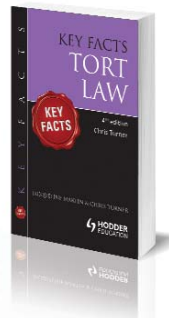
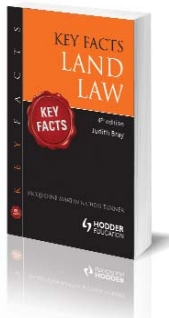
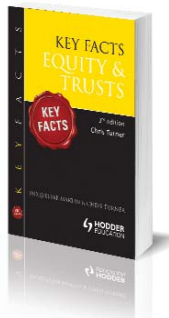
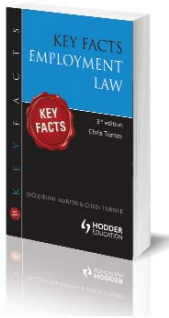
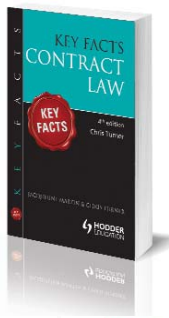
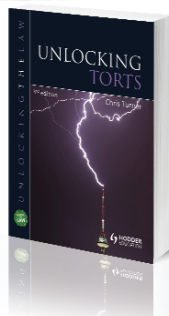
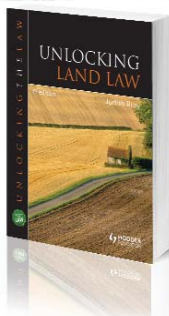
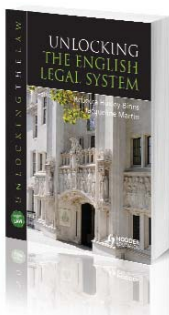
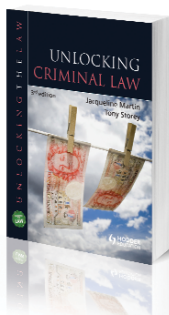
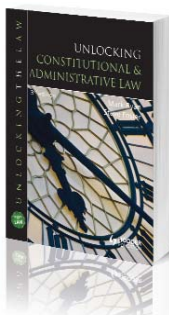


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1.9 Law reform

A modern legal system needs to be flexible and adaptable to avoid stagnation of the law. So where does the impetus for changes to the law arise?

Figure 1.8 The sources of law reform

1.9.1 Judges

How do judges reform the law? This is done through the system of precedent, which is explained in detail in Chapter 2.

Note that there are democracy and accountability issues that deserve your attention. Judges are not elected; yet they clearly do make law. Judges are notoriously difficult to remove from office, as they lack public accountability. Unlike MPs, we cannot vote judges out if we do not like their decisions. Nevertheless, in certain areas of the law have never received legislative attention, or have not for a century or more, there is naturally no alternative but to allow the judges to make the law. For example, murder, arguably the most serious crime, is a common law offence. Without judicial law-making, developments in the interpretation of the elements of the offence would not have occurred. By way of further example, assaults are governed by the antiquated Offences Against the Person Act 1861. You may be familiar with some of the terms used in the 1861 Act (actual bodily harm and grievous bodily harm); it not for the judges in the leading case of *M v R [1997] 2 WLR 554*, psychological illness suffered by victims of the defendant's harassment and intimidation would not have amounted to bodily harm. The House of Lords felt that the old Act had to be re-interpreted for modern times.

However, waiting for the law to be reformed by case law alone is a long process. It could be many years before a case that might reform the law reaches the House of Lords (this is the only court that has the power to overrule previous law unless a question of human rights under the ECHR arises). Case law is also limited to the facts of the case from which it arises. Legislation, on the other hand, has a wider reach and there can be statutory provisions on every and all aspects of behaviour. That is why, when pressure groups advocate a change to the law, they pressure Parliament to introduce comprehensive legislation. It is little use petitioning a judge hearing an intellectual property law

ARTICLE

Art 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing...
3. Everyone charged with a criminal offence has the following minimum rights...
 - d. to examine or have examined witnesses against him...

The House of Lords had to decide in the appeal whether s 41 of the Youth Justice and Criminal Evidence Act 1999 could be given effect, in accordance with 3 of the HRA 1998, in such a way that was compatible with the defendant's rights to a fair trial and to present a full and complete defence under Art 6, and, if it could not, whether the House should make a declaration of incompatibility between the 1999 Act and the ECHR.

Lord Steyn adopted a very wide reading of 3 of the 1998 Act. He read into s 41 of the 1999 Act an implied provision of compatibility with Art 6 so as to avoid a declaration of incompatibility. He did this by giving the trial judge discretion to allow such questioning where it was relevant to a fact that was in issue in the trial and where such questioning was needed to allow the defendant to have a fair trial under Art 6.

It would be incorrect to leave you with the impression that the HRA 1998 has not affected legislation at all; there has been a lot of parliamentary sovereignty, but only a slight one. Parliament must declare all proposed legislation to be compatible with the ECHR articles during the Reading of the Bill.

SECTION

s 19(1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill

- (a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights ("a statement of compatibility"); or
- (b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.

(2) The statement must be in writing and be published in such manner as the Minister making it considers appropriate.

ACTIVITY

Self-test questions

1. Briefly explain the difference between the Council of Europe and the European Union.
2. In your own words, explain the effect of s 3 and 4 of the Human Rights Act 1998.
3. State three of the rights under the ECHR Articles.

KEY FACTS

Key facts chart: the sources of English law

The European Union	The Council of Europe
<ul style="list-style-type: none"> The UK joined the EU (then called the EEC) in 1973 EU law is supreme over UK law under the European Communities Act 1972. English courts can refer questions concerning EU law to the Court of Justice of the European (Constitutions) (CJ) under Art 268 of the Treaty of Rome. 	<ul style="list-style-type: none"> The Council of Europe is responsible for the European Convention of Human Rights and the European Court of Human Rights. English law is now subject to the Articles in the European Convention of Human Rights because of the Human Rights Act 1998.

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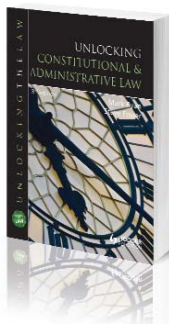
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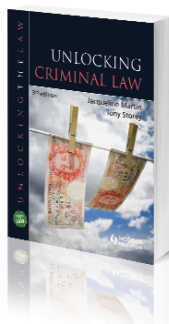
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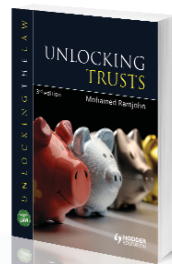
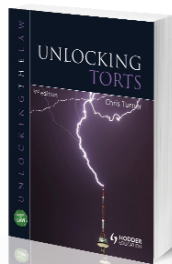
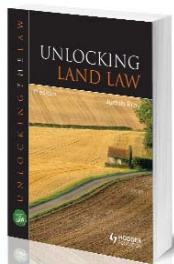
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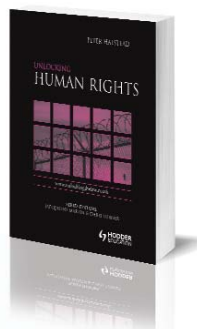


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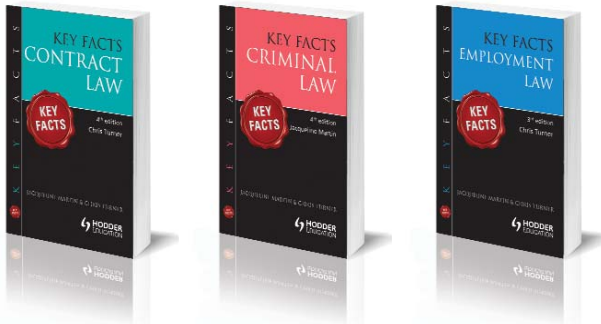
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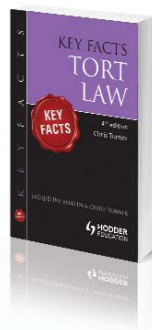
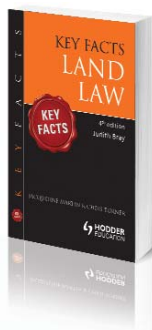
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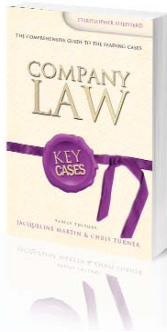
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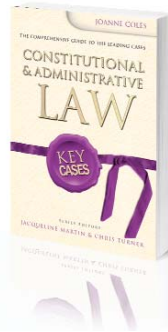
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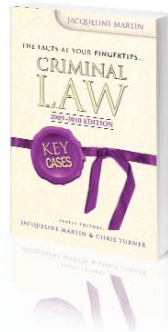
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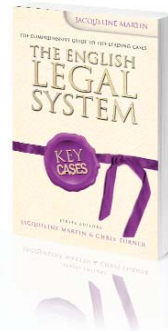


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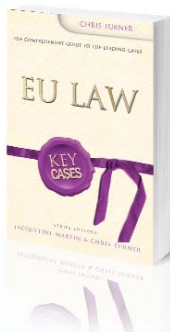
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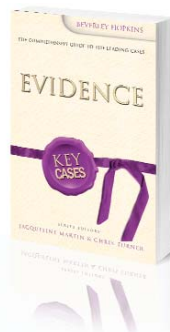
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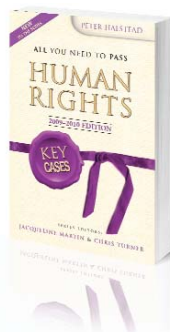
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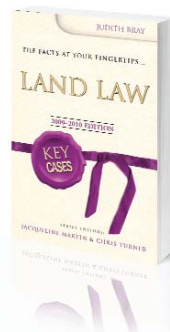
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