

# English legal system in context

Cownie, F. and Bradney, A. (2000) *English Legal System in Context*, London, Butterworths, pp. 293–4.

Law is not just a mechanism for settling disputes. It is also a way of avoiding disputes; of telling people how they might order their lives so that disputes can be avoided. If people are to do this they must know what the law is; they must know how judges will settle a dispute should a matter come to court. Law must be predictable. Lawyers must be able to tell their clients how to run their affairs. Judges must be able to announce what the law will be to the world at large. One must be able to know what the law is before going to court, for this would be expensive both financially and socially. Moreover, the law must be removed from the judges. Judges must be there not to decide cases on their own initiative. They must be there to apply a known set of rules to the facts before them. The job of the judge must be stripped of any subjective or personal element. Law must be a system of rules not of men. It has been argued that a system of precedent can be of assistance in allowing all these things to be done.

The previous Lord Chancellor, Lord MacKay, has described the advantages of precedent in this way:

'... a scheme of precedent is clearly capable of providing important benefits. It assists litigations to assess the nature and scope of legal obligations and, to the extent that it enables them to predict the likely outcome of disputes, it restricts the scope of litigation. By allowing the vast bulk of disputes to be settled in the shadow of the law, a system of precedent prevents the legal apparatus from becoming clogged by a myriad of single instances. It reflects a basic principle of the administration of justice that like cases should be treated alike and therefore generates a range of expectations from different participants in the legal process. Rules of law based on a system of precedent are therefore likely to exhibit characteristics of certainty, consistency and uniformity.'

Precedent, on this argument, provides certainty, consistency and thus a measure of clarity. People know not only what the law is but also what it will be. In principle, the ordinary person, the ordinary lawyer, the humblest judge is in just as good a position as the judge in the highest court to look back and see what the law was and, thus, see what the law will be. However, in providing this consistency, precedent also carries a disadvantage.

Precedent carries with it the unlikely message that those that came before us knew as much as we do now; that those in the past are good judges of what we should do in the present. One past Lord Chancellor, in a book of political philosophy, has caricatured the lawyer's idea of precedent thus:

'Failing all else, their last resort will be: 'This was good enough for our ancestors and who are we to question their wisdom?' Then they'll settle back in their chairs, with an air of having said the last word on the subject – as if it would be a major disaster for anyone to be caught being wiser than his ancestors!'

Precedent is conservative. It favours the status quo. Precedent slows down the pace of change within the legal system. In a world where things are constantly in flux, where things are always changing and where the pace of change seems to ever increase, the very advantages of precedent can thus be a disadvantage. By making the law predictable, precedent also makes it predictable that law will be suitable for old social conditions but not for those that presently obtain. Law is certain but also certainly out-dated. Law is consistent but also consistently wrong.

For traditional theorists the solutions to these problems are clear. The legislature exists to change legal rules. Parliament has the political legitimacy to amend the rules of the game. The judiciary, being unelected professionals who merely have a particular technical competence, are simply there to apply those rules which the legislature have made, or by implication, approved.

There are several problems with this account of the judge's role. One difficulty is its political naïveté. The parliamentary timetable is a crowded matter. There is not the time to debate all the legislation that the government would like to put forward in order to fulfil its own programme. There is still less time for measures which may be of great moment or importance within a narrow area of law but which are of no pressing weight for the population taken as a whole. There is almost no time at all for ideas for legislation which are not favoured by the government. A second problem for this traditional account of precedence is that most people, including most judges, now accept that judges do indeed make law.