to Scottish law. **James Mackay**, **Baron Mackay** of **Clashfern** said: 'He was a meticulous, courteous and diligent judge and a great believer in the reputation of Scots Law. He was sensitive to any interference by the Executive in the work of the Courts.' He was the first Scottish judge to be a member of the International Union of Judges.

**Lord Gill** was Scotland's longest serving judge having been appointed in 1994. On his retirement the Judicial Office for Scotland said: 'In the course of a distinguished legal career Lord Gill has presided over some of the most significant changes to the Scottish legal system in over a century, in particular the implementation of the proposals of the Scottish Civil Courts Review, which he led, as well as some major changes to criminal appeal procedure which are in the process of being implemented.'

Supreme Court Justice, **Lord Neuberger**, described Lord Gill's judicial opinions (judgments) as 'models of authority, conciseness and lucidity from which many other judges, including me, would benefit' and thanked Lord Gill for his 'enormous and long-lasting contribution to the development of the law and the rule of law in Scotland and the UK generally.'

**Eliot Jauncey** joined the Faculty of Advocates in 1949 and succeeded Lord Mackay of Clashfern as the Scottish representative among the law lords in the House of Lords. In 1983 he presided over what was then the longest-ever action heard at the Court of Session, which took 203 days and 1434 pages of evidence. Supporting Ian Fraser QC (later Lord Fraser of Tullybelton), he was junior counsel to Margaret Campbell, Duchess of Argyll, from 1959 to 1963 in the divorce action brought by her husband, the 11th Duke of Argyll, alleging her adultery, which broke new ground in the law of confidentiality.

**Lord MacKay** is the Editor-in-Chief of Halsbury's Laws of England, the major legal work which states the law of England, first published in 1907. In 1987 the then UK Prime Minister, Margaret Thatcher, appointed Lord Mackay as Lord Chancellor. He was one of the longest serving Lord Chancellor's in British History, holding the position for 10 years. In 1987 he caused surprise when, as Lord Chancellor he abolished the Kilmur rules which set out the principle that as a general rule undesirable for judges to take part in radio or television broadcasts. He believed that 'judges should be allowed to decide for themselves what they should do. However, judges must avoid public statements either on general issues or on a particular case which may cast any doubt on their complete impartiality, and that judges should avoid issues which were or might become politically controversial'.

**Lord Hope** of Craighead was appointed as Lord President of the Court of Session in 1989 and became one of the founding justices of the UK Supreme Court on 1 October 2009. As Lord President, he controversially permitted an experiment in televising trials in Scottish courts. This was done for documentary purposes, and whilst it did not result in regular broadcasts taking place it was seen as creative and radical and generated a review as to

whether court proceedings should be televised. Some 17 years later the UK Supreme Court has now decided to televise its hearings as part of an attempt to become more transparent.

**Lady Stacey** was the first woman to be elected Vice Dean of the Faculty of Advocates andwas appointed a Judge of the Supreme Courts in January 2009. She has appeared in a number of high profile cases, including the outbreak of e-coli in Wishaw.

**Lord Reid** is seen as one of the most outstanding judges of second half of the 20th century. In 1948 he was appointed as a Lord of Appeal in Ordinary (one of few individuals to be appointed a Law Lord straight from the Bar and without judicial experience). He sat as a Lord of Appeal in Ordinary for 27 years hearing a number of leading cases.

**Lord Hodge** joined **Lord Reed** as one of the two Scottish members of the UK Supreme Court in 2013 (continuing the long-standing convention that the at least two of the Court's Justices should have comprehensive experience of the Scottish legal system). Lord Hodge also sits on the Judicial Committee of the Privy Council (JCPC). That Committee serves as the court of final appeal for the UK overseas territories, Crown dependencies and for certain Commonwealth countries.

Now watch the following video in which Sir David Edward explores the role of judges in the courtroom.

Video content is not available in this format.
**The role of judges: Sir David Edward**

# 8 This week's quiz

Check what you've learned this week by taking the end-of-week quiz.

Week 5 quiz.

Open the quiz in a new window or tab and then come back here when you've finished.

# Summary

This week, you explored legal reasoning and the work and impact of a number of individual judges. You considered how the judges reached their conclusions in *Donoghue*. Understanding legal reasoning is an important legal skill. Understanding how to structure and develop an argument can assist in all aspects of life and we hope that you found the final activity useful in thinking about those skills.

After studying this week you should be able to:

- outline why and how legal reasoning is used
- outline the reasoning used in *Donoghue v Stevenson* [1932] AC 562 to reach the decision
- explain the role played by a number of individuals holding judicial office.

You can now go to Week 6, where you will explore the role played by individuals and organisations in shaping the law.

# Week 6: Making a difference

## 1 Legal heroes

What do we mean when we refer to ‘legal heroes’? There are a number of differing definitions of the word ‘hero’ and Activity 1 asks you to think about these.

### Activity 1 Definition of a legal hero

Allow about 10 minutes

Think about the following statements and identify the characteristics that you think would make a ‘legal hero’.

Interactive content is not available in this format.

#### Comment

The word ‘hero’ has many different meanings, for example, it could be the central character in a film or book. The word ‘hero’ actually originates from Greek, its original meaning ‘protector’ or ‘defender’.

Certain words become associated with the ‘law’, and the professional conduct regulations of advocates use words such as: independence, trust, personal integrity, confidentiality, personal honour, duty of loyalty, eliminating discrimination.

What, though, makes a ‘legal hero’? There is no one correct answer and the words you identify reflect your own perception of the law and what the law should achieve. For the purposes of this course, the term ‘legal hero’ is used to mean an individual, organisation or institution who made a difference by seeking a change in the law.

## 1.1 A unique legal tradition

Before you move on and watch the following video, take a few moments to reflect on this quotation. It reflects the high regard in which the Scottish legal system is held and also the inextricable link between society and the law in Scotland.

> The Scottish legal tradition is a thing to be prized both in Scotland and beyond its borders, and the public of Scotland should be more conscious of the fact. It is in a very real sense a typical product of the Scottish ethos, and has attracted to its enthusiastic service some of the greatest figures in our country’s history … The truth is that law is the reflection of the spirit of a people, and so long as the Scots are conscious that they are a people they must preserve their law.
>
> (Cooper, 1991)

Watch the video in which Sir David Edward reflects on the Scottish legal system and considers an example of how Scots law has been widely influential.

Video content is not available in this format.
**Sir David Edward reflects on the Scottish legal system**

# 2 Individuals and organisations

Numerous individuals and organisations over the course of history have fostered and fought for changes in the law. These struggles have included issues in relation to land, employment practices, equality, the right to an education, the right not to be punished, the right to vote, against injustice and cruelty. The list is never ending. As society develops, new areas that require regulation also develop. Whilst some areas such as land law and constitutional law have their roots firmly in history, others such as the regulation of the internet and medical treatments such as IVF, are relatively new. This section touches upon a few examples to illustrate the role of individuals, organisations and institutions in developing and changing the law.

## 2.1 James Wilson (1742–1798)

Individuals have had a far-reaching impact on the law in Scotland and in other jurisdictions. One such individual was James Wilson. He was born near St Andrews and emigrated aged 24. He was one of the six original justices appointed by George Washington to the Supreme Court of the United States and he later became one of the first Associate Justices of the Supreme Court. He also played a significant role in drafting the American Constitution. Educated at universities in Scotland, he emigrated with the ideals of the Scottish Enlightenment. He believed that all power derived from ‘the people’ and that American colonies did not have to follow laws laid down by a British Parliament in which they had no representation. These beliefs significantly influenced the drafting of the American Constitution, a process in which he played a key role.


**Figure 1** James Wilson

## 2.2 Whisky and golf

In terms of organisations and institutions, there is one sport in which rules and regulations drafted in Scotland have played a key role. The Royal and Ancient Golf Club of St Andrews sets the rules for golf worldwide (except for the USA and Mexico, but there is little divergence).

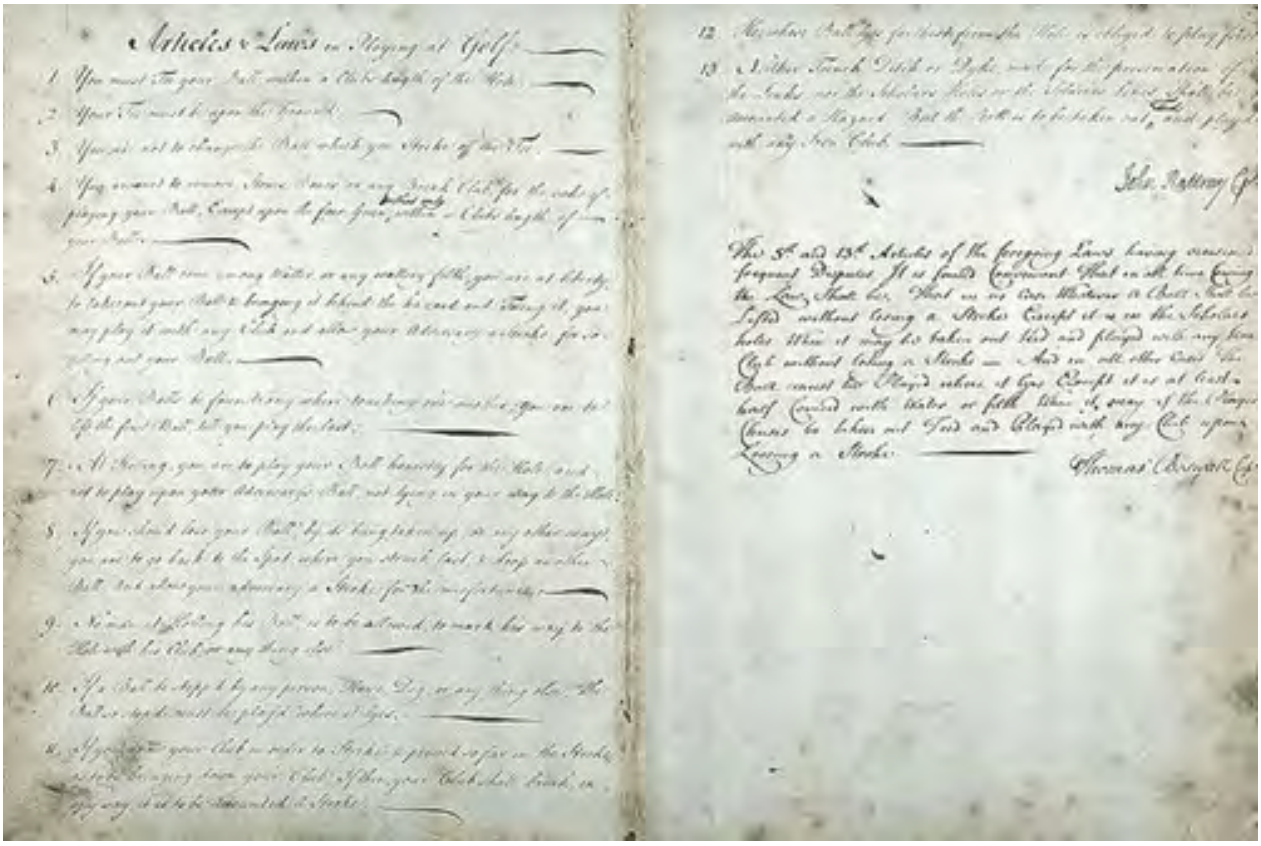

**Figure 2** The original rules of golf

Other industries closely associated with Scotland also set out rules and regulations which have an impact worldwide. For example, the Scotch Whisky Association sets rules as to where single malt Scotch whisky can be bottled.

## 2.3 Mary Barbour (1875–1958)

A statue commemorating the work of Mary Barbour has recently been installed in Glasgow. Mary Barbour was a key figure in a fight by working-class women to oppose draconian and arbitrary rent increases. In 1915 she led months of peaceful protest and civil disobedience as wealthy landlords attempted to exploit women whose sons and husbands were away at war. As a result of that war, new jobs with high wages were being created and housing was needed for the incoming workers. Landlords wanted to maximise their profits and sought an opportunity to cash in by removing their more vulnerable and poorer tenants. Mary Barbour and her supporters stopped them by taking their case to Glasgow Sheriff Court and the City Chambers. Their success in standing up for their rights led to legislative protection which was subsequently copied by other cities throughout the UK and in America.

**Figure 3** Mary Barbour **Figure 4** Statue of Mary Barbour

## 2.4 Caroline Mockford

More recent examples of individuals making a difference can be seen, for example, in the petition submitted by Caroline Mockford (a community activist with The Poverty Alliance) to the Scottish Parliament campaigning for calls to NHS Direct to be made free. Having been charged £8 by her mobile phone provider for ringing NHS Direct, Caroline Mockford wanted to raise awareness of the disproportionate impact that this would have on users most likely to access the service, particularly children, the elderly and those with disabilities. Such calls are now free of charge as a new number was subsequently introduced.


The Scottish Parliament
Pàrlamaid na h-Alba

PUBLIC PETITION NO. PE01285

**Name of petitioner**

Caroline Mockford

**Petition title**

Free calls to NHS 24 for mobile phones

**Petition summary**

Calling on the Scottish Parliament to urge the Scottish Government to make arrangements for all calls from mobile phones to NHS 24 to be free of charge to users.

**Figure 5** A public petition

# 3 Thinking about why change may be needed

Here you will consider a contemporary example of a call for change and reflect upon the reasons why the change was called for and one of the mechanisms used to raise awareness.

## Activity 2 Making a difference

Allow about 10 minutes

In the UK army, under 18s undertake training for combat roles. Many argue that the UK is in breach of international norms on recruiting 16- and 17-year-olds for military service. The UK is the only nation in NATO that allows 16- and 17-year-olds to serve in the armed services.

Read the open letter that was sent to the *Guardian* newspaper in September 2017 and answer the questions that follow.

**Armed forces are no place for 16-year-olds**

> It is unacceptable that the British armed forces continue to recruit people under the age of 18. We are academics who research the armed forces or who are concerned with the wellbeing of young people, and it has been brought to our attention that the youth wing of the Scottish National party is

presenting a motion to raise the minimum age of military recruitment to 18 at the SNP's national conference. We fully support the SNP youth motion.

The UK is one of only 19 countries worldwide to recruit 16-year-olds. Other countries that do so include North Korea, Iran and Syria. No other EU or Nato member state recruits 16-year-olds. Some 2,250 minors were recruited into the armed forces in the past 12 months. The army alone enlisted 1,000 16-year-olds. This makes 16-year-olds the single biggest age group entering the army. The army states that it uses the recruitment of minors as "an opportunity to mitigate standard entry shortfalls, particularly for the infantry". This is worrying because the infantry has the highest fatality and injury rate of any branch of the armed forces. Child Soldiers International has found that soldiers who enlisted at 16 were twice as likely to die in Afghanistan as those who enlisted aged 18 or above.

The UK's child recruitment policy has been challenged by the UK Parliament's joint committee on human rights, the defence committee, the Equality and Human Rights Commission, major child rights organisations, Amnesty International, the National Union of Teachers, the UN committee on the rights of the child and military veterans themselves. The UK government has ignored all these calls to review the policy, and it is an issue on which the SNP should take leadership.

**Dr Rhys Crilley** *Open University*
**Dr Jamie Johnson** *University of Sheffield*
**Dr Aggie Hirst** *City University London*
**Alister Wedderburn** *Australian National University*
**Dr Kevin McSorley** *University of Portsmouth*
**Dr Helen Dexter** *University of Leicester*
**Dr Katy Parry** *University of Leeds*
**Dr Melanie Richter-Montpetit** *University of Sheffield*
**Dr Joanna Tidy** *University of Sheffield*
**Dr Andrew Judge** *University of Glasgow*
**Professor Cynthia Enloe** *Clark University, USA*
**Dr Naomi Head** *University of Glasgow*
**Dr Laura Mills** *University of St Andrews*
**Dr Catherine Baker** *University of Hull*
**Dr Ciaran Gillespie** *University of Surrey*
**Dr Claire Duncanson** *University of Edinburgh*
**Dr Laura Shepherd** *University of New South Wales, Australia*
**Dr Megan Mackenzie** *University of Sydney, Australia*
**Dr Julia Welland** *University of Warwick*
**Dr Linda Åhäll** *Keele University*
**Dr Nicholas Robinson** *University of Leeds*
**Dr Harriet Gray** *University of Gothenburg, Sweden*
**Dr Victoria Basham** *Cardiff University*
**Dr Katharine Wright** *Newcastle University*
**Dr Cian O'Driscol** *University of Glasgow*
**Dr Scott Harding** *University of Connecticut, USA*
**Seth Kershner** *Northwestern Connecticut Community College, USA*
**Federica Caso** *University of Queensland, Australia*
**Professor Sally Wyke** *University of Glasgow*
**Dr Chris Rossdale** *London School of Economics and Political Science*

**Dr John Carman** *University of Birmingham*
**Alice Cree** *Durham University*
**Dr Diana Martin** *University of Portsmouth*
**Dr Nancy Taber** *Brock University, Canada*
**Dr Synne Dyvik** *University of Sussex*
**Dr Bryan Mabee** *Queen Mary University of London*
**Wesley Doyle** *University of Liverpool*
**Dr Robertson Allen** *Author of America's Digital Army, USA*
**Professor Hugh Gusterson** *George Washington University, USA*
**Dr Matthew Flintham** *Kingston University*
**Professor Anthony Burke** *University of New South Wales, Australia*
**Albert Sargis** *Niebyl-Proector Marxist Library for Social Research, USA*
**Dr Adam Broinowski** *Australian National University*
**Dr James Eastwood** *Queen Mary, University of London*
**Professor Paul Dixon** *Kingston University*
**Dr Catriona Pennell** *University of Exeter*
**Dr Sarah Bulmer** *University of Exeter*
**Dr Brian Lagotte** *University of Kansas, USA*
**Henry Redwood** *King's College London*
**Dr Hannah Partis-Jennings** *King's College London*
**Dr Thomas Gregory** *University of Auckland, New Zealand*
**Dr Cristina Masters** *University of Manchester*
**Dr Tom Smith** *University of Portsmouth*
**Dr Stephen Gibson** *York St John University*
**David Gee** *ForcesWatch*

(*Guardian*, 2017a)

1. What was the purpose of the letter?

*Provide your answer...*

2. What motion were the academics listed supporting?

*Provide your answer...*

3. Why do you think this particular newspaper was chosen?

*Provide your answer...*

4. What do the list of signatories have in common?

*Provide your answer...*

5. What committees challenged the recruitment of 16- and 17-year-olds?

*Provide your answer...*

Comment

1. The purpose of the letter was to raise awareness of an issue, which it is claimed, the UK Government was ignoring. In effect, the letter was calling upon the Scottish National Party (SNP) (who, at the time of writing, formed the Scottish Government) to show leadership on the issue.

The letter had been sent in support of a motion proposed by the SNP youth branch at the forthcoming SNP national conference. This motion supported raising the age of recruitment for the UK armed forces to 18.

2. The letter was designed to raise awareness of the SNP's youth branch conference motion at the SNP conference in October 2017. The SNP's youth branch campaigns for the raising of the army recruitment age.

3. The *Guardian* is an UK-wide newspaper with a wide readership and is known for its investigative journalism and dispassionate discussion. The paper has an editorial code which is published and accessible via the internet. In the summary it states:

> A newspaper's primary office is the gathering of news. At the peril of its soul it must see that the supply is not tainted.
>
> The most important currency of the Guardian is trust. This is as true today as when CP Scott marked the centenary of the founding of the paper with his famous essay on journalism in 1921.
>
> The purpose of this code is, above all, to protect and foster the bond of trust between the paper and its readers, and therefore to protect the integrity of the paper and of the editorial content it carries.
>
> (Guardian, 2017b)

4. The list of signatories (bar one) work in academia and identify which university they are employed by. They include academics from the UK, USA, New Zealand and Australia.

5. The committees which have challenged the recruitment of 16- and 17-year-olds are the Defence Committee and UK Parliament's Joint Committee on Human Rights. The Defence Committee is appointed by the House of Commons (in the UK Parliament) to examine the expenditure, administration and policy of the Ministry of Defence and its associated public bodies. The Joint Committee on Human Rights consists of twelve members, appointed from both the House of Commons and the House of Lords (in the UK Parliament), to examine matters relating to human rights within the United Kingdom. (This excludes consideration of individual cases.) Defence is a reserved matter and falls outside the remit of the Scottish Parliament.

This also illustrates how, since devolution, the support of one administration can be used to effect change in the law across the UK (other examples include legislation charging for carrier bags, the smoking ban, equality on public boards, prevention of domestic violence and opt-out organ donation schemes).

Having thought about the call for review of the recruitment of 16- and 17-year-olds, read the briefing in Box 1 provided by ForcesWatch.

## Box 1 ForcesWatch briefing

The minimum age for enlisting in the UK armed forces is 16. The UK is the only country in Europe which routinely recruits people aged under 18. Those who sign on when 16 or 17 must serve until they are 22.

The recruitment of minors has been criticised by the United Nations Committee on the Rights of the Child, Parliament's own Joint Committee on Human Rights and children's charities amongst others. The Armed Forces Bill is an opportunity to phase out the recruitment of people under 18 in line with international standards, while introducing greater protection for 16- and 17-year-old personnel in the meantime.

**Recruiting minors**

People under 18 are not legally recognised as adults. They cannot vote or, in most cases, sign contracts. They are barred from buying the most violent films and video games. For minors to join the armed forces, they must have parental consent. Yet, a contract which they signed as a minor will legally bind them for up to 6 years.

Independent research has highlighted many areas in which the recruitment of young people into the armed forces is not characterised by transparency. Not only is recruitment material often less than balanced about the risks, obligations and dilemmas involved, but after enlistment there is considerable misunderstanding by those recruited as to their rights. The research concludes that, as a result, many young people are not making an 'informed choice' to join the army.

The UK is the only country in Europe which routinely recruits minors into the armed forces.

Worldwide, 134 countries have prohibited the practice. 37 countries recruit from the age of 17. The UK is one of only 20 countries in the world to recruit 16-year-olds. These countries include no other member of NATO and no other permanent member of the UN Security Council. But they do include several regimes with little respect for human rights, including Iran, Zimbabwe and North Korea.

**Restrictive terms of service**

After their first six months, minors are committed to remaining in the forces until turning 22.

Whereas an adult commits to serve for four years, a minor is committed for four years from his/her 18th birthday – up to six years in total.

Although members of the armed forces cannot legally be deployed on the front line until they turn 18, once they become adults they continue to serve based on a commitment they made as a minor with no opportunity to reassess this commitment as an adult. This appears to be a legal anomaly. Michael Bartlet, Parliamentary Liaison Secretary for the Religious Society of Friends (Quakers), describes this situation as 'conscription by the back door' because it relies on 'a decision made without informed consent' (ForcesWatch, 2011).

This information from this source supports the factual information presented in the letter to the *Guardian* newspaper, but builds on it by considering the age of consent implications. However, both the letter to the *Guardian* and ForcesWatch are campaigning for reform of the current position. Information that supports their viewpoint is therefore presented. On their website, ForcesWatch outline their purpose, stating that it 'scrutinises the ethics of armed forces recruitment practices and challenges efforts to embed militarist values in civilian society.' Alternative positions arguing for no change also exist.

Legislation in regulation to the armed forces is often reviewed, for example, the Armed Forces (Flexible Working) Bill 'to make provision for members of the Regular Forces to serve part-time or subject to geographic restrictions' was introduced into the House of Lords (UK Parliament) in October 2017.

The course authors chose this topic as it is one relating to a reserved matter and one where the international community and UK Parliamentary Committees (amongst others) have identified a need for change. However, not everyone is in agreement that this change is necessary. Whether it occurs will be a reflection of changing values and ideas within society around the employment and rights of minors. This also highlights a grey area of law where there are contradictory rules about minors. For example, minors can vote in Scottish Parliamentary elections or join the armed services at 16, can marry with parental consent at 16 but cannot vote in a UK Parliamentary election or open a bank account until 18.

# 4 Reflecting changes in society

Law can be used as a mechanism for change in society, for example, in charging for carrier bags to reduce plastic waste and pollution. However, changes in society can influence changes in the law, for example, the right to vote, equality and regulation of medical practitioners.

> Laws exist to help protect our rights and shape how we live and work. Law, policies or procedures often change when there is believed to be a fairer or better way of doing things.
>
> (Scottish Parliament exhibition, 2017)

One change that has recently been explored is in an area that is highly emotive, that of organ donation. Organ donation can save a life at a time when another life has been lost. In June 2014 Anne McTaggart, a Member of the Scottish Parliament (MSP), issued a consultation document on a Proposed Organ and Tissue Donation (Scotland) Bill, 'A proposal for a Bill to amend the law on human transplantation, including by authorising (in certain circumstances) the posthumous removal of organs and tissue from an adult who had not given express consent'.

She gave her reasons for issuing a consultation as:

> The existing opt-in system of organ donation in Scotland has been the subject of debate for a number of years. The United Kingdom has one of the lowest organ donation rates in Europe. In view of the significant difference between the number of people on the waiting list for transplant operations and the number of organs available, I believe that reform is essential.
>
> (McTaggart, 2014)

This consultation was issued at a time when the law was changing in another devolved nation, Wales. On 1 December 2015 the law in Wales changed. A soft 'opt-out' system for consent to organ donation was introduced through legislation from the Welsh Assembly. People living in Wales have the following choices:

- If they want to be a donor, they can either register to be a donor (opt-in) on the NHS Organ Donor Register or do nothing.
- If they do nothing, they are regarded as having no objection to donating their organs. This is called deemed consent.
- If they do not want to be a donor, they can register not to be a donor (opt-out) on the NHS Organ Donor Register.

They can appoint a representative to make the decision for you after their death.

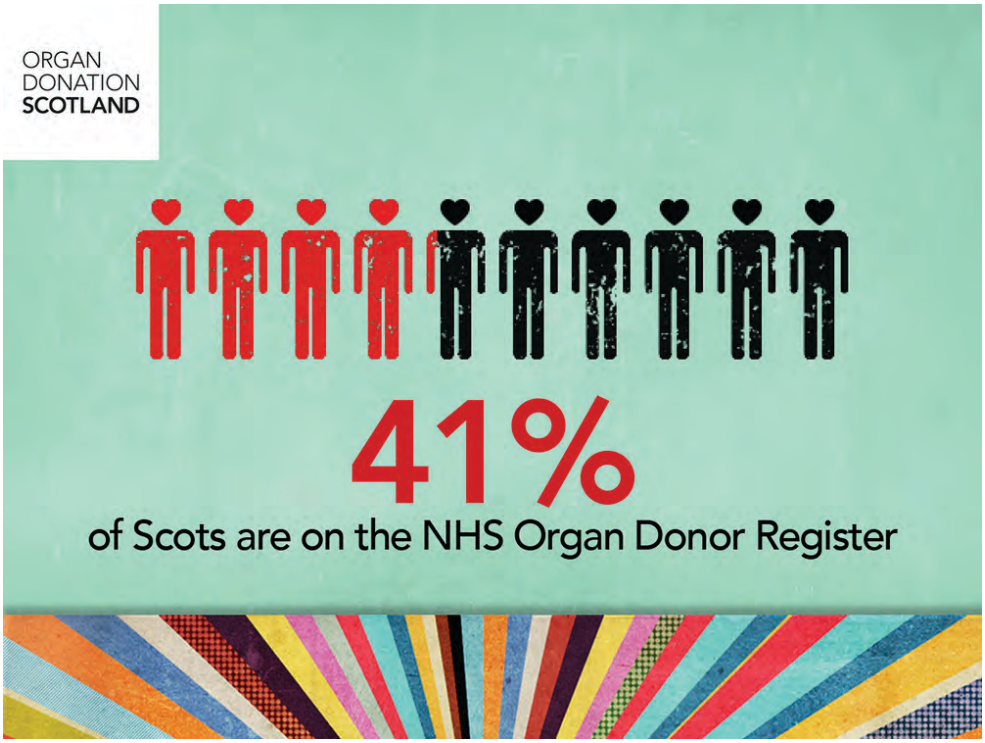


**Figure 6** Organ donation register Scotland

Anne McTaggart's Bill was eventually defeated but she had raised awareness of the need for some form of change. In December 2016 the Scottish Government issued a consultation. That consultation closed in March 2017. An extract of the consultation is in the box below.

## Box 2 Feedback updated 3 Jul 2017

We Asked

For views on ways to increase numbers of successful organ and tissue donations, including proposals to introduce a soft opt out system of organ and tissue donation.

You Said

The responses to the consultation suggest that there is significant support for organ and tissue donation in Scotland, including the introduction of further measures which aim to increase donation. The responses show significant support for the introduction of a soft opt out system, and the system as set out in the consultation.

We Did

We intend to introduce legislation for a soft opt out system of organ and tissue donation as well as taking forward other measures to increase organ and tissue donation.

Results Updated 3 Jul 2017

The Scottish Government undertook a consultation inviting views on ways of increasing the numbers of organ and tissue donations. The consultation paper outlined options including the introduction of a soft opt out / deemed authorisation system. It also suggested ways of increasing referrals by clinical teams to specialist transplant teams when they are caring for a dying or recently deceased patient. The findings presented summarise the views of those who participated in the consultation.

Files:

- Organ and Tissue Donation and Transplantation Analysis of Responses.pdf (PDF document)

Links:

- http://www.gov.scot/Publications/2017/07/3119

Published Responses

View submitted responses where consent has been given to publish the response.

(Scottish Government, 2017)

A Bill will be prepared and put before the Scottish Parliament. If you are interested in reading the consultation papers and documents please use the links in the box above.

You should now watch Sir David Edward as he reflects on a significant legal change. This provides a further example of the law responding to changes within society, changes in values and attitudes and which demonstrates the UK's ongoing commitment to its obligations under the ECHR (in this particular instance Article 1).

Video content is not available in this format.
**Sir David Edward: legal change**

# 5 A UK Supreme Court

As you learnt in Week 1, the rule of law is one of the principles underpinning the UK's constitution. One of the features of the rule of law is the separation of powers – that the executive, legislature and judiciary should all perform separate functions within the state. In this way they can act as checks and balances on each other and thus prevent the abuse of power.

This was not adhered to in its strictest sense for many centuries as the highest appeal court in the UK was formed from holders of judicial office in the House of Lords, the UK Parliament's (the legislative branch) second chamber. This changed on 1 October 2009 when judicial power was transferred from the House of Lords to the newly created UK Supreme Court. At the time of writing, two of the Justices of the UK Supreme Court are Scottish – Lord Reed and Lord Hodge. Lord Lloyd-Jones and Lord Kerr are the first UK Supreme Court Justices to come from Wales and Northern Ireland respectively.

**Figure 7** UK Supreme Court Parliament Square London

This move to a new UK Supreme Court was not without criticism as Activity 3 below shows. Activity 3 asks you to read an extract from the written evidence to the Select Committee on Constitutional Reform (UK Parliament).

## Activity 3 UK Supreme Court

Allow about 20 minutes

Read the extract from the written evidence presented to the Select Committee on Constitutional Reform at the UK Parliament. Based on your reading of the extract, answer the questions below.

1 Why had English law had little influence over Scots criminal law?

2 What concerns are expressed about English judges hearing a Scottish appeal?

3 In the conclusion, what view does the writer reach on ways to make the UK Supreme Court effective for Scots law?

Box 3 Written evidence to the Select Committee on Constitutional Reform

### Box 3 Memorandum by Ross Gilbert Anderson

1. INTRODUCTION

In his well-known work on the *Law of the Constitution, the great English constitutional lawyer, Dicey stated that "it would be rash of the Imperial Parliament to abolish the Scotch law courts, and assimilate the law of Scotland to that of England. But no one can feel sure at what point Scottish resistance to such a change would become serious." In 1953, following the coronation of Her Majesty, the great Scottish judge, Lord Cooper of Culross, labelled such a view "exceedingly cynical"2 and suggested that an Advisory opinion from the International Court of Justice might be available if such a situation arose. Mercifully, the*

*government's proposals for a new Supreme Court for the United Kingdom do not include a proposal to abolish the independent existence of Scots law. Nevertheless, the proposals, in their present form, pose a serious threat to the independent existence of the Scottish legal system. That is not to say that the status quo is ideal. Far from it. Indeed, some of the criticisms which follow are applicable* mutatis mutandis to the present arrangements.

The Judicial Committee of the Privy Council now has limited jurisdiction over Scots criminal law. Prior to devolution, there had never been any London jurisdiction over Scots criminal law. Scots criminal law has therefore been little influenced by English law. One of the cornerstones of the Scottish criminal justice system has been the tight time constraints in which an accused must be served with the indictment (80 days) and brought to trial (110 days).There has never been such a culture, never mind statutory requirement, in England. In a recent case the issue in a Scottish appeal was whether unreasonable delay had led to a breach of the ECHR on the right to a fair trial. There were a majority of three Scottish judges on the committee. They were quite clear that the unreasonable delay had led to a breach of the convention. The English judges disagreed: one of the reasons being that such a decision would have catastrophic consequences in England, though English law was quite irrelevant to the appeal. Unfortunately, however, when the same point arose for decision in an English appeal, the English judges doubted whether the previous decision in the Scottish appeal was correct, much to the consternation of the Scottish judges, Lord Hope and Lord Rodger. The Scottish appeal was not, after all, binding on the court in the English appeal. There is no reason whatsoever why one result can be reached for Scotland and another for England; indeed, this has been the position in criminal law for the last three hundred years of union. With respect, it seems to this writer that the great problem with the present arrangements (which will be perpetuated in the proposed Supreme Court) is a great reluctance on the part of the English judges to do anything in a Scottish appeal other than reach the result that would be reached on the basis of English law. This is not surprising: that is the law in which they are trained and indeed expert.

6. PRECEDENT

The foregoing point raises an important issue. The legal systems of Scotland and England both apply a principle of precedent, i.e. lower courts are bound by the judgments of higher courts. At the moment, a judgment of the House of Lords in an English appeal is binding only in England; judgments in Scottish appeals bind only Scottish courts. As was highlighted in the previous paragraph, differences between Scottish and English law do arise. Yet, nowhere in the Constitutional Reform Bill 2004 is there a guarantee that English judgments will not be binding in Scotland. This again highlights the problem of judges who are quite unqualified to pronounce on Scots law producing opinions which the Court of Session may then be bound to follow. A rigid system of precedent is not required to achieve uniformity between the laws of Scotland and England. Scottish lawyers make regular and often copious

reference to English law. Often the results arrived at are the same in both systems. Rather, it is the way of arriving at that result which sometimes differs; and the chosen route can be very important for future legal development. The more flexible system of precedent advocated here would also allow different decisions to be reached in the small number of cases where differences do arise.

CONCLUSIONS

This comment has tried to make clear that Scots lawyers find the present appellate system highly unsatisfactory. Indeed, it may be that the present system, to be perpetuated by the Supreme Court, is itself in breach of the ECHR. If the Supreme Court is to inspire the confidence of the Scottish people, it must be comprised only of practising Scottish judges (paragraph 1). They should be appointed on an *ad hoc* basis (paragraph 7). This is something which has, to some extent, already begun: in some Privy Council cases, extra Scottish judges have been drafted in to ensure a Scottish majority. I would argue, however, that only a full bench of Scottish judges is sufficient to comply with the ECHR: otherwise, if there be disagreement among the Scottish judges, the opinions of unqualified judges will have the deciding vote. Finally, provision must be made to ensure that decisions of the Supreme Court in English appeals are not binding on Scottish courts (paragraph 6).*21 April 2004*

(House of Commons, 2004)

### Comment

The writer in the extract expresses a number of concerns and is clearly unhappy with the way in which Scottish appeals may potentially be dealt with in what are, in effect, appeal courts staffed mainly by English Judges. There was no one way in which to answer the three questions but the main points were as follows:

1. The conclusion that English law has had little influence over Scots criminal law was drawn as prior to devolution there had been no jurisdiction over Scots criminal law in the appeal courts in England. The highest appeal court in relation to criminal law had been the High Court of Justiciary. However, when criminal matters now involve a matter of human rights, the highest civil appeal court could hear the case (the House of Lords and now the UK Supreme Court). This is staffed by a majority of English judges who have little or no knowledge and experience of Scots criminal law and Scots legal traditions. The writer provides an example of the differences in relation to the item constraints which exists in Scotland but not in England.

2. A number of concerns were expressed about English judges hearing a Scottish appeal. One of these was mentioned in relation to question one; English judges are not grounded in Scots law or Scots legal tradition. Another was that English judges may question a decision of Scottish judges without providing an opportunity for the Scottish judges to respond. An example was also given that a matter may be relevant to Scotland but that applying the precedent may cause significant issues in England, so the decision in a Scottish appeal case may therefore be questioned by English judges.

3. The views the writer reaches on ways to make the UK Supreme Court effective for Scots law include ensuring that decisions in English appeals are not binding on

Scottish courts and that judges should be co-opted so that only Scottish judges hear Scottish cases.

The writer makes reference to the 'English' legal system. Whilst many texts make reference to the 'English legal system' the correct reference is to the legal system in England and Wales. The use of the shorthand 'English' leads to misconceptions, but an alternative has not yet been found.

Whilst some of the writer's concerns have been addressed with the establishment of the UK Supreme Court, for example, there are two Scottish judges appointed as justices who sit in Scottish cases with one or more other judges. There is no full bench of Scottish judges.

Such significant constitutional change is relatively rare. The end of the twentieth century did, however, see an unusual number of constitutional statues enacted, ranging from those which enabled the UK to join the EU, as well as human rights protections and devolution. All these reflected and furthered change in society.

# 6 Making a difference individuals and organisations

Law is not static – as you heard in the earlier week 1 audio which quoted from an article by Professor Gary Slapper, the first Professor of Law at the OU,

> Although law is sometimes portrayed as a dull discipline pursued by ethically dubious practitioners, it is a spellbindingly vivid and varied subject which affects every part of human life […] law permeates every cell of social life. Law governs everything from the embryo to exhumation. Law regulates the air we breathe, the food and drink that we consume, our travel, sexuality, family relationships, our property, sport, science, employment, education, and health, everything in fact from neighbour disputes to war
>
> (Slapper, 2012)

Individuals and organisations play a role in developing and changing the law and, whether large or small, their contributions are important and central to the role law plays in society.

Here you explore just a few examples of individuals and organisations who have worked to effect legal change. Our selection of examples is based on conversations with colleagues and students. The answers they gave as to who their legal hero was help highlight how change occurs. The one thing all these individuals have in common is that, whether large or small they helped make a difference.

## Donald Dewar

Donald Dewar started his career as a solicitor and first became an MP in 1966. His political careers spans both The UK and Scottish Parliaments. As a passionate supporter

of devolution his contributions both to the establishment and work of the Scottish Parliament has led to him being referred to as the ‘Father of the Nation’.

Following the 1997 general election as MP for Glasgow Anniesland he was given the post of Secretary of State for Scotland. In this UK Government post he was able to kick start the devolution process he had long dreamt of.

Following the 1997 referendum in which there was a majority of 74%, in favour of devolution work began on the creation of a Scottish Parliament. Donald Dewar worked tirelessly on creating the Scotland Act 1998 (popularly referred to by some as ‘Smith's unfinished business’), the act that transferred law making powers back to Scotland. The Scotland Act 1998 gave Scotland its own Parliament, a historical moment as 300 years earlier the Scottish Parliament had been abolished as part of the Union with England.

In the first elections to the Scottish Parliament held on 6 May 1999 Donald Dewar was elected as the Member of the Scottish Parliament for Glasgow Anniesland. When the Scottish Parliament opened in July 1999 he was nominated as the first First Minister. He was officially appointed by the Queen on 17 May 1999 at a ceremony in the Palace of Holyroodhouse and later sworn in by the Lord President of the Court of Session where he received the Great Seal of Scotland.

As First Minster he set out a wide ranging agenda for news laws which were designed, for example, to improve standards in Scottish schools; give right of access to the countryside, abolish the feudal system of land tenure and to establish National Parks in Scotland.

Although everyone did not agree with his views or politics he fought for significant legal change in Scotland and worked tirelessly to establish the new parliament. His work in this respect is an example of a legal hero, someone who worked tirelessly for change in the belief it would create a better Scotland and a Scotland with an inclusive and transparent parliament that worked for everyone.

A statue, which reflects his always slightly crumpled appearance and recognises his contributions has been erected in Glasgow, the city where he held a seat as both MP and MSP. The base of the statue is inscribed with the opening words of the Scotland Act: ‘There Shall Be A Scottish Parliament’, a phrase about which Donald Dewar himself said at the opening of the Scottish Parliament in July 1999 ‘Through long years, those words were first a hope, then a belief, then a promise. Now they are a reality’. On display in the Scottish Parliament is a copy of the Scotland Act signed by the then UK Prime Minister Tony Blair which says ‘It was a struggle, it may always be hard; but it was worth it. Scotland and England together on equal terms!’


**Figure 8** Donald Dewar

# Sir David Edward

You have watched Sir David Edward speak on a number of topics. Throughout his long career he has made a significant contribution to the legal system and to laws which have benefitted those resident within the EU.

In the words of one of his colleagues 'His life has been marked by service and accomplishment, and his contributions have influenced – and undeniably opened opportunities for – today's and tomorrow's European Union citizens.' In the words of another his 'life and career have been both inspiring and instructive'.

Sir David Edward was admitted to the Faculty of Advocates in 1962 and became a QC in 1974. He served as Clerk and then Treasurer of the Faculty, represented the Faculty at the Consultative Committee of the Bars and Law Societies of the European Community (of which he served as President from 1978–80).

He was Salvesen Professor of European Institutions and Director of the Europa Institute at the School of Law of the University of Edinburgh from 1985 to 1989, during which time he served on three occasions as Specialist Adviser to the House of Lords Select Committee on the European Communities.

In 1989, he was appointed one of the inaugural Judges of the newly created European Court of First Instance and in 1992 was appointed Judge of the European Court of Justice a position from which he retired in 2004.

He sat as a temporary judge of the Court of Session in Scotland, hearing civil appeals until 2009. In December 2005 was sworn into the Privy Council. He was also a member of the Commission on Scottish Devolution chaired by Professor Sir Kenneth Calman, and a member of the UK Commission on a Bill of Rights, 2011–12.

In the course of his practice at the Bar, Sir David appeared eight times in the House of Lords (the UK's most senior appeal court in civil matters) and four times before the Court of Justice of the European Communities:

Generous with his time, expertise and experience, his contributions have enriched both the legal system in Scotland and in the EU, and though these wider society.

**Figure 9** Sir David Edward

# Fidra

Fidra is a charity which seeks ways to gather local concerns over current and emerging environmental issues, and use these to contribute to a wider dialogue at both national and international levels.

Fidra's charitable aspirations were born out of The Great Nurdle Hunt, when 'A group of local mums' became concerned that plastic pellets were washing up on their local beaches. Using the evidence they collected they harnessed the concerns of people living around the Firth of Forth and then throughout Scotland and further afield to encourage plastics producers, users, transporters and trade associations to introduce best practice in plastic pellet management, Operation Clean Sweep.

The charity has worked on a number of projects including raising awareness of the environmental issues caused by the use of plastic cotton buds. Working at a local level they produce evidence and use this to lobby for change, both within the plastics industry and within the law. Working with other organisations their campaigns for change have had an impact, for example, it led to an announcement by the Scottish Government that a public consultation on plans to ban the manufacture and sale of plastic-stemmed cotton buds would be held.

# Assynt Crofters' Trust and Allan Macrae

The 1 February 1993 has become an historic date in relation to the laws of land tenure in Scotland.

In 1989 the Vestey family sold the North Lochinver Estate (the 'Estate') in three parcels for £1 million to a Swedish land speculator. The people who lived and worked the land were not consulted and were presented with a fait accomplis.

In 1992 that Swedish land speculator went into liquidation. A London firm of Liquidators appointed selling agents. The 'Estate' was divided into seven parcels. Once again there was no consultation of the local people who lived and worked on the land. The possibility of a number of disinterested and remote landlords loomed large for those who lived and worked on the land for generations. Their homes and livelihoods were at risk through a process over which they had no input or control.

A public meeting was called at which it was proposed that the crofters on the Estate should try and raise sufficient money to bid for the land themselves. This would enable them to secure their own future and the future generations to come. The aim was to achieve 100% croft ownership.

There were no forgone conclusions and the crofters worked hard to raise awareness of their situation and to secure capital with which to buy the Estate. Their campaign began to gain wide support thanks to publicity on a local and international level. The crofters formed a trust, the Assynt Crofters' Trust. As a result of the publicity offers of support and financial contributions were made to the trust from all over the world.

Despite the support shown it was not a straightforward process. Two offers to buy were made to the liquidators, both were refused. The trust had to change tactics and turned to the legal regulations of the time. They threatened to use right-to-buy provisions of crofting law to buy the crofts. This option had drawbacks (it was potentially expensive, time-consuming and involved resorting to legal provisions) and would not have given the trust complete control of the estate. However those tactics meant the Estate was less attractive

to other buyers. Compulsory purchase of the crofts would force new landowners to sell parts of Estate land for a fraction of its value.

In December 1992 a deal was reached with a sale price of £300,000 pounds. Almost half of the money was raised by locals and their supporters worldwide, the rest was made up from grants and loans from public bodies.

On 1st February 1993, following their hard fought campaign, the Assynt Crofters' Trust took title to the land and, in the words of the local MP, 'lit a beacon throughout Scotland'.

On 26 June 2013 a motion was lodged at the Scottish Parliament which noted:

> That the Parliament notes with regret the untimely death of Allan Macrae at Lochinver who led the successful Assynt crofters' bid in 1993 to take control of the North Lochinver estate, which involved teamwork and leadership of a high order; understands that this was the first modern takeover of crofting land and has inspired today's community land movement to reclaim 500,000 acres of Scotland into local control; recalls what it considers Allan's dramatic use of language that galvanised his fellow crofters to persevere in retaking the land of their ancestors and make it subject to modern local democratic control; understands that there was world-wide welcome for the Assynt crofters' success, and contends that this action of the Assynt crofters represents a major part of the modern-day land rights movement and set a template for many more similar buyouts by communities across the Highlands and Islands and the rest of Scotland.

**Figure 10** Allan MacRae of the Assynt Crofters' Trust

# John Muir Trust

The John Muir Trust (the trust) is a Scottish Charity which takes its name from John Muir. John Muir was Scots-born and is regarded as founder of the modern conservation movement. He is known for his work as one of the early campaigners to preserve the natural wilderness in the United States where he played a key role in creating National Parks, such as the Yosemite and in setting up the Sierra Club, which is still a prominent American conservation organisation.

Their purpose is 'To conserve and protect wild places with their indigenous animals, plants and soils for the benefit of present and future generations'. They work to defend wild land, enhance habitats and encourage people of all ages and backgrounds to connect with wild places.

The trust collects collect evidence and campaigns throughout Scotland. They note, for example, that in 2013, only 27% of Scotland was free from the visual intrusion of a man-made built development, that native woodlands cover a mere 4% of the land area in Scotland and more than half of these are dying due to overgrazing by high deer populations. That time spent by children playing outside is down 50% in just one generation.

Examples of campaigning work which has led to change include the introduction of improved wild land protection measures by the Scottish Government and the adoption of the Wild Land Areas map into planning policy.

Having considered some examples of individuals and organisations who have fought for legal change you'll now take a more focused look at firsts, and in particular some firsts that occurred in the legal profession in the 20$^{th}$ century.

The Sex Disqualification (Removal) Act 1919 opened up an exclusively male legal profession to women. Whilst females were admitted into the profession following the 1919 act it was not until the late twentieth century that a female judge was admitted to the College of Senators and sat in Scotland's higher courts.

# Madge Easton Anderson

In 1920 Madge Easton Anderson was the first woman in Scotland and the UK to qualify as a lawyer and was the first woman to graduate from Glasgow University with a degree in law. Some women had graduated from the Faculty of Law at Edinburgh University previously but had been prohibited from practising as lawyers.

Madge Easton began working as an apprentice law agent in May 1917. In 1920 she was admitted as a law agent in Scotland (the Law Society of Scotland was only created in 1949). Her application for admission as a law agent was initially refused, because she had begun her three years of training before the passing of the Act and her indenture of training had not been properly registered (her registration was refused in 1917 because she was a woman). She appealed to the Court of Session and her case was heard in December 1920.The court criticised the English terminology used in the Act and upheld her appeal.

# Dame Margaret Henderson

Dame Margaret Henderson Kidd QC was a pioneering woman lawyer who studied law at the University of Edinburgh. She graduated in 1922 and in 1923 was called to the Faculty of Advocates, becoming its first female member (and, until 1948, its only female member).

During an eminent legal career, Margaret became the first woman advocate to appear before the House of Lords and before a Select Committee of the House of Commons. In 1948 she became the first woman to become a King's Counsel in Britain. She went on to become Sheriff Principal (the first woman to occupy such a post) and was also Editor of the Court of Session law reports of the Scots Law Times from 1942 to 1976.

**Figure 11** Dame Margaret Henderson

# Elish Angiolini

Elish Angiolini was appointed Solicitor General for Scotland in 2001 and was the first solicitor (as opposed to advocate) to be appointed Solicitor General. Her appointment was not received favourably amongst all members of the legal profession.

Her nomination for the post of Lord Advocate was passed by Parliament in October 2006 (with 99 votes in favour 0 against and 15 abstentions) .She was subsequently sworn in as Lord Advocate at the Court of Session on 12 October 2006. A month later she became a member of the Privy Council.

Her background was that of a career prosecutor. She had been a procurator fiscal in Glasgow and Airdrie, held senior posts in the Crown Office (which oversees Scotland's prosecution service) and served as the regional prosecutor for Grampian, Highlands and Islands.

She was also one of only two Lord Advocates in 500 years who was not allied to the politically dominant faction in Scotland. On her appointment she noted: ‘There is still a great deal to be done to ensure that, as Nelson Mandela says, prosecutors defend the rights of the weakest and the worst amongst us.’

**Figure 12** Elish Angiolini

The following are further examples of legal ‘firsts’ and are ones which have had significant impact on the legal system:

- In 1880 that Dr Henry Faulds, a Scottish pysician and missionary working in Japan, published his idea of recording fingerprints with ink, and was the first to identify fingerprints left on a glass bottle.

- The world's first cloned mammal was created in 1996 by a team of experts at the Roslin Institute near Edinburgh. Dolly the sheep survived for six years. Her birth saw the Cloning Act rushed through the UK Parliament as the law raced to keep up with scientific developments

## Finally

There are many individuals and organisations who campaign for change, the petition pages on the Scottish Parliament website contains many examples of people and organisations seeking change, examples include the petition of Caroling Mockford which was discussed earlier. Other petitions range from making the wearing of cycle helmets compulsory, land registration, homelessness, literary standards in schools, control of wild goose numbers.

Changes in the law and legal system occur for many reasons: to reflect changes in society, to remedy injustice, to achieve justice, to build a fairer and more equal society, to compensate, punish and provide restitution. You may not agree with all the changes or the way in which they were achieved but understanding why change was sought and how it was achieved is important in helping formulate your own ideas, opinions and voice.

The legal system is dependent on individuals and organisations, through them ideas for change are proposed and debated, their passion for making a difference, whether for one individual or for society as a whole, helps the legal system to develop, keeps it relevant to society and ensures it used to hold both State and government to account. We all play a role in this, whether large or small, when we vote in elections. Who our legal heroes are however will be influenced by our own experiences and interests. The course authors hope that this brief exploration of just a small number of examples has been of interest and that it has inspired you to think about who your legal hero would be.

# 7 This week's quiz

Check what you've learned this week by taking the end-of-week quiz.

Week 6 quiz.

Open the quiz in a new window or tab and then come back here when you've finished.

# Summary

In this week you have explored some examples of the work of individuals, organisations and institutions that have effected change. Whether you regard them as legal heroes will depend on your viewpoint. The course authors have chosen them to illustrate the wide range of individuals, organisations and institutions who have worked to make a difference and instigate change.

After studying this week you should be able to:

- explain the role of individuals, organisations and institutions in effecting change in the law
- identify examples of how the law has changed in response to the needs of society
- explain the tensions over the rule of the UK Supreme Court.

Next week you will explore the principles of good decision-making and consider on what grounds decisions of public bodies may be effectively challenged. Week 7 explores ways in which you, as an individual, could or, if you wish to do so, should, become involved in making a difference.

You can now go to Week 7.

# Week 7: Challenging decisions

## 1 Delegated powers: decision-making and law

Understanding how decisions which impact us may be made by public bodies, local authorities and other professionals who have a legal duty to make decisions impacting on our lives, helps provide a context of thinking about how to ensure those decisions are made lawfully (legally) and why and when they can be challenged. However, it is worth noting at this point that powers to make decisions (which have been legally granted) cannot simply be challenged because we don't like them or their effect. There has to be a legal basis for challenging a decision or law (and evidence to support the challenge).

You should now watch the following video in which Sir David Edward reflects on the importance of asking the right question, being heard, being concise and being persuasive. Skills which are important when developing an argument or challenging a decision.

Video content is not available in this format.

Challenges to decisions or laws may be made in a number of ways. Whether the challenge is made to a court or tribunal will depend on the specific issue and reason for the challenge. Decisions may also be reviewed by the Scottish Public Services Ombudsman where they fall within the remit of that role, for example, investigation of complaints about the service received (which could include a decision or series of decisions) from a public body.

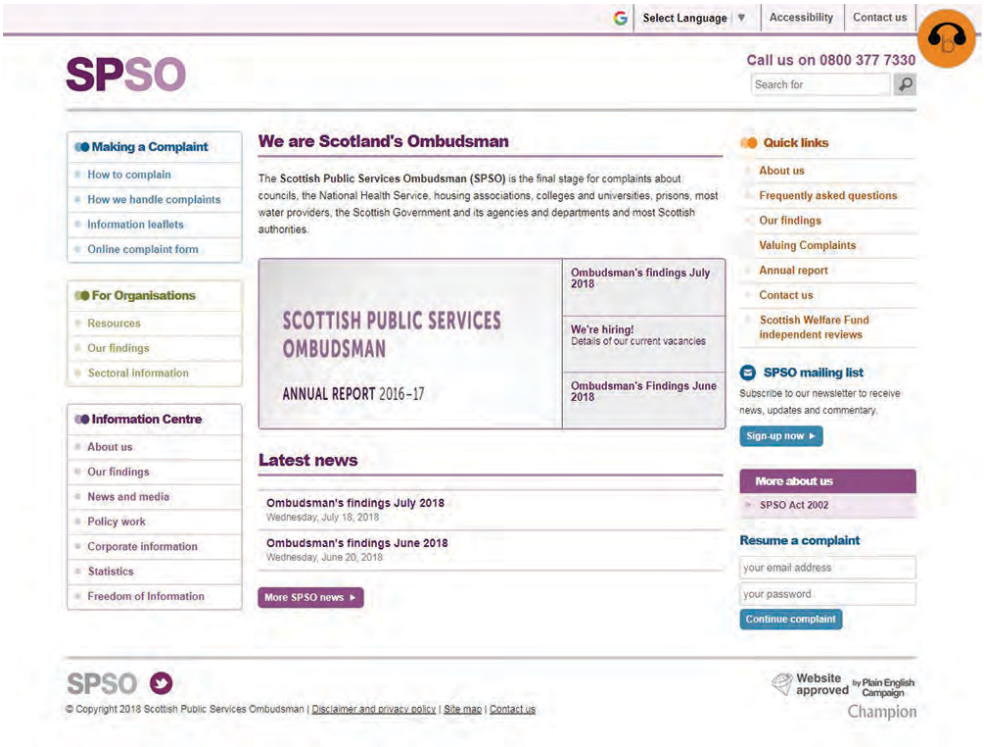


**Figure 1** The website of the Scottish Public Services Ombudsman

If you wish to explore the work of the Scottish Public Services Ombudsman, you can read more information on their website.

You will now consider the factors which need to be taken into account by any individual (institution or organisation) who has been given power to make decision under legislation (whether from the Scottish or UK Parliaments). Through this, you will gain an understanding of the duties and responsibilities decision-makers have when making their decisions. Later sections go on to consider the reasons why challenges may arise.

As noted earlier, the ability to structure a challenge to a decision is a useful one in a modern world where so many decisions are based on delegated authority. Thinking through the process logically and in a structured way can reveal whether or not a decision can be challenged, and on what grounds.

# 2 What is the power and are there any limitations?

Structuring a challenge to a decision can be done in many ways. Anyone challenging a decision must be able to establish that there are grounds for challenge and that they have

the ability (the legal standing) to make a challenge. Figure 2 provides an example of one way in which to structure gathering information when preparing to make a challenge.

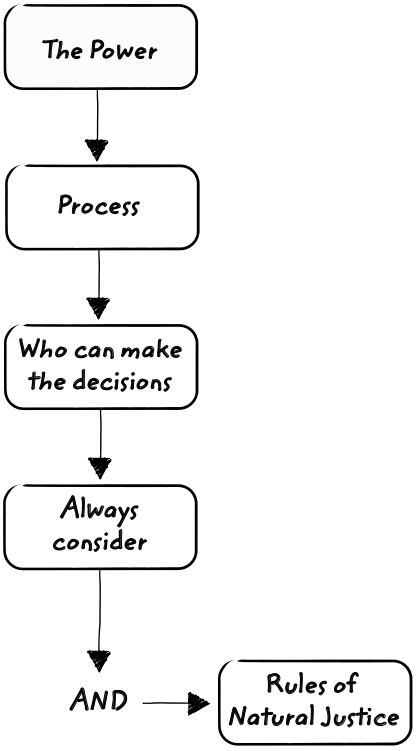


**Figure 2** Power

A decision-maker may appear to have unlimited powers. No matter how unlimited a power appears to be at first glance, there will be legal limits either:

- on the power itself or
- on how that power is used.

These will be set out in the legislation delegating the power.

## 2.1 Thinking about the power

The first step is to check the legislation itself and in order to make a decision, identify in relation to the delegated power:

- whether there are any express limitations on the power
- what are the purposes for which the power was given
- the criteria to be applied in exercising the power.

If any one of these criteria has been breached, then this could form part of your list of reasons to pursue a complaint. To act lawfully, a decision-maker must have the legal power to do what they intend to do. If not, that decision-maker will be acting *ultra vires* or outside their powers.

There are examples of local authorities having to rescind and refund parking charges which had not been made within their powers, of ministers having to review decisions and examples of governments being successfully challenged. If any one of the criteria was not followed then the decision taken is open to challenge. You will learn more about this later.

## 2.2 A structured approach to analysing the power given

It is key to think about:

- the legislation setting out and delegating the power
- general legal principles developed to uphold the rule of law.

Box 1 sets out some key points when considering where the delegated power is set out in legislation.

### Box 1 Key points to consider

| Look at the legislation and in particular think about: | |
|---|---|
| 1. Wording | Look at the words in the legislation to work out what the decision-maker can and cannot do.<br><br>Usually, words in legislation are given their plain English meaning. Where the words might give rise to a different interpretation, a court will try to determine the intention of the parliament that made the legislation. |
| 2. Purpose | You need to understand the purpose of the legislation and the reasons why the power was delegated.<br><br>It can be helpful to consider the explanatory notes to the legislation, the executive note for subordinate legislation and the record of any proceedings in the Scottish or UK Parliament. |
| 3.Compliance | Legislation should be read as to comply with human rights, European law and, in the case of legislation made by the Scottish Parliament, the Scotland Act 1998. |
| 4. Is it a power or duty? | Confusingly even though the words in the legislation indicate that there is discretion as to whether or not to act – e.g. that the public authority 'may' do something – there are cases where that must be interpreted as imposing a duty to act.<br><br>In order to determine what a law means when it says 'may' (or 'shall') you have to look at the law in question and its purposes as a whole.<br><br>For example, a public authority with the power to grant licences may be obliged to do so where an applicant fulfils all the prescribed requirements. |
| 5. How should the power be exercised? | Legislation may expressly set out the purposes for which a power may be exercised, or they may be implied from its objectives.<br><br>It is accepted that a public authority may undertake tasks 'conducive to' or 'reasonably incidental to' a defined purpose. If, for example, a decision-maker has the power to hold a public hearing to assist in making a decision, related powers to hire accommodation, pay for IT etc., this will be treated as being 'reasonably incidental' to that purpose. |

Having considered the legislation which sets out the delegated power, you then need to also consider the limits set out by general legal principles. These principles exist to ensure fairness and compliance with the rule of law. They form part of administrative law and are outlined in Box 2.

### Box 2 The general legal principles

| Consider the general legal principles of: | |
|---|---|
| 1. Legality | Has the decision-maker acted within the scope of the power delegated and for a proper purpose? |
| 2. Procedural fairness | Has the decision-maker ensured that due process has been followed? Have objections been considered; was there an opportunity to be heard; was there proper consultation and disclosure of any conflicts of interest? |
| 3. Reasonableness or rationality | Has the decision-maker followed a proper reasoning process? Has the process been fair and has it led to a reasoned conclusion? |
| 4. Compatibility | Has the decision-maker reviewed their decision to ensure it is compatible with human rights principles and European law? |
| 5. Lawful purpose | Any public authority must use its power for a lawful purpose. Any actions will be *ultra vires* and an abuse of power if a public authority uses the delegated power to achieve a purpose for which the delegated power was not intended. |

To act lawfully, a decision-maker must have the legal power to do what they intend to do. If not, that decision-maker will be acting *ultra vires* or outside their powers and this enables their decision to be challenged.

# 3 The process of taking the decision

Those making the decision:

- must take into account factors and/or considerations on which they have a duty to base their decision
- must not base their decision on irrelevant factors or irrelevant considerations.

Whilst legislation will not set out every factor for the decision-maker to consider, if the legislation does list factors to consider or to which particular attention has to be paid, then these must be considered.

If the legislation doesn't set out factors to be considered then you have to look at what the legislation is trying to achieve (its purpose). From this, factors relevant to the decision-making process can be identified.

If a decision is challenged, the court (or tribunal) will want evidence to establish what factors were considered. It is worth noting that the media's reaction to a decision is unlikely to be relevant to the purpose of the legislation and the court (or tribunal) would likely decide that this was an irrelevant factor on which to base a decision.

## 3.1 Considerations to be made

Decision-makers need take into account **all relevant** considerations. The decision-maker cannot merely 'rubber-stamp' the advice or recommendation they receive from elsewhere.

Relevant considerations include:

- making sure that information and the facts relied on are accurate and up-to-date
- if the information needed to make the decision is missing, the decision-maker must make sure they obtain it from those they should be consulting
- following any guidance or points of reference in place within the public body which relate to the way the decision has to be made (i.e. internal processes)
- where representations have been made regarding the decision, they should, where appropriate, be taken into account
- consultations should take place as required
- if there is missing information, every effort should be made to obtain it
- whether the decision affects an individual's human rights.

Factors incorporating the decision-making process are important and the decision-maker must be able to demonstrate that they have properly considered all relevant factors following due process. A decision-maker should be able to provide evidence of how the decision was made, on what grounds and what factors were taken into consideration.

Any consideration of irrelevant factors, failure to consider all relevant factors or failure to follow due process will provide a basis on which challenges can be made (or provide a basis for a request for clarification before a challenge is made).

## 3.2 Discretion

When delegating powers, the legislation may confer discretionary powers. The decision-maker must keep an open mind and consider each case on its own merits; otherwise there is a failure to exercise discretion properly. Discretion cannot:

- be surrendered (or overridden by policy or procedure)
- be limited.

Where legislation confers a discretionary power on government ministers or another public authority to issue something such as a licence, they will potentially have to deal with hundreds or thousands of cases. The legislation may spell out the criteria for the grant of the licence in general terms, but the decision-making authority may still be left with wide discretion. To ensure consistency and promote administrative efficiency, the decision-making authority often develops a standard way of dealing with cases; they will try to apply the same criteria, attaching the same weight in each case. In effect they develop a 'policy' for dealing with cases.

However, and this is an important point, where legislation confers a discretion on an individual, such as a government minister, that discretion must not be surrendered to another person, to a set of rules or to a 'policy'.

A minister or public authority must also act within their powers. They must not close off (or 'fetter') the exercise of their discretion. They may, however, exercise their discretion in accordance with a 'policy', provided the policy is operated consistently but not too rigidly.

### 3.2.1 Legitimate expectations

A tension may arise in practice. Suppose a public authority operates a policy or procedure consistently, but a change of circumstances means that there is a need to modify the policy or procedure. Or suppose the decision-maker misunderstands the extent of their

legal powers and offers to an applicant a benefit (for example, planning permission) for which the applicant is not qualified under legislation.

In this kind of situation someone affected by the decision can have a legitimate expectation that because the policy or procedure has been operated in such a way in the past, that this will continue in the future. Equally, if the authority has promised someone in particular a benefit, it may (depending on the circumstances) be unfair to break that promise, even if there are public interest grounds for breaking it.

The key to resolving these tensions is to strike a balance between the public interest, for example, in changing the policy, and the private interest in maintaining it. Where a legitimate expectation has arisen, a public authority can still frustrate that expectation if any overriding public interest requires it. Whether a legitimate expectation has arisen, and whether it can be overridden, will depend upon a number of factors, such as:

- Were the words or conduct (the 'promise' or 'representation') which gave rise to the expectation clear and unequivocal?
- Did the person promising the benefit have the legal power to grant it, or was it *ultra vires*?
- Who made the promise and how many people stood to benefit by it?
- Did the person(s) to whom the promise was made take action in reliance upon it which has placed them in a worse position than they would have been if they had not taken that action?

# 4 Who can make the decision

The general rule is that where legislation confers a power on a specified individual or body, the power must be exercised by that individual or body and must not be given away to another person or body.

However, there are many exceptions to this rule. In particular, both courts and tribunals accept that government ministers cannot possibly personally make every decision which is made in their name. It is common practice that officials may act on their behalf. The 'Carltona principle' (after a leading case) applies to national government. This sets out the theory that, legally and constitutionally, the acts of officials are the acts of their government ministers provided the official is acting with the express or implied authority of the government minister. This principle does not apply in local government.

Where the Carltona principle applies, a decision can only be taken on a government minister's behalf by an official of appropriate seniority and experience. There will, however, always be some cases where the special importance of the decision, or its consequences, mean that the government minister must make the decision personally.

Specific statutory provisions are such instances which may require that the government minister make the decision personally. If the power can be delegated, it must be checked whether there are limitations on the seniority of officials who can exercise the power on the government minister's behalf.

# 5 Factors to always consider

There are also other aspects to consider when any decision is made using delegated authority. These are summarised in the following sections.

## Devolution

The Scottish Parliament has powers to make laws in devolved areas. The UK Parliament has powers to make laws in reserved areas or where a legislative consent motion has been passed, devolved areas.

- The UK and Scottish Governments have legal powers only over the matters that are within their competencies. Ministers and civil servants in the Scottish and UK Governments must ensure that any decisions they make have a lawful basis.
- An Act of the Scottish Parliament or the purported exercise of powers by the Scottish ministers can be struck down by the court where they have an effect beyond that permitted by the Scotland Act 1998 (for example, it is on a reserved matter, it is incompatible with human rights or European law).
- As a general rule, decision-makers assume that current legislation is within the competence of the Scottish Parliament where there has been no previous challenge.

## Human rights

The Human Rights Act 1998 requires public bodies to act compatibly with a wide range of the rights set out in the European Convention on Human Rights (ECHR).

- For public authorities other than the Scottish Government, the only exception to this is where a duty under primary legislation made at the UK Parliament means that they cannot do otherwise.
- The Scotland Act 1998 obliges the Scottish Ministers and the Scottish Parliament to act compatibly with both human rights and European law.

## Equality

There are a number of pieces of legislation which make it unlawful to act in a particular way or reach a particular decision where it would be discriminatory.

The Equality Act 2010 (and regulations under it) contain prohibitions on discrimination on grounds of protected characteristics in the exercise of most public functions.

A decision may be unlawful if it fails to have due regard to the need to eliminate unlawful discrimination and promote equality of opportunity.

- The Scotland Act 1998 reserves the subject matter of equal opportunities to the UK Parliament, with the exception of the encouragement of equal opportunities by, and the imposition of duties on, the Scottish Government and Scottish public authorities

to ensure that their functions are carried out with ‘due regard’ to the need to meet equal opportunities requirements.

- Specific provisions of equalities legislation also impose duties on public authorities to evidence that they have shown due regard to certain matters. The public sector equality duties for race, gender and disability require public authorities to undertake equality impact assessments to ensure that the implications of decision-making, both positive and negative, for different groups in society have been considered.
- Decisions must therefore be taken with due regard for the need to:
  - eliminate unlawful discrimination and harassment on the grounds of the protected characteristics
  - promote equality of opportunity between men and women
  - promote equality of opportunity and good relations between persons of different racial groups
  - promote equality of opportunity between disabled persons and other persons
  - take steps to take account of disabled persons’ disabilities (even where that involves treating disabled persons more favourably than other persons)
  - promote positive attitudes towards disabled persons
  - encourage participation by disabled persons in public life.

Failure to do so may lead to a decision being struck down.

The duty is not a duty to achieve the elimination of discrimination or the promotion of equality of opportunity. It is only a duty to have regard to the need to achieve these goals.

## Data protection and freedom of information

Data protection information about individuals held by public authorities is governed by the data protection legislation, as is such information held by private bodies.

- If information is biographical, and is capable of being used on its own or in conjunction with other information to identify a person, it is covered by data protection.
- Where it applies, data protection legislation restricts the use that can be made of the information, and allows the individual rights to get that information. There are a wide range of exemptions which can apply, e.g. national security and where disclosure is required by law. Decision-makers should ensure that all personal information is accurate, up-to-date, kept for no longer than necessary and stored safely.
- Under the Freedom of Information (Scotland) Act 2002, members of the public are given rights to get information from most Scottish public authorities merely because it is held by the authority. Reasons for a request do not have to be given. Decisions not to release information can be reviewed by the Scottish Information Commissioner.

# 6 Rules of natural justice

Correct procedure (or ‘due process’) is vitally important, because there are some tried-and-tested procedural mechanisms which are likely to secure a just outcome and demonstrate the rule of law.

The ‘rules of natural justice’ are rules of procedure. What amounts to a fair process may vary depending on the circumstances. As a general rule, however, a person likely to be affected by a decision should be given adequate notice to allow them to make representations. This may mean that they have a right to an oral hearing or it may just allow them an opportunity to make written submissions. If there is available evidence then there must be an opportunity for all parties to consider and make representations. In determining whether there has been a fair hearing, the court will consider whether there has been equality of treatment.

## 6.1 Consultation

Legislation can also impose specific procedural conditions or requirements which must be satisfied before a power can be exercised. For example, legislation might stipulate that the Scottish ministers or another public authority must:

- consult with particular persons
- publish a decision in draft
- make due inquiry
- consider any objections before making a decision.

These procedural requirements are important, and failure to comply with them may make a decision invalid. The decision-maker will need to fulfil them (and be able to show that they have been fulfilled) in spirit, as well as literally.

Consultation helps to make the process a transparent and fair one and helps to ensure that the decision-maker is in possession of all the relevant information, so that the decision is a ‘rational’ one as well. Where consultation is undertaken, it has to be conducted properly if it is to satisfy the requirement for procedural fairness. Four conditions have to be satisfied, as illustrated in the figure below.

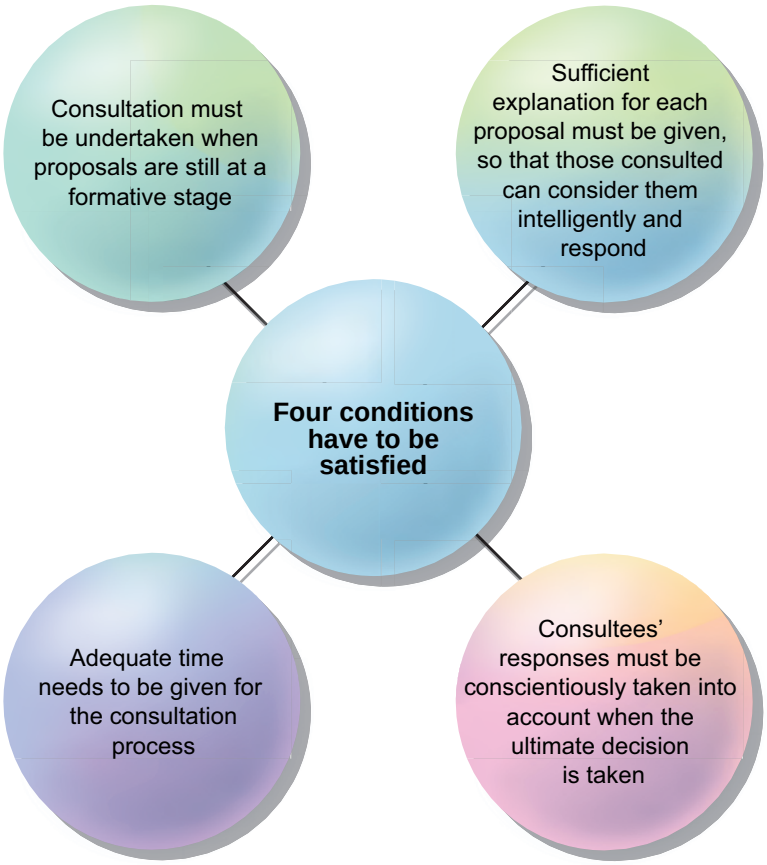


**Figure 3** Four conditions

## 6.2 Procedural fairness

The decision-maker will need to come to a decision in a procedurally fair way. Without such procedural fairness, even if the decision-maker is not acting *ultra vires*, the decision may still be unlawful.

The common law recognises procedural fairness, or the existence of 'due process', as a key principle of just decision-making. Fairness is a concept drawn from the constitutional principle of the rule of law, which requires regularity, predictability and certainty in public authorities' dealings with the public.

Where legislation confers an administrative power there is a presumption that it will be exercised fairly. What is 'fair' will depend on the particular circumstances in which the decision is to be taken and may change with the passage of time. Such principles cannot be applied by rote and what is fair depends on the context of the decision.

It is a feature of a fair procedure or decision-making process that the person affected by it will know in advance how it will operate, and so how to prepare for it and participate in it. Features of good practice include:

- disclosure of the reasons the decision-maker intends to rely on
- an opportunity for consultation or making representations

- an oral hearing where appropriate
- disclosure of material facts, or the reasons for the decision.

## 6.3 Bias

One aspect of the rule of natural justice is that 'no one shall be the judge in their own case'. If a decision-maker has a financial or other interest in the outcome of the case, they cannot be, or seen to be, impartial.

The rule deals with actual bias and with the appearance of bias; hence the saying 'Justice must not only be done, but be seen to be done'. No one should be able to allege that a decision was a fix because the decision-maker was biased, whether or not there was any truth in that allegation. The rule must be observed strictly to maintain public confidence in the decision-making process. If, for example, the applicant for a grant is known personally to the decision-maker, or the decision-maker has dealt with the applicant before and decided against the applicant or expressed a view adverse to the applicant, it may be appropriate to refer the application to a different, or more senior, official.

Article 6 of the ECHR (fair determination of civil rights) also requires that a court or tribunal must be, and have the appearance of being, impartial and independent.

## 6.4 Reasonableness

When making decisions, all relevant considerations need to be taken into account and irrelevant considerations should be ignored. Crucially, when it actually comes to the decision, it must not be so unreasonable that no reasonable person acting properly could have taken it. These are often called the 'Wednesbury principles' after the name of the court case which first established them.

The test of unreasonableness concerns the decision as well as the way in which it was reached. Even if the decision-maker has taken into account the correct considerations, they may still come to a decision so wildly unreasonable or perverse that it can be judged to have been outwith the decision-maker's discretion to make it. If this happens then the decision will be unlawful.

The court has recognised that when different reasonable people are given the same set of facts, it is perfectly possible for them to come to different conclusions. This means a range of lawful decisions may be within the discretion of the decision-maker. However, at the same time, the court has defined a category of decisions which lie outside that range of discretion. These have been described as:

- 'a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it'
- 'beyond the range of responses open to a reasonable decision-maker'.

Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1983] UKHL 9

If a decision is challenged, the court or tribunal will examine it to see whether it was made according to logical principles, and will often expressly state that it is not its intention to substitute its own decision for that of the decision-maker. The court will not make its own

decision in place of that of the decision-maker because it bears in mind that the legislation has given the discretion to make the decision to a particular decision-maker, and it is not for the court to make that decision instead.

## 6.5 Proportionality

Proportionality essentially means the decision should meet a legitimate policy goal and should not go further than necessary to achieve that goal – i.e. it must be appropriate and necessary to achieve its aim.

In principle, the court is entitled to review the vast majority of decisions taken by public authorities; this is 'in principle' because there are still a handful of types of decisions with which the court is reluctant to concern itself – the award of honours is one example. Another may be where, because of the subject matter of the decision, the decision-maker is better qualified than the court to make a judgement. So, for example, the court is likely to 'defer' to, or recognise, a 'demarcation of functions' with the decision-maker in:

- ordering financial priorities, in deciding to spend public money in one way rather than another
- assessing the needs of national security and public order
- setting policy on maximum sentences for particular criminal offences.

In the demarcation of functions, that political judgement should be left to the decision-maker, who understands the policy and has experience of its operation to inform their decision. In this kind of area, the court may exercise restraint in reviewing the decision-maker, or recognise the demarcation of functions between the executive branch of government and the judiciary; the court is likely to allow a 'margin of discretion' or 'discretionary area of judgement' depending on the nature of the decision.

## 6.6 Giving reasons

Although it may still be true that there is no general rule requiring that reasons be given for administrative decisions, the circumstances where they are not required are becoming rare.

There is one other important factor which should now encourage the giving of detailed reasons with the decision. Rights for the individual who is the subject of a decision about their case to access information about that decision – including the reasons for it – may arise under data protection legislation. In addition, Section 1 of the Freedom of Information (Scotland) Act 2002 provides that:

'(1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.'

So, assuming that, in making the decision, the decision-maker had their reasons and recorded them, any person will be entitled to request that 'information' under the Freedom of Information (Scotland) Act 2002 , and – unless an exemption applies – that information will have to be disclosed. There are exemptions in respect of certain categories of information, and one or more of them may be relevant to your decision, but the presumption will be in favour of disclosure. The Act should therefore be a salutary incentive to careful reasoning and good record-keeping.

This does not mean that every decision must be accompanied by copious reasoning; it will depend upon the subject matter and the importance of the interests at stake. Moreover there will be some cases where the issue to be decided does not lend itself to logical analysis, but is more a matter of subjective judgement.

# 7 Bringing this all together

You have learnt about how decisions should be made and the grounds on which they may be challenged. The materials you have encountered this week may have appeared drier in their tone and approach and there has been a lot to take in. Figure 4 provides an example summary of the sort of steps that may be used in considering whether it is possible to bring a case against a decision made by a public body.

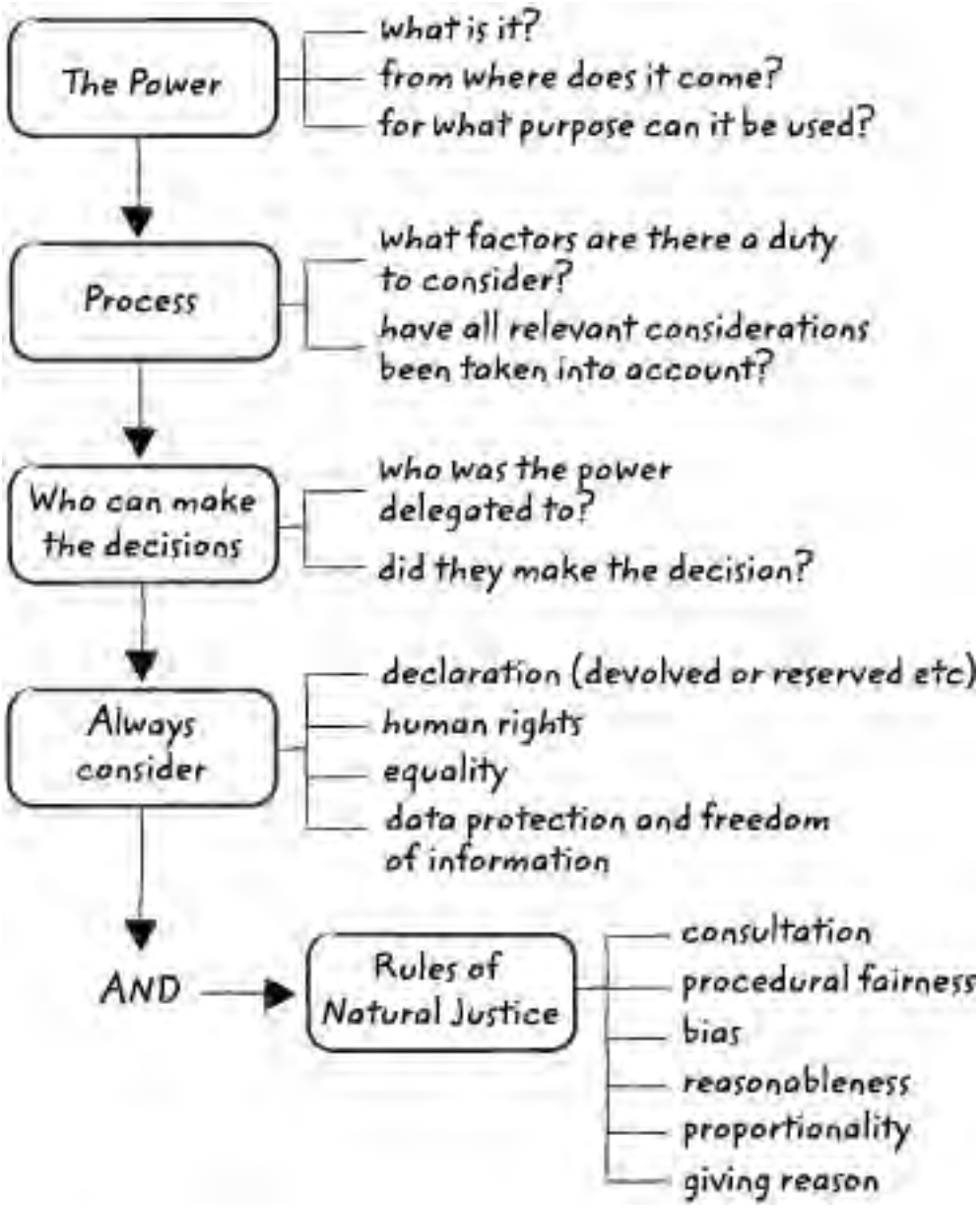


**Figure 4** Example summary

You should now listen to the audio in which two OU Law School academics discuss judicial review and then attempt Activity1 which provides an opportunity for you to try out what you have learnt during your studies of this week.

Audio content is not available in this format.
Judicial review

## Activity 1 The decision-making process and challenges

Allow about 15 minutes

Read the following scenarios. Based on the knowledge gained from this week of study, reach a conclusion in each case. Provide a reason for your conclusion.

1 A senior police officer is dismissed from their post. They are not given reasons for their dismissal and they are given no prior notice of their dismissal. They have not been accused of any misconduct and have an exemplary record.

2 The local authority has a delegated legal power to make regulations in respect of charges for parking in public car parks. They have issued a notice which takes effect in seven days that in future all residents in the town will need to pay for parking permits for any car or other vehicle they park on a publically owned road. The permits are going to cost £1,000. The reason given for the decision was to make more parking available for visitors (who will park for free).

### Comment

Identifying issues and finding solutions is key to the work of many solicitors and advocates. Good problem-solving and communication skills are developed by the study of law and legal systems and are at the heart of legal work. It is one of the reasons why the skills developed during study of a law degree are regarded as so transferable.

When approaching legal problems, it is important to take a logical approach. One approach that is commonly taken is to identify the issue, what rule has been broken, what the evidence is and what conclusion should follow. This is sometimes referred to as IRAC (Issue, Rule, Application and Conclusion). This was illustrated in Figure 5 Week 5.

**Question 1**

Issue – Is an administrative decision properly made by a public authority? Was the correct and fair procedure followed to determine he dismissal of the senior police officer?

Rule – Police forces fall within the definition of public body, Administrative decisions of public bodies must be made following the correct procedure and the person affected must be given a fair hearing. The deciding authority ought to give reasons for their decision.

Application – The rules of procedural fairness were not applied here as the senior officer was not informed of the procedure in advance, was not given the opportunity to hear the grounds for the decision against them and were not given the opportunity to present a case before the decision was made. At no point where they able to object to the decision. Also, the senior police officer was not told of the reasons for the decision when they should have been.

Conclusion – The way in which the decision to dismiss the senior officer was made was procedurally unfair and should be reviewed.

**Question 2**

Issue –The issue is whether the local authority went outside the powers granted to it by the primary legislation and if so, was the decision make a reasonable and/or proportion one. To be proportionate the short notice and £1000 cost of the permit must be the most effective way of achieving the result sought.

Rule – The powers of local authority have been delegated to it by primary legislation. In exercising those delegated powers the local authority must to act in a way which does not exceed those power. The local authority must also act reasonably and in a way that is proportionate to the ends it wishes to achieve. It should also consult affected groups before making such decisions.

Application – This is an administrative decision by a public authority (the local authority) which has been made under its delegated powers. We are not given information on whether the local authority had power to make such extreme rules. Assuming it has, the goal to be achieved was to create free parking for visitors to the town. In order to achieve that goal the local authority has imposed regulation both at short notice to obtain permits and which are very expensive. Providing free parking for visitor could have been achieved through less expensive and less intrusive means. The residents were of the town were not consulted on whether this was the best way of providing free parking for visitors.

Conclusion – In making the decision the local authority acted in a way that was not legal as it passed regulation without consultation and that were punitive and disproportionate.

# 8 This week's quiz

Check what you've learned this week by taking the end-of-week quiz.

Week 7 quiz.

Open the quiz in a new window or tab and then come back here when you've finished.

# Summary

Throughout your studies this week, you have considered why decision- and law-makers can be challenged. You learnt that a structured and logical approach to challenging decisions is important. You also learnt that decisions cannot be challenged merely because you do not agree with them

After studying this week you should be able to explain:

- how decisions of law-makers may be challenged
- why decisions of decision-makers in public bodies may be challenged
- the need for a structured approach supported by evidence when challenging decisions.

We hope that your studies this week have raised awareness of how and why legal challenges can be made. Here the actions of individuals seeking to have their rights upheld or in challenging incorrect or illegal decisions can result in change within the legal system. These changes may impact on society as a whole or in local areas and in individual's lives.

Next week you will explore how as an individual you can choose to become involved in the lawmaking process.

You can now go to Week 8.

# Week 8: Making a difference: becoming involved

## 1 Making a contribution to the work of the Scottish Parliament

The Scottish Parliament has an open and transparent way of conducting its business and you learnt about its lawmaking process in Week 1. In this week you will build on that knowledge and consider how individuals are actively encouraged to take part in that process.

The design and location of the new Parliament building reflect the Parliament's Scottish heritage and the debating chamber, which is central to the overall design, reflects the Parliament's commitment to openness.

The use of social media and television have put the Parliament within reach of all the population. The Scottish Parliament TV channel contains clips and a video archive, hosts live proceedings and is searchable. Committee proceedings can be found there as well. Through the Parliamentary website you can sign up for regular updates or follow the updates section on the website at http://www.parliament.scot/


**Figure 1** Scottish Parliament TV website


**Figure 2** Scottish Parliament website

The modern Scottish Parliament has come a long way from its medieval roots however those roots can still be seen in the ceremony and work of the parliament. Both its history and current day practices are interwoven with those of the Monarchy. In medieval times parliament was convened only occasionally by the Monarch as a consultative form. Ideas of constitution and rule by law were however beginning to emerge, the medieval coronation oath included the words ‘ after the laws and customs of the realm’.

In the 1320 Declaration of Arbroath the Three Estates of the Realm (Lords, Bishops and Burgh merchants) asserted that monarchy was conditional upon the Monarch performing their duties, ideas built upon during the reign of James VI, through the dissolution of the Scottish Parliament by Oliver Cromwell and its re-establishment under Charles II. The Act of Union saw the sceptre from the Scottish Honours being used to signify assent and the dissolution of the Scottish Parliament. In 1999 a new parliament emerged.

The monarch still plays a role, albeit a ceremonial one. The monarch is present at the opening of parliament and the Scottish crown is brought from Edinburgh castle. This modern day practice links to the medieval belief that without the presence of the Monarch, parliament cannot legitimately meet. The mace presented by Queen Elizabeth II at the opening of the Scottish Parliament on 1 July 1999 is engraved with the words 'wisdom', 'justice' 'compassion' and 'integrity'. These words are designed to represent the aspirations of MSPs.

## 1.1 Becoming involved in the lawmaking process of the Scottish Parliament

As one of our constitutional duties, citizens are expected to vote in parliamentary elections to both the Scottish and UK Parliaments. Both MSPs and MPs are elected through democratic processes (each election process differs). In voting in elections, a citizen is becoming involved in lawmaking (even though they may not realise this). Scottish Parliamentary elections are held every four years, UK Parliamentary elections every five years (subject to exceptions).


**Figure 3** Get involved

There are other ways to become involved in the parliamentary lawmaking process. These include:

- writing to a parliamentary committee to give your viewpoint

- using the media or social media to generate public interest in an issue and pressure parliament to make changes to the law
- writing to an MSP on a particular issue
- lobbying an MSP to make an amendment to a Bill.

Individuals can also consider:

- standing for elections as an MSP (you need to be over 21 and could stand as an independent candidate or as a candidate for a political party)
- taking place in online debates using the discussion forums on the Scottish Parliament website
- if they have specialist knowledge, they can register as a potential adviser to a committee
- submitting a petition to the Parliament asking for the introduction of a new law or change to an existing one (or that they look into a matter of public interest or concern)
- becoming involved in a cross-party group. These provide an opportunity for MSPs, individuals and organisations to meet and discuss areas of interest
- attending a committee event. These are held throughout Scotland to discuss issues with the public. As you learnt earlier, the Scottish Parliament has achieved international recognition for its openness and the way in which it provides opportunities for its citizens to become involved
- responding to a consultation
- applying for a job at the Parliament or undertaking work for an MSP.

Now attempt Activity 1 which encourages you to explore the website of the Scottish Parliament.

### Activity 1 The Scottish Parliament: becoming involved

Allow about 15 minutes

Explore the getting involved section of the Scottish Parliament website. http://www.parliament.scot/getting-involved.aspx and in particular look to see:

1 what topics the current consultations cover

2 the process for submitting a petition to the parliament

3 what petitions have been submitted previously.

#### Comment

The 'Getting Involved' section of the website is set out into different sections to assist navigation and enables individuals to learn about how they can become involved. In Week 6, you explored examples of a number of individuals who became involved in the work of the parliament as they sought a change in the law.

1 When we looked at the website in 2018, the current consultations ranged over a wide number of topics. There were a number of preventive measures being considered in relation to health, substance abuse, consultations on land and buildings transaction taxes, licensing of fun fairs, changes to planning, changes to the regulation of privately operated car parks.

2 Petitions can be submitted using an online process and can be submitted by any individual regardless of age or the number of signatures collected. There is a section where you can view current and previous petitions, look at how they were worded, what changes they were seeking, whether they were open, lodged or closed.

3 Submitted petitions cover a wide range of matters including (but not exclusively) health, tax, road safety, travel, funding, access to justice, environmental concerns, vaccination, sewage sludge spreading, local area matters and individuals. Information is provided on previous action taken (if any), the petition history and comments made on the petition.

An example of a petition is provided in Figure 5. This petition was made on behalf of the Scottish Crofting Federation in response to increasing numbers of geese in the Western Isles and others (from approximately 150 breeding pairs to over 10,000 over a period of 18 years) and the impact on agriculture and threat to the continuation of island crofting. A number of goose-management schemes had been in place since 2000. These are managed by Scottish Heritage but more funding and support was being called for.

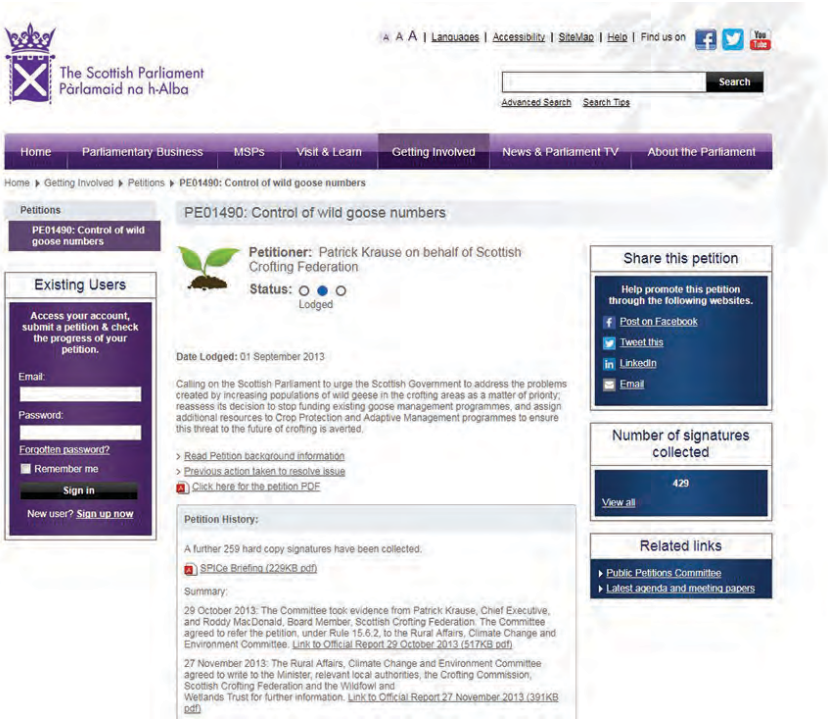


**Figure 4** Control of Wild Goose Numbers Petition

In relation to goose-management schemes, the Scottish Government website states:

> Historically, wild geese have formed an important part of Scotland's natural heritage.
>
> Following a period of decline in the 1950s-70s, goose numbers have increased in Scotland and in recent decades the recovery of certain goose populations has caused agricultural damage to crops in some areas.
>
> As a result many farmers and crofters affected by large numbers of grazing geese regard them as agricultural pests.

> A national policy framework for goose management has been in place in Scotland since 2000 to help balance agricultural and conservation interests.
>
> […]
>
> Where geese are making use of agricultural land, initial responsibility for minimising damage to crops and grass rests with the farmer or crofter, who should take appropriate steps by scaring and, where appropriate and legally possible, shooting geese.
>
> Where this is impossible, either because of goose numbers or because the necessary level of scaring and any associated shooting could not be undertaken due to the protected status of the population, a local goose management scheme may be considered.
>
> […]
>
> The schemes aim to minimise losses to farmers, whilst ensuring that Scotland fulfils its international nature conservation obligations. These schemes are targeted at specific geese populations and defined areas. Most of the schemes provide payments towards the maintenance of disturbance free feeding areas while encouraging the scaring of geese on other parts of the holding.
>
> (Scottish Government, 2011)

The Rural Affairs, Climate Change and Environment Committee agreed that the petition PE01490 should remain open at a meeting held on 9 March 2016 as the issues were ongoing.

Uou can also find details of your MSP on the Scottish Government website. You may also like to explore the ‘Your voice’ section and watch the video which explains how you can become involved in the work of the Scottish Parliament. There is also an extensive education section which you may like to explore.

# 2 Making a contribution to the UK Parliament

Like the Scottish Parliament, the UK Parliament also has a long and turbulent history. The Palace of Westminster which now houses the UK Parliament emerged from what was the Royal Palace of Westminster. The buildings have changed as result of fire (in the Great Fire of 1834), war and rebellion, and it is listed as a UNESCO World Heritage Site.

Westminster Hall forms part of buildings which together make up the Palace of Westminster. It has played a central role in both English and UK-wide history. Originally, Westminster Hall was part of a royal palace around which the major institutions of state developed (law courts, administrative offices, church and executive). In Westminster Hall, state trials were held. The most well-known of these is the trial of Charles I of England and Scotland. Like that of the Scottish Parliament, the architecture of the Palace of Westminster is instantly recognisable.

**Figure 5** The trial of Charles I **Figure 6** The Palace of Westminster, home of the UK Parliament

The UK Parliament has gone through several transitions; following union with Wales and then union with Scotland, it became the Parliament of Great Britain, and following union with Ireland it became the UK Parliament. In the past it was commonly referred to as Westminster Parliament but since devolution, it is more commonly referred to as the UK Parliament.

Like the Scottish Parliament, the UK Parliament encourages participation in lawmaking. As with the Scottish Parliament an individual can participate by:

- writing to a parliamentary committee
- using the media or social media to generate public interest in the issue and pressure parliament to make changes to the law
- writing to an MP on a particular issue
- lobbying an MP to make an amendment to a Bill.

Individuals can also consider:

- standing for elections as an MP (they need to be over 21 and could stand as an independent candidate or as a candidate for a political party)
- taking part in online debates using the discussion forums on the UK Parliament website
- registering as a potential adviser to a committee where they have specialist knowledge
- submitting a Petition to the parliament asking for the introduction of a new law or change to an existing one (or that they look into a matter of public interest or concern)
- attending a committee event
- responding to a consultation
- applying for a job at the parliament or undertake work for an MP
- watching live debates on parliamentary TV and follow social media.

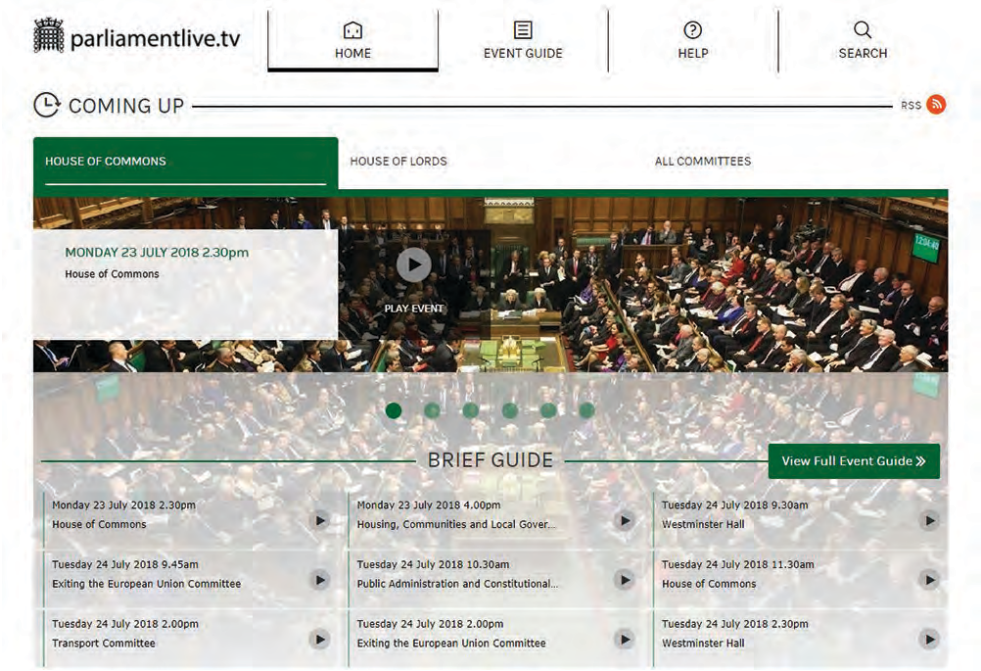


**Figure 7** UK Parliament TV

Now attempt Activity 2 which encourages you to explore the getting involved section of the UK parliament website.

## Activity 2 The UK Parliament: Becoming involved

Allow about 15 minutes

Then explore the ‘Get involved’ section of the UK Parliament website https://www.parliament.uk/get-involved/ . It is set out differently from the website of the Scottish Parliament. In particular look to see:

1 how you can have a say in debates and consultations
2 the process for submitting a petition to the parliament.


**Figure 8** 'Get involved' section, UK Parliament website

## Comment

As with the Scottish Parliament website, the 'Get involved' section of the UK Parliament website is set out into different sections to assist navigation and enables individuals to learn about how they can become involved.

1 There is a section 'Have your say: Laws and debates'. This provides information on how to follow the progress of current legislation and how individuals can input your view where Bills affect you, about contacting a member of the House of Lords, your MP and submitting evidence to a Public Bill Committee. There is also an opportunity to participate in digital debates and to object to a private Bill which directly affects you.

2 A new e-petitions website was opened in 2015 and if an e-petition gains 100,000 votes it will be debated in the House of Commons (the directly elected chamber). Details of e-petitions can be found at https://petition.parliament.uk/ and a video explanation of how to start or sign an e-petition can be found at https://www.parliament.uk/get-involved/sign-a-petition/.

You will have noted that the processes and opportunities to get involved differ from those of the Scottish Parliament. The UK Parliament legislates on reserved matters in relation to Scotland and has different legislative procedures. This has an impact on how individuals can become involved.

In the 'Get involved' section of the website, you can sign up for a regular newsletter. You may also like to explore the 'Get involved' video which explains how you can become involved in the work of the UK Parliament. There is also an extensive education section and a section in which you can find out more about MPs, members of the House of Lords and lobbying the UK Parliament.

# 3 Other ways to become involved

There are also other ways to become involved in petitioning for legal change. Two which you may have come across are:

- Private Members' Bills

Individual Members of Parliament have the power to introduce their own legislation known as a 'Private Members' Bill'. Private Members' Bills may be the result of an MSP or MP being approached for support for a proposal put forward by particular interest groups operating outside Parliament. Private Members' Bills in the Scottish Parliament may also originate from a Scottish Government suggestion to an MSP that they propose a particular measure.

- Pressure groups

A pressure group can be described as an organised group that exists for the purpose of permanently representing particular interests. Pressure groups do not generally put up candidates for election but seek to influence government policy or legislation. They can also be described as 'interest groups', 'lobby groups', 'campaign groups', or 'protest groups'. In the UK, the number of political parties is very small, whereas the number of pressure groups runs into thousands. A pressure group can be a huge organisation like the CBI (Confederation of British Industry), which represents approximately 150,000 businesses, but it can also be a single-issue, locally based organisation.

The aim of all pressure groups is to influence the people who actually have the power to make decisions. Pressure groups provide a means of popular participation in national politics between elections. They are sometimes able to gather sufficient support to force government to amend or even repeal legislation. You came across some examples of this in Week 7.

Now attempt Activity 3 which explores a change in the law made though the enactment of a Private Member's Bill in the Scottish Parliament.

### Activity 3 High hedges

Allow about 20 minutes

This activity is in two parts.

#### Part 1

The High Hedges (Scotland) Bill was a Members' Bill introduced in the Scottish Parliament on 2 October 2012 by Mark McDonald MSP. The Scottish Government supported the Bill.

**Figure 9** and **Figure 10** Examples of high hedges

The Bill was seeking to provide a solution to issues where the high hedges of one neighbour interfered with other neighbours' enjoyment of their property. High hedges can restrict light, damage property and generally restrict the enjoyment of a garden. The Bill provided that where a hedge has been defined as a high hedge, an owner or occupier of a domestic property may apply to the relevant local authority for a high hedge notice. Local authorities were to have new powers to issue high hedge notices to owners of hedges specifying the work, if any, to be carried out to remedy problems and prevent their re-occurrence. If the owner of the high hedge failed to comply then the local authority could carry out the work and recover the costs of carrying out the work.

Although high hedges may impact on only a proportion of individuals, the work, damage and issues caused can be significant.

Make a list in the box below of anyone you think may have an interest in commenting on the draft Bill or of any association that may wish to comment on the draft Bill.

*Provide your answer...*

### Comment

There is no one correct answer to Part 1. This part was designed to get you thinking about the Bill and which organisations or individuals may respond to a request for comments.

## Part 2

Read the following extract from a briefing on the committee hearing of the Stage 1 of the Bill and make a note of:

(a) the organisations that made representations

(b) what the main debate was about.

### The Stage 1 hearing - 5 February 2013

The definition of a high hedge as provided in the Bill as introduced was, undoubtedly, the key issue raised by witnesses who gave evidence to the Local Government and Regeneration Committee ("the Committee") at stage 1. The Bill as introduced defined a high hedge as one which:

- is formed wholly or mainly by a row of 2 or more evergreen or semi-evergreen trees or shrubs;
- rises to a height of more than 2 metres above ground level; and
- forms a barrier to light

The definition is similar to those used in England and Wales and in Northern Ireland and is intended to capture the commonly perceived problem of fast-growing conifers in suburban areas. Under the Bill as introduced, a single tree is not considered to be a high hedge.

Most of the written and oral evidence received by the Committee commented on this aspect of the Bill. Opinion varied between those witnesses who believed that the definition should be expanded to include other forms of vegetation, such as single and deciduous trees, while others favoured retaining the definition as set out in the Bill as introduced. Other witnesses believed that the definition should be narrowed even further to provide protection to various types of evergreen or semi-evergreen species (e.g. yew or juniper).

The campaign group Scothedge, while being strongly supportive of the introduction of the Bill, argued that the definition should be expanded to include single evergreen or deciduous trees. While acknowledging that the definition in the Bill broadly replicates those in England, Wales and Northern Ireland, they stated that:

> "Our preferred definition is the one that is used in the Isle of Man, because it is a wide definition. The wording is about something that stops people having reasonable enjoyment of a property…. We prefer the Isle of Man definition because it allows all the cases to be made. People can make a complaint and their case can be considered. If we do not do that, the danger is that people will just switch species. Believe me; our experience is that some pretty unscrupulous people are growing these hedges."
>
> (Scottish Parliament Local Government and Regeneration Committee 2012a).

Other witnesses giving oral evidence were unanimously opposed to the expansion of the Bill to include single trees. For example, Dr Maggie Keegan of the Scottish Wildlife Trust argued that the principle intention of the Bill should be to:

> "….capture leylandii and other trees such as western red cedar that have little biodiversity value". (Scottish Parliament Local Government and Regeneration Committee 2012a).

Dr Keegan suggested that the definition in section 1 of the Bill could be amended to specifically identify non-native evergreen and semi-evergreen species.

Aedán Smith of the RSPB highlighted what he saw as the advantages of retaining the definition of a high hedge as set out in the Bill as introduced:

> "The current definition has the merit of simplicity, which has obvious benefits in terms of administration and management if the implementation of the bill is progressed. As Dr Keegan said, the current definition is likely to mean that hedges and trees that, broadly speaking, are of higher biodiversity value—those tend to be native species—will not be captured by the bill. Our primary concern is that there should not be an adverse impact on wildlife or biodiversity, and the current simple definition means that adverse implications for wildlife are less likely."
>
> (Scottish Parliament Local Government and Regeneration Committee 2012a).

The Scottish Tree Officers Group ("STOG") represents local authority tree officers who will have primary responsibility for implementing and managing the high hedge notice system under the Bill. In their evidence to the Committee they expressed some concerns in relation to the definition of a high hedge in section 1 of the Bill. STOG felt that this definition may be draw too widely and could lead to the removal of trees and hedges of historic and biodiversity value.

In its written evidence STOG provided an example where the Bill may give rise to a problem where two evergreen trees could be planted 5 metres apart. Eventually, the lower branches come together and form a barrier to light, however the original intention was the establishment of two individual trees, not to form a hedge.

In oral evidence to the Committee, Robert Paterson of STOG expanded these concerns when he stated—

> "My understanding of section 1 is clear, which is that it applies to a hedge or two or more trees growing closely together. We would seek to have the latter part of the provision removed because it could relate to a couple of mature yew trees that are 3,000 years

> old. If, as you suggest, those trees are reduced to 2m high, we will no longer have yew trees that look individual."
>
> (Scottish Parliament Local Government and Regeneration Committee 2012b).

Angus Yarwood of the Woodland Trust Scotland expressed a concern that widening the definition of the Bill to include single trees would require a more considered examination of the implications, telling the Committee:

> "If there is to be a broader definition, we would want to go back and look at the other sections in the bill, particularly with regard to tree preservation orders and the importance of heritage trees and the proper assessment of biodiversity value."
>
> (Scottish Parliament Local Government and Regeneration Committee 2012a).

The Member in charge of the Bill, Mark McDonald MSP in addressing the questions raised about whether the definition of a high hedge should be amended, stated that "we should go forward on the current basis and see how the definition works in a Scottish context". On single trees he added:

> "…deciduous trees will be covered by the bill if they are part of a high hedge that is mainly formed of evergreen or semi-evergreen plants. Deciduous trees are not, by definition, completely off the agenda. However, in our view, the real problem in the context of barriers to light is the semi-evergreen or evergreen hedge." (Scottish Parliament Local Government and Regeneration Committee 2012c). Mr McDonald also stated that he did not support protection for native Scottish species of evergreen and semi-evergreen plants fearing it would create a "significant loophole" whereby anyone who wished to pursue a neighbour-hood dispute could simply shift from a non-native to a native species.
>
> The Minister for Local Government and Planning Derek Mackay MSP ("the Minister") stated that the Government supported both the Bill, and the definition of a high hedge as set out in the Bill as introduced, stating that it "broadly strikes the right balance and required neither narrowing nor expanding". (Scottish Parliament Local Government and Regeneration Committee 2012c). The Committee (by a majority - Stuart McMillan MSP dissenting) concluded in its stage 1 report that it was content with the definition of a high hedge as established by section 1 of the Bill stating that it did not believe, at this stage, that the definition needed to be amended to include single or deciduous trees, or other forms of vegetation."
>
> (The Scottish Parliament, n.d.)

Comment

Part 2 considered the Stage 1 debate. This is the only part of the process of consultation and other organisations and individuals will have made contributions at other stages. From the extract provided the organisations that made representations included:

- the campaign group Scothedge
- Dr Maggie Keegan of the Scottish Wildlife Trust
- Aedán Smith of the RSPB
- the Scottish Tree Officers Group ('STOG'). Local authority tree officers who will have primary responsibility for implementing and managing the high hedge notice system under the Bill.
- Angus Yarwood of the Woodland Trust Scotland
- the Member in charge of the Bill, Mark McDonald MSP.

The main debate concerned the definition that would be used in the Act. Some contributors wanted this widened, others expressed concerns over ancient trees which may have protection orders, others over the type of trees to be included. The final definition, agreed after the Bill went through all three stages of the parliamentary process is shown in the box.

*High Hedges (Scotland) Act 2013 2013 asp 6*

The Bill for this Act of the Scottish Parliament was passed by the Parliament on 28th March 2013 and received Royal Assent on 2nd May 2013.

An Act of the Scottish Parliament to make provision about hedges which interfere with the reasonable enjoyment of residential properties.

## Meaning of "high hedge"

1 Meaning of "high hedge"

(1) This Act applies in relation to a hedge (referred to in this Act as a "high hedge") which—

(a) is formed wholly or mainly by a row of 2 or more trees or shrubs,

(b) rises to a height of more than 2 metres above ground level, and

(c) forms a barrier to light.

(2) For the purposes of subsection (1)(c) a hedge is not to be regarded as forming a barrier to light if it has gaps which significantly reduce its overall effect as a barrier at heights of more than 2 metres.

(3) In applying this Act in relation to a high hedge no account is to be taken of the roots of a high hedge.

The purpose of this activity was to introduce you to the types of activity that are carried out during committee and debate stages in the Scottish Parliament. In reading the extract you can begin to see the thought and level of scrutiny that appear even for what seem to be the most straightforward of Acts (and definitions) before they become law.

# 4 Thinking about making a difference

There are many ways to become involved in legal change at a local, national and UK level. In Week 7, you explored a number of principles underpinning how decisions should be taken by those with legal authority delegated to them and why challenges to such decisions may arise. This week, you learnt about participating in the parliamentary lawmaking process. You should now watch the following video in which Elish Angiolini, the former Lord Advocate, explores her early experience with the law.

Video content is not available in this format.


Having the courage to challenge decisions and to do so in a structured and organised way can help effect change for individuals, community or society. Through such challenges, as you have learnt from the history of development of the law as well as your exploration of legal change and the principles underpinning the rule of law, certain words and behaviours have become associated with it.


**Figure 12** Law word cloud

There are times, however, when we may become more directly involved with the law and its impact on a more personal basis. Often this comes at a time when we are experiencing difficulties whether at work, home, school, college, during our leisure time or in our community. It is often at times when we may be emotionally vulnerable and under significant stress that we come into contact with the law. This can also impact on our perceptions and colour the way in which we view law.

You should now watch the following series of videos which contain the personal reflections of Scottish law makers and lawyers. The former Lord Advocate Elish Angiolini, Craig McKerracher, Scott Manson and Iain Gray reflect on their legal heroes. They discuss the individuals, organisations and campaigns they hold in high esteem together with the reasons why, whether for their tenacity, perseverance, contributions, support or encouragement.

Video content is not available in this format.
Elish Angiolini

Video content is not available in this format.
Craig McKerracher


Video content is not available in this format.
Scott Manson


Video content is not available in this format.
Iain Gray

# 5 This week's quiz

It's time to complete the Week 8 badged quiz. It is similar to previous quizzes, but this time instead of answering five questions there will be fifteen.

Week 8 compulsory badge quiz.

Remember, this quiz counts towards your badge. If you're not successful the first time, you can attempt the quiz again in 24 hours.

# Summary

During this week, you learnt more about processes by which individuals can make a contribution to legal change. You explored how individuals and groups can become involved in the parliamentary-lawmaking process and heard about the early experience of an individual in challenging legal rules. An individual who then went on to hold legal office.

You also considered words and terms associated with law. These words and terms are some of the tools used to create a perception of law.

Following your study of this week you should be able to:

- explain how an individual can contribute to parliamentary lawmaking
- explore ways of contributing to legal change
- understand the role of elected official such as local councillors, MSPs and MPs in lawmaking.

# Course summary

The course authors hope that, through your studies on this course, you now have an appreciation of how and why law evolves. Law is inextricably linked with the needs of the society in which it operates and can be used as a force for change and to represent the values of society itself. Often that occurs through the work and passion of individuals in challenging inequality and injustice.

You should now have developed your own opinion about whether law deserves its reputation and understand how you could contribute to legal change, whether through participation in the parliamentary-lawmaking process, through campaigns or by challenging decisions which directly affect you.

We hope you have found the course both interesting and useful. We hope it has inspired you to think about the role you could play in engaging with change and that you are now more aware of the richness and diversity of Scotland's legal history, its impact beyond its borders and its fiercely held independence.

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