1 Sources of Law and Legal Reform

INTRODUCTION

There are different interpretations of the phrase 'source of law'. It can, in jurisprudence, refer to what it is in our nature or society that necessitates law. More generally, however, the expression refers to the procedural origin of the law which is applied in the courts. There are three main sources: Parliamentary legislation, delegated legislation and the common law. Used in this sense, the latter phrase 'common law' connotes all judge made law and therefore includes equity.

If you are covering this theme, you should be very familiar with the origins and modern role of both common law and equity. You should also understand the details of the process of enacting legislation from the stage before the publication of Green Papers to the final stage, the Royal Assent. However, the English legal system cannot be treated as static; it is continuously responding to changes that take place in society as a whole. To deny the relevance of European law in an English legal system course would not only be restrictive, it would be wrong to the extent that it ignored an increasingly important factor in the formation and determination of UK law.

You should also have a good knowledge of the different bodies associated with reform: permanent institutions, that is, the Law Reform Committee, the Criminal Law Revision Committee and the Law Commission, and *ad hoc* bodies, such as Royal Commissions. You should also understand how the system resolves the interplay of several competing interest groups in order to produce legislation. This is a subject area where it is especially useful to have a sound knowledge of recent examples.

Checklist ✔

You should be familiar with:

- the origin and modern operation of the common law;
- the origin and modern operation of equity;

- the stages of promulgation of legislation;
- Parliamentary sovereignty and types of legislation;
- the types of delegated legislation and its advantages and disadvantages;
- the major institutions of the European Union (EU) particularly the European Court of Justice (ECJ);
- the institutions of law reform, the Law Commission, *ad hoc* bodies, etc.

QUESTION 1

What are the main sources of law today?

Answer Plan

This is, apparently, a very straightforward question, but the temptation is to ignore the European Union (EU) as a source of law and to overemphasise custom as a source. The following structure does not make these mistakes:

- in the contemporary situation, it would not be improper to start with the EU as a source of UK law;
- then attention should be moved on to domestic sources of law: statute and common law;
- the increased use of delegated legislation should be emphasised;
- custom should be referred to, but its extremely limited operation must be emphasised.

ANSWER

EUROPEAN LAW

Since the UK joined the European Economic Community (EEC) (now, following the Lisbon Treaty, the European Union EU), it has progressively but effectively passed the power to create laws which are operative in this country to the wider European institutions. The UK is now subject to Community law, not just as a direct consequence of the various treaties of accession passed by the UK Parliament, but increasingly, it is subject to the secondary legislation generated by the various institutions of the EU.

European law takes three distinct forms: regulations, directives and decisions. Regulations are immediately effective without the need for the UK Parliament to produce its own legislation. Directives, on the other hand, require specific legislation to implement their proposals, but the UK Parliament is under an obligation to enact such legislation as will give effect to their implementation. Decisions of the ECJ are binding throughout the EU and take precedence over any domestic law.

PARLIAMENTARY LEGISLATION

Under UK constitutional law, it is recognised that Parliament has the power to enact, revoke or alter such and any law it sees fit to deal with and no one Parliament can bind its successors. The extent of this sovereignty may be brought into question with respect to the EU for such time as the UK remains a member, but within the UK, Parliament's power is absolute. This absolute power is a consequence of the historical struggle between Parliament and the Stuart monarchy in the seventeenth century. Parliament arrogated to itself absolute law-making power, a power not challenged by the courts, which were in turn granted an independent sphere of operation. It should be remembered, however, that the **Human Rights Act (HRA) 1998** has, for the first time, given the courts the power to question, although not strike down, primary legislation as being incompatible with the rights protected under the **European Convention on Human Rights (ECHR)**. It also allows the courts to declare secondary legislation to be invalid for the same reason.

Parliament makes law in the form of legislation, that is, Acts of Parliament. There are various types of legislation. Whereas public Acts affect the public generally, private Acts only affect a limited sector of the populace, either particular people or people within a particular locality. Within the category of public Acts, a further distinction can be made between government Bills and Private Member's Bills. The former are usually introduced by the Government, whilst the latter are the product of individual initiative on the part of particular MPs.

Before enactment, the future Act is referred to as a Bill and many Bills are the product of independent commissions, such as the Law Commission, or committees, such as the Law Reform Committee and the Criminal Law Revision Committee. Without going into the details of the procedure, Bills have to be considered by both Houses of Parliament and have to receive Royal Assent before they are actually enacted.

Delegated legislation has to be considered as a source of law, in addition, but subordinate, to general Acts of Parliament. Generally speaking, delegated legislation is law made by some person or body to whom Parliament has delegated its general law-making power. In statistical terms, it is arguable that at present, delegated legislation is actually more significant than primary Acts of Parliament. The output of delegated legislation in any year greatly exceeds the output of Acts of Parliament and,

each year, there are over 3,000 sets of rules and regulations made in the form of delegated legislation, compared to fewer than 100 public Acts of Parliament. Delegated legislation can take the form of Orders in Council, which permit the Government to make law through the Privy Council. This power is usually considered in relation to impending emergencies, but perhaps its widest effect is to be found in relation to EU law, for under **s 2(2)** of the **European Communities Act 1972**, ministers can give effect to provisions of the Community which do not have direct effect. Most delegated legislation, however, takes the form of statutory instruments, through which government ministers exercise the powers given to them by general enabling legislation to make the particular rules which are to apply to any given situation within its ambit. A third type of delegated legislation is the bylaw, through which local authorities and public bodies are able to make legally binding rules within their area of competence or authority.

Delegated legislation has developed for a number of reasons. One such reason is the increased pressure on Parliamentary time, with the consequent hiving off of detailed and time-consuming work to ministers and their specialist departments. Another reason for the growth in the output of delegated legislation is the highly technical nature of the subject matter to which it tends to be addressed and the concomitant need for such rules themselves to be highly technical. Any piece of delegated legislation is only valid if it is within the ambit of the powers actually delegated by Parliament. Any law made outside that restricted ambit of authority is void, as being *ultra vires*, and is open to challenge in the courts under the process of judicial review.

COMMON LAW

The next source of law that has to be considered is case law, the effective creation and refinement of law in the course of judicial decisions. It should be remembered that the UK's law is still a common law system and, even if legislation in its various guises is of ever increasing importance, the significance and effectiveness of judicial creativity should not be discounted. Judicial decisions are a source of law, through the operation of the doctrine of judicial precedent. This process depends on the established hierarchy of the courts and operates in such a way that generally, a court is bound by the *ratio decidendi*, or rule of law implicit in the decision of a court above it in the hierarchy and usually by a court of equal standing in that hierarchy. Where statute law does not cover a particular area, or where the law is silent, it will be generally necessary for a court deciding cases relating to such an area to determine what the law is and, in so doing, that court will inescapably and unarguably be creating law. The scope for judicial creativity should not be underestimated and it should be remembered that the task of interpreting the actual meaning of legislation in particular cases also falls to the judiciary and provides it with a further important area of discretionary creativity. As the highest court in the land, the Supreme Court has particular scope for creating or extending the common law, and a relatively contemporary example of its adopting such an active stance can be seen in the way in which it overruled the long-standing presumption that a man could not be guilty of the crime of rape against his wife (see *R* (1991)). It should, of course, always be remembered that Parliament remains sovereign as regards the creation of law and any aspect of the judicially created common law is subject to direct alteration by statute.

An extension of the doctrine of judicial precedent leads to a consideration of a further possible source of law, for when the court is unable to locate a precise or analogous precedent, it may refer to legal textbooks for guidance and assistance. Such books are sub-divided, depending on when they were written. In strict terms, only certain venerable works of antiquity are actually treated as authoritative sources of law. Amongst the most important of these works are those by Glanvill from the twelfth century, Bracton from the thirteenth century, Coke from the seventeenth century and Blackstone from the eighteenth century. Legal works produced after *Blackstone's Commentaries of 1765* are considered to be of recent origin, but although they cannot be treated as authoritative sources, the courts on occasion will look at the most eminent works by accepted experts in particular fields in order to help determine what the law is or should be.

CUSTOM

The final source of law that remains to be considered is custom. The romantic view of the common law is that it represented a crystallisation of common customs, distilled by the judiciary in the course of its travels around the land. Although some of the common law may have had its basis in general custom, a large proportion of these so-called customs were invented by the judges themselves and represented what they wanted the law to be, rather than what people generally thought it was.

There is, however, a second possible customary source of law and that is rules derived from specific local customs. Here, there is the possibility that the local custom might differ from the common law and thus limit its operation. Even in this respect, however, reliance on customary law as opposed to common law, although not impossible, is made unlikely by the stringent test that any appeal to it has to satisfy. Amongst these requirements are that the custom must have existed from 'time immemorial' (that is, since 1189) and must have been exercised continuously within that period and without opposition. The custom must also have been felt as obligatory, have been consistent with other customs and, in the final analysis, must be reasonable. Given this list of requirements, it can be seen why local custom does not loom large as an important source of law.

Common Pitfalls ✗

The temptation is to concentrate on only one, source such as legislation or the common law, and to go into far more detail than is necessary for such a general question. Remember that each subtopic in this answer can be asked as a question topic in its own right. So remember to cover most, if not all, of the potential sources.

Aim Higher ★

It is essential to be aware of the EU as a source of modern law and reference to the Lisbon Treaty will show an up to date awareness of that particular source. In relation to legislation, reference could be made to examples of legislation introduced by the new coalition government.

QUESTION 2

How far would you agree with the contention that King Henry II deserves to be called 'the father of the common law'?

Answer Plan

A suggested plan for answering this question is as follows:

- introduction – the range of contributory factors;
- 'tradition expressed in action' (Simpson, *Legal Theory and Legal History*, 1987);
- the role of Henry II's clerics – itinerant royal justice;
- royal justice in competition with other sorts of justice;
- Pollock and Maitland's six principles (in *History of English Law*, 1911);
- conclusion – evaluating the role of an individual in legal history.

ANSWER

Before the Norman conquest in 1066, the English legal system involved a mass of oral customary rules, which varied according to region. Most writers agree with Pollock and Maitland's view that the common law had been largely established by the accession to the throne of Edward I in 1272. Certainly, the three courts of King's Bench, Common Pleas and Exchequer were operational by this time. It is true that Henry II, who reigned 1154–89, did much of significance to enhance the development of the common law, for instance, by popularising the King's court with the introduction of the Petty Assizes. However, we are not really familiar with how the *Curia Regis* acted during the Norman period before Henry II, because the earliest plea rolls date from his reign, so it would perhaps be over-presumptuous to credit too much to Henry II. In any event, the development of the common law was contributed to by many factors of a general historical nature and it might be more meaningful to speak of the various parties which helped nurture the common law from its first green shoots to its full bloom rather than to try and find a 'father'.

Unlike continental civil law, the English system does not originate from any particular set of texts or digests but from what Simpson has called 'tradition expressed in action'. It began as customary law used in the King's court to settle disputes and conflicts which touched the monarch directly. To begin with, these only included the graver crimes which became Pleas of the Crown. After the Norman invasion, there were still many different types of court apart from the royal court: the stannary courts of Devon and Cornwall and the courts of the royal hunting forests but, principally, in potential rivalry with the royal court, were the feudal and manorial courts. It was during Henry II's reign (but clearly not wholly attributable to this one man), that the clerics in his court (that is, his royal entourage) began specialising in legal business and acting in a judicial capacity.

In the jurisdictional expansion considered presently, an important role was played by the clerics who developed a range of writs and establishing procedures which, perhaps very significantly, afforded them greater importance and provided them with a generous income. These practices developed into the common law of England, the law which was available throughout the realm. In Simpson's words: 'It was common as a prostitute is common: available to all.' On this point, perhaps the most convincing of the reasons why Henry should be regarded as the 'father of the common law' is that he was largely responsible for the regional and itinerant royal justice, through which (by sending his judges up and down the country) the law truly became common.

Henry sent officials from the royal household to the counties and the travelling judges formed a nucleus of *iusticiarii totius Angliae* who had no local roots. They were thus much less susceptible to the corruption which had spoilt a similar attempt, earlier in the twelfth century, in which the royal judges had actually been based in the local communities. It was under Henry II that judges were for the first time sent on 'circuits', hearing pleas in the major places they visited and taking over the work of the local courts. In this travelling mode, the royal representatives were *iusticiae errantes*

(wandering justices) or *iusticiarii in itinere* (justices in eyre, that is, law French for journey). The judges were periodically sent on a 'general eyre', which included the whole country. Baker has argued, however, that it was the smaller circuit which was to prove 'the essence of the common law system', by bringing royal justice regularly to the counties.

The era running from the Norman invasion to the accession of Edward I saw the important struggle to administer justice between the royal judges and the tribunals of feudal lords, the shires and the hundreds which had survived from Anglo-Saxon times. The efforts of the royal judges were significantly assisted by the works of the text writers Glanvill and Bracton. Glanvill's *Tractatus de Legibus Angliae* (published under Henry II) was the first clear statement of the law, administered throughout the procedure of the royal courts. Glanvill was a senior royal judge. The writer's preface (it was probably not actually written by Glanvill, but by Hubert Walter or by Henry II's Chief Justiciary) divides the pleas into criminal and civil and the body of the work is mostly practical.

With only a few principles of general application before them and by virtue of some particular advantages of the evolving system, the royal judges had established the supremacy of their courts over all competing jurisdictions by the time of Edward's reign. Pollock and Maitland formulated six principles upon which was founded the usurpation of general jurisdiction by the *Curia Regis*. These principles show that while much was done by Henry II to promote the common law, there were several other factors which engendered it, some of which were effective only after Henry II's reign.

First, the King's court was a court to go to in default of justice. Under the Norman kings, the litigant who wished to proceed in the ordinary court obtained the King's 'Writ of Right Patent' which contained the threat *quod nisi feceris vicecomes meus faciet* (if you do not do this, my sheriff will). Complaints and petitions for justice were numerous and these cases formed the basis of the growth of the common law throughout the development of the Register of Writs (added to each time a judge accepted a new writ as suitable to be used again in similar cases).

Second, the Writ of Right issued by the Royal Chancery became compulsory for all pleas relating to freehold land, according to an apparently lost ordinance of Henry II. This was so, even where the case was to be tried in the seigniorial court and so gave the King power over manorial courts.

Third was the introduction by Henry II of the Grand Assize as an alternative to trial by battle in the proceedings on the Writ of Right. As these cases were decided by impartial neighbours, it became much more popular than trial by battle and was only available in the royal court.

Fourth was Henry II's introduction of the Petty Assizes, also only obtainable in the King's court. These assizes were for trying disputes concerning *disseisin* of land. They did not actually infringe the feudal rights of the lord to try actions relating to the title to the freeholds of his tenants. They did, however, become very popular because of their summary nature and were frequently used by dispossessed owners to recover *seisin*, since the opponent rarely took any further action if his claim was weak.

The fifth factor accounting for the usurpation of jurisdiction by the King's court was the expansion of the 'King's Peace' (the monarch's as opposed to a lord's right to deal with any local disorder, crime, etc). Pleas of the Crown increased rapidly at this time and included many claims that would eventually evolve into torts.

Finally, Pollock and Maitland mention the important series of writs which began with the word *praecipe*, where the sheriff was commanded to investigate a matter and give any wrongdoer the right to give satisfaction, or else face the royal judges for their judgment. This was among the Pleas of the Crown and again quickly became quite popular on account of its efficiency.

Kiralfy (in *English Legal History*, 1958) has advanced another factor significant in the acquisition of jurisdiction by the royal courts, namely, the construction given to the **Statute of Gloucester 1278** by the royal judges. This statute provided that no cases involving an amount of less than 40 shillings should be brought in the royal courts, but that they should be tried before local tribunals. The judges interpreted this to mean that no personal actions to recover a sum greater than 40 shillings could be commenced in the local courts, thus reserving all important legislation for themselves. It is relevant here that the judges were anxious to attract litigants because their fees varied with the amount of business done.

Apart from the advantageous nature of the remedy in the recovery of land provided by the Petty Assizes, the growth in popularity of the royal courts is connected with the progressive move towards strong, centralised government and its accompanying ability to compel attendance at court and enforce execution of its judgments. By contrast, we can look at the diminution in power of the feudal lords, their dilatory procedures and the inadequate powers to make defendants appear in their courts and to enforce judgments. Additionally, only the royal courts could give litigants the novel and desirable method of proof, the *recognitio* or jury, as it came to be called.

In conclusion, it can be seen that although Henry II was instrumental in making a number of important innovations which promoted the development of the common law, these policies were part of a wide and complex struggle for the power and

revenue to be enjoyed by whoever controlled and administered justice. There were many other important figures involved, such as the clerics, the judges and the writers, whose own behaviour and interests it is important to appreciate in developing a proper understanding of the origins of the common law.

QUESTION 3

Why was the development of equity necessary? Did equity satisfy those needs?

Answer Plan

In response to this question, you should:

- define the concept of equity;
- outline the origins of the system of equity;
- examine defects in the common law: expense, delay, corruption, single remedy, etc;
- note trusts;
- note the advantages of equity – no formality, enforceable judgments, mobility of court, varied remedies, etc;
- include some mention of the 1873–75 legislation;
- comment on the irony of modern equity being slow and rule-bound.

ANSWER

In his *Nicomachean Ethics*, Aristotle argued that law operates through general rules in the pursuit of justice and is thus imperfect because it will fail to deal fairly with all eventualities. It is impossible for those who draft law to anticipate the infinite variety of circumstances which could arise in the future. Thus, if we are to have justice, we must use not simply a system of rules but also a power to depart from the rules in certain cases. Aristotle referred to *epieikia*, 'equity' as it was later known in its English form, as the absolute justice which corrects law in particular cases. In the light of the many problems encountered by litigants at common law, and the concerns of many Chancery personalities, equity developed to 'soften and mollify the extremity of the law': *per* Lord Ellesmere in *The Earl of Oxford's Case* (1615).

The establishment of the common law courts in the early medieval period did not represent the full extent of the Crown's jurisdiction. The monarch as the 'fountain of justice' retained a residuary power 'to do equal and right justice and discretion in mercy and truth' (Coronation Oath). The King received many petitions for justice from dissatisfied litigants and, by the fourteenth century, there were so many that they were being dealt with by the King's Council. By the end of the century, most were being sent directly to the Chancellor, the most senior officer of the Council.

The Chancery originated as the royal secretariat (its name comes from the chancel or latticed screen behind which the clerks worked) and the Chancellor was responsible for authenticating writs in ordinary cases. The earliest judicial work in Chancery was concerned with settling disputes within the department. Petitions to the King for legal redress against the Crown also began here. These proceedings were recorded in Latin, but it was the so-called 'English side' of Chancery, which grew to meet the more mundane needs of litigants, that hatched the Court of Chancery.

By the late fourteenth century, the Chancellor was dealing with a high number of petitions which could not properly be heard on the 'Latin side' of Chancery. By 1460, the Court of Chancery was as established as the common law courts. The ordinary ways of obtaining justice were not feasible options for many prospective litigants because they were too poor to afford the expensive process entailed in an action through the Court of Common Pleas. The claimant had to take care that the writ he chose was the appropriate one and that all the particulars were correct, otherwise the case might be lost as a result of the procedural defect.

A greater problem was that the common law only provided the remedy of damages, whereas a claimant might really wish for the defendant to desist from carrying out some activity (for example, a nuisance) or force him to carry out an obligation (for example, to sell a particular area of land). Additionally, the common law did not recognise simple breaches of common law as actionable. Actions for breaches of agreement could only be brought if they could be framed as writs for debt or detinue (wrongful detention of another's goods). The common law courts did not recognise actions for breaches of contract *per se*.

Local corruption also thwarted many claims. There is even evidence, mentioned by Baker (in *An Introduction to English Legal History*, 1971), that some supplicants complained of witchcraft.

The common law had been quite well developed and was, as Simpson has argued, passed down as an essentially oral tradition amongst a very small legal profession (not many more than 50 judges and important lawyers in about 1450). This group, however, had a very conservative conception of law. The response of the common law to the development of trusts, for example, illustrates how its conservatism led to the need for equity. The practice of making trusts (for example, a father giving property to two trusted friends to hold, on trust, for his son until the son reached a certain age) was becoming more popular by the end of the fourteenth century, especially amongst

those who were going off to battle and were uncertain of whether they would return. The common law courts, though, did not recognise such an arrangement. The property had been given to the trustees and it was theirs, thought the common law, to do with as they pleased. The intended beneficiary, the son, could have no legal remedy if the trustees abused their position. The Chancellor could, and did, act in such circumstances to order the trustees to fulfil the trust reposed in them.

The law was no respecter of persons and afforded no justice to those who came a cropper of a technicality. By contrast, equity acts *in personam*, that is, it is concerned with the conscience of the individual. In one fifteenth-century case, Fortescue CJ rebuked counsel for advancing a legal point: 'We are here to argue conscience not the law!'

There were, principally, two theoretical justifications used by the Chancellors who developed the doctrines of equity. The first was that they were administering not law, but *conscience*. Thus, those who abused their position as trustee or who sought to take an unconscionable advantage of another's mistake in a contract were corrected by equity. In the fifteenth century, the Chancellor's court was called a court of conscience. The use of the term 'equity' in this context, and its Aristotelian meaning, became more popular in the sixteenth century.

There were great advantages in the early forms of Chancery action. Unlike the actions at common law, the petition required no formality and the *subpoena* which was issued was much more effective than the common law *capias*. The former commanded the respondent to appear in Chancery and answer the petition under a fixed pain, often £100. There were none of the sort of problems involved at common law, where litigants were defeated by errors on the face of the writ because no cause of *subpoena* was stated on the petition. The hearings were not hampered by rules of evidence like those which required debts to be proven with deeds, and the Chancellor – who acted without a jury – could take evidence from the parties themselves. Unlike the common law courts, Chancery was not in a fixed place and followed the Chancellor. The court could even convene in his private house. A number of discretionary remedies were developed by Chancery. Specific performance was an order to compel a defendant to perform a specified activity, usually involving the sale of land. The injunction was an order used to prevent defendants from taking some specified action.

By the sixteenth century, the distinct approaches and procedures of law and equity had become clear. Law was concerned with a body of rules applicable to certain facts, whereas the Chancellor was concerned with individual cases which were dealt with according to the dictates of 'conscience'. Equity was consolidated during the seventeenth and eighteenth centuries, but difficulties were still experienced by litigants who had to seek legal and equitable remedies in separate courts. This could be problematic (slow and expensive), where a case required consideration from both legal and equitable perspectives. The administration of law and equity was achieved through the **Judicature Acts 1873–75**, after which equity could be obtained in any division of the High Court.

It was a problem for equity that, on the one hand, its justice flowed from its not being a rule-bound system, but one operating on discretion whilst, on the other hand, uncontrolled discretion could itself become oppressive by its unpredictability. Conscience varied from man to man. It was Selden (in *A Brief Discourse Touching the Office of Lord Chancellor of England*, 1617) who remarked that if the measure of equity was the Chancellor's conscience, then one might as well make the standard measure of one foot the Chancellor's foot. Chancellors began to give reasons for their decisions in the seventeenth century and these were reported and gradually formed into a set of rules. Some maxims of equity were published in 1727 by Richard Francis, and have been relied on by courts ever since. They include the propositions 'he who comes to equity must have clean hands'; 'equity is equality'; 'equity does nothing in vain'; and 'equity regards the substance not the form'. However, the improved system of reporting during the eighteenth century helped a system of equity precedents to develop and by then, as Baker puts it, *rigor aequitatis* had set in. It is an irony of legal history that as equity developed, it became less discretionary and was often as rigid as law.

Not long after its emergence, the Court of Chancery, with its cheap, quick and effective procedures, became attractive to the wealthy as well as the poor. Avery (in 'The history of the equitable jurisdiction of the Court of Chancery before 1460' (1969)) has shown that between 1432 and 1450, the total number of petitions to the court increased sixfold and over 90 per cent of the cases were, by this time, disputes about land.

From the seventeenth century, Chancery became notorious for delay and expense, a theme given a wonderfully biting and humorous exposure in Dickens' *Bleak House*. The court was insufficiently staffed with judges and had no effective appeal system. Estimates of cases pending in Chancery at this time went as high as 20,000. Some cases were still pending after 30 years. The court was also plagued with corruption. Gifts of gold or silver to court officials could often expedite proceedings and, by long usage, many of the gifts became 'fees' which could be demanded as of right. Fees could be demanded at each distinct stage of the proceedings, so Masters procured rules of court which extended court cases beyond any reasonable length.

What had begun as a system based on speed, cheapness, informality and a concern to assist the poor had collapsed by the nineteenth century into an incredibly protracted, rule-bound, expensive system for the wealthy.

This irony can, however, be overstated. There were several more positive contributions made by equity to the legal system. Its discretionary remedies of the injunction and specific performance, the law of trusts and the equity of redemption should all be cited in this regard.

QUESTION 4

What is legislation? Where does it come from, how is it produced and what does it do?

Answer Plan

This is a wide-ranging question that requires a fairly close knowledge of the workings of Parliament. A suggested structure is as follows:

- distinguish statute law from judge-made common law;
- consider where the actual proposals for legislation come from – for example, government policy, Green Papers, White Papers;
- mention the limited scope for individual MPs to generate legislation;
- set out the actual process that legislation has to pass through to be enacted;
- make reference to the various types of legislation, emphasising the role of delegated legislation; mention should also be made of the potential impact of the **Human Rights Act (HRA) 1998**.

ANSWER

Although the courts retain an essential function in the interpretation of statutes, it has to be recognised that legislation is the predominant form of law-making in contemporary times. The process through which an Act is passed by Parliament is itself a long one, but before concentrating on that process, some attention should be focused on the pre-Parliamentary process through which the substantive content of the Act is generated.

SOURCES OF LEGISLATION

There are various sources of legislative proposals.

The majority arise from government departments, in pursuit of their policies in relation to their allocated area of responsibility. Actual policy will, of course, be a consequence of the political persuasion and imperatives of the government of the day and as, by convention, the Government is drawn from the majority party, it can effectively decide what legislation is to be enacted through its control over the day to day procedure of the House of Commons, backed by its majority voting power. The decision as to which Bills are to be placed before Parliament in any session is under the effective control of a cabinet committee known as the Legislation Committee, which draws up the legislative programme announced in the Queen's Speech, delivered at the opening of the Parliamentary session.

In some cases, the Government will set out its tentative plans for legislation in the form of a Green Paper and will invite interested parties to comment on the proposals. After considering any response, the Government may publish a second document, in the form of a White Paper, in which it sets out its firm proposals for legislation.

If the Government is the source of most legislation, the role of the individual MP, acting through the process for the enactment of Private Member's Bills, should not be forgotten. There are, in fact, three ways in which an individual MP can propose legislation. These are through the ballot procedure, by means of which backbench MPs get the right to propose legislation on the 10 or so Fridays specifically set aside to consider such proposals, under Standing Order 39 and under the 10-minute rule procedure. Of these procedures, however, only the first has any great chance of success and, even then, success will depend on securing a high place in the ballot and, in practice, must not incur government disapproval. If such a proposal is looked upon with favour by the Government, it has an especially good chance of being enacted, since the Government may provide additional time to allow it to complete its passage. Perhaps the most famous Private Member's Bills have related to the provision of abortion. The original **Abortion Act 1967** was introduced by the Liberal MP David Steel, and has been subject to numerous attempts to amend it by further Private Member's Bills.

Alternative sources for proposed legislation are the recommendations of independent commissions and committees, such as the Law Commission, or the Law Reform Committee, which considers alterations in the civil law, and the Criminal Law Reform Committee, which performs similar functions in relation to the criminal law.

It is always open to pressure groups to lobby political parties and individual MPs in an attempt to have their particular interests made concrete in legislation. However, some concern has been expressed at the growing number of professional lobbyists who are paid to make sure that their clients' cases are prominently placed before the appropriate people within the legislature.

THE LEGISLATIVE PROCESS

Before any legislative proposal (known at that stage as a Bill) can become an Act of Parliament, it must proceed through, and be approved by, both Houses of Parliament and must receive the Royal Assent. A Bill must be given three readings in both the House of Commons and the House of Lords before it can be presented for the Royal Assent. It is