Certainty and Flexibility in the Law: Insights from English Law

Lord Sales

Address to LLM Students
Cambridge University, 16 June 2025

First of all, may I congratulate you on finishing your exams. I wish you all good luck for your results.

I hope you have taken the opportunity of studying for the LLM to advance your legal education and to deepen your thinking about the law. I believe that it was studying for the year for my own postgraduate degree in law that I truly became a lawyer in my own thought. I was made to think harder about law than I ever had before. Even now I find myself reflecting on legal problems in ways that hark back to my studies then. I hope that in your future careers you will find that is the case for you as well.

I am grateful for the invitation to give this address. The subject I have chosen is Certainty and Flexibility in the Law: Insights from English Law. My hope is that this may be of interest to you across the spectrum of private law, public law and international law.

Certainty and flexibility in law is without doubt a big and important topic. I believe that maintaining a reasonable balance between certainty and flexibility is a central aim of any legal system. My lecture is focused on the legal system in the UK, but I think that this is illustrative and I hope that what I say has a wider resonance.

I begin by asking, why should we care about flexibility in the law? Isn't the rule of law all about providing certainty for people who are transacting with each other? And doesn't that logic carry across to public law as well? Through certainty in the law, the citizen is protected from capriciousness and abuse of power on the part of officials dealing with them.

The famous sociologist Max Weber explains that where the law satisfies the requirement that the law be stable and predictable this has significant economic benefits. If citizens can predict when the law will impact upon them and hence are enabled to plan their affairs, they can have confidence to invest for economic gain. Where the law defines and enforces property rights it provides an answer to the Tragedy of the Commons.[1] The owner of property can invest in its protection and development in the expectation that the fruits of this work will accrue to them.

[1] Joseph E. Stiglitz, *The Road to Freedom: Economics and the Good Society* (Allen Lane 2024), ch 5, 'Contracts, the Social Contract, and Freedom', 62.

Furthermore, citizens can have confidence to trade with each other, knowing the state will enforce their contracts. As the economist Joseph Stiglitz points out, a capitalist economy depends critically on this aspect of the rule of law. He writes:

> "without rules and regulations enforced by government there could and would be little trade … A world without any restraints would be a jungle in which only power mattered … It wouldn't be a market at all. Contracts agreeing to receive a good today in return for payment later couldn't exist, because there would be no enforcement mechanism". [2]

Weber explains that calculability in relation to legal rights is necessary for the accumulation of capital and economic planning and investment, which is undermined when the law is unpredictable. The law has to be certain to provide the necessary element of calculability.[3]

However, that is not the only function the law has to fulfil. It also has to provide a sense of legitimacy for those who are subject to it. No legal system operates just on the basis of fear of sanctions. Every legal system depends for its effectiveness upon the cooperation and willing compliance of the public who are subject to it. And this requires it to satisfy a basic demand for legitimation, to use the language employed by the philosopher Bernard Williams.[4] That means that to an important degree it has to be aligned with general background social values and a sense of morality.

Background values are subject to gradual change in society. So the basic legitimation demand requires a degree of flexibility in the law so that it can be adjusted in line with developing social values. Rigid certainty of law would undermine that objective. As I will explain, this is a particularly important consideration in relation to the common law in the UK, which depends for its legitimacy not on its democratic credentials but on its capacity to encapsulate social standards in the form of legal rules.

There is also an important area of overlap between the aims which certainty promotes and the aims which flexibility promotes. The law cannot specify a rule to govern every situation: the task would be impossible. In addition, no rule governs its own application. So rules have to be interpreted to see how they apply in new situations and they have to be applied in sensible and reasonably predictable ways. The law is embedded in society and has to be understood and applied in the light of background social values. Where a rule is uncertain, or it states an open-textured standard – for example, that someone must act reasonably – the way that people can be guided as to its application is to have regard to background social and moral standards regarding what counts as reasonable. So if the law is flexible in its application to new situations and is

---

[2] Ibid., p. xvi; and see ch 5, 'Contracts, the Social Contract, and Freedom'.
[3] M. Weber, *General Economic History* (1923) 341-342.
[4] Bernard Williams, *In the Beginning was the Deed* (2005).

developed flexibly in accordance with developing social standards, it can actually make the application of the law more certain and predictable to those who are subject to it. [5]

In relation to the striking of a balance between certainty and flexibility in the law, it is relevant to call attention to the very basic distinction between statute law and the common law. These two forms of law address the balance between certainty and flexibility in very different ways.

Statute is positive law created by the deliberate and thoughtful action of Parliament as the democratic legislature. Parliament's democratic and representative nature means that it is well placed to react to social change. In enacting a statute it creates positive law in the form of canonical and binding statements. It may of course sometimes choose to enact rules in the form of open-textured standards, such as reasonableness, rather than hard-edged bright line rules. But generally it can and does make laws which are strict in their formulation and much more certain in their application. Statute law can achieve this level of certainty because it copes with the need for flexible adaptation to changing social circumstances by virtue of the fact that Parliament is democratically authorised to change the law to reflect those circumstances if it perceives a need to do so. The current debate within Parliament about changing the law on assisted suicide is a good example of this process in action.

The common law, by contrast, is the product of centuries of indirect lawmaking by judges as a byproduct of deciding real cases and of articulating the legal rules which emerge from those decisions and which fall to be applied in present cases and can be applied to future cases. The form of common law rules tends to be open-textured. Also, they are in practice revisable through processes of being applied, or qualified, or distinguished and therefore <u>not</u> applied in particular cases. In these ways they are made open to flexible adaptation and development over time.

Part of the reason for this is the need for the common law to maintain its legitimacy in the eyes of the public in circumstances where, unlike statute law, it does not have democratic legitimacy to support it. Part of the reason for the form of the common law is because judges, unlike Parliament, cannot just change the law at the stroke of a pen. Again, this is because of the absence of democratic authority for what they do. Judges have to reason from basic accepted and established principles in order to justify their decisions and legitimate their decision-making. The principles they state have to allow for flexibility in their application to accommodate future cases which cannot be foreseen at the time that any particular decision is made.

Within the common law I also include the distinct body of legal rules known as Equity. Equity developed as a body of doctrine specifically to provide greater flexibility in the application of common law rules, essentially in a period through

[5] Compare R. Goodin "An Epistemic Case for Legal Moralism" (2010) Oxford Journal of Legal Studies 615.

to the nineteenth century during which the common law rules were regarded as more fixed and rigid than they generally are now. In this way, Equity fulfilled the legitimation aim of law when the common law was not treated as fully responsive to it.[6]

Equity and common law have come closer together in modern law. Equity has had to develop increasingly fixed rules and principles in order to meet the social need for the law to be certain and predictable. It has responded to the charge that equitable rules depended too much on the subjective whim of the particular judge who was deciding a case, the old jibe that the rules were not fixed rules at all but varied from case to case depending on the size of the Chancellor's foot. On the other hand, in the twenty-first century it is recognised that the common law is flexible and is subject to development by the judges, albeit not in the way that statute law can be changed by Parliament. The balance in the common law between certainty and flexibility has shifted, so it has become more flexible and responsive to changing social standards. The balance in equity has changed in the opposite direction, so that it has become more certain.

In an important lecture in 1972, Lord Reid – a leading judge of the twentieth century - described the tension felt by a judge in the process of identifying, developing and applying the law:

> "People want two inconsistent things; that the law shall be certain, and that it shall be just and shall move with the times. It is our business to keep both objectives in view. Rigid adherence to precedent will not do. And paying lip service to precedent while admitting fine distinctions gives us the worst of both worlds. On the other hand too much flexibility leads to intolerable uncertainty."[7]

The centrifugal tendencies of the common law inherent in investing judges with authority to change the law by adapting it to changing social needs have to be controlled by subjecting judges to various disciplines to maintain their decision-making and law-developing functions within reasonable bounds. Those bounds have to be acceptable to society as a whole, in order to maintain the authority of the law as so developed and of the judiciary as trusted specialists in dispute resolution. This means that the judges have to be alert to the constitutional context in which they operate and conscious of their subordinate law-development role as compared with Parliament.

The social function to be fulfilled by the law in providing reasonable guidance to citizens in the conduct of their affairs also imposes its own requirements, in that development of the law by judges should be consistent with promotion of that function and should not undermine it to an unacceptable degree. This grounds the disciplines of maintaining doctrinal and conceptual coherence to which a common law judge is subject. These disciplines are in part internal to a judge, as something into which he or she is trained. They are also the subject of external

[6] Irit Samet, *Equity: Conscience Goes to Market* (2018).
[7] Lord Reid, "The Judge as Law Maker" [1972] J.S.P.T.L. 22, 26.

controls and reinforcement, through a structured appellate system with a doctrine of precedent and through the embeddedness of the judge in a specialised legal culture which can reflect on and criticise what he or she does.

However, the tension described by Lord Reid flows from a different social function of law, that it should reflect and give effect to conceptions in society of justice, fair-dealing between people and reasonable outcomes. If the common law does not achieve that, its legitimacy is put in doubt. Those conceptions change over time, so this social function implies that the judges cannot properly avoid some role in developing the law to keep pace with them. This tendency in the common law, to depart from or change previously recognised legal rules, is also disciplined by review through the appellate system and critique within the legal culture, as well as through the possibility of critique in wider society.

The reconciliation through the common law of these competing forces for stability and change mean that the topography of legal doctrine is subject to movement, but at a slow rate and subject to a presumption in favour of inertia. Fixed points in the terrain which serve to orientate the common lawyer can gradually be eroded or undermined by other changes in the landscape, while new mountains can be pushed upwards to become in their turn the key doctrinal reference points. The normative power of the reference points used for common law reasoning fluctuates, as lawyers and judges try to keep doctrine in alignment with society and its expectations.[8]

Therefore the courts strive to achieve a coherent fit with previous caselaw dealing with the same topic whilst at the same time trying to adjust the law to changing social needs.

Lord Sumption put it this way in *Willers v Joyce*:[9]

> "… where the courts develop the law, they must do so coherently. This means, among other things, that the development must be consistent with other, cognate principles of law, whether statutory or judge-made …"

and

> "… the proposed development of the law should be warranted by current values and current social conditions. Unless the law is to be reinvented on a case by case basis, something must generally have changed to make appropriate that which was previously rejected. …"

And here is Lord Sumption again, this time in *Mirza v Patel*:[10]

> "… The common law is not an uninhabited island on which judges are at liberty to plant whatever suits their personal tastes. It is a body of instincts and

[8] This section draws on P Sales "The Common Law: Context and Method" (2019) 135 LQR 47.
[9] [2016] UKSC 43 at paras. [178]-[179].
[10] [2016] UKSC 42 at para. [226].

> principles which, barring some radical change in the values of our society, is developed organically, building on what was there before. It has a greater inherent flexibility and capacity to develop independently of legislation than codified systems do. But there is a price to be paid for this advantage in terms of certainty and accessibility to those who are not professional lawyers. The equities of a particular case are important. But there are pragmatic limits to what law can achieve without becoming arbitrary, incoherent and unpredictable even to the best advised citizen, and without inviting unforeseen and undesirable collateral consequences. …"

In England, the common law grew out of the judgments of the royal courts and the practices of the barristers who appeared in them, and who became judges in their turn. Judges and barristers shared an institutional life together in the Inns of Court, in which new barristers were trained in legal science and practice. This background of the common law in a common legal culture of judges and practitioners is important to understand its strength, resilience and adaptability. The common law was not built on simple commands from the courts in the form of judgments in particular cases, but on a strong autonomous legal tradition to which both judges and lawyers contributed. The common law has its foundation in a combination of a strong common legal culture and an authority system, in which higher courts lay down decisions on legal issues which are binding on lower courts. Both the legal culture and the structure of authority serve to promote predictability, consistency and stability in the law.

The strengths of this system are three-fold. First, the common training of judges and lawyers in a discrete and stable legal science means that it is possible to obtain reasonably determinate legal advice regarding the predictable effects of law. Law does not apply itself, but requires common standards to be inculcated through the training and expectations of lawyers. The courts behave in ways which lawyers are able to predict with reasonable confidence, and about which they can advise their clients. People are thus able to plan their affairs.

As Brian Simpson has written:

> "… it seems to me that the common law system is properly located as a customary system of law in this sense, that it consists of a body of practices observed and ideas received by a caste of lawyers, these ideas being used by them as providing guidance in what is conceived to be the rational determination of disputes litigated before them, or by them on behalf of clients, and in other contexts. These ideas and practices exist only in the sense that they are accepted and acted upon within the legal profession …"[11]

The American jurist Karl Llewellyn also emphasised the cultural and customary setting for legal thinking and practice. In his book *The Common Law Tradition: Deciding Appeals* he wrote that the law includes:

> "along with the rules of law, all the rest of the doctrinal environment in a

[11] A.W.B. Simpson, "The Common Law and Legal Theory", in A.W.B. Simpson (ed), *Oxford Essays in Jurisprudence (Second Series)* (1973), p. 94.

> fashion which adversary dialectic dares not face and of which the ignoramus is unaware. It is enough to mention here the general conceptual frame, the vibrant though almost unspoken ideals, the force-fields in doctrine and attitude which strain toward or against movement in any contemplated direction, the going techniques and going organization of the work of Law-Government. The ideas thus as of course embrace in 'the Law' the skill and the traditions of the crafts of law, the ways of seeing, thinking, feeling, doing, and duty in and into which the craftsmen – the body of craftsmen – have been reared";

And it requires a judiciary which is:

> "right-minded, learned, careful, wise, to find and voice from among the still fluid materials of the legal sun the answer which will satisfy, and which will render semisolid one more point, as a basis for future growth. And the *certainty* in question is that certainty *after the event* which makes ordinary men and lawyers *recognize as soon as they see the result* that however hard it has been to reach, it is the right result. Then men feel that it has *therefore* really been close to inevitable … the certainty … not of logical conclusion from a static *universal*, but of that *reasonable regularity* which is the law's proper interplay with life".[12]

These points about the significance of legal culture are relevant for all legal systems. This is because legal systems all depend on interpretation, whether of legal texts or legal principles inherent in legal traditions – which are themselves captured and reflected in texts. And interpretation is a practice of lawyers and judges operating within a legal culture. Through inculcation in the culture, they are trained to react to texts and principles in determinate ways, thereby giving them determinate and predictable meaning. This is true of constitutional instruments, statutes, contracts and wider legal principles in a particular system.

This view is found again in the work of Max Weber, in his explanation of how the English common law met the requirements of predictability and calculability in a developing capitalist economy. He emphasised how English lawyers were trained in a craft and operated as part of a sort of guild, with a strong internal culture.[13]

It has often been noted that the ability of English law to operate with a high degree of formality in the interpretation of contracts and statutes is related to the close-knit legal culture which exists among judges and practitioners. Atiyah and Summers make this point in their book, *Form and Substance in Anglo-American Law*:

> "The homogeneity of the English judiciary (and the senior bar) is of immense importance to the whole legal culture of England; it certainly plays a part in determining how questions of law are viewed and decided … to the extent that

[12] Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960), 185-186, emphasis in original
[13] M Weber, *Economy and Society* 1979, vol 1, 794.

> judges share the same 'inarticulate major premises', traditional legal reasoning is not nearly so bogus as American realism has been credited with demonstrating."[14]

The American jurist William E Scheuerman takes this point and generalizes it to explain how reasonable predictability is achieved in the law of international arbitration. In his book, *Frankfurt School Perspectives on Globalization, Democracy, and the Law* he points out how the globalized law of international arbitration is a form of modern lex mercatoria, in which basic norms such as good faith are invoked which are vague and open-ended, and appeal is made to a version of anti-formalistic justice. But the uncertainty which is associated with this is acceptable if the lawyers and arbitrators who participate in the system are well schooled in relevant business practices affecting the contracting parties.[15] Legal stability is guaranteed not by formal legal devices, "but by the relative homogeneity of legal decision-makers [who have received similar training in law schools and in large law firms] and the fact that arbitrators and international businesses share relatively similar social interests and ideological views"; this means that although the norms to be applied confer a wide discretion on arbitrators, regularity and predictability can be achieved "as a result of the social and ideological background of those outfitted with discretionary authority".[16]

The second strength of the common law system is that the cultural and institutional framework in which it is set introduces discipline for the courts. Judges are drawn from the legal culture and care what lawyers and legal academics think. Lower courts care what the higher courts think of their judgments. So judges at all levels recognise that they have to explain their decisions in terms which will be acceptable to these audiences, using the autonomous concepts and language of the law. By their reasoning, judges seek to show that their decisions are legitimate and justified in objective legal terms, and are not simply subjective exercises in application of power. This point too can be generalised to other legal systems.

By proceeding in this way, the courts distinguish their function from the realm of political power and hence avoid any direct and substantial challenge to that power. This allows the courts to operate in partnership with the legislature, rather than in an unstable and ultimately one-sided power contest with it.

The common law is thus partially autonomous from society and from the political sphere. It employs what Sir Edward Coke – a famous judge of the seventeenth century – called artificial reason. This can be regarded as what has been described as "a technically trained sense of legal right". It has its own vocabulary, concepts and reasoning processes, as recognised by legal cadres as a

---

[14] PS Atiyah & RS Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory and Legal Institutions* (1987), 355. See also R Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (1995), 170.
[15] William E Scheuerman, *Frankfurt School Perspectives on Globalization, Democracy, and the Law* (2008), 33-34.
[16] Ibid, 43.

form of objective legal knowledge. These simplify social problems and disputes and make them resolvable without recourse to force or pressure.

But the common law remains embedded in and draws on wider social norms. This is a virtue, because background morality provides a practical guide for citizens as to how to conduct themselves, where they could not hope to know the law in detail. Alignment of the common law with background morality fulfils an important guidance function and serves rule of law values.[17] Moreover, reasonable alignment with background morality in society provides legitimation for common law rules and promotes their acceptance within society as a whole. By remaining in touch with background morality the common law inspires public confidence.

Thirdly, the institutional framework of the common law allows for gradual development of the law over time. There is a feedback loop from lawyers to courts through commentary and development of legal analysis and critique. Mis-steps can be corrected and the law refined. This again has resonances with other legal systems. Those systems also have a place for authoritative statements of law by the courts in the course of applying it, and – depending on the system – the courts play a greater or lesser, but still significant role, in developing the law through its application.

The primary feature of common law adjudication is that it faces in two opposing directions, to the past and to the future. Common law method has to accommodate this split personality. It faces the past, in that a court is presented with a dispute rooted in what has happened in the past and has to produce a just outcome, applying the existing law in a fair and neutral way. It faces the future, in that the court will be aware that its decision may become a precedent governing the decision of future cases on similar facts. The level of generality at which a court – especially the Supreme Court – expresses a principle which it finds should govern the outcome in the particular case before it becomes highly important in terms of how many other fact-situations arising in the future will be governed by that statement of principle.

Another important feature of common law adjudication is that it relates to particular disputes brought to the courts by the parties, who argue for a view of the facts and the law which offers them victory. The parties set the ambit of their dispute and present the materials which they say are relevant to its determination. The court does not conduct a roving inquiry into all factors which might potentially influence a legislature seeking to frame a law appropriate for a particular topic. The law is born out of the argument of party versus party, almost as a side product of the resolution of specific disputes. Accordingly a court's law-making function, though it can be real, is set within modest parameters. It seeks to draw out a principle which is already in some sense inherent in the decided cases, and then to apply it to the new fact situation with which it is confronted.

[17] Goodin "An Epistemic Case for Legal Moralism", n 5 above.

In exercising this function the courts have to be sensitive to the institutional context in which they operate. Again, I take the UK as my focus. Parliament is the primary law-making body. It is elected and thus has democratic legitimacy. The government is the principal proposer of legislation. Government and Parliament will have access to a wide range of social research and information which is not available to the courts. They will have access to expertise to assess this information in a way which is not available to the courts. They are also accountable to the electorate for the decisions which they make, whereas the courts are not accountable and are insulated from direct public pressure for what they do. By contrast with legislation by Parliament, "[t]he legitimacy of the judicial establishment of legal rules … depends in large part on the employment of a process of reasoning that begins with existing legal and social standards rather than those standards the court thinks best".[18] Against this background the courts sometimes have to decide how far they can go in developing the law through the articulation of principle and its extension to new sorts of cases, and when doing this would in fact trespass upon the proper sphere for Parliament. For the Supreme Court, this can involve a difficult judgment call and it is not uncommon to see the justices divided about how far it is legitimate for them to go in making new law.

The distinctive mode of common law reasoning is analogical reasoning. The parties to a dispute come to court and argue that their case is analogous to other previously decided cases. The courts explain and justify their decisions by reference to analogies with one or other set of previous decisions.

Through analogical reasoning, the common law can bring into account plural disparate and incommensurable values and hold them in a reasonably stable balance for a particular local area of the law. The common law thus has a particular resonance with theories of value pluralism, such as that associated with Sir Isaiah Berlin.[19] In human affairs there are many different sources and forms of value, with no single over-arching common metric or standard to show how they must be fitted together. As Cass Sunstein has observed,

> "The analogical thinker is alert to the manifold dimensions of social situations and to the many relevant similarities and differences";

and

> "A distinctive feature of analogical thinking is that it is a 'bottom-up' approach, building principles of a low or intermediate level of generality from engagement with particular cases. In this respect, it is quite different from 'top-down' theories, which test particular judgments by reference to general theory. Because analogy works from particular judgments, it is likely to reflect

[18] M. Eisenberg, *The Nature of the Common Law* (1988), 153.
[19] J. Gray, *Isaiah Berlin: An Interpretation of his Thought* (new ed., 2013).

the plural and diverse goods that people really value."[20]

This sort of approach has disadvantages as well, in that it can be more chaotic and less clear. However, as I have already observed, the common law has adopted strategies to address this problem, through a strong common legal culture and the doctrine of binding precedent, or *stare decisis*.

The common law gains from its sensitivity to the particular facts of individual cases and from being able to make localised accommodations of competing values. It can reflect forms of social knowledge embodied in practical experience and local understandings of how to do things well, which may be hard to articulate and state in abstract terms. This sort of social knowledge may be ignored where the state tries to proceed by laying down abstract general rules in advance, potentially at great cost to society. James Scott makes this argument in his book, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed*. In decision-making environments characterised by uncertainty, with multiple dimensions of impact, he argues for the superiority of decision-making procedures based on "a community of interest, accumulated information, and ongoing experimentation"[21]; the taking of small steps, allowing for reversibility and planning for surprises. And in his view this model is reflected in the common law: "Common law, as an institution, owes its longevity to the fact that it is not a final codification of legal rules, but rather a set of procedures for continually adapting some broad principles to novel circumstances".[22]

This perspective links to another very ancient view of law, derived from the philosophy of Aristotle. Aristotle famously argues that it is impossible for a general rule stipulated in advance always to capture the nuanced legal or moral aspects of a situation as may be required to provide an outcome of a dispute which is optimal in terms of doing justice between the parties. A preannounced legal rule takes the form of a general statement which deals with the usual kind of case, but there is a need for *epieikeia* (usually translated as equity) to allow departure from the general rule to achieve justice at its point of application. As he puts it, equity is a "correction of law where it is defective owing to its universality … about some things it is impossible to lay down a law accurately in advance, so that a specific ruling is needed."[23]

Historically in English law, this idea was used to justify Equity as a body of law distinct from the common law, which had become very rigid. Equity allowed the courts to depart from the general and fixed common law rules where the justice of the case demanded this. But in modern times, as I have said, Equity and common law have converged. Now there is a more flexible approach to the

---

[20] Cass R Sunstein, "Incommensurability and Valuation in Law" (1994) 92 Michigan Law Review 779, 852-853; also see Cass R Sunstein, "On Analogical Reasoning" (1993) 106 Harv L Rev 741.
[21] James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (1998), 334.
[22] Ibid. 357.
[23] *Nichomachean Ethics*, Book V, 1137b 12-29.

formulation of common law rules and principles. The insights of the equitable perspective are incorporated more and more into the formulation of the common law itself, while equitable principles have stabilised and become more rule-like. The higher courts discuss openly what is the optimum formulation of a rule or principle of common law, and seek to move the law in that direction rather than leaving it as a reified and unchanging entity. The courts adapt the common law according to arguments of principle suitable to the particular context, rather than just treating common law rules as fixed and unalterable. In this way the common law allows for modest legislation by experts who are experienced in applying rules and standards in particular contexts and who may thus be good at assessing how they are likely to work in practice.

This led Lord Reid, in his 1972 article, to compare the common law to a fine hand-crafted pair of shoes, perfectly fitted for the individual case; while rules laid down in legislation were like mass-produced goods, cheap to produce but not always fitting very well. On the other hand, it has to be acknowledged that a bright line rule in legislation may create greater clarity.

Argument by analogy leads to refined practices in following and distinguishing precedents. A lot of argument in the courts is taken up on these questions. Because a lower court is legally obliged to follow a decision of a superior court when confronted with the same issue, it is important to identify what is the true ground of decision of the superior court – its *ratio decidendi*.

There are technical rules about which courts are bound by an earlier decision. Basically, superior courts bind both themselves and inferior courts. The presumption is that the Supreme Court binds itself, but it has a limited power to reverse its previous decisions if the proper development of the law requires this.

But working out what is the *ratio decidendi* of an earlier decision is not a straightforward matter. In the famous case of *Donoghue v Stevenson*[24] a woman suffered physical harm when she drank a bottle of ginger beer which was found to contain the semi-decomposed body of a snail. The manufacturer of the ginger beer had been negligent during the manufacturing process in allowing the snail to get into the bottle. The manufacturer sold the bottle of ginger beer to a shop, which sold it to the claimant. She would have had a claim for breach of contract of sale against the shop, for selling contaminated drinks. The shop had a contract claim against the manufacturer. But did the woman have a direct claim against the manufacturer for the tort of negligence? The House of Lords held that she did. But how wide was the principle? Did it only apply when ginger beer was sold? Or any drink? Or drink and foodstuffs? Or any manufactured goods? And what about economic harm, rather than physical injury? One could read the *ratio decidendi* narrowly or widely – so how to choose?

Neil Duxbury points out that there is no simple guide to determining whether one case is like a previous precedent so that it must be decided the same way: "Demonstrating the likeness of cases means settling on a principle to govern

[24] [1932] AC 562.

their treatment …"; the rule of relevance of features is tautological; to say that a rule should be applied consistently "means simply that the rule should be applied to the cases to which it applies." [25]

Melvin Eisenberg explains how the use of precedents is linked to the way in which the common law is embedded in, and reflects, general background social norms.[26] He calls these "social propositions". For Eisenberg, social propositions always figure in determining the rules the courts establish and the way they are extended, restricted and applied. This may be done implicitly rather than explicitly. Doctrinal propositions should be consistently applied and extended if they are substantially congruent with social propositions. On the other hand, if a precedent is surrounded by hostile social propositions, its application will be restricted. It may eventually come to be regarded as aberrant, and then may be overruled. On this view, the success of *Donoghue v Stevenson* as a precedent given wide extension and effect is attributable to the way it meets a social need for protection of innocent consumers and a moral sense that a negligent manufacturer ought to be liable to an innocent consumer injured as a result of their negligence. Lawyers and judges are used to offering reasons in support of reading individual precedents widely, to cover the case before the court, or narrowly, so that they do not bind the court to reach a particular decision in that case.

Another theorist, Frederick Schauer, puts it this way: "The task of a theory of precedent is to explain, in a world in which a single event may fit into many different categories, how and why some assimilations are plausible and others not".[27] What counts as a precedent turns on rules which are dependent on time and culture. There is also a trade-off between the degree of clarity and guidance in the law achieved by a wide reading of a particular precedent against a risk of sub-optimal decision-making where it is followed in situations in which it is less and less appropriate, the further one moves from the actual facts of the precedent. This resembles the trade-off between making legal rules through general legislation and particularised decision-making in individual cases. "A system in which precedent operates as a comparatively strong constraint will be one in which decision-makers ignore fine but justifiable differences in the pursuit of large similarities".[28] Adherence to precedents read widely promotes predictability and stability, but only by diminishing our ability to adapt to a changing future or to recognise small but significant differences between particular contexts.

Precedent might be followed because it presents a ready-made answer to a problem, reducing decision-making costs. But there are also risks in this, if it tempts the judges into losing sight of deeper principles and a more profound coherence in the law overall. Duxbury quotes Dr Johnson, "The more we rely on precedents … the less often we will take principles seriously".

---

[25] Neil Duxbury, *The Nature and Authority of Precedent* (2008), 175-176.
[26] Eisenberg, *The Nature of the Common Law*, n 18 above.
[27] Frederick Schauer, "Precedent" 39 Stan. L Rev 571 (1986-1987), 579.
[28] Ibid., 595.

Ultimately for Duxbury – and I think this is a fair and measured assessment - the value of the doctrine of precedent is its "capacity simultaneously to create constraint and allow a degree of discretion … the common law requires not an unassailable but a strong rebuttable presumption that earlier decisions be followed. It requires that past events be respected as guides for present action, but not to the extent that judges must maintain outdated attitudes and a commitment to repeating their predecessors' mistakes".[29]

Again, although my focus here has been on law in the UK, I think there are strong resonances across legal systems generally. Most legal systems give weight to precedent, even if they do not regard it as formally binding in the way that English law does. So the points I have made about the common law can be generalised in a significant way across other legal systems.

And other legal systems have legislative institutions, which promulgate positive law as something new and a fresh departure. Within sovereign states, there will be institutions like Parliament which make law. In the sphere of public international law, this function is fulfilled by treaty-making, particularly in the form of large multilateral treaties. So all systems have to confront at some level the relationship between lawmaking by democratic or sovereign institutions, and law-making – perhaps one should call it law development – by judicial institutions.

To conclude, therefore, I come back to the fundamental point that statute law and the common law adopt different strategies to adapt themselves to social change and respond to the basic legitimation demand of the public who are subject to the relevant legal system. Both of them have to strike a balance between certainty and flexibility, as do all legal systems. Where they strike that balance reflects those different strategies, which in turn reflect the difference between the limited law-making authority of judges and the unlimited law making authority of Parliament based on its democratic credentials.

[29] Duxbury, n 25 above, 183.