



# **Law for lawmakers**

A JUSTICE guide  
to the law

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# About JUSTICE

**Established in 1957 by a group of leading jurists, JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. We are a membership organisation, composed largely of legal professionals, ranging from law students to the senior judiciary.**

Our vision is of fair, accessible and efficient legal processes, in which the individual's rights are protected, and which reflect the country's international reputation for upholding and promoting the rule of law. To this end:

- We carry out research and analysis to generate, develop and evaluate ideas for law reform, drawing on the experience and insights of our members.
- We intervene in superior domestic and international courts, sharing our legal research, analysis and arguments to promote strong and effective judgments.
- We promote a better understanding of the fair administration of justice among political decision-makers and public servants.
- We bring people together to discuss critical issues relating to the justice system, and to provide a thoughtful legal framework to inform policy debate.

A key goal is to provide evidence-based analysis to inform the development of new

law and policy and to propose practical solutions to legal problems for law-makers, judges and public servants.

An important part of this work is done with decision makers in Westminster and Whitehall, where we work to provide practical briefings on the law for officials, MPs and Peers, free from party political influence

This guide is designed to provide a basic introduction.

Key concepts and legal terms are highlighted in **'bold'**. A brief plain English description follows.

Fuller information is provided in end notes.

Signposts on where to find further legal advice and support are provided in Chapter 7, with clickable links to further information and contacts.

**We use the term 'MPs' throughout the guide as shorthand. We hope that this material will be useful to both MPs and Peers and to their staff.**



**JUSTICE**

59 Carter Lane  
London EC4V 5AQ

admin@justice.org.uk

020 7329 5100

# Welcome

**As the Chair and Vice-Chairs of JUSTICE – and Parliamentarians – we are pleased to open this new guide to the law for lawmakers. Originally conceived as a “pocket” guide for members of both houses and their staff, it is designed to provide a basic introduction to some of the core legal and constitutional principles with which we grapple on a daily basis at Westminster.**

Since its inception, JUSTICE has worked hard to engage with all political parties on a non-partisan basis. Each of us represents a different political tradition, but we work together through JUSTICE to raise the profile of legal problems with constitutional significance for our justice system and for the rule of law. JUSTICE works to create a useful bridge between politics and law, between public servants and the legal community.

In this Parliament, as we consider significant constitutional questions about the nature of our democracy and the foundation of the United Kingdom, this work will be

particularly significant. This guide doesn't provide answers to those questions but a basic glossary to help inform discussion and debate. At its heart is a shared understanding – stepping beyond party politics – of the role which Parliament plays in both making the law work and ensuring respect for the rule of law in practice.

If you have any questions about the guide, or the legal impact of this Parliament's work, JUSTICE has a small but dedicated team of lawyers ready to provide further support and assistance where they can.

***Baroness Helena Kennedy of the Shaws QC***

*Chair, JUSTICE Council*

***Lord David Hunt of Wirral***

*Vice-Chair*

***Baroness Sarah Ludford***

*Vice-Chair*



# Foreword

*Lord Hope of Craighead KT*

**Law is a complex subject. No short guide can possibly cover all of its intricacies and complexities. But there are some fundamental points that are quite easy to state and that, on the whole, can give travellers through this jungle all that needs to be known for them to keep their bearings and find the right way forward wherever they want to go.**

We all depend on the rule of law for the moral and ethical well-being of our country. Upholding the rule of law is not, however, just a matter for the judges. It is the responsibility of Parliamentarians too, as the laws which they make are underpinned and given primacy in our courts by the theory of the sovereignty of Parliament. The role that Parliament plays in upholding the rule of law itself is therefore crucial to its existence. But the rule of law is not just a concept that hangs in the air. It needs to be respected and cared for if it is to do its work. It is a living creature that works all around us in the institutions on which we depend. We need to know what these institutions are, and what they do, if we are to keep the concept alive.

That, in short, is the aim of this little booklet. It is intended to set out in simple terms the main principles upon which our democracy is founded and the structural framework which it needs for it to function as it should. Like all reference guides, it is not something to be read through once only and then cast aside. It should remain ready to hand, for use when needed. And of course it must, and will be, kept up to date. I congratulate all those who have contributed to the booklet's publication. I am sure that they will see to it that, as time moves on, it will continue to be of use to all those who seek to make use of it.

*David Hope*  
*July 2015*



# Chapter 1: Law for lawmakers

## Introduction

Whilst the legal profession is well-represented in politics it has never dominated the House of Commons.<sup>1</sup>

For example, of Parliament's 650 current MPs, only 88 practise law in England and Wales.<sup>2</sup> This is no bad thing. A Parliament full of lawyers would not only be deprived of the wider experience of our community, but could also be deeply dull.

As the makers of our laws, as our representatives, and in holding the Government to account, MPs and Peers wear many hats. Each of these roles requires MPs to grapple with the law every day. However, for over three-quarters of all first-time MPs this may be a very new experience.

This short guide briefly introduces some of the key legal and constitutional principles which MPs encounter in their work. It is designed to start a conversation about the bridge between politics and the law, and to encourage discussion about independent legal support for MPs. As much of this guide is equally applicable to the work of both MPs and Peers, mentions to 'MPs' throughout this guide should be taken as a reference to both 'MPs and Peers'.

**On any one day, an MP might be asked to consider the law in a number of ways:**

**On the floor:** Every new Bill presented to Parliament is a government proposal to change the law. These vary in their legal complexity and their significance.

**Conducting scrutiny:** Select Committees of both Houses work hard to keep government in check. This work can include checking whether Ministers and agencies are acting lawfully.

**In their constituency:** MPs regularly help constituents with their problems, including on immigration, housing and eviction, access to health and social care services, and challenges to local authority decision-making.

## Our constitution

In most other countries, new MPs might arrive equipped with a copy of the Standing Orders of the House and a well-thumbed copy of the constitution. In the UK, the first is easy to get your hands on, but the latter less so.

The starting point for any conversation on the law is always the constitution. The UK is rare in having no single constitutional document. Instead, our constitution is found in an accumulation of principles,

conventions, precedents and pieces of legislation. Although you can't download a copy or borrow the constitution from the library, this doesn't make the rules and principles that govern how our government works any less significant.

This Parliament will have to grapple with a number of key constitutional questions about our membership of the European Union, the protection of human rights and, ultimately, the state of the Union. This guide does not set out to provide answers to those questions, but may help readers explore the constitutional and legal principles which lie behind them.

## *The 'unwritten' constitution*

The UK is commonly said to have an 'unwritten constitution'. This shorthand is popular but could be misleading. It might suggest that we have never bothered to think properly about the rules which govern the relationships between the institutions of state. In fact, those rules have evolved over centuries of thought and practice, and they continue to do so. This makes the constitution more difficult to grasp, but also means that it can adapt to the needs of our community.

The constitution is ultimately derived from a range of sources. Ancient 'statutes' like Magna Carta and the Bill of Rights 1689 are joined by more modern statements from Parliament on how we run the country. For

example, the Constitutional Reform Act 2005, the European Communities Act 1972, and the Acts which govern the devolution settlement all shape our constitution as it stands today.

Less simple to identify are the conventions which underpin our constitution, including our system of ‘**prerogative powers**’. These are powers which traditionally belonged to the Crown by reason of its sovereign power alone. In practice, however, they are now exercised by the central government on behalf of the Crown.

The ‘**common law**’, which is a set of legal rules that have been developed by the courts over time, is also an integral part of our law. It is the source of many important principles about who holds power in our constitution – and how that power is exercised.

## SUMMARY

The UK has no written constitution, but is governed by constitutional principles set in practice.

Our constitution is built on parliamentary sovereignty and the rule of law.

Key features of the constitution include the separation of powers and devolution.

## *Parliamentary sovereignty and the rule of law*

Our constitution rests on two of these core common law principles. The first is that Parliament is sovereign. The second is that we are all – including the government of the day – governed by the rule of law.

“The sovereignty of Parliament and the supremacy of the law of the land... may appear to stand in opposition to each other, or to be at best only counterbalancing forces. But this appearance is delusive; the sovereignty of Parliament...favours the supremacy of the law, whilst the predominance of rigid legality throughout our institutions evokes the exercise and thus increases the authority of Parliamentary sovereignty.”

### **A V Dicey, Introduction to the Study of the Law of the Constitution<sup>3</sup>**

It is a core principle of our constitution that Parliament is the primary source of legislative authority for the UK. This principle is a common law rule recognised by courts over centuries.

“Parliamentary sovereignty is a principle of the UK constitution. It makes Parliament the supreme legal authority in the UK, which can create or end any law. Generally, the courts cannot overrule its legislation and no Parliament can pass laws that future Parliaments cannot change.”

[www.parliament.uk](http://www.parliament.uk)

## *The rule of law*

The ‘**rule of law**’ lies at the heart of modern democracy, but it is a phrase much used and little explained.

The rule of law does not mean ‘rule by lawyers’. While it is often said that the judiciary is the ultimate guardian of the rule of law, this is not the same as saying that the view of judges will always trump Parliament’s intention.<sup>4</sup> What it does mean is that no government can do anything unless it can point to the law which gives it the power to do so.

This makes sure that government bodies and other agencies can’t interfere with our freedom without Parliamentary approval; we are all, including government, equal before the law. The now 800 year-old Magna Carta – which guarantees against unlawful detention and punishment without due process – provides one of the earliest examples of the rule of law in action.



As a common law rule, the impact of the rule of law is best understood by looking at how it works in practice. We do this in Chapter 2.

### *The separation of powers*

The principle of the ‘**separation of powers**’ requires that all three arms of the state – the legislature, the executive and the judiciary – perform their constitutionally distinct roles independently of each other:

- The executive is responsible for formulating and implementing policy;
- The legislature oversees the work of the executive, and creates the law to reflect policy; and
- The judiciary interprets, enforces and applies the resulting legal rules.

This allows for a system of ‘**checks**’ and ‘**balances**’ designed to ensure that each institution works within the constitution.

In the UK, the executive comprises the government, including the Prime Minister, Cabinet Ministers and the Crown. The legislature – Parliament – comprises the House of Commons, the House of Lords and the Crown, and the judiciary comprises the judges in the courts and tribunal system.

Unlike in some countries, the separation of powers between UK institutions is by no means absolute. Although the Queen exercises limited powers in practice, the Crown retains a unifying role across all

three branches of government. As well as being members of the executive, Ministers also sit and vote in the House of Commons. While this means that the government can vote as part of the legislature, it also means that Ministers remain subject to the rules of Parliament.

Nevertheless, the independence of each of our institutions of government remains critically important. The Constitutional Reform Act 2005 created the new and separate institution of the Supreme Court, breaking a centuries-old link whereby our highest court – the House of Lords Judicial Committee – also formed part of our Parliament. That Act also reflects the duty on the Lord Chancellor, a member of the executive, to uphold the independence of the judiciary.

The relationship between Parliament and the courts is also based on respect for their different constitutional functions. Article 9 of the Bill of Rights 1689 prevents domestic courts from directly calling into question the proceedings of Parliament. This concept of a ‘**privilege**’ afforded to Parliament is mirrored to a degree in the ‘**sub judice**’ rule, whereby Parliament will not generally comment on cases which are actively being considered by the courts.<sup>5</sup>

Some of the checks that each of these bodies perform on each other are explored in this guide. Parliament can make laws which affect how both the executive and

the judiciary work. Parliament sets the budget with which the executive has to work. When Ministers act unlawfully, we can ask the courts to step in.

### **SUMMARY**

The separation of powers means that Ministers, Parliament and the courts each respect their different – and independent – roles in the constitution.

### *The independence of the judiciary*

The constitutional role of the judge is to decide cases fairly and in accordance with the law. A judge subject to outside influence cannot discharge his or her responsibility to provide impartial justice.

### **SUMMARY**

To fairly decide disputes between individuals – and between people and public bodies – judges must be independent.

While the Constitutional Reform Act 2005 sets the principle of judicial independence in statute, it is a long-standing principle of the common law which underpins the right to access to justice, the rule of law and the separation of powers.

“ [I swear that] I will do right to all manner of people after the laws and usages of this realm, **without fear or favour, affection or ill will.**”

### The Judicial Oath

Judges must be free from influence by the other branches of government, business, political parties, other judges, the press and media, and any other organisation or individual which might sway them in their decision-making.

Independence from Parliament and the executive is particularly important. It is vital that the judges who adjudicate on the law are independent from those who make and implement it.

### Unelected but democratic

“ It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true...that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself.”

**Lord Bingham, *Belmarsh***<sup>6</sup>

Preservation of this impartiality has a number of consequences:

- The judiciary must be institutionally and functionally separate from the other branches of government.

### Judicial appointments

Historically, the Lord Chancellor's office comprised elements of executive, legislative and judicial power. Today, the Lord Chancellor has no judicial role. Instead, it is the Lord Chief Justice who is head of the judiciary in England and Wales.<sup>7</sup>

Independent bodies are responsible for judicial appointments and remuneration within their jurisdiction. For example, the Judicial Appointments Commission handles judicial recruitment in England and Wales, overseeing a merit-based selection process consisting of online applications, shortlists and selection days. The Commission has a statutory duty to select candidates solely on merit.<sup>8</sup>

- Judicial independence also assumes that the other branches of government will refrain from personal attacks on individual judges and undue criticism of judicial decisions. Ministers also have a duty to uphold the independence of the judiciary, and are barred from trying to unduly influence judicial decisions.<sup>9</sup>

- Finally, and crucially, both actual bias *and* the appearance of bias are barred.<sup>10</sup>

In the famous *Pinochet* case, a House of Lords decision was overturned because one of the judges was linked to a charity which intervened in the case. There was no suggestion that the judge had not acted independently, but the appearance that he *could have done* so meant the case had to be heard again.

### *Institutional competence and respect*

Points of constitutional crisis in the history of the UK have been exceptionally rare. Generally, the principles of parliamentary sovereignty and the rule of law reinforce the distinct constitutional responsibilities of both Parliament and the judiciary.

Just as Parliament recognises that it would not be proper for it to comment on live disputes, the courts recognise that there are boundaries to their expertise. For example, in judicial review cases, judges will not substitute their own decision for that of a public authority. They pay particular respect to the decisions of specialist tribunals and bodies appointed by Parliament, and are sensitive to the limits of their ability to make decisions about resource allocation or socio-economic policy (see Chapter 4).

Historically this has been called ‘**judicial deference**’ to either Parliament or to the executive. It is an illustration of the

distinct ‘**institutional competence**’ of the branches of government, with each recognising the importance of respect for the separation of powers when performing their proper constitutional role.

### *Other key features of the constitution*

There is a range of other conventions and principles which form part of the UK constitution which we cannot cover in detail. Most are grounded in the common law and reflected in the **Ministerial Code**, the **Civil Service Code** or in the **Cabinet Manual**.<sup>11</sup> These documents are a helpful guide to the work of Ministers and officials and they are often used by Parliament in its scrutiny work. Examples of well-known constitutional conventions include:

- The Queen does not withhold Royal Assent for any law passed by Parliament.
- The principle of ‘**collective cabinet responsibility**’ means that all Ministers take responsibility for all of the government’s decisions, even if they disagree with them privately.
- The UK intends to abide by its obligations in international law.

### *Devolution*

One of the most important constitutional developments in the UK relates to the increasing amount of power which is devolved from Westminster – to Scotland,

Wales and Northern Ireland, and more recently, to major cities.

### SUMMARY

*Devolution – the distribution of power between the Westminster Parliament and each of the nations of the Union – is a core feature of our modern constitution.*

The current power-sharing settlement is set out in a series of Acts of Parliament devolving different powers to Northern Ireland (the Northern Ireland Act 1998, which was founded on the terms of the Good Friday Agreement), Scotland (the Scotland Acts 1998, 2008 and 2012) and Wales (the Wales Acts 1998 and 2014, and the Government of Wales Act 2006).

These Acts form an important part of our constitutional framework, and all share a common feature: the power to create legislation is split between the Westminster Parliament and the devolved Parliament or Assembly. ‘**Devolved**’ powers are transferred to the primary control of the devolved legislature, and relate to matters such as education, health and agriculture. ‘**Reserved**’ powers remain under the control of Westminster, and include areas such as foreign policy, defence and energy. In Northern Ireland, devolved powers are known as ‘**transferred**’ powers, and the Assembly can legislate in respect of reserved powers subject to obtaining various

consents (though in practice this rarely happens). The Northern Irish Assembly is prohibited from legislating in relation to a third category of ‘**excepted**’ powers. Under all three devolution settlements, the Westminster Parliament may still make legislation which applies in devolved areas of responsibility but it will not normally act without the consent of the devolved Parliament or Assembly (‘**the Sewel Convention**’).

The devolution settlement is often described as ‘**asymmetric**’, as the scope of devolution varies across each of the nations. In Northern Ireland and Scotland, all legislative power is devolved unless expressly reserved or excepted. While there are plans for Wales to shift to the same model, under the current devolution settlement only powers expressly devolved are within the control of the Welsh Assembly.

Power has also been devolved to some cities, first to London and most recently to Manchester.

These divisions of legislative power are at the heart of the current debate on further devolution, and will be a key constitutional question for this Parliament. New devolution Bills for each of the nations, and further devolution to cities and local government in England, are expected soon.

## *Our legal system*

The UK does not have a single legal system. Instead, our constitution recognises three distinct legal jurisdictions: in England and Wales, Scotland, and Northern Ireland, each with its own system of courts and laws.

### **SUMMARY**

The three legal jurisdictions in the UK – in England and Wales, Northern Ireland and Scotland – have their own laws, judges and courts but share many common principles.

This section provides an introduction to the court systems in each of the three jurisdictions. Throughout the guide, relevant differences which might affect the constitutional questions faced by MPs are highlighted.

### *The courts and tribunals*

The Supreme Court unifies the three legal jurisdictions of the United Kingdom. It has the power to give the last word on appeals from all jurisdictions and on all types of law in the UK (with the exception of its limited power in Scots criminal cases). The Supreme Court will generally only consider issues of major public importance.

Aside from the Supreme Court, each of the three jurisdictions has its own system of courts and tribunals, which share many similar features.

### *Criminal courts*

In England and Wales and Northern Ireland, all criminal cases begin life in the magistrates' court. These are courts made up of lay magistrates sitting with a legally qualified adviser, or of District Judges sitting alone. Serious criminal cases go to the Crown Court for trial before a jury. If permission to appeal is granted, appeals go to the Criminal Division of the Court of Appeal, and, from there, to the Supreme Court.

In Scotland, minor criminal cases start in the Justice of the Peace courts (which are similar to the magistrates' courts in England and Wales). More serious criminal cases go to the Sheriff Court to be considered by a Sheriff sitting either alone or with a jury.<sup>12</sup> The most serious cases start in the High Court of Justiciary, which also acts as the final court of appeal for all Scots criminal cases.<sup>13</sup> The only criminal cases which may be heard by the UK Supreme Court are those which raise compatibility issues (i.e. questions about compatibility with European Union law or Convention rights).<sup>14</sup>

### *Civil courts*

Civil cases in England and Wales are usually dealt with by the county courts. A huge range of civil claims can be heard in these courts – ranging from neighbour disputes about trespass to major contractual disputes

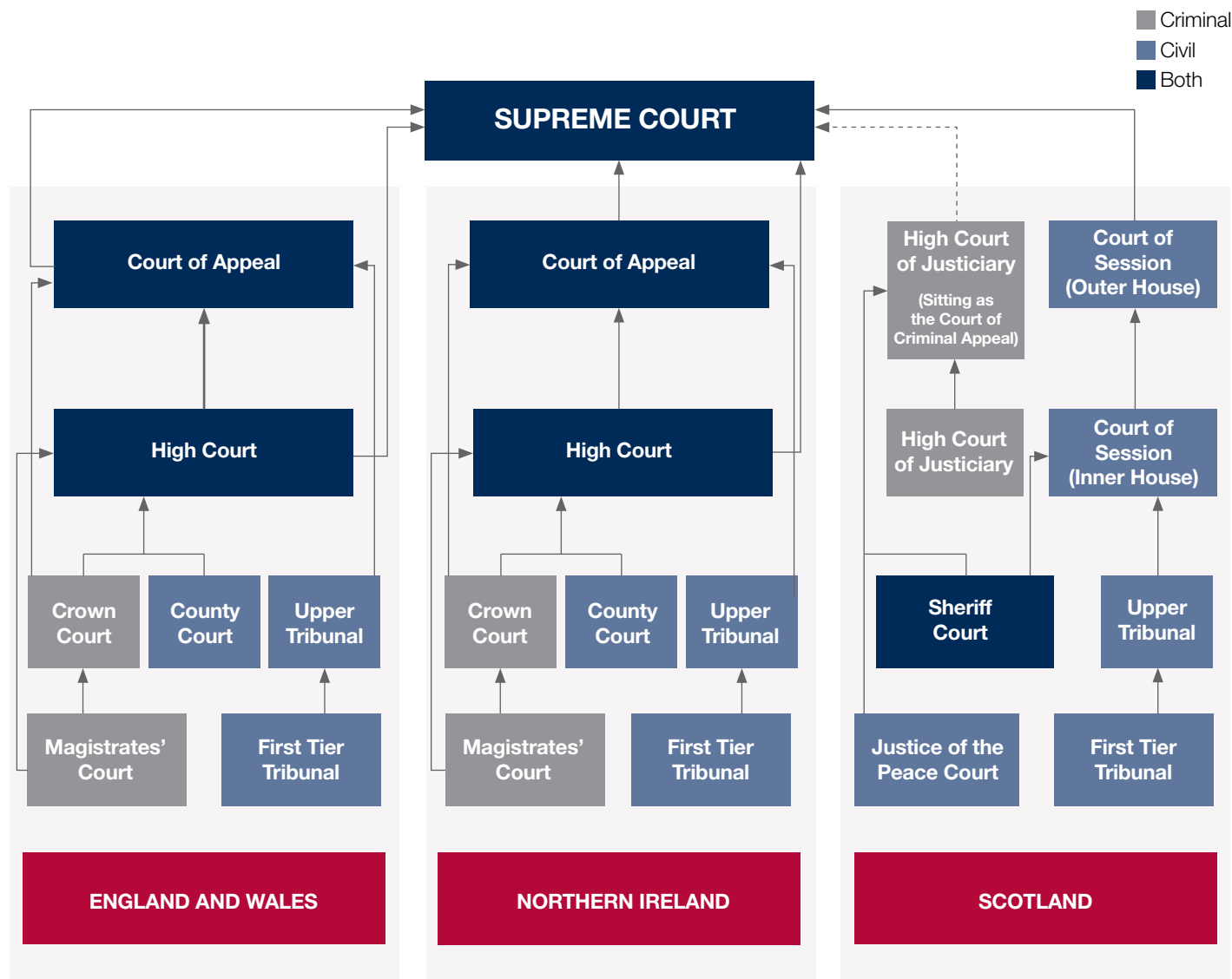
between multi-national companies. Some complex, sensitive or high-value claims are heard in the High Court. Certain specialist issues also have their own 'division' of the High Court; the Family Division of the High Court hears family cases and the Administrative Division deals with judicial review. Where permitted, appeals go to the Civil Division of the Court of Appeal and on to the Supreme Court. The courts in Northern Ireland adopt the same model.

In Scotland, civil cases are heard in the local Sheriff Court or in the Court of Session, depending on the type of case and its value. The Court of Session is Scotland's highest civil court. The Outer House has powers similar to the High Court in England and Wales; the Inner House is equivalent to the Court of Appeal. Where permitted, appeals go to the Inner House, and then to the Supreme Court.<sup>15</sup>

### *Tribunals*

Tribunals are bodies that, just like courts, must decide on legal disputes between individuals. They are designed to adopt more informal procedures and focus on specialist areas of law. For example, specialist tribunals hear cases relating to health and social care entitlements, immigration and asylum claims, competition disputes and employment matters.<sup>16</sup>

# The United Kingdom court system



This graphic does not illustrate all Tribunals operating in the three jurisdictions. It does not for example, show the Employment Tribunals or the Special Immigration Appeals Commission. Appeals from the High Court of Justiciary in Scotland to the Supreme Court are only possible in respect of 'compatibility issues'.



## Chapter 2: The rule of law

“Wherever law ends, tyranny begins.”

John Locke, 1690<sup>17</sup>

“The hallmarks of a regime which flouts the rule of law are, alas, all too familiar: the midnight knock on the door, the sudden disappearance, the show trial, the subjection of prisoners to genetic experiment, the confession extracted by torture, the gulag and the concentration camp, the gas chamber, the practice of genocide or ethnic cleansing, the waging of aggressive war. The list is endless.”

Tom Bingham, 2010<sup>18</sup>

These sweeping statements might sound dramatic. However, imagine arriving home to discover that the Home Office has commissioned agents to rifle through your papers, looking for evidence that you’ve committed an offence. The Minister argues that since there’s no law to stop him, the government can do what it likes. That’s just what happened in England in 1765.

In a classic illustration of the rule of law in action, the High Court in *Entick v Carrington* decided that public bodies could only act according to the powers which the law granted them. The government suspected Mr Entick of sedition and had unlawfully sent its agents to look for evidence. The state was not above the law.<sup>19</sup>

It’s hard to overstate the importance of the rule of law. It sits alongside parliamentary sovereignty as a pillar of the constitution. Today, the Constitutional Reform Act 2005, the Ministerial Code, and the Cabinet Manual, all bind Ministers to act in accordance with the rule of law.<sup>20</sup>

“The rule of law is the most precious asset of any civilised society. It is the rule of law which protects the weak from the assault of the strong; which safeguards the private property on which all prosperity depends; which makes sure that when those who hold power abuse it, they can be checked; which protects family life and personal relations from coercion and aggression; which underpins the free speech on which all progress – scientific and cultural – depends; and which guarantees the essential liberty that allows us all as individuals to flourish.”

Rt. Hon Michael Gove MP,  
Lord Chancellor<sup>21</sup>

### What is the rule of law?

Lord Bingham of Cornhill, one of the most respected jurists of the modern age, identified a number of its key features.<sup>22</sup>

### Elements of the rule of law

- No-one is above the law, and the law **applies equally to everyone**, unless objective differences mean people should be treated differently.
- The law must be **accessible and understandable**. Everyone should be able to find out what the law is. The law should be **certain and predictable**. Individuals should be able to **plan their actions** based on the law.
- Legal rights and responsibilities are **decided according to rules of law**, not by the exercise of general discretion.
- Ministers and public officials must exercise their powers **reasonably and in good faith**. They must only use their powers for the purpose for which they were conferred, and **must not exceed the limits of their powers**.
- The state must provide **accessible ways for people to resolve legal disputes between them**. Justice should not be **excessively delayed**, or **inordinately costly**.
- Individuals are entitled to a **fair trial** in the determination of their legal rights and responsibilities. This includes the principle that **judges be independent and impartial**.
- The state must comply with its obligations in **international law**.
- The law must provide adequate **protection of fundamental human rights**.

## SUMMARY

The rule of law means that we are all equal before the law, including the government.

In practice, this means that there are limits on public power designed to make sure it is exercised fairly.

However, the rule of law is best explained by looking at how it has been applied to real life cases.

### *Some key features of the rule of law*

#### *Equality before the law*

“Every person within the [UK] enjoys the equal protection of our laws...He who is subject to English law is entitled to its protection.”

**Lord Scarman, *Khawaja***<sup>23</sup>

The law must apply equally to everyone, regardless of their status, background or wealth. It should not impose arbitrary distinctions between some individuals and others. Laws that do this are inconsistent with the rule of law.

“Democracy values each person equally. In most respects, this means that the will of the majority must prevail. But valuing each person equally also means that the will of the majority cannot prevail if it is inconsistent with the equal rights of minorities.”

**Baroness Hale, *Belmarsh***<sup>24</sup>

By requiring that legal rules must generally be applicable to us all, the equality principle also provides a defence against arbitrary government.

“Equality is not merely abstract justice...there is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.”

**Justice Jackson, *Railway Express Agency, US Supreme Court***<sup>25</sup>

This doesn't mean that Parliament can never distinguish between different classes or groups. The key is whether there is an ‘**objective justification**’ for the difference.<sup>26</sup> Distinctions between groups of people must be based on rational, objective evidence. A law preventing people with red hair from being teachers would fail the test.<sup>27</sup> However, treating children who have committed crimes differently to adults

is justified by reference to their limited maturity, experience and capacity.

#### *Access to justice*

Rights in law mean little unless they can be interpreted and applied by a body with the power to enforce them. A tenant whose deposit has been unfairly withheld by a former landlord should be able to go to court to get it back. A person whose home has been unlawfully searched by the police should be able to challenge his or her treatment in court.

## Access to justice in action

Suspecting that letters to and from his solicitor were being censored, a prisoner challenged the prison governor's power to censor inmates' correspondence.

This censorship of prisoners' legal correspondence was unlawful: the right of access to a court was a fundamental common law right. It could not be limited except by Parliament's express provision. Parliament hadn't granted prison governors this power of censorship, and so it wasn't permitted.

“It is a principle of our law that every citizen has a right of unimpeded access to a court... [It] is a ‘basic right’. Even in our unwritten constitution it must rank as a constitutional right.”

**Steyn LJ, *Leech***<sup>28</sup>



Respect for the rule of law requires access to justice for all, irrespective of economic or social status. This means that it shouldn't be too expensive or time-consuming for an individual to access the courts, tribunals or other dispute resolution mechanisms. This rule reaches back to Magna Carta which famously said "To no one will we sell, to no one will we deny or delay, right or justice".<sup>29</sup>

“There is the old taunt, the familiar taunt, about His Majesty's courts being open to all just as the grill room at the Ritz hotel is open to all.”

**Sir Hartley Shawcross**<sup>30</sup>

It also sits behind the decision by Parliament to make provision for legal aid (Sir Hartley used this Ritz comparison when introducing the first UK statute on legal aid in 1948).

### *Open justice*

It is a well-accepted feature of the right to access to justice that justice is best done in public.

“The right to know and effectively challenge the opposing party's case is a fundamental feature of the judicial process. The right to a fair trial includes the right to be confronted by one's accusers and the right to know the reasons for the outcome. It is fundamental to our system of justice that, subject to certain established and limited exceptions, trials should be conducted and judgments given in public.”

**Lord Hope, *Bank Mellat***<sup>31</sup>

Exceptions to this principle can be justified in the public interest, for example, by providing screens to protect witnesses or hearing some evidence in private to limit publicity and to protect the identities of children. However, these exceptions are closely examined. In very limited circumstances, the principle of open justice must bend in order for the court to do justice.

### **Some limited exceptions**

For example, Parliament has permitted one party to be shut out of court for part, or all, of the hearing of a civil case involving evidence which might be damaging to national security.<sup>32</sup> However, the Supreme Court has indicated that this kind of exceptional measure must be a matter of last resort.<sup>33</sup>

### *Transparency and legal certainty*

“The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it.”

**Lord Diplock, *Black-Clawson International***<sup>34</sup>

The law must be clear and intelligible enough to allow people to regulate their conduct. This doesn't mean that we must all be lawyers, or the law so simple that we can read it as easily as the newspaper. However, it does mean that there must be a clear answer about what the law is, and that answer must be reasonably accessible. In practice, this means that: (a) the law must be made public; (b) it must be 'prospective' and not 'retroactive' (i.e. forward-looking, not making behaviour unlawful after the event); and (c) it must be relatively stable, with fair warning given of any significant change.

The need for transparency and accessibility affect the making of law by Parliament and the development of the common law by the judiciary.

For example, where an Act of Parliament gives discretion to a Minister or other public official, that discretion cannot generally be completely unfettered or undefined.

If it were, it would be extremely difficult for individuals to know how the discretion might affect them in practice. Might it be at the whim of how the decision-maker felt that day?

To avoid this, criteria for the exercise of a power are likely to be provided by Parliament. In addition, those powers must be exercised in accordance with the ordinary principles of the common law, subject to judicial review by the courts (we return to judicial review and the application of public law in Chapter 4).

### *Protection of individual rights*

“It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”

#### **Preamble, Universal Declaration of Human Rights 1948**

“What we now term human rights law and public law has developed through our common law over a long period of time. The process has quickened since the end of World War II ... the growth of the state has presented the courts with new challenges to which they have responded by a process of gradual adaption and development of the common law to meet current needs.”

**Lord Toulson, *Kennedy***<sup>35</sup>

The UK courts have a history of protecting individual rights through the common law, as a fundamental part of the rule of law (see Chapter 5).

### **The rule of law in Parliament**

- The Jobseekers (Back to Work Schemes) Act 2013 sought to overturn a High Court judgment which was being appealed. The House of Lords Constitution Committee raised serious concerns that doing so would not be compliant with the constitutional principle of the rule of law. They considered that the ‘fast-track’ legislative process, and the Bill’s retrospective application, deprived individuals of a legal right in a way that was not clear, accessible or predictable.<sup>36</sup>
- A recent independent report on surveillance, commissioned by the last government, stresses that the rule of law requires the government’s powers to be set out clearly. The use of surveillance techniques and methods in the absence of a clear statutory framework or published guidance could run contrary to the transparency and certainty requirements of the rule of law.<sup>37</sup> Parliament is expected to consider a new Investigatory Powers Bill soon.



## Chapter 3: Introduction to the law

The sources of law in each of the three jurisdictions of the UK – in England and Wales, Northern Ireland and Scotland – are shared. Law is either made by Parliament in legislation (also known as ‘**statutes**’) or is found in the ‘**common law**’ as developed and applied by the judiciary.

### SUMMARY

UK law is found in statute law (also known as legislation) and in the common law.

Statute law is made by Parliament, the Scottish Parliament or the Assemblies and the common law is developed by the judiciary.

The development of both kinds of law can be informed by international law, which are rules agreed by the UK with other states.

### Primary and secondary legislation

Making law in Acts of Parliament and statutory instruments takes up a significant amount of an MP’s time at Westminster.

### Laws passed by Parliament: a quick guide

‘**Primary legislation**’ is an Act of Parliament. It is also known as ‘**statute law**’. Judges can interpret primary legislation but generally cannot strike it down or disapply it.

An ‘**enabling Act**’ is an Act of Parliament which sets out a legal framework for making secondary legislation.

‘**Secondary legislation**’ is legislation made by public bodies under powers delegated from Parliament by an enabling Act. Secondary legislation which is outside the scope of the powers permitted by Parliament can be struck down by the courts.

‘**Devolved legislation**’ includes Acts of the Scottish Parliament, Acts of the Northern Ireland Assembly and Acts of the Welsh Assembly.

This statutory law sits at the core of our legal system. Acts of Parliament are also known as ‘**primary legislation**’ because they are made by Parliament and generally cannot be amended except by Parliament.<sup>38</sup>

Many Acts of Parliament create a basic legal framework but don’t deal with the detail needed to make the law work in practice. Parliament simply does not have the time

or technical expertise to engage with some detail in primary legislation. Instead it gives Ministers and other bodies the power to create ‘**secondary legislation**’.

A huge amount of secondary legislation is produced, far outweighing the amount of primary legislation each year. This important source of law is often essential to make the law work in practice.

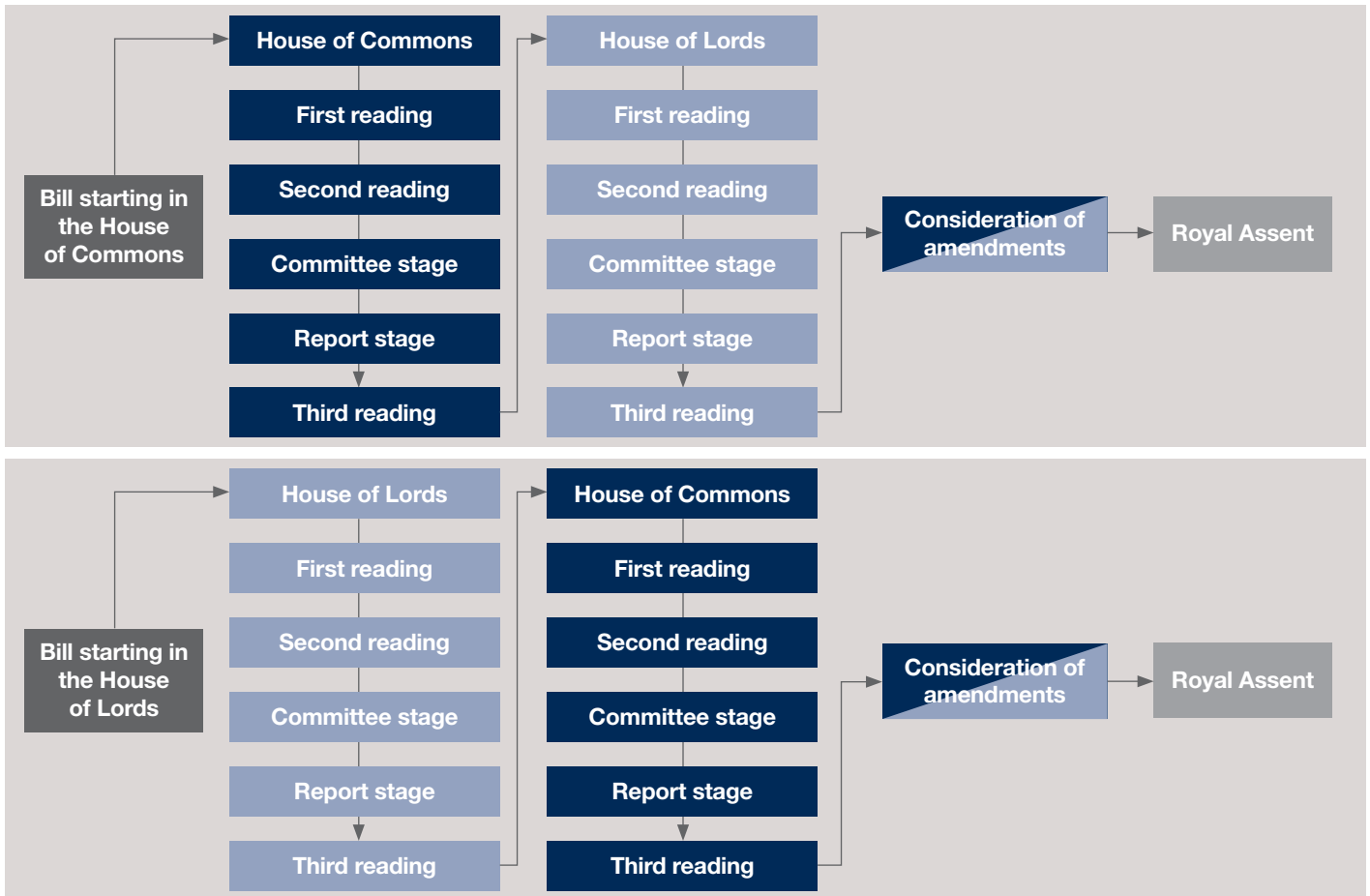
### Making legislation work

- The Welfare Reform Act 2012 sets out the framework for Universal Credit. However, much of the detail governing the benefit and how it is paid is found in secondary legislation.
- Similarly, while the Legal Aid, Sentencing and Punishment of Offenders Act 2012 sets out the areas where legal aid must be available, the details of the civil legal aid scheme are in delegated secondary legislation made by the Lord Chancellor.

Importantly, public bodies can only create secondary legislation within the limits set by Parliament in the ‘**enabling**’ Act of Parliament. If the legislation exceeds the scope of the delegated power, the courts can strike down the secondary legislation as unlawful (this is sometimes called ‘**ultra vires**’, which essentially means ‘outside the law’).

## Making legislation

The authorities in the House of Commons library provide detailed guidance to MPs and Peers on the passage of primary and secondary legislation. A summary of the passage of a Bill is set out below.<sup>39</sup>



All Acts of Parliament start life as Bills. In order to become law, they must be approved by both chambers of Parliament – the House of Commons and the House of Lords – and receive Royal Assent. Bills progress through a number of stages in each House: First Reading (usually purely formal), Second Reading, Committee Stage, Report Stage and Third Reading. The Second Reading is a general debate on the principles of the Bill. The Committee Stage and Report Stage provide an opportunity for detailed consideration, through amendments proposed by MPs and Peers.<sup>40</sup>

Secondary legislation takes less Parliamentary time as a result and is subject to less close scrutiny. ‘**Negative resolution**’ delegated legislation comes into force when it is placed – or ‘laid’ – before both Houses by the government. It remains law unless MPs or Peers pass a motion to strike it down. ‘**Affirmative resolution**’ delegated legislation becomes law only after Parliament has voted to approve it. A rare ‘**super-affirmative**’ procedure can require additional steps to be taken before the legislation can take effect. The procedure to be followed is set by Parliament when it creates the relevant power. In practice, delegated legislation is generally considered in Committee and there is no opportunity for amendment once it has been laid before Parliament.

## Scrutinising delegated powers

The **Joint Committee on Statutory Instruments** reports to Parliament on most delegated legislation. It considers a range of issues, including whether the legislation is lawful.

The **House of Lords Secondary Legislation Scrutiny Committee** reports on the merits of secondary legislation – including considering substantive concerns raised by third parties about its effects.

The **House of Lords Delegated Powers and Regulatory Reform Committee** reports on the scope of delegated powers proposed in new Bills before Parliament. Government Bills are generally accompanied by a Delegated Powers Memorandum designed to explain to Parliament why the government considers certain powers and discretions, including the power to make delegated legislation, are needed.

## Devolution and legislation

In Northern Ireland, Scotland and Wales, legislation passed by the devolved Parliament or Assembly is an important additional source of law. It shares many features of primary Westminster legislation. It is, however, subject to review by the relevant courts and may be struck down if it goes beyond the powers of the relevant Parliament or Assembly.

## The common law

The ‘**common law**’ is the body of law created by the courts setting ‘**precedents**’ in individual cases. It is one of the core sources of law in each of the jurisdictions in the UK. Many principles are shared, despite having been developed by different courts and through the application of different precedents.

Generally, the common law and statute law co-exist peacefully. There are many important areas of common law where Parliament has passed very little or no legislation – for example, in the law of negligence. Even within the same area of law, statute and the common law often exist alongside, and complement, each other. For example, the right to freedom of expression is protected both as a fundamental principle of the common law and by the Human Rights Act 1998 (‘HRA’).

In keeping with the principle of parliamentary sovereignty, if there is any direct conflict between statute and the common law, the statute will prevail. If the courts develop a rule that Parliament doesn’t like, MPs and Peers can legislate to override it. On the other hand, where legislation is vague or unclear in its application, the common law can help fill gaps, either unplanned or unanticipated. We cover these rules of statutory interpretation in some more detail, below.

## The role of judges

The judge's role is to interpret, apply and enforce the law passed by Parliament and to develop and apply the common law.

### Statutory interpretation

When courts interpret and apply statutes, they are trying to reach the legal outcome which Parliament wanted to create. This isn't always straightforward.

For example, some statutes use deliberately broad language, giving judges the flexibility to interpret and apply the law, depending on the facts of any individual case. At other times, Acts of Parliament are simply unclear, or give an unquantified degree of discretion to individuals who hold public power. Then again, even where the meaning of the law appears obvious, its application to an unforeseen set of facts may be far from clear.

To help them, judges use a number of common law rules of 'statutory interpretation', including:

- The '**literal rule**': Judges must start with the 'ordinary meaning' of legislation. Judges are seeking to enforce the will of Parliament, and the first insight into the will of Parliament is the ordinary meaning of the words which Parliament has approved.

- The '**golden rule**': In some circumstances, a phrase might legitimately have more than one literal and valid interpretation. In others, adopting its literal meaning might lead to an absurd result. The golden rule allows judges to adopt the interpretation that is reasonable in light of the statute read as a whole. It is sometimes referred to as the presumption that Parliament does not intend to create absurdities.

### Statutory interpretation in action

Parliament criminalised the act of causing an obstruction "*in the vicinity of*" an air force station. One defendant argued that because he had caused a disruption *inside* an air force station he hadn't committed an offence. The court interpreted "*in the vicinity of*" to mean "*in or in the vicinity of*". A literal interpretation would have had the absurd outcome of frustrating the purpose of the statute – which was to prevent interference with the armed forces in their work.<sup>41</sup>

- The '**mischief rule**': In some cases, the intended practical effect of a measure is far from clear from the actual text of an Act. Judges may use the mischief rule to identify the problem that the statute was trying to remedy and interpret it in a way that meets the intention of Parliament.

### Pepper v Hart

If primary legislation is ambiguous or obscure, the courts may refer to Hansard when interpreting the meaning of a particular provision. Clear statements of purpose by the Minister responsible for steering the Bill through Parliament may help the court to give effect to Parliament's intention in passing it. For this reason, Ministers often take care to make clear statements about a Bill's intended effect as it passes through Parliament. These statements are usually called '*Pepper v Hart*' statements after the case which established the rule. However, the courts will not treat such statements as conclusive.<sup>42</sup> The use of Explanatory Notes to accompany legislation means that the courts are referring to Hansard less frequently.<sup>43</sup>

- **Implied repeal**: Where two Acts of Parliament clash, the later Act stands and the conflicting provisions of the earlier one fall away.

Some statutes have been considered to be so constitutionally significant by the courts that the doctrine of implied repeal may not apply to them. For example, it has been suggested that the Bill of Rights 1689, the European Communities Act 1972, the Human Rights Act 1998 and the various devolution statutes can only be repealed expressly.<sup>44</sup>

- **Fundamental rights:** Special considerations arise when there is a direct conflict between a statute and fundamental principles of the common law. Examples of these principles include the presumption in favour of open justice, the right to equal protection by the law and the right to freedom of expression. The courts will try to interpret any ambiguous statute, as far as is possible, in a way that is consistent with the common law principle in question. It is presumed that Parliament intends to respect fundamental rights. Any step to restrict these core principles must be done explicitly (see also Chapter 5).
- **Parliamentary directions:** Judges will also follow clear instructions on statutory interpretation given by Parliament. Examples of such instructions are included in the European Communities Act 1972 ('ECA') and in the HRA. The courts have a statutory duty to interpret legislation in a way that is both compatible with the law of the European Union and in "so far as is possible" respects the individual rights guaranteed by the HRA (see also Chapters 5 and 6).

### *Developing the common law*

Judges are also responsible for developing the common law. In areas not governed by statute, judges maintain the application and interpretation of the rules of common law.

### Common law in action

- When Mrs Donoghue ordered a bottle of ginger beer in a Scottish café, she didn't expect to find a dead snail inside. When she fell ill after drinking the ginger beer, she sued Mr Stevenson, the manufacturer. The House of Lords found that the manufacturer should have taken reasonable care to ensure that the beer was safe to drink – and the common law of negligence was born.<sup>45</sup>
- In 1992, the House of Lords overturned the common law rule that when a couple married, the wife irrevocably consented to sexual intercourse with her husband. In response to changing attitudes towards marriage and the status of women, the old common law rule could not stand. It was overturned, and marital rape became a crime contrary to the common law.<sup>46</sup>

'**Precedent**' is the principle that the decisions of higher courts create legal authorities which lower courts must follow. It is how the common law develops. It creates consistency of practice and a common understanding about the scope of the law, but allows for evolution to meet changing practices.

### Lawyers love Latin

Court judgments set out the reasons for the court's decision. Different parts of the judgment have different effects. The part which explains the legal rules on which the decision is based is still called by its Latin name – the '**ratio decidendi**'. Under the doctrine of precedent, this part of the decision is binding on lower courts.

The other parts of a judgment are known as '**obiter dicta**'. This might include the judge's views on the current state of the law, or on what the decision might have been if the case had slightly different facts. This commentary is not binding, but it can be persuasive.

### What about international law?

**International treaties** are agreements between countries that are legally binding in international law. These might be bilateral agreements between the UK and just one other state. For example, extradition treaties typically set out the process for transferring suspected criminals between the UK and other countries. Or they might be multilateral and lay down obligations for a much wider group of countries. For example, the United Nations exists because of a single treaty agreed to by most nations of the world.

International law also includes rules of ‘**customary international law**’. These are rules whose legal force develops over time. A rule becomes binding when it is (a) followed consistently by many countries for many years; and (b) countries have followed the rule in question because they treat it as law. An example of a rule of customary international law is the prohibition on torture.

In some countries, international law is automatically treated as part of the domestic legal system (these are called ‘**monist**’

systems). The UK is not such a system – it is a ‘**dualist**’ legal system – which treats international and domestic law as two separate legal orders. That means that before international treaties have any effect they must be made part of domestic law by Parliament.

By contrast, **customary international law** is regarded as being a source of law. Customary international law can be considered by our courts and, if there is no wider constitutional problem, may be treated as part of our law.

The ‘**presumption of compatibility**’ is a common law rule for the construction of statutes. When construing a statute, the presumption is that Parliament intends to respect its international obligations. In the event of ambiguity, the interpretation which is consistent with the UK’s international law obligations is preferred.

More detail on international law is provided in Chapter 6.





## Chapter 4: Public law and judicial review

Every day, public bodies, including government Ministers and local authorities, take a variety of decisions and perform a range of public functions which impact on constituents' daily lives.

Public bodies must respect public law principles designed to ensure that their actions are lawful and that they do not abuse their power or neglect their duties.

For MPs, public law can provide a helpful starting point for the scrutiny of the work of public agencies, civil servants and Ministers alike. It can also help shape the scope of statutory powers and duties.

If public bodies act outside the bounds of public law, their decisions can be challenged in court through a process called '**judicial review**'.

“Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs – that is to say misuses of public power.”

**Sedley LJ, Dixon**<sup>47</sup>

### SUMMARY

Public law operates as a check on the abuse of public power. In practice, this means that public decisions must be lawful and follow a fair procedure.

If the work of a public body is challenged, the courts may conduct a judicial review.

Judicial review is not concerned with whether a decision was right, but whether it was lawful.

Judicial review is a last resort and claimants have to bring a claim promptly.

### What is judicial review?

Judicial review is a remedy of last resort. The courts will not look at a public decision if there is another means of putting right something which has gone wrong.

#### *Which decisions can be challenged?*

Many different kinds of public decisions are subject to judicial review. Any type of action or decision can be subject to the courts' scrutiny, as can failures or refusals to act. The key test for whether a decision can be challenged is generally to ask if the relevant decision maker was exercising a '**public function**'.

Delegated or secondary legislation – rules, regulations or other statutory instruments

made by public bodies acting under the delegated authority of Parliament – can be struck down by the courts if they breach the principles of public law. It is presumed that Parliament intends these important delegated powers to be exercised lawfully.

However, the activities of Parliament itself are not subject to judicial review and Acts of Parliament cannot be ruled invalid by judges exercising judicial review. At most, the courts can make a '**declaration of incompatibility**' in some human rights cases and can '**disapply**' primary legislation if it is contrary to EU law (see Chapters 5 and 6).

#### *What kind of review?*

Judicial review doesn't give a judge the power to step in and have another go at making a disputed decision. A judicial review claim is not an appeal on the merits of a decision, and the judge will not substitute his own view for that of the decision maker.

This is particularly important when the relevant decision maker is a specialist in their field with a great deal of experience which the court does not have (a medical professional, for example). In all cases, the concern for the court is not whether a decision was right, but whether it was **lawful**.

## Judicial review or ‘appeal’

When it creates a new power, Parliament may make a decision or an action subject to ‘**statutory appeal**’. Unlike judicial review, an appeal court or tribunal may have the power to retake a decision from scratch, rechecking the law and the evidence, and substituting their own view for that of the original decision-maker.

### What are the ‘grounds’ for judicial review?

There are limited reasons why a decision may be unlawful. These reasons are called ‘grounds’ for judicial review:

- **‘Illegality’**: A decision-maker might make a mistake in law, might try to do something which it has no power to do, or might exercise their power unlawfully. This includes a failure to follow EU law, including EU Directives, or to comply with the requirements of the Human Rights Act 1998 (‘HRA’).
- **‘Irrationality’**: Where the decision-maker has made an unreasonable decision or failed to take relevant matters into account.
- **‘Procedural unfairness’**: Where the decision-maker has failed to follow relevant procedures or has shown bias.

These traditional labels for the grounds for judicial review are not rigid, and individual cases can fall under more than one category. For example, a decision-maker who reaches a conclusion without all the necessary facts might act both illegally and unfairly.

### Illegality

If a public body misinterprets the law when making a decision, uses a power for a purpose it was not designed for, or acts ‘**ultra vires**’, then it has acted unlawfully, and its decision may be set aside for ‘**illegality**’. *Ultra vires* means beyond its powers – doing something it doesn’t have the power to do. A decision may also be unlawful if it is so unfair that it amounts to an abuse of power.

In the early 80s, the Greater London Council (‘GLC’) decided to make all local authorities in London pay towards a 25% reduction in tube and bus fares. The Council leaders had promoted this policy – ‘Fares Fair’ – as a manifesto commitment during the GLC election. The Court agreed with Bromley Borough Council that this was outside the scope of the powers granted to the GLC by Parliament – and so *ultra vires*. The GLC decision was quashed.<sup>48</sup>

Where a discretion – including a power to make secondary legislation – is exercised in a way which is inconsistent with the

fundamental principles of the common law, this will also be unlawful.

Applying prison rules to prevent a prisoner meeting with a journalist was inconsistent with the common law protection offered to free expression and the principle of legality.<sup>49</sup>

A judicial review can also check whether a public body has complied with its duty under the HRA 1998 to respect individual rights (see Chapter 5). A judge can also look at whether public decisions breach European Union law or the European Communities Act 1972 (see Chapter 6).

### Irrationality

A decision can be successfully challenged if it is ‘**irrational**’. A decision is irrational if no reasonable decision maker could justify it (often called ‘**Wednesbury unreasonableness**’, after the case that established the principle).<sup>50</sup>

This is a high threshold and it is relatively rare for the courts to find that it has been met. One judge has said that it should generally apply only “to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it”.<sup>51</sup>

In *Wednesbury* itself, a local council decided that cinemas would not be allowed to admit children under 15 on Sundays. In a challenge to the decision, local cinema owners argued that it amounted to an irrational restriction on their licence. Rejecting the challenge, the court held that so long as the council had not reached a decision so unreasonable that no reasonable body could ever have come to it, it had discretion to set whatever limitations it saw fit. This very high threshold was not reached, and so the restriction on cinema entry was allowed to stand.

However, the ‘intensity of review’ will depend on the type and circumstances of the challenge. If a decision interferes with the fundamental common law rights of an individual or a group of people a judge may look more closely at the decision taken and can expect a higher standard of justification from the public body. This is sometimes called ‘anxious scrutiny’.

A number of actions might render a decision both illegal and irrational. These might include failing to think about matters relevant to the decision, thinking about things which are irrelevant, or making a decision based on plain errors of fact.

## Unfairness

A challenge can be brought if a public body has made a decision without observing the proper procedure or where a decision breaches the ‘principles of natural justice’.

### Express procedural requirements

Failure to comply with an express procedural requirement – whether statutory or self-imposed – is the clearest example of procedural unfairness. These can include, for example, a right:

- To be given notice of proceedings;
- To be heard or consulted before a decision is taken; and/or
- To be given reasons for a decision after it has been made.

Greenpeace successfully challenged a decision to proceed with the building of new nuclear power plants. The Secretary of State had set his own rules for public engagement. The court considered the quality of the consultation process and decided it was inadequate. The decision had to be taken again, with the benefit of fuller engagement by the public.<sup>52</sup>

“ When a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise.”

Lord Fraser, *Ng Yuen Shiu*<sup>53</sup>

### A fair hearing

Public bodies must also respect the common law principles of ‘**natural justice**’. These require decision makers to act impartially and give the parties involved a fair hearing.

This can include a right to be heard and a right to receive reasons for a decision. A decision can be challenged if a public authority has exhibited ‘**real or apparent bias**’. It is very rare for a public body to be proved to be biased, but a decision may be unlawful if there is enough evidence to show a ‘**real possibility**’ that it was.<sup>54</sup> Decision-makers should be above reproach and a real appearance of bias is enough to undermine their authority.<sup>55</sup>

In some circumstances there will be a ‘**legitimate expectation**’ that a public authority will act in a certain way. For example, the public might legitimately expect to be consulted before a long-standing practice is changed. A breach of this kind of expectation can be grounds for review.

## A home for life?

Ms Coughlan – a person with severe disabilities – challenged a local authority’s decision to close her residential care home, on the basis that she had been promised that the residence would be her home for life. The court held that Ms Coughlan had a legitimate expectation that she would be allowed to stay in the care home, and that for the council to go back on this promise would be so unfair as to amount to an abuse of power.<sup>56</sup>

### Proportionality

In some claims involving EU law or the HRA, the court will look at whether a particular decision is ‘**proportionate**’. This involves the judge asking whether the impact of a decision is proportionate to its aim. The court can check whether the public authority has gone further than is necessary to serve the public interest (see Chapters 5 and 6).

In cases involving fundamental common law rights, the courts have resisted adopting a general proportionality test. However, there is some indication that courts may in substance apply a proportionality test when deciding whether a decision is lawful.

Whether applying a ‘**proportionality**’ test or applying ‘**anxious scrutiny**’ to the question of whether a decision is reasonable, these decisions are ones where the courts

can play a special role in checking whether public decisions respect individual rights. Members of Parliament may consider this when creating new powers or duties for public bodies.

## Proportionality and the common law

The Supreme Court considered a challenge to the Home Secretary’s attempt to strip a suspected terrorist of his British citizenship. The court noted that – when looking at an interference with fundamental rights, such as citizenship – anxious scrutiny and proportionality tests may produce very similar results.<sup>57</sup>

### Who can bring a judicial review?

A person or body must have ‘**sufficient interest**’ in a decision to bring a claim for judicial review.<sup>58</sup> Sometimes this interest will be obvious, for example if they have been refused asylum. However, a claimant does not have to have a financial or legal interest in the decision, nor does it need to be the most obvious challenger.

Community groups and NGOs have brought judicial review claims on the basis that they represent the public interest.<sup>59</sup> However, claims cannot be brought by someone who simply does not like a decision or who disagrees with the policies of the decision maker.<sup>60</sup>

## Who has sufficient interest?

The ‘Save Lewisham Hospital Campaign’, a crowd-funded community group, had sufficient interest to bring a successful challenge to a decision of the Secretary of State to close the maternity and accident and emergency services at Lewisham Hospital.<sup>61</sup>

### How does judicial review work?

Judicial review is a three-stage process:

- First, decision-makers must be given an opportunity to correct their mistakes. Generally claimants should write a formal letter setting out a summary of their concerns (this is called the ‘**pre-action protocol**’). In rare, urgent, cases, for example, if someone is due to be deported, this step might not be enforced by the court.

## Watch the clock

Applications for judicial review must be made promptly and in any case within three months of the challenged administrative act. The time limit for planning challenges is six weeks.<sup>62</sup> This time keeps running even after the pre-action letter is sent.

- If the decision-maker thinks its decision is right or refuses to change its mind, the claimant can then ask for ‘**permission**’ to bring a claim for judicial review.<sup>63</sup> You must have an ‘**arguable case**’ and ‘**sufficient interest**’ to get permission.
- If the court considers there is a case to answer, there will be a full judicial review hearing.<sup>65</sup>

## Permission stage

There can be no judicial review without the court’s permission. This check is intended to avoid timewasting challenges to public decisions.<sup>64</sup> Judges can think about permission without hearing arguments, ‘**on the papers**’. If they refuse, the claimant can ask for a second opinion after a hearing. Judges can rule this out if they think a case is ‘**totally without merit**’. This means the judge thinks the case has no foundation.

In some cases, judges can choose to think about permission and the rest of the case at the same hearing. This can save time and money, but it might mean more work for both sides if the judge ultimately decides there is no case.

## Who pays for a judicial review?

The legal and other costs of judicial review claims are generally decided in the same way as civil claims, namely that the loser pays the costs of the winner, and the conduct of the parties is taken into account.

A person who brings a judicial review faces the risk that they might have to pay all the costs of the public body if they’re wrong.<sup>66</sup>

## What can the court do?

If a challenge succeeds, the court has a wide range of options. None of these ‘**remedies**’ are automatic, but are granted at the discretion of the court:

- **Strike down a decision:** The court can tell the decision-maker to re-take the decision lawfully (commonly called ‘**quashing**’ the decision).

The public body can lawfully arrive at the same conclusion or result a second time, but it must follow the proper process and consider all evidence reasonably in doing so. The court might give guidance on the law which the decision-maker needs to follow.

- **A declaration:** The court can make a ‘**declaration**’ that the decision-maker got it wrong and acted unlawfully, explaining why. This remedy might mean that its decision stays in place because quashing it wouldn’t be appropriate. If a public body has changed its decision while the case was going on, the judge might use a declaration to give clearer guidance for future cases and other public bodies.
- **Compensation:** Compensation or ‘**damages**’ cannot be sought in a claim for judicial review. However, a judge can hear other claims where compensation is available at the same time, including a claim that a public authority has been negligent, or a claim for damages under the HRA, for example.

For an individual to seek compensation in connection with a judicial review is very rare.

## Wales, Scotland and Northern Ireland

The law on judicial review in Scotland and Northern Ireland is very similar. The grounds of review are broadly the same and the courts refer to each other’s case law.<sup>67</sup> The location of the public body determines where a challenge should start.

## Scotland

In Scotland, the Court of Session deals with judicial review. The Courts Reform (Scotland) Act 2014 will more closely align judicial review procedure in Scotland with that south of the border. Permission for judicial review will require ‘**sufficient interest**’ and that the application has a ‘**real prospect of success**’. The distinction between public bodies and private bodies in Scotland is less stark. The Court of Session will hear challenges against any person or body which exercises a power or authority delegated by statute, agreement or other instrument (including, for example, a private golf club).<sup>68</sup>

## Northern Ireland

Although many familiar public law questions are routinely raised in Northern Ireland, the highly political context has created some unique elements to judicial review.<sup>69</sup> The (amended) Northern Ireland Act 1998 has been described as a ‘**constitution**’<sup>70</sup> for Northern Ireland, and in subsequent judicial review proceedings the importance of paying “*particular attention*” to it has been noted.<sup>71</sup> The Northern Irish courts also appear to have taken a slightly different approach to the administrative acts that are subject to judicial review.<sup>72</sup>

## Wales

As England and Wales share a legal system, the situation for judicial review in Wales is identical to that in England, except for ‘**devolution issues**’.

## Devolution issues

Devolution issues are challenges which ask whether the devolved legislatures or executive administrations have acted within the boundaries of their devolved powers or ‘**competences**’. This can also include checking EU law and human rights compatibility (see Chapters 5 and 6 below).

## Parliament and judicial review

- In the Criminal Justice and Courts Act 2015, Parliament made a number of changes to the procedure for judicial review which were controversial. Both the Joint Committee on Human Rights and the House of Lords Constitution Committee expressed concern about the impact of the Bill during its passage.
- On a number of occasions, the Joint Committee on Human Rights has rejected the view of Ministers that access to judicial review of some public decisions is sufficient to protect the right to a fair hearing guaranteed by the HRA. For example, in its scrutiny of the Marine and Coastal Access Bill, it recommended that where a right of public access over private land was created, the landowner should have a statutory right of appeal to an independent body.<sup>73</sup>
- The House of Commons Education Select Committee reported on a much criticised decision of the exam boards and the regulator Ofqual to change the way that GCSE English was graded in 2012. A number of bodies, schools and individual pupils had brought a judicial review which was critical of the public bodies, but which failed. The Committee expressed concern that judicial review had not helped and can be “rather long and expensive”.<sup>74</sup>

# Chapter 5: Rights and the individual

## SUMMARY

The law protects individual rights in a range of different ways, including through the common law, the Human Rights Act 1998, and the European Convention on Human Rights.

Parliament has also provided further protection for a broad range of rights in Acts of Parliament, including the right to equality.

## Introduction

The UK has a long tradition of protecting human rights – from the first recognition of the right to liberty protected by Magna Carta over 800 years ago, to the Bill of Rights of 1689, and beyond.

UK Ministers, diplomats and lawyers were central players in the development of the international human rights framework, which was designed to isolate fascism and promote stability following the Second World War. The UK played a leading role in drafting the European Convention on Human Rights ('ECHR'), framing the Convention rights that are now central to the protection of human rights in the UK and across Europe.

In 1950, the UK was the first country to ratify the ECHR. Since then, the UK has agreed to treaties which protect the rights of women and girls, safeguard the rights of disabled people, help stamp out racism,

protect the rights of refugees fleeing persecution and recognise the international prohibition on torture (see Chapter 6).

## Protecting rights in UK law

In the UK, human rights are protected both by the common law and statute. The Human Rights Act 1998 ('HRA') provides the cornerstone of the UK's framework for rights protection. The Act is subject to criticism, including by the current government, but has been described as a Bill of Rights for the UK. The Government is planning to publish proposals for a new Bill of Rights for the UK in this Parliament.

Beyond the HRA, there is a wide network of statutes which also work to protect individual rights in practice. For example, the Public Order Act 1986 provides a framework for marches and demonstrations designed to safeguard the right to protest, and the Police and Criminal Evidence Act 1984 protects the right of individuals in England and Wales to fair treatment in police investigations. The Care Act 2014 covers eligibility for care and support for people with disabilities.

It is outside the scope of this short guide to consider each and every action by Parliament designed to protect individual rights. However, in this Chapter, we also consider one of the most significant 'rights-protecting' statutes which may affect the work of MPs, the Equality Act 2010.

## Common law rights

The courts have historically played an important role in protecting individual rights against the state. Some rights to liberty, personal property and freedom of assembly (among others) have long been respected as a matter of UK law.<sup>75</sup> Today, the Supreme Court considers the common law as "*the natural starting point in any dispute*" involving civil liberties or human rights.<sup>76</sup> The common law might protect human rights in new ways not required by the HRA.<sup>77</sup> The courts use the common law to protect individual rights in a number of ways:

- Acts of public bodies or officials can be challenged as being outside the scope of the public body's power. For example, the Home Secretary, acting under the prison rules, instituted a blanket ban on prisoners being interviewed by journalists in their professional capacity. The court held that the blanket ban was incompatible with the common law right to free expression, and beyond the powers conferred on the Home Secretary by the rules.<sup>78</sup>
- Acts of Parliament will be interpreted in a way which respects common law rights unless there is an express intention to the contrary. Secondary legislation substantially increasing court fees had such a serious impact on individuals' ability to bring a case that it violated the right of access to courts. It was struck down.<sup>79</sup>

- The acts of public authorities remain subject to judicial review, tested against a standard of rationality, reasonableness or proportionality where those acts interfere with fundamental rights protected by the common law.

However, the protection of the common law has limits. For example, before the HRA, a well-known actor tried to use the common law to protect his right to privacy after journalists published photographs of him seriously ill in hospital, taken without his permission.<sup>80</sup> The common law offered no remedy. Similarly, gay people discharged from the military were offered no protection by domestic law against the discrimination they suffered. In a famous case brought by two discharged service people, the UK courts were unable to help. They, like many others, were unable to secure a remedy at home but won their case in the European Court of Human Rights.<sup>81</sup>

Where rights are recognised in the common law, that protection is valuable. However, it is not clear that the common law protects every Convention right guaranteed by statute. In some cases the protection offered may be less effective than the HRA.

In 2015, the Michael family challenged a failure by the police to protect their daughter from a violent partner, after they failed to respond to a 999 call on the night she was killed. The Supreme Court decided that while the common law of negligence offered no remedy, they could bring a claim under the HRA alleging a breach of the right to life guaranteed by Article 2 ECHR.<sup>82</sup>

If Parliament speaks clearly and without any ambiguity, primary legislation will always trump common law rights. Even if this effect is unintended, the only remedy is to ask Parliament to change the law.

### The Human Rights Act 1998<sup>83</sup>

After a number of high-profile cases – including the ‘gays in the military’ case – which highlighted the limits of the common law, Parliament passed the Human Rights Act 1998 (‘HRA’). The HRA protects the same rights in the European Convention on Human Rights (ECHR), making those ‘**Convention rights**’ part of the domestic law.

### Convention rights<sup>84</sup>

Right to life (Article 2)

Prohibition of torture and inhuman or degrading treatment or punishment (Article 3)

Prohibition of slavery and forced labour (Article 4)

Right to liberty and security (Article 5)

Right to a fair trial (Article 6)

No punishment without law (Article 7)

Right to respect for private and family life (Article 8)

Freedom of thought, conscience and religion (Article 9)

Freedom of expression (Article 10)

Freedom of assembly and association (Article 11)

Right to marry (Article 12)

Right to an effective remedy (Article 13)

Right to enjoy each of these rights without discrimination (Article 14)

Right to the peaceful enjoyment of property (Article 1, Protocol 1)

Right to education (Article 2, Protocol 1)

Right to free elections (Article 3, Protocol 1)



## The Human Rights Act

- Public authorities must act in a way which respects our rights unless a statute passed by Parliament stops them from doing so (Section 6 HRA).
- Courts must read and apply all legislation **'in so far as is possible'** in a way which respects Convention rights (Section 3 HRA).
- Courts have no power to **'strike down'** primary legislation which breaches Convention rights. Instead, they can issue a **'declaration of incompatibility'**, which says that the statute is incompatible with Convention rights. Whether to change the law – or not – remains a matter for Parliament alone (Section 4 HRA).
- Courts must **'take into account'** the case law of the European Court of Human Rights ('ECtHR'). They are not required to follow it. They are not bound by the HRA to agree with the ECtHR, and all lower courts must follow the Supreme Court's rulings even if it adopts a view which is different to that of the European Court (Section 2 HRA).

In order to act compatibly with Convention rights, public bodies might be required to refrain from doing something (called a **'negative obligation'**). Sometimes, however, to protect a right properly,

public authorities might have to take steps to make sure that it works in practice (a **'positive obligation'**).

For example, the right to life means public bodies must not kill people unlawfully. However, any suspicious deaths must also be properly investigated and a system must exist to deter and punish those who do take others' lives unlawfully.

### *Are rights absolute?*

The rights in Articles 8 to 11 are **'qualified rights'**. These rights can be limited where it is necessary to consider the competing rights of other people or the wider community. For instance, freedom of expression is sometimes limited in order to prevent incitement to violence.

These limits are only acceptable if they are **'proportionate'** to a **'legitimate aim'**. This means that the seriousness of the impact on individual rights must be weighed against the public interest goal which any limitation seeks to serve.

Legitimate aims are identified in each of the Articles, and include important public interest goals such as the prevention and detection of crime and the protection of the rights of others. A limitation will not usually be proportionate if there are less intrusive means of meeting the same goal.

## Example of a qualified right

Article 10(1) protects the right to free expression:

*"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers..."*

Article 10(2) explains its limits:

*"The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*

Other Convention rights are referred to as **'absolute rights'**. For example, states cannot (for any reason) infringe the prohibitions on torture or slavery.

Some of these rights, however, have express or inherent limits. For example, the right to liberty expressly allows for detention in defined circumstances, including where there is a “reasonable suspicion of having committed an offence” and “after conviction by a competent court”.

## Balancing rights?

Deciding whether a limitation is ‘**proportionate**’ or necessary can mean looking at competing rights and interests in some detail. Applying the HRA, this balancing exercise is performed by officials and Ministers, by Parliament and by judges.

This involves looking at evidence of how seriously a measure will affect someone’s rights in practice; how much this change will impact on other people or the public interest; and whether there are less intrusive ways to solve a problem.

For example, Ms Eweida complained that a ban on her wearing a small cross to work was a violation of her right to religion. She won. There was no evidence of a risk to the public or of any significant impact on anyone else. It was disproportionate for her employer to prevent her from wearing it.<sup>85</sup>

## Derogation

States are able to ‘**derogate**’ from (meaning, expressly limit) some Convention rights in times of war or other public emergencies “threatening the life of the nation”.<sup>86</sup>

After 9/11, the UK derogated from the right to liberty to provide for the detention of foreign terrorist suspects without trial as part of its counter-terrorism strategy. The House of Lords struck down the secondary legislation which provided for derogation as it only applied to foreign nationals suspected of terrorism. Such limits must be no more than strictly required by the circumstances – and the fact that British terror suspects were not subject to the same restrictions showed that there were other, less intrusive, ways of combating terror threats.

“The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.”

**Lord Hoffmann, *Belmarsh***<sup>87</sup>

Some Convention rights are ‘**non-derogable**’. These include the right to life and the prohibitions on torture and slavery.<sup>88</sup>

## The HRA in action

- A local authority instituted a blanket ‘no-lifting’ policy, designed to protect nursing staff. Limited alternatives left severely-disabled people unable to wash or move around for months, causing pain and injury. The blanket policy was found to be disproportionate and in violation of the right to private life protected by Article 8.<sup>89</sup>
- A Code of Practice accompanying the Police and Criminal Evidence Act 1984 allowed 17 year olds to be interviewed as adults, with no right to have a parent or other adult present. After an Article 8 challenge, the Home Office has agreed to change this rule.<sup>90</sup>
- The police policy of ‘containing’ or ‘kettling’ protesters was challenged as a violation of the Article 5 right to liberty, after a number of G20 demonstrators were detained for several hours without food or access to toilets. After challenges in the UK and Strasbourg, judges clarified that the policy was proportionate and lawful, if certain safeguards were in place, including a time-limit, provision for release in some circumstances and access to water and toilet facilities.<sup>91</sup>

## How does the Human Rights Act work?

### *The public duty to respect rights*

The Act creates a duty on all public authorities to act compatibly with Convention rights.<sup>92</sup> This is designed to make sure individuals' rights are respected without any need for the courts to get involved. If a public body falls short, a claim can be considered by the courts and a judge can overturn a decision or direct a public body to stop acting unlawfully. Damages are available under the HRA, but compensation is generally fairly limited.

'**Public authority**' includes bodies such as government departments, local authorities and the courts. It also covers public hospitals, prisons and schools, for example.

The duty also applies to private bodies when they perform '**public functions**'. So, the public duty can, in some circumstances, apply to publicly funded providers of social housing and some private health facilities.<sup>93</sup> The Care Act 2015 clarifies that the HRA should apply to all publicly funded care, whether in residential care or in someone's own home.

### *Interpreting legislation in accordance with human rights*

UK courts must interpret Acts of Parliament and secondary legislation,

*"so far as it is possible to do so"*, in a way which is compatible with Convention rights.<sup>94</sup>

This is an extension to the courts' ability to interpret unclear legislation in a way which respects common law rights. Under the HRA, courts have a duty to try to interpret even unambiguous legislation in a way which respects the rights protected by the HRA.

However, there are limits to this power. The courts cannot give express statutory words a meaning inconsistent with their plain language or one which would *go against the grain* of the statute.<sup>95</sup>

Secondary legislation which can't be read in a way which respects Convention rights can be struck down by the courts.

### *Declarations of incompatibility*

Where primary legislation cannot be read in a way which is compatible with Convention rights, the courts can make a '**declaration of incompatibility**'.<sup>96</sup>

Unlike with secondary legislation, a declaration does not strike down the legislation in question. It stays in force. Instead, it brings the incompatibility to the attention of Parliament. However, there is no legal obligation on government to change the law – in this way, the HRA respects the legislative sovereignty of Parliament.

Declarations of incompatibility are extremely unusual (only 20 final declarations have been made since the HRA was brought into force).<sup>97</sup>

### *Fast-track 'remedial orders'*

A fast-track '**remedial order**' procedure allows a violation of Convention rights to be fixed quickly by Parliament.<sup>98</sup> This allows the government to use secondary legislation to change the law, but creates a special procedure which lets Parliament subject the change to close scrutiny. A draft – which can be amended – is placed before Parliament for 60 days. Parliament must then vote on whether to amend the law. An urgent process allows the Government to make a temporary change immediately which will lapse if not approved by Parliament in 120 days.

The government can use this process to respond to either a declaration of incompatibility by a UK court or a decision of the ECtHR finding the UK in breach of the ECHR (see below). Again, these are very rare.

### *Ministerial statements and parliamentary scrutiny*

All government Bills which are presented to Parliament have on their front cover a Ministerial statement on whether the Bill respects Convention rights.<sup>99</sup> This either (a) gives the Minister's opinion that the legislation has a clean bill of health or (b) states that the government knows the Bill will breach Convention rights but wants to go ahead anyway.<sup>100</sup>

This ‘**Section 19**’ statement encourages Ministers and their departments to address human rights issues when engaged in actually drafting new laws. Ministers have rarely asked Parliament to pass legislation that does not respect Convention rights.

Every government Bill is generally accompanied by an explanation of the government’s views on the law, in either the Explanatory Notes or in a free-standing Human Rights Memorandum.

### The Joint Committee on Human Rights (JCHR)

The JCHR is a joint select committee, consisting of twelve members drawn from both the House of Commons and the House of Lords.

The committee reports to Parliament on human rights issues in the UK. Its work includes: (a) scrutinising draft legislation to consider compatibility with human rights; (b) undertaking thematic inquiries; and (c) reviewing the framework for the domestic protection of human rights. Like other select committees, it can call government Ministers and public bodies to give evidence and can make recommendations to government.

Its recent work has included inquiries on violence against women and girls and on the rights of children in the UK.

### The national human rights institutions

The **Equality and Human Rights Commission** is an independent statutory body responsible for protecting and promoting equality and human rights in Great Britain. It has a range of legal powers which include running formal inquiries and investigations, intervening in litigation and bringing some judicial review proceedings on its own account. The EHRC has specific duties in respect of the HRA and the Equality Act 2010, set by Parliament.

There are also separate human rights commissions in Scotland – the **Scottish Human Rights Commission**<sup>101</sup> – and Northern Ireland – the **Northern Ireland Human Rights Commission**.

Each of these bodies is accredited by the United Nations as an Independent National Human Rights Organisation and has ‘A’ status under the ‘Paris Principles’ (the UN guide for grading these bodies).

A separate body exists to protect equality in Northern Ireland, the **Equality Commission for Northern Ireland**.

## The European Convention on Human Rights<sup>102</sup>

### Introduction

While the HRA protects the same rights as the European Convention on Human Rights (‘**ECHR**’), they are two very different pieces of law. The HRA is an Act of Parliament which protects individual rights in domestic law. The ECHR is a treaty binding on the UK in international law:

- Article 1 ECHR requires the UK to make sure that everyone within its “*jurisdiction*” enjoys each of the rights it guarantees. This generally applies to people in the UK, but can include rare circumstances where the UK exercises control over an area or an individual overseas (for example, to some conduct by UK troops).<sup>103</sup>
- Article 13 ECHR requires that effective remedies are available when things go wrong. For instance, the effective criminal prosecution of murder is considered one necessary effective remedy for the protection of the right to life.

The HRA is designed to meet both of these obligations in the UK.

## *The European Convention on Human Rights and the European Union*

The ECHR is not an instrument of the European Union ('EU'), but one of the Council of Europe. The Council of Europe is an older institution established in the aftermath of the Second World War. Made up of 47 member states, it is larger than the EU and includes many non-EU states (including Russia).

All EU member states are also members of the Council of Europe. The EU requires member states to comply with the minimum standards of the ECHR. The ECHR rights are mirrored in, and supplemented by, the EU Charter of Fundamental Rights (see Chapter 6).

## *What about the European Court of Human Rights?*

The European Court of Human Rights, based in Strasbourg, interprets and applies the provisions of the Convention. The UK – together with each of the other states of the Council of Europe – has agreed to “*abide by the final judgment of the court*”.<sup>104</sup>

The Court is made up of judges from each of the states of the Council of Europe. Nominations are made by individual states, but judges are elected by the Parliamentary Assembly of the Council of Europe (which includes MPs from each of the countries in the Council).

Since 1960, the UK has allowed individuals to take cases against it to the European Court of Human Rights. This route is one of last resort. The Court will refuse to hear a claim if there is an effective domestic remedy which the applicant has ignored. If a case is ‘**manifestly unfounded**’ the court can also refuse to hear it.

Where a country breaches the Convention, the Court may require it to:

- pay compensation to affected individuals;
- stop doing whatever is causing the problem; and/or
- adopt ‘**general measures**’ to prevent the violation from happening again – often this means changing the law.

## *Taking into account judgments from the Strasbourg court*

UK courts must “*take into account*” judgments from the European Court of Human Rights (Section 2, HRA).<sup>105</sup> These decisions are not directly binding on UK courts.

In practice, UK courts will follow the European Court’s decisions if they are not:

“...*inconsistent with some fundamental substantive or procedural aspect of [UK] law and whose reasoning does not appear to overlook or misunderstand some argument or point of principle*”.<sup>106</sup>

This means the Supreme Court can refuse to adopt the European Court’s approach in cases where it won’t work in the UK.

For example, the ECtHR backtracked from finding that the UK rules on hearsay evidence in criminal trials were in breach of Convention rights after the Supreme Court forcefully disagreed in a carefully reasoned judgment.<sup>107</sup>

These differences of opinion create a ‘**dialogue**’ between the courts.

## **A conversation about rights?**

The Strasbourg Court decided that prisoners serving a ‘whole-life tariff’ – serious offenders with a life sentence, where a judge has confirmed that they should spend their whole life in jail – should have an opportunity for their sentence to be reviewed. Without one, a whole-life term would be inhuman and degrading punishment (Article 3 ECHR). The Court of Appeal considered this judgment and said that the existing law – interpreted under the HRA to comply with Article 3 – provides for sufficient opportunity to ask for early release to be considered. Thinking about its position again, with the benefit of the Court of Appeal’s explanation of the way in which UK law works, the Strasbourg court has now agreed.<sup>108</sup>

There are a number of technical terms used in the conversation about the work of the European Court. The two most significant are:

- The ‘*living instrument*’

The ECtHR treats the Convention as a ‘**living instrument**’. This means it is interpreted with reference to present day conditions, and in the light of changing moral standards or scientific developments. For example, over the past fifty years, the protection offered to the rights of gay and transgender people has changed significantly.<sup>109</sup> The right of people with disabilities not to be discriminated against has also been recognised by the ECtHR, despite the fact that it is not mentioned in the original text of the Convention.<sup>110</sup>

- The ‘*margin of appreciation*’

States have a ‘**margin of appreciation**’ in the application of some rights.

This means that, in some cases which involve striking a balance between a legitimate public interest and the impact on an individual right, the ECtHR may allow the government room – or margin – to take a decision which is best suited to local law, policy and practice.

This is because the primary responsibility for protecting individual rights lies with states. The role of the Strasbourg Court is a ‘supervisory’ one. There may be a range of acceptable ways of responding to a problem, each of which might adopt a different strategy, while all meeting the requirements of the ECHR. The Court recognises that national institutions are better placed to make local decisions than an international court. A wider margin of appreciation is allowed in cases raising issues of social and moral controversy where there is a lack of consensus among the member states, such as assisted dying.<sup>111</sup> The countries of the Council of Europe have decided that the Convention should be amended to reflect this principle in its preamble.<sup>112</sup>

## Protecting Convention rights in Parliament

### Pre-Charge Detention in Terrorism Cases

After 9/11, Parliament was persuaded to introduce an extended period of pre-trial detention for terrorist suspects of up to fourteen days (in ordinary criminal cases, police have up to seven days to act before a person must be charged or released). In 2006, the Government sought to increase pre-charge detention to 90 days – with suspects held for almost three months without charge. Parliament refused, but extended the period to twenty-eight days.

This measure was controversial and criticised by the Joint Committee on Human Rights, which expressed concern about the compatibility of the measure with a number of rights, most importantly, Article 5(3), which guarantees the right to be informed “promptly” of any charge. The Protection of Freedoms Act 2012 saw Parliament reduce this period again to fourteen days. Each of these debates saw MPs engage in detailed consideration of the unfairness of detention without charge and its consistency with Convention rights.

## Protecting Convention rights in Parliament

### DNA and privacy

Until 2008, the UK National DNA Database retained the fingerprints and DNA of people never convicted of any offence, including children. In *S & Marper*, the ECtHR held that this blanket policy of indefinite retention was disproportionate and incompatible with the right to privacy. The Court rejected the UK government's argument that this retention was necessary to prevent crime or disorder or to protect the rights of others as the blanket retention of information did not strike "a *fair balance between the competing public and private interests*".<sup>113</sup>

In 2009, the government proposed measures to retain the DNA of innocent people after arrest for up to six years (with provision for further extension). Following criticism, including from MPs, the Protection of Freedoms Act 2012 provides for DNA samples to be deleted after six months and for most DNA profiles and fingerprints to be destroyed after three years (subject to extension in some cases). This process involved close consideration of the balance to be struck between the right to privacy and the role played by DNA retention in the prevention and detection of crime.

## Protecting Convention rights in Parliament

### Prisoner voting

In *Hirst v UK*<sup>114</sup>, the Strasbourg Court held that the UK's blanket ban on prisoners voting in general elections was inconsistent with the obligation to hold free elections (Article 3, Protocol 1, which includes a right to vote). The Strasbourg Court held that conditions curtailing the right to vote must maintain the integrity and effectiveness of the right, and must be imposed in pursuit of a legitimate aim in a way that was proportionate. The blanket ban on prisoner voting did not fulfil these requirements. This decision has since been upheld by the Supreme Court.<sup>115</sup> It has also been confirmed by the European Court of Human Rights, although that Court has refused to offer prisoners any compensation.<sup>116</sup>

The UK does not have to give all prisoners the vote following this ruling. It can still stop prisoners voting without breaching the ECHR. However, it cannot continue a 'blanket ban' if the UK wants to comply with its international law commitments.

In December 2013, a Select Committee of both Houses recommended that all prisoners serving sentences of less than 12 months should be entitled to vote. However, the ban remains in force. The UK will remain in breach of the ECHR until Parliament acts to change the law.

## Devolution and human rights

The HRA and the Convention rights have a particular constitutional significance for the devolution settlements in Scotland, Wales, and Northern Ireland.

Whilst the Westminster Parliament is able to pass legislation incompatible with the Convention, neither the Scottish Parliament nor the Northern Irish or Welsh Assemblies may do so: any legislation they pass which is incompatible with any of the Convention rights may be struck down by the courts.<sup>117</sup>

The first case in which a provision of an Act of the Scottish Parliament was 'struck down' under the Scotland Act 1998 was *Salvesen v Riddell*.<sup>118</sup> The Agricultural Holdings (Scotland) Act 2003 was outside the legislative competence of the Scottish Parliament. This was because it violated the rights of some landlords of agricultural tenancies to the peaceful enjoyment of their possessions (Article 1, Protocol 1). However, the court made an order suspending the effect of its decision, to allow the incompatibility to be resolved by the Scottish Parliament.

The Convention also operates to limit the acts of the devolved administrations. A member of the Scottish government has no power to make any subordinate legislation or to do anything else which is incompatible with any of the Convention rights or with EU law.<sup>119</sup>

Similar restrictions exist in relation to the powers of Ministerial office holders in the Northern Irish<sup>120</sup> and Welsh Assemblies.<sup>121</sup>

The Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland were set up long before the establishment of the Equality and Human Rights Commission for Great Britain. They were established after the Good Friday Agreement by the Westminster Parliament. The creation of these bodies, the implementation of the Human Rights Act 1998 and the consideration of a Bill of Rights for Northern Ireland were all part of the Agreement.<sup>122</sup> The Commission produced its advice to the UK Government in 2008, recommending the creation of a Bill of Rights for Northern Ireland.

The Scottish Human Rights Commission was created by the Scottish Parliament and reports to it. The Commission has general functions and duties concerning human rights issues which are related to devolved matters, including promoting human rights in Scotland, in particular to encourage best practice; the monitoring

of law, policies and practice; conducting inquiries into the policies and practices of Scottish public authorities; intervening in civil proceedings; and providing guidance, information and education. Its current work includes monitoring the implementation of Scotland's National Action Plan for human rights.<sup>123</sup>

## The Equality Act 2010

Although the common law enshrines the right of us all to the equal protection of the law, Article 14 of the ECHR and the HRA protect only against discrimination in the enjoyment of other Convention rights.<sup>124</sup>

These guarantees are supplemented by the Equality Act 2010, which provides freestanding equality protection in the UK.

The Equality Act replaced a patchwork of anti-discrimination laws, and is for the first time a holistic legal framework for equal treatment in the law.<sup>125</sup> The Act applies in England, Scotland and Wales. It has limited effect in Northern Ireland, which has its own equality legislation.

## Introduction

The Equality Act protects individuals against discrimination on the basis of 'protected characteristics'. These are:

- disability;
- gender reassignment;

- pregnancy and maternity;
- race (including ethnic or national origins, colour and nationality);
- religion or belief;
- age;
- marriage and civil partnership;
- sex; and
- sexual orientation.

The Equality Act creates a wide-ranging framework for the protection of equality. It contains five key prohibitions:

- **Direct discrimination:** When a person is treated less favourably than another in a similar situation because they have, or are wrongly believed to have, a protected characteristic;
- **Indirect discrimination:** When a rule generally applies to everyone, but affects a particular group unfairly. If there aren't fair reasons – known as objective justification – for the treatment, this will be unlawful;
- **Failure to make reasonable adjustments** to practices or premises to avoid disadvantaging disabled people;
- **Harassment:** Unwanted conduct related to a protected characteristic that has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment; and



- **Victimisation:** When a person takes legal action against discrimination or harassment and is subsequently victimised because of doing so.

The Act also protects someone from discrimination which happens because they are believed to be in a particular group or because they are associated with someone with protected characteristics. This latter protection is important for carers.<sup>126</sup> If the reason they are treated differently is connected to their relationship with a person with disabilities, it may be unlawful.

## When does the Equality Act 2010 apply?

The Equality Act 2010 applies to both private and public bodies, including employers and service providers whether public or private. For example, it applies to small and large businesses, schools, hospitals, transport providers, banks, hotels, landlords and shops.

### Equality law in action

A school excluded a Sikh boy – who was required to wear a turban as part of his religious observance – for non-observance of its uniform policy. The policy banned all headgear and made no exception for religious dress. By applying the rule without exception, the school was unlawfully discriminating against him.<sup>127</sup>

It applies to employment and recruitment, to services, to education and to housing, and to the decisions of public bodies (see below).

### Come one, come all

Anyone providing the public with goods, services or facilities must do so without discriminating on the basis of any protected characteristic.

If a pub refuses entry to a group because they are Irish Travellers, then they have discriminated against them because of their race.<sup>128</sup>

A B&B owner who refuses to let a room to a gay couple discriminates on grounds of their sexual orientation.<sup>129</sup>

It would be in breach of the duty to make reasonable adjustments in failing to make the branch accessible to people with disabilities.<sup>130</sup>

### Disability and reasonable adjustments

In recognition of the social barriers faced by people with disabilities, the Equality Act 2010 can require ‘**reasonable adjustments**’ to be made in order to ensure that people with disabilities receive the same opportunities, as far as this is possible, as someone who is not disabled.

Changes need to be made if a disabled person will be at a ‘**substantial disadvantage**’ if they are not made. This means facing a barrier which is not ‘**minor**’ or ‘**trivial**’. However, a change need only be made if it would be ‘**reasonable**’ taking into account a range of circumstances, including the nature of the change and its impact on the person with a disability.

A college disability officer who is blind asks for reasonable adjustments to be made to allow him to continue to do his job. The college invests in software to help him do his job, but five years later it still doesn't work. He can bring a successful claim under the Equality Act 2010.<sup>131</sup>

Changes can include providing someone with aids to help them do their job properly, changing the entrance to a shop to ensure that someone can get in or approaching how you do business differently. Service providers should anticipate and make adjustments if their service might affect disabled people as a class.

A solicitor usually only sees clients in his office. He has a client who suffers from agoraphobia and arranges to meet her at home, recognising the need for a reasonable adjustment to his usual practice.

In addition to the duty to make reasonable adjustments, it is unlawful to discriminate against someone for a reason “*arising as a consequence*” of their disability, without a proportionate justification.<sup>132</sup> One example where this may apply is where someone takes prolonged time away from work for reasons connected with their disability.

### Equal pay

The Equality Act 2010 continues to protect the presumption in law that men and women should earn equal pay for equal work. It enables women to challenge unequal pay and terms.<sup>133</sup>

### Equal pay for equal work

251 women working for a local council recently won their Supreme Court claim for equal pay. Working as classroom assistants, support for learning assistants or nursery nurses, they were paid less than a group of mostly male groundskeepers and refuse workers who were entitled to substantial bonuses. The Supreme Court rejected the Council's case that because they worked in different places there could be no claim.

The decision benefited thousands of women working across different local authorities. The Court emphasised the purpose of the law, in addressing historical undervaluing of work traditionally done by women.<sup>134</sup>

## The public sector equality duty

The Equality Act also contains a **public sector equality duty**. This requires public bodies, in the performance of their functions, to give ‘**due regard**’ to three statutory equality needs:<sup>135</sup>

- The need to eliminate discrimination, harassment and victimisation;
- The need to advance equality of opportunity; and
- The need to foster good relations between different people when carrying out their activities.

The duty requires public bodies to consider each of these needs in a rigorous and open-minded way, whenever decisions which may affect equality are being taken. The aim is to make sure that the impact on potentially disadvantaged groups is considered at the policy-making stage.

Most public bodies are also required to comply with ‘**specific**’ duties to publish information showing their compliance with the equality duty and setting equality objectives.

### What is a public body?

The public sector equality duty and the specific public sector equality duties apply to a range of public bodies specified by Parliament. This includes Ministers and

government departments, local authorities and most public agencies.

## Scotland

The Equality Act 2010 applies to Scotland and the power to legislate for equality is broadly reserved to Westminster. The new Scotland Bill 2015 proposes new powers to give the Scottish Parliament a greater ability to supplement the protections in that Act, including in respect of socio-economic inequality.

## Northern Ireland

Although the Equality Act 2010 doesn't apply in Northern Ireland (with a few limited exceptions), many of the same protected characteristics are protected from discrimination by a patchwork of earlier legislation.<sup>136</sup> Many features are similar. For example, Section 75 and Schedule 9 of the Northern Ireland Act 1998 provide for a single public sector equality duty. There are, however, a number of important differences. These include:

- the prohibition on age discrimination only applies to employment issues;
- some new protections against disability-related discrimination don't apply in Northern Ireland; and
- protection against discrimination in private clubs is more limited in Northern Ireland.

The Equality Commission for Northern Ireland has recommended wholesale reform of equality law in Northern Ireland.<sup>137</sup>

## Equality in Parliament

- A Speaker's Conference was convened in 2008 to consider the disparity between the representation of women, ethnic minorities and disabled people in the House of Commons and their representation in politics. In 2010, it identified a number of barriers to involvement and recommended reforms to increase representation and engagement.<sup>138</sup>
- Select Committees often examine how Government Departments and public bodies meet their duties towards people with protected characteristics. In 2007, for example, the Joint Committee on Human Rights looked at how older people are treated in healthcare.<sup>139</sup> In 2013, the House of Commons Justice Committee made recommendations on the treatment of older prisoners.<sup>140</sup>
- In 2015, the House of Commons agreed to establish a Select Committee on Women and Equalities. This followed a recommendation by the All Party Parliamentary Group on Women in 2014. The new Committee will look at all the work of the Government Equalities Office.<sup>141</sup>





## Chapter 6: EU and international law

In earlier Chapters, we have explored how the UK legal system works and how individual rights are protected by law and statute. In this section, we look in more depth at how UK law is affected by the law of the European Union and wider international law.

### The European Union

In 1957, representatives from six states signed the Treaty of Rome, creating the European Economic Community. In the aftermath of the Second World War, the Community was intended to secure economic unity amongst European states. The UK joined in 1973.

The **European Union** ('EU'), today draws together 28 states from across the continent. It promotes a common, pan-European approach to many political and economic issues. The UK's continuing involvement in the EU will be subject to a referendum during the life of this Parliament. An understanding of the scope and influence of EU law for people living in the UK may play an important part in the referendum debate.

### Understanding EU law

The European Economic Community started life as an economic union, characterised by the operation of a single internal market for the free movement of

persons, goods, money and services, with the removal of barriers to trade between member states.

#### Free movement and EU citizenship

The free movement of goods, services and people has been the central pillar of the EU since its inception.

In 1992, the member states recognised the concept of EU citizenship, which is enjoyed by all citizens of the member states of the Union. A citizen of any EU member state enjoys the right to move to, live and work in, any EU member state. A Danish architect is free to join a firm in Belgium, an Irish student to study at a French university, and a British pensioner to retire to Spain or Portugal.

In addition to free movement, EU citizens also enjoy a range of other rights, including the right to vote for and stand as a candidate in the European Parliament elections, and the right to receive diplomatic and consular protection in any EU country.

Today EU law covers a broad range of areas. For example, the EU now has '**competence**' – the authority delegated to it by the member states – to develop policy and law in relation to agriculture, fishing, business, energy, health, justice, human rights, the environment and transport.

There are a number of EU institutions which are responsible for developing and overseeing EU law. These include:

- **The European Commission:** Draws up proposals for law and policy on behalf of the Union. Once adopted, it works to ensure the correct implementation of decisions of the Council and Parliament.
- **The Council of the European Union:** This comprises Ministers from each of the member states and works to determine law and policy within Europe. It reviews and amends the legislative proposals of the Commission as well as determining the law and policy agenda within Europe. Law is agreed by qualified majority vote. Together with the European Parliament, these bodies are the key decision-makers for the Union.
- **The European Parliament:** This comprises Members of the European Parliament elected in constituencies across Europe once every five years; it reviews and amends legislative proposals from the Commission and Council and calls for political and legislative action. It shares decision-making responsibility with the Council (on a '**co-decision**' basis).

- **The Court of Justice of the European Union** ('CJEU'):

Comprises judges from each member state. It interprets EU law to make sure it is applied in the same way in all EU countries, and settles legal disputes between national governments and EU institutions.<sup>143</sup>

There are different types of EU law, which take effect in different ways:

- **Treaties:** The primary law of the EU is contained in two treaties – the Treaty on the Functioning of the European Union ('TFEU') and the Treaty on European Union ('TEU'). Together these treaties are sometimes called '**the Lisbon treaty**'. They set out the objectives of the EU and the principles to be followed by the Member States in achieving those objectives.

Secondary EU legislation is used to obtain these objectives in practice. There are different types of secondary legislation, the most important of which are '**regulations**' and '**directives**'.

- **EU regulations** automatically bind the UK when they come into force, without the need for new UK legislation. In practice, these rules automatically trump inconsistent domestic law.

- **EU directives** set out binding goals that member states must achieve, but they leave the decision as to how best to achieve that result to each member state. They give countries time to decide how to change the law. If they are not implemented within that period, or are badly or only partially implemented, individuals can still rely on their provisions against the state. In cases between individuals, the courts will interpret domestic law in line with the directive as far as it is possible to do so.

- **Judgments of the Court of Justice of the European Union:** The case law of the Court is binding on member states. It will be applied by domestic judges when they are thinking about questions involving EU law.

The goal of setting common standards in key policy areas would be undermined if each member state were able to pick and choose which EU laws to apply. So, members of the EU agree that EU law will have '**supremacy**'. This means that, in practice, EU law will trump inconsistent national law. They are '**directly effective**', which means that they confer rights on individuals which can be enforced against other individuals, and against the state.

## Driving discrimination law

“ The Court has repeatedly held that the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure.

**Court of Justice of the European Union, Schröder**<sup>142</sup>

One example of the impact of EU law is in driving change in anti-discrimination law across Europe. The right to equal pay between men and women has been recognised by the EU ever since its inception, and was an influential factor in the introduction of the Equal Pay Act 1970 on the eve of the UK's accession.

More recently, a series of EU laws on non-discrimination was directly responsible for the introduction of many of the equality rights we now enjoy in the UK. Decisions of the Court of Justice of the European Union continue to inform the development of our law under the Equality Act 2010.

## EU law in the UK

The **European Communities Act 1972** ('ECA') provides for EU law to have direct effect in domestic law. It also allows Ministers to use secondary legislation to implement changes to EU law which may be needed as a result of EU directives.

In practice '**direct effect**' means that any legislation – including primary legislation – which is incompatible with EU law is '**disapplied**'. This means the law will stay on the statute books, but will stop having any effect in so far as it is inconsistent with the European provisions.

Individuals can directly enforce positive rights created by directives against the state, but not against other individuals.<sup>144</sup> However, the European Communities Act 1972 requires courts to interpret national law in a way that respects any EU law that applies. This means that in areas with an EU law connection, EU law can play an important role in domestic disputes.

## The Court of Justice of the European Union

Only the CJEU can declare EU legislation unlawful. If a question is raised about the legality of an EU measure, a domestic judge can refer the matter to the CJEU for an answer.

UK courts also have the power (and in certain circumstances, an obligation) to send cases to the CJEU to ask them to clarify the interpretation of EU law. These '**preliminary references**' take place during the course of a case before the national court. The CJEU will answer the questions about the specific point of law referred, but will generally leave the final decision on the case to the domestic courts.

Unlike the European Court of Human Rights, individuals can't generally take complaints about EU law to the Court of Justice. There is an exception for individuals who have been affected directly by the activities of the European institutions, for example persons or companies subject to EU sanctions.

## EU law and fundamental rights

Respect for the fundamental rights of EU citizens is one of the general principles of EU law. It is drawn from the constitutional traditions common to member states, and upheld by the Court. The Treaty on the European Union explicitly recognises a role for the EU in upholding human rights.<sup>145</sup> It also states that fundamental rights as protected by the European Convention on Human Rights are part of EU law.<sup>146</sup>

### *The Charter of Fundamental Rights of the European Union*

The **Charter of Fundamental Rights of the European Union** ('the Charter') was agreed by the member states of the EU and came into force in 2009.

It is binding on EU institutions and member states when they are acting to give effect to EU law. The rights in the Charter include key political rights – such as the right to liberty and security – and also some social and economic rights, such as the right to equal pay for men and women.

The purpose of the Charter is to codify, rather than extend, the rights of EU citizens, and it is binding on EU institutions developing EU law.

The Charter provides an important addition to the protection offered by the ECHR and the HRA:

- It protects social and economic rights which are not in the ECHR or the HRA.
- Where Convention rights protected by the ECHR are also covered by the Charter, it can provide greater protection than the Human Rights Act.

If an Act of Parliament clearly violates both the Charter and the Convention, the European Communities Act 1972 will require the offending Act to be disapplied. The only remedy available under the HRA would be a declaration of incompatibility.

### The Charter in action

Two employees at a foreign embassy wanted to sue their employers in the Employment Tribunal, alleging unfair treatment, race discrimination and breaches of the rules on working time. Their case was barred by the application of the State Immunity Act 1972 and they complained that this was incompatible with the right to a fair hearing under both Article 6 HRA, and Article 47 of the Charter. The language of the State Immunity Act 1972 was plain. The only remedy open under the HRA was a declaration of incompatibility. However, in so far as the claim related to EU law – race discrimination and working time – the State Immunity Act 1972 was set aside and their claim could proceed. The rest of their case was struck out.<sup>147</sup>

## EU legislation and Parliament

MPs receive copies of EU documents and explanatory notes to keep them up-to-date with developments that may affect the UK and their constituents.

MPs on the House of Commons European Scrutiny Committee and Peers on the House of Lords European Scrutiny Committee (and its various Sub-Committees) have particular responsibility for scrutinising EU laws that the government puts to Parliament.<sup>148</sup> The reports of these Committees are designed to help inform Parliament in its consideration of the work of the EU and its impact on domestic law and policy.

In some areas the UK has to decide whether to ‘opt-in’ to a new EU law. The Committees closely scrutinise these decisions, and the wider role of the UK Government in the adoption of new EU law.

### *Ensuring UK legislation reflects EU law*

Parliament is responsible for considering changes to UK legislation designed to implement EU law. This is often done through secondary legislation under the European Communities Act 1972. However, major changes are regularly made by primary legislation. For example, the Data Protection Act 1998 was intended to implement the Data Protection Directive, adopted in 1995.

The role of Parliament in ensuring compliance with EU law is particularly important in relation to the implementation of EU directives. Directives will require domestic law to make them work. Directives which aren’t implemented well – or on time – may be given direct effect by the courts.

## International law

This section expands on the relationship between UK and international law and highlights some of the UK’s most important international obligations for individuals. It also identifies key ways in which international law might impact on the work of Parliament.

### How does international law affect our law?

In the UK, international law is treated as separate and distinct from domestic law. This ‘dualist’ approach means that international law is not automatically part of domestic law. This means ‘treaty’ obligations and ‘customary international law’ which bind the UK do not automatically create rights and obligations which individuals can enforce in the domestic courts.



## *Treaties*

Treaty-making is the responsibility of the Crown, exercised typically by the Foreign Secretary. Parliament plays an important role in ‘**ratification**’, the process which determines whether a treaty will bind the UK internationally. No international treaty will bind the UK unless it has been laid before Parliament and neither House objects.<sup>149</sup> Parliament always has the opportunity to debate the implications of a treaty and could vote against the UK being bound by the treaty.

Once ratified, Parliament may decide to ‘**incorporate**’ the UK’s international obligations into domestic law. Ratification binds the UK in international law, but further steps are very likely to be needed before the obligations take effect in domestic law. For example, the UN Convention against Torture 1984 requires states to make acts of torture a criminal offence. The UK ratified the Convention in 1988. The Criminal Justice Act 1988 then created a framework for the prosecution of acts of torture.

## *Unincorporated treaties*

A treaty can be ratified (and therefore internationally binding) but not formally incorporated into domestic law.

The ‘**unincorporated**’ treaty obligations remain binding on the UK in international law, and will also remain relevant to

Parliament’s consideration of law, policy and practice. The rule of law assumes that the UK intends to comply with its obligations in international law.<sup>150</sup>

The Ministerial Code imposes an overarching duty on Ministers to comply with the law, which is expressly defined as including international law and treaty obligations. This also means that international law will be relevant to the interpretation of domestic legislation and to the development of the common law.

In considering what constitutes the ‘interests of children’ for the purpose of the Children Act 2004, the Children’s Commissioner must have regard to the UN Convention on the Rights of the Child, as must the court if called upon to interpret this provision.<sup>151</sup>

The way in which judges interpret the law – both statutory law and common law – can be informed and influenced by the interpretation of treaties.<sup>152</sup> Where an international law obligation is relevant to an issue before an English court, the judges may look at that obligation to help them reach an interpretation which meets our international obligations in practice. For example, in deciding a disability discrimination case under the Human Rights Act 1998, the Supreme Court considered the UK’s obligations under the UN Convention on the Rights of Persons with Disabilities.<sup>153</sup>

Some treaties also provide specific international mechanisms for their interpretation and enforcement. The Court of Justice of the European Union is one example. Although a treaty generally has no formal binding effect in domestic law (absent ‘incorporation’), Ministers, officials and Parliament will be aware that the UK’s adherence to the treaty obligations is being monitored internationally by other treaty parties.

## *Customary international law*

It is generally accepted that customary international law is a source of the common law of England.<sup>154</sup> However, there is no absolute right to bring a claim before the English courts solely on the basis of customary international law.

Whether a person can bring a case relying on a rule of customary international law depends on: (a) the subject matter of the dispute; (b) whether the claim has any other basis in domestic law; (c) the importance of the dispute; (d) the complexity of the issue, and (e) whether there is any constitutional objection (for example, a clash between the rule of custom and an important democratic principle recognised by the common law).<sup>155</sup> Irrespective of whether a particular customary international rule can be directly enforced in the domestic courts, it can influence the general development of the common law.

Customary international law also influences the work of Parliament. For example, reporting on the UK's involvement in Kosovo, the House of Commons Select Committee on Foreign Affairs considered the development of customary international law on humanitarian intervention.<sup>156</sup>

## Scotland and Northern Ireland

Within their devolved competences, Northern Ireland and Scotland may have particular responsibilities for the UK's international obligations within their devolved powers. For example:

- The Scottish Parliament enacted the International Criminal Court (Scotland) Act 2001 which expressly seeks to give effect to the obligations under the Rome Statute 1998. This complements the International Criminal Court Act 2000 which covers England and Wales and Northern Ireland.
- The Commissioner for Older People Act (Northern Ireland) 2011 creates a specific statutory duty to have regard to the UN Principles for Older Persons.<sup>157</sup>
- The Attorney General for Northern Ireland has a specific duty to provide guidance to specified organisations on how to exercise their functions in a way which respects “*international human rights standards relevant to the criminal justice system*”.<sup>158</sup>

Scots courts have been clear that “*a rule of customary international law is a rule of Scots law*”.<sup>159</sup>

## International human rights law

The post-war political settlement included the development of international treaties which protect minimum standards of individual rights in international law.

The UN Declaration of Human Rights, agreed in 1948, has been joined by a framework of specific guarantees designed to protect the most vulnerable communities in every society.

The UK ratified the International Covenant on Civil and Political Rights (‘ICCPR’) and the International Covenant on Economic, Social and Cultural Rights (‘ICESCR’), in 1976. Every few years, the UK submits a ‘**periodic report**’ on its performance to the bodies set up to monitor compliance with those treaties in practice. These are the UN Human Rights Committee and the UN Committee on Economic, Social and Cultural Rights respectively.

Other key human rights treaties ratified by the UK include:

- The Convention relating to the Status of Refugees (‘the Refugee Convention’);
- The Convention on the Elimination of Racial Discrimination (‘CERD’);

- The Convention on the Elimination of all Forms of Discrimination against Women (‘CEDAW’);
- The UN Convention against Torture (‘UNCAT’);
- The Convention on the Rights of the Child (‘CRC’); and
- The Convention on the Rights of Persons with Disabilities (‘CRPD’).

These treaties all have their own individual monitoring mechanisms. The comments and recommendations of the UN Committees in relation to the UK can inform the work of public agencies, government departments and Parliament.

The UK accepts the ‘right of individual petition’ in relation to both CEDAW and CRPD. This means that people in the UK who think that UK law, policy or practice is unlawful can take their complaint directly to the relevant UN Committee.<sup>160</sup>

## Ratifying the Convention on the Rights of Persons with Disabilities

The CRPD (and its Optional Protocol) was ratified by the UK in June 2009. This obliges the UK to take concrete action to comply with its obligations under the CRPD.<sup>161</sup>

In 2012, the Joint Committee on Human Rights published a report on the right of disabled people to independent living within the context of the CRPD. It found that the government had not conducted an assessment of the cumulative impact of budget cuts and other reforms on disabled people. It regretted that the CRPD had not yet played a significant role in the development of policy and legislation in the UK.

Since ratification, the Supreme Court has confirmed that it will consider the CRPD in disability cases brought under the HRA, where it can assist the court in its interpretation of Convention rights.<sup>162</sup>

## Torture and practice at home?

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('UNCAT') was ratified by the UK in 1988.

The UK has also signed the Optional Protocol to UNCAT ('OPCAT'), which establishes a system of unannounced and unrestricted visits by independent international and national monitoring bodies to places where persons are deprived of their liberty.

The UK National Preventive Mechanism ('NPM') established under the OPCAT is currently made up of eighteen visiting or inspecting bodies who visit places of detention such as prisons, police custody and immigration detention centres. The NPM is coordinated by HM Inspectorate of Prisons ('HMIP'). The Joint Committee on Human Rights has recommended a number of reforms to UK law in the light of our UNCAT obligations.<sup>163</sup>

## Children's rights and the UNCRC

The UN Convention on the Rights of the Child is an international treaty ratified by the UK. The UK government has committed to ensuring that children have the rights guaranteed to them under the UNCRC. The UNCRC influences the way in which Convention rights protected by the HRA are applied by the domestic courts of England and Wales.<sup>164</sup>

The Children Act 2004 provides the legal basis for how social services and other agencies deal with issues relating to children. The Act requires that the 'interests of children' must be understood in the context of the CRC.<sup>165</sup> The guiding principles of the Act are:

- to allow children to be healthy;
- to keep children safe in their environment;
- to help children enjoy life;
- to assist children to make a positive contribution to society; and
- to achieve economic well-being.

The provisions of the Act have implications for MPs when considering issues such as housing, education, welfare and immigration controls, as children's welfare should play a role in these decisions.



## Chapter 7: Want to know more?

### Where next for legal help?

This guide is designed as a basic introduction to the laws which most affect the work of MPs and their staff at Westminster.

However, many MPs face constituents with complex legal problems on a weekly basis. They also deal with difficult legal questions in their work at Westminster. This section is designed to help provide some easy signposts to where further help and support is available.

### Can my constituent get legal aid?

All individuals are entitled to free legal assistance if detained or questioned on police station premises. For all other legal aid, applicants must satisfy a strict ‘**means test**’.<sup>166</sup>

Additional ‘**merit-based**’ criteria also apply. For ‘**criminal legal aid**’,<sup>167</sup> it must be in the interests of justice to grant legal aid to the applicant. The more serious the possible consequences for the applicant, the more likely it is that they will pass this test. There’s no single test for ‘**civil legal aid**’, but factors considered include the applicant’s prospects of success, the likely cost of the claim versus the potential benefit of bringing it, and the wider public interest. In addition, the applicant’s civil dispute must fall within one of the specified categories for which legal aid is available.<sup>168</sup>

### Civil legal aid covers...

- ✓ Family law (for victims of domestic violence and children)
- ✓ Family mediation
- ✓ Community care
- ✓ Housing law
- ✓ Asylum and some immigration cases
- ✓ Some serious debt cases (where a home may be lost)
- ✓ Welfare benefit appeals
- ✓ Some mental health cases
- ✓ Special educational needs appeals
- ✓ Some discrimination cases
- ✓ Judicial review

### But it does not include...

- ✗ Consumer and contractual disputes
- ✗ Most immigration claims
- ✗ Private family law cases
- ✗ Personal injury or death
- ✗ Advice on making a will
- ✗ Business law issues
- ✗ Defamation claims
- ✗ And many other disputes...

**Exceptional** legal aid funding may be available if the absence of legal aid might breach an individual’s rights under the European Convention of Human Rights, or EU law – for example, if it would deprive them of a fair trial. This is a high hurdle and very few exceptional awards are made.<sup>169</sup>

### How can they access legal aid?

A police custody officer will help individuals who are detained or questioned in a police station to access legal assistance. For most other types of legal aid, applicants should contact a legal aid lawyer, who will apply for legal aid on their behalf.<sup>170</sup> For civil legal aid in relation to debt, discrimination or special educational needs disputes, applicants must first contact the ‘**Civil Legal Advice Helpline**’<sup>171</sup> – available on **0345 345 4345** – for help and advice.

### Evidence is key

Applicants should provide their legal aid lawyer with as much evidence as possible – particularly in relation to their financial circumstances, and the merits of the case. Some categories of legal aid have additional evidence requirements – for example, legal aid in domestic violence cases is dependent on proof of abuse.

*Constituents can check their eligibility for legal aid using the Ministry of Justice interactive portal.*

In all but the clearest cases, constituents may wish to speak to a High Street lawyer. The Law Society provides a searchable database of local solicitors which may be helpful, and you can also search the CILEx Practitioners Directory.

### *Scotland and Northern Ireland*

In Scotland and Northern Ireland, independent legal aid schemes will determine access to legal aid.

In each jurisdiction, means and merits tests apply to most criminal legal aid. In civil cases, a distinction is drawn between legal advice and assistance (like letter writing) which is subject only to a means test, and more substantial support such as representation in court, which requires both a means and merits test.<sup>172</sup> In both jurisdictions the merits test requires that the applicant demonstrate an objective basis for their case, as well as showing that it is reasonable to use public funds towards it.<sup>173</sup> Unlike England and Wales, civil legal aid is available in principle for most kinds of dispute.<sup>174</sup>

More detailed information on the legal aid schemes in Scotland and Northern Ireland can be found online.<sup>175</sup>

### *When legal aid is not available*

Many MPs will see constituents who are looking for help because they are not eligible for legal aid and cannot afford

legal advice. Although MPs may not be able to provide legal advice, they often do provide support. They can help individuals understand their options and often help people to better explain their complaints in correspondence.

MPs and their surgeries build relationships with local law centres and advice services, and are able to refer individuals for help on a local level. Some national sources of legal advice and support are outlined, below.

## Where next for advice?

**Citizens Advice** gives generalist free advice and information from its local bureaux and national phone line (03444 111 444).

**AdviceUK** provides details for local advice agencies.

Local law centres can be found through the **Law Centres Network**.

**LawWorks** provides details for local free legal advice from solicitors.

The **Bar Pro Bono Unit** offers free legal representation, subject to a referral by a Citizens Advice Bureau, a law centre or an MP.

The **Personal Support Unit** provides support in civil proceedings. They are based at a number of courts across the country.

The **Equality Advisory and Support Service** may be able to provide advice in some equality cases.

Some solicitors, barristers or chartered legal executives may offer advice on 'fixed-fee' or 'no-win, no-fee' conditional fee arrangements.

### Specialist Advice

**Shelter** for housing advice covering the private and social sector as well as homelessness.

**ACAS** gives advice on employment matters and provides mediation for employment disputes.

**Liberty** has an advice line for matters relating to human rights.

### In Scotland

**Citizens Advice Scotland.**

**LawWorks Scotland.**

**Free Legal Services Unit** provides free legal representation subject to a referral from certain agencies listed on their website.

### In Northern Ireland

**Citizens Advice Northern Ireland.**

**AdviceNI** for free advice on tax, benefits and debt problems.

The **Equality Commission Northern Ireland** may be able to give free advice on matters relating to discrimination.

## Legal help and support at Westminster

### *The House of Commons*

There are a number of sources of legal support available at Westminster:

- The **House of Commons Library** – and their colleagues in the House of Lords – will be the first port of call for many MPs seeking help on legal issues. The Library provides impartial and independent professional research support to MPs and their staff.

While the Library is not able to provide legal advice, it employs qualified legal staff who provide legal information and support to MPs on legal issues.

They produce briefings on most topical areas of interest and on all Bills progressing through Parliament. On other areas of legal interest, there may already be a ‘Library Briefing Paper’ which may help.

- The **Office of Speaker’s Counsel** (‘OSC’) provides legal advice and support to Mr Speaker, the Clerk and all the departments of the House as an institution.

The work of the OSC falls into three main areas: general legal advice (including parliamentary privilege,

information law, copyright, and employment, health and safety, commercial and contractual issues), scrutiny of domestic legislation (e.g. scrutiny of statutory instruments and advice on Private Bills) and scrutiny of European legislation.

**The Office does not advise Members and their staff**, but is always happy to assist Members to find an alternative source of advice or to indicate where an answer may be found.

- **Specialist Select Committees:** There are a number of Select Committees in both Houses which may already have produced a report on a matter of legal interest. These include:
  - The House of Commons Justice Select Committee
  - The Joint Committee on Human Rights
  - The House of Commons EU Scrutiny Committee
  - The House of Lords Constitution Committee
  - The Joint Committee on Statutory Instruments and the House of Lords Secondary Legislation Committee
  - The Public Administration and Constitutional Affairs Committee
  - The Women and Equalities Committee

These Committees have access to their own dedicated legal advisers and specialist clerks.

- Many **All-Party Parliamentary Groups** exist for MPs and Peers with an interest in legal issues. These include groups on Legal and Constitutional Affairs, Legal Aid and the Rule of Law.

## Legal help and support from others

**JUSTICE** has worked with MPs on legal issues within our expertise since our creation in 1957. In areas where we work, we regularly receive and answer questions from MPs and their staff. Full information about our work, and details on how to contact our staff, is available at [www.justice.org.uk](http://www.justice.org.uk).

A significant number of organisations outside the House of Commons may be willing to help MPs and their staff on legal issues within their area of expertise. These include professional bodies, universities and academics, expert practitioners and civil society organisations.

### *Professional bodies*

- Law Society of England and Wales
- Law Society of Northern Ireland
- Law Society of Scotland
- Bar Council
- Bar of Northern Ireland
- Faculty of Advocates
- Chartered Institute of Legal Executives

### *Academic bodies*

Many academic institutions and individual academics are happy to assist Parliamentarians on issues within their field of interest. Those which work on legal and constitutional issues include:

- The University College London Constitution Unit
- The Bingham Centre for the Rule of Law
- LSE Institute of Public Affairs (Constitution Project)

### *Other sources of help*

Specialist organisations with legal expertise work in many of the areas where MPs will receive most calls for help.

## Equality and Human Rights

MPs and staff with questions about equality and human rights issues may find the **Equality and Human Rights Commission**, the **Scottish Human Rights Commission** or the **Northern Ireland Human Rights Commission** helpful. For equality questions in Northern Ireland, contact the **Northern Ireland Equality Commission**.

**Liberty** is a campaign organisation working on human rights and civil liberties in the UK. Liberty also runs an **advice line** on these issues, which is open to the public.

Both **Amnesty International** and the **British Institute of Human Rights** work on human rights issues in the UK.

Many other organisations work actively on specific human rights issues in the UK, focusing on, for example, health, children or disability. Many will have specialist legal expertise which MPs and staff may find useful. Note that this list is not exhaustive:

- Age UK
- The Children's Rights Alliance for England
- The Equality and Diversity Forum

- Fair Trials International
- Just for Kids Law
- The Howard League
- Mind
- REDRESS
- Reprieve
- The Prison Reform Trust
- The Public Law Project

### ***Immigration***

MPs and their caseworkers may regularly handle questions about immigration law. The following contacts may be helpful:

- The Immigration Lawyers Practitioners Association
- The Joint Council for the Welfare of Immigrants

### ***Housing***

MPs and their caseworkers may regularly handle questions about housing law. The following contacts may be helpful:

- The Housing Law Practitioners Association
- Shelter



# References

- 1 David Howarth, David Feldman (Ed), *Law in Politics, Politics in Law* (2014), Chapter.3.
- 2 Figures compiled by the Law Society of England and Wales and the Bar Council. These figures do not include lawyers qualified in Scotland or Northern Ireland. In the last Parliament 80 MPs admitted to either being a lawyer, having had some legal training, or having been one in a previous life; see David Howarth, David Feldman (Ed), *Law in Politics, Politics in Law, Hart* (2014), Chapter 3.
- 3 AV Dicey, *Introduction to the Study of the Law of the Constitution* (1885), p.494.
- 4 As noted by Lord Hughes (dissenting in part) in *R (Evans) v Attorney General* [2015] UKSC 21 (the 'black spider memos' case) at [154].
- 5 We do not consider these rules in detail in this guide, but guidance is available from the House of Commons authorities. Readers may find the Report of the Joint Committee on Parliamentary Privilege provides a helpful background, see *Parliamentary Privilege*, HL Paper 30/HC 100, available online: <http://www.publications.parliament.uk/pa/jt201314/jtselect/jtprivi/30/3002.htm>.
- 6 *A and others v Secretary of State for the Home Department* [2004] UKHL 56 at [42]
- 7 S7(1) Constitutional Reform Act 2005. The Lord Chief Justice of Northern Ireland is the head of the judiciary in Northern Ireland and the Lord President is the head of the judiciary in Scotland.
- 8 S63 Constitutional Reform Act 2005. Further guidance is available at <https://jac.judiciary.gov.uk/about-us>.
- 9 s3 Constitutional Reform Act 2005
- 10 *Regina v Bow Street Metropolitan Stipendiary Magistrate*, ex parte Pinochet Ugarte (No 2) [1999] 2 WLR 272.
- 11 The Ministerial Code is available online at <http://bit.ly/1GBxs1A>. At the time of going to print, updated versions of the Civil Service Code and Cabinet Manual had not yet been uploaded online.
- 12 The Court Reform (Scotland) Act 2014 has introduced a new Sheriff Appeal Court which will start to hear appeals in September 2015.
- 13 *McInnes v HM Advocate* [2010] UKSC 7 at [5] (Lord Hope).
- 14 Criminal Procedure (Scotland) Act 1995, section 124(2), as amended. Once the compatibility issue is resolved, the Supreme Court must remit the case back to the High Court for disposal, meaning that the High Court of Justiciary remains the final court of appeal for all criminal matters in Scotland.
- 15 The new Sheriff Appeal Court introduced by the Court Reform (Scotland) Act 2014 will start to hear civil appeals in January 2016. The Act has also introduced a new Personal Injury Court, which will commence operating in September 2015.
- 16 The UK tribunal system is largely arranged on a two-tier basis. The First-tier Tribunal comprises many different chambers dealing with disputes in the first instance. Appeals from the First-tier go to the appropriate chamber in the Upper Tribunal. From there, you can appeal to the Courts of Appeal (England and Wales and Northern Ireland), or to the Court of Session (Scotland). Some specialist tribunals, such as the Employment and Employment Appeals Tribunal, and the Competition Appeal Tribunal, make up separate jurisdictions which exist outside the two-tier structure.
- 17 Locke, *Second Treatise of Government* (1689), chap. XVII, s.202, p.400.
- 18 Bingham, *The Rule of Law* (2010), p.9.
- 19 *Entick v Carrington* [1765] EWHC KB J98.
- 20 See s1 Constitutional Reform Act 2005, The Cabinet Manual 2011 at [6.4] and The Ministerial Code 2010 at [1.2]. The last Government confirmed that the Cabinet Manual and Ministerial Code reflect an obligation on Ministers to act in accordance with the rule of law, see *Government Response to the House of Lords Select Committee on the Constitution Report*, Sixth Report of Session 2014–15 The Office of Lord Chancellor, HL 75, available online at: <http://bit.ly/1LRvEa2>.
- 21 Rt Hon Michael Gove MP, *What does a one nation justice policy look like?*, 23 June 2015. Available online: <https://www.gov.uk/government/speeches/what-does-a-one-nation-justice-policy-look-like>
- 22 Bingham, *The Rule of Law* (2010).
- 23 *R (Secretary of State for The Home Department) ex parte Khawaja* [1983] 2 WLR 321, p.111.
- 24 *A v Secretary of State for the Home Department ('Belmarsh')* [2004] UKHL 56 at [237].
- 25 *Railway Express Agency Inc v New York* (1949) 336 U.S. 106 at [112].
- 26 See Bingham, *The Rule of Law* (2010), p.55.
- 27 *Short v Poole Corporation* [1926], Ch.66, at p. 90, 91, (Warrington LJ)
- 28 *R v Secretary of State for the Home Department ex p. Leech* [1993] 3 WLR 1125, at p.210.
- 29 Magna Carta (1215), Article 40.
- 30 HC Deb, 15 Dec 1948, Vol 549, Col. 1221.
- 31 *Bank Mellat v HM Treasury* [2013] UKSC 38 at [81]. Although Lord Hope dissented in this case – meaning he disagreed with its outcome – this summary of the principle of open justice is uncontroversial.
- 32 See Justice and Security Act 2013.
- 33 See also, *Bank Mellat v HM Treasury* [2013] UKSC 38 at [3] and [74].
- 34 *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, at p.638.
- 35 *Kennedy v The Charity Commission* [2014] UKSC 20 at [133].
- 36 House of Lords Select Committee on the Constitution, Twelfth Report of Session 2012–2013, *Jobseekers (Back to Work Schemes) Bill*, HL155, pp.4-6, available online at <http://www.publications.parliament.uk/pa/ld201213/ldselect/ldconst/155/155.pdf>.
- 37 David Anderson QC, *A Question of Trust: Report of the Investigatory Powers Review* (2015) at [12.9], available online at <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2015/06/IPR-Report-Web-Accessible1.pdf>.

- 38 In an exception to this rule, Parliament can authorise Ministers to amend primary legislation in a later statutory instrument ('secondary legislation'). This practice is commonly known as a 'Henry VIII Clause' and is generally subject to close scrutiny by Parliament. Locke, *Second Treatise of Government* (1689), chap. XVII, s.202, p.400.
- 39 An easy guide to the passage of a Bill is available online at <http://www.parliament.uk/about/how/laws/passage-bill/>.
- 40 Some technical amendments can be made in the House of Lords at Third Reading, but in the House of Commons, this stage involves a simple 'yes or no' vote on the Bill as amended.
- 41 *Adler v George* [1964] 2 QB 7.
- 42 *Wilson v First County Trust* (No.2) [2003] UKHL 40 at [66].
- 43 *Pepper v Hart* [1993] AC 593.
- 44 *Thoburn v Sunderland City Council* [2002] EWHC 195 Admin at [62].
- 45 *Donoghue v Stevenson* [1932] AC 562.
- 46 *R v R* [1992] 1 AC 599.
- 47 *R v Somerset County Council and ARC Southern Ltd, ex p Dixon* [1998] Env LR 111
- 48 *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768.
- 49 *R v Secretary of State for the Home Department Ex p. Simms* [2000] 2 AC 115
- 50 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223
- 51 *Council of Civil Service Unions and Others v Minister for the Civil Service Respondent* [1985] A.C. 374 (Lord Diplock).
- 52 *R (Greenpeace Ltd) v Secretary of State for Trade and Industry (No 2)* [2007] EWHC 311 (Admin). In another example, the court found that the public consultation process regarding the proposed third runway at Heathrow was invalid as it was based on out-of-date figures, see *R (Hillingdon and others) v Secretary of State for Transport* [2010] EWHC 626 (Admin).
- 53 *AG of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 at p.638.
- 54 Southey, Weston & Bunting, *Judicial Review: A Practical Guide* (2012), p.51 citing *R v Gough* [1993] AC 646 at p.661G.
- 55 A good example of the need to avoid apparent as well as actual bias is the Pinochet case, considered in Chapter 2.
- 56 *R v North and East Devon Health Authority (ex parte Coughlan)* [2001] QB 213.
- 57 *Pham v Secretary of State for the Home Department* [2015] UKSC 19.
- 58 S31(3), Senior Courts Act 1981.
- 59 *R v Secretary of State for Trade and Industry ex p Greenpeace Ltd* [2000] 2 CMLR 94.
- 60 *R v Somerset County Council and ARC Southern Ltd, ex p Dixon* [1998] Env LR 111
- 61 *R (on the application of London Borough of Lewisham and another) v Secretary of State for Health and another* [2013] EWHC 2381 (Admin).
- 62 CPR 54.5. The court may make special allowance where the delay is out of the applicant's control; see *R v Stratford-upon-Avon DC ex p. Jackson* [1985] 3 All ER 769, where the delay was caused by the applicant's difficulties in obtaining the requisite legal aid.
- 63 CPR 54.4.
- 64 *R v Inland Revenue Commissioners ex p National Federation of Self-Employed and Small Business Ltd* [1982] AC 617 at p.643 (Lord Diplock).
- 65 Southey, Weston & Bunting, *Judicial Review: A Practical Guide* (2012), p.165.
- 66 CPR 44.3(2).
- 67 C. Himsworth, *Judicial Review in Scotland*, in Supperstone, Goudie, Walker and Fenwick (eds.), *Judicial Review*, 5th Edn (2014), para.22.9.1. See also, for example, in *Re Board of Governors of Loreto Grammar School's Application for Judicial Review* [2011] NIQB 30.
- 68 For more information see *West v Secretary of State for Scotland* [1992] SC 385.
- 69 Anthony, Himsworth, Lewis J and Lloyd Jones LJ, *Devolution*, in Supperstone, Goudie, Walker and Fenwick (eds.), *Judicial Review*, 5th Edn (2014), para.22.5.1.
- 70 *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32.
- 71 *Re McComb's Application for Judicial Review* [2003] NIQB 47.
- 72 For a summary of judicial review in Northern Ireland see Dickson, *Law in Northern Ireland* (2013) at pp.130-134.
- 73 Joint Committee on Human Rights, Eleventh Report of Session 2008-09, *Legislative Scrutiny*, HL 69 / HC 396 at [2.11], available online at <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/69/69.pdf>.
- 74 House of Commons Education Committee, First Report of Session 13-14, 2012 *GCSE English Results* at [140], available online at <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmeduc/204/20402.htm>.
- 75 For further reading, see Mark Elliott, *Beyond the European Convention: Human Rights and the Common Law* (2015), available online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2598071](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2598071).
- 76 *Kennedy v The Charity Commission* [2014] UKSC 20 at [46] (Lord Mance).
- 77 *A v BBC* [2014] UKSC 23 at [56] and [57] (Lord Reed).
- 78 *R v Secretary of State for the Home Department Ex p. Simms* [2000] 2 AC 115.
- 79 *R v Lord Chancellor ex parte Witham* [1998] QB 575.
- 80 *Kaye v Robertson* [1991] FSR 62. See also *Wainwright v Home Office* [2003] UKHL 53. In this case a grandmother and her disabled grandson were subject to an unjustified and obtrusive strip search before a prison visit. They were awarded some damages for common law battery but they had no remedy for the invasion of their privacy in common law.
- 81 *Smith and Grady v UK* (2000) 29 EHRR 493.
- 82 *Michael & Ors v The Chief Constable of South Wales Police & Anor* [2015] UKSC 2.
- 83 For further reading, see Blackstone's *Guide to the Human Rights Act 1998*, 7th Edn, (2015).
- 84 Human Rights Act 1998, Schedule 1, Parts 1 and 2.

- 85 *Eweida v British Airways plc* [2010] EWCA Civ 80. Ms Eweida lost her case before the Court of Appeal. She did however win at the European Court of Human Rights, after the Equality and Human Rights Commission, Liberty and others intervened in the case (*Eweida and others v the United Kingdom* (2013) 57 EHRR 8).
- 86 Article 15(1) ECHR. See also s14 Human Rights Act 1998.
- 87 *A and others v Secretary of State for the Home Department; X and another v Secretary of State for the Home Department* [2004] UKHL 56.
- 88 Article 15(2) ECHR.
- 89 *A and others v East Sussex County Council and another* [2003] EWHC 167 (Admin).
- 90 *R (Cousins-Chang) v (1) Secretary of State for the Home Department and (2) The Commissioner of Police of the Metropolis* [2013] EWHC 982 (Admin).
- 91 *Austin v the United Kingdom* (2012) 55 EHRR 14; *Austin & Anor v The Commissioner of Police of the Metropolis* [2007] EWCA Civ 989.
- 92 s6 HRA.
- 93 *YL v Birmingham City Council* [2007] UKHL 27. See also *Weaver v London & Quadrant Housing Trust* [2009] EWCA Civ 587 (social housing) and *R (A) v Partnerships in Care Ltd* [2002] 1 WLR 2610 (publicly funded mental health care in a private facility).
- 94 s3 HRA.
- 95 *Ghaidan v Godin-Mendoza* [2004] UKHL 30 at [33] (Lord Nicholls).
- 96 s4 HRA.
- 97 There have been 29 declarations so far. 20 of these are 'final'. This means that they are no longer subject to any appeal.
- 98 s10 HRA.
- 99 s19 HRA.
- 100 For instance, such a statement was made in connection with the ban on the broadcasting of political advertising in the Communications Act 2003.
- 101 The Scottish Human Rights Commission is also the current Chair of the European Network of NHRIs (ENNHRI).
- 102 For further reading, see Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (3rd Edn. 2014).
- 103 *Al-Skeini v the United Kingdom* [2011] ECHR 1093
- 104 Art. 46 ECHR.
- 105 s2 HRA.
- 106 *Manchester City Council v Pinnock* [2010] UKSC 45 at [48] (Lord Neuberger).
- 107 *R v Horncastle* [2009] UKSC 14.
- 108 *Hutchinson v UK*, App No. 57592/08, 3 February 2015. This case is currently being considered by the Grand Chamber of the European Court of Human Rights. A limited number of cases can be reconsidered by the Grand Chamber (17 judges of the Court sitting together).
- 109 *Shalk and Kopf v Austria*, App No. 30141/04, 24 Jun. 2010.
- 110 *Burnip v Birmingham City Council and another* [2012] EWCA Civ 629.
- 111 *Pretty v UK* (2002) 35 EHRR 1
- 112 Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms. Available online at <http://conventions.coe.int/treaty/en/Treaties/Html/213.htm>.
- 113 *S and Marper v United Kingdom* [2008] ECHR 1581
- 114 *Hirst v the United Kingdom* (No 2) (2006) 42 EHRR 41.
- 115 *R (on the application of Chester) (Appellant) v Secretary of State for Justice (Respondent); McGeoch (AP) (Appellant) v The Lord President of the Council and another (Respondents)* [2013] UKSC 63.
- 116 *McHugh and Others v United Kingdom* App. No 51987/08, 10 February 2015.
- 117 See Lord Reed in *Axa General Insurance Ltd v HM Advocate* [2012] 1 AC 868 at [136]-[141]. See Northern Ireland Act 1998 is s6(2).
- 118 *Salvesen v Riddell* [2013] UKSC 22.
- 119 s57(2) Scotland Act 1998.
- 120 s24(1) Northern Ireland Act 1998, "A Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act— (a) is incompatible with any of the Convention rights."
- 121 s81 Government of Wales Act 2006, "(1) The Welsh Ministers have no power— (a) to make, confirm or approve any subordinate legislation, or (b) to do any other act, so far as the subordinate legislation or act is incompatible with any of the Convention rights."
- 122 More information about both of these bodies can be found online: The Northern Ireland Human Rights Commission at <http://www.nihrc.org/about-us/who-we-are>, and the Equality Commission for Northern Ireland available online <http://www.equalityni.org/HeaderLinks/About-Us>.
- 123 The Scottish Human Rights Commission website provides helpful information on its duties and history, at <http://www.scottishhumanrights.com/>. Scotland's National Action Plan for human rights can be found here: <http://www.scottishhumanrights.com/actionplan>.
- 124 The UK has not yet ratified Protocol 12 to the European Convention on Human Rights which would provide a freestanding equality guarantee within the Convention.
- 125 Including the Equal Pay Act 1970, Sex Discrimination Act 1975, Race Relations Act 1976, Disability Discrimination Act 1995, Employment Equality (Religion or Belief) Regulations 2003, Employment Equality (Sexual Orientation) Regulations 2003, Employment Equality (Age) Regulations 2006, Equality Act 2006 and Equality Act (Sexual Orientation) Regulations 2007.
- 126 *Coleman v Attridge Law* [2008] All ER (D) 245.
- 127 *Mandla v Lee* [1983] 2 WLR 620.
- 128 *Howe v JD Wetherspoon*, 18th May 2015.
- 129 *Hall v Bull*, [2013] UKSC 73.
- 130 *RBS v Allen* [2009] EWCA Civ 1213.
- 131 21st May 2015, reported online at <http://www.ucc.org.uk/7540>.

- 132 s15, Equality Act 2010
- 133 Equality Act 2010, Part 5.
- 134 *Dumfries and Galloway v North* [2013] UKSC 45.
- 135 s149 Equality Act 2010.
- 136 See Employment Equality (Age) Regulations (NI) 2006; Disability Discrimination Act 1995; Disability Discrimination (Northern Ireland) Order 2006; Equal Pay Act (NI) 1970; Sex Discrimination (NI) Order 1976; Race Relations (NI) Order 1997; Fair Employment & Treatment (NI) Order 1998; Equality Act (Sexual Orientation) Regulations (NI) 2006.
- 137 Equality Commission for Northern Ireland, *Gaps in Equality Law in Great Britain and Northern Ireland* (2014), available online at <http://www.equalityni.org/ECNI/media/ECNI/Publications/Delivering%20Equality/Gaps-in-Equality-Law-in-GB-and-NI-March-2014.pdf>.
- 138 Full details on the Speaker's Conference on Parliamentary Representation are available online at <http://www.parliament.uk/business/committees/committees-a-z/other-committees/speakers-conference-on-parliamentary-representation/>.
- 139 Joint Committee on Human Rights, Eighteenth Report of Session 2006-07, *The Human Rights of Older People in Healthcare*, HL156-I / HC 378-I, available online at <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/156/156i.pdf>.
- 140 House of Commons Justice Committee, Fifth Report of Session 2013-14, *Older Prisoners*, HC 89, available online at <http://www.publications.parliament.uk/pa/cm/cm201314/cmselect/cmjust/89/8902.htm>.
- 141 Full details on the work of the new Women and Equalities Committee is available online at <http://www.parliament.uk/business/committees/committees-a-z/commons-select/women-and-equalities-committee/role/>
- 142 C-50/96 *Deutsche Telekom AG v Schröder* [2000] IRLR 353 at [56].
- 143 Fuller information about each of the institutions of the EU can be found online at [http://europa.eu/about-eu/institutions-bodies/index\\_en.htm](http://europa.eu/about-eu/institutions-bodies/index_en.htm)
- 144 Although under the doctrine of 'indirect effect', in many disputes between individuals, courts will interpret national law in a way that conforms with EU law.
- 145 Article 6 TEU.
- 146 Art. 6(3)TEU. The EU is looking into ratification of the ECHR. This would make the EU a Contracting Party to that Convention. It would mean that individuals could make complaints against the institution as a whole before the European Court of Human Rights.
- 147 *Benkharbouche & Anor v Embassy of the Republic of Sudan* [2015] EWCA Civ 33.
- 148 The House of Lords also has an EU Committee which performs a similar function.
- 149 s20(1) Constitutional Reform and Governance Act 2010. See also, Part 2 Constitutional Reform and Governance Act 2010.
- 150 See Chapter 2 of this Guide (The Rule of Law).
- 151 As defined in s2(11) Children Act 2004.
- 152 Although they tend to follow international consensus when doing so, see Lord Hope in *R v Asfaw* [2008] UKHL 31, at [53].
- 153 *P v Cheshire West and Chester Council & Anor* [2014] UKSC 19, [32].
- 154 *R v Jones & Ors* [2006] UKHL 16 at [11] (Lord Bingham). See also *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] Q.B. 529 553-554.
- 155 *R v Jones & Ors* [2006] UKHL 16 at [27-31] (Lord Bingham); and *R (Abassi) v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ. 1598 at [85].
- 156 Available online at: <http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmcaff/28/2813.htm>.
- 157 Commissioner for Older People Act (Northern Ireland) 2011 s2(3)(a-b).
- 158 Justice (Northern Ireland) Act 2004 s8.
- 159 *Lord Advocate's Reference* (No.1 2000) [2001] S.C.C.R. 296 at [23].
- 160 A number of other treaties – including the International Covenant on Civil and Political Rights – have a similar mechanism to let individuals take their cases to an international body for review. The UK does not accept this route of complaint more generally.
- 161 Equality and Human Rights Commission, *The Commission's work on UNCRPD: Update March 2012* (2012), available online at [http://www.equalityhumanrights.com/sites/default/files/documents/humanrights/uncrdp\\_mar2012.pdf](http://www.equalityhumanrights.com/sites/default/files/documents/humanrights/uncrdp_mar2012.pdf).
- 162 *P v Cheshire West and Chester Council & Anor* [2014] UKSC 19 at [36].
- 163 See, for example, Joint Committee on Human Rights, Nineteenth Report of Session 2005-06, *The UN Convention against Torture*, HL 185/HC 701, available online at <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/185/185-i.pdf>.
- 164 *HH v Deputy Prosecutor of the Italian Republic; F-K (FC) v Polish Judicial Authority* [2012] UKSC 25 at [98].
- 165 s2(11) Children Act 2004.
- 166 The Ministry of Justice provides online calculators to help individuals assess their financial eligibility. Individuals who are under 18, or in receipt of certain benefits, are exempt from the means test.
- 167 Governed by ss13-20, Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO 2012').
- 168 These categories comprise the 'general' legal aid regime, as governed by s9 and Schedule 1 LASPO 2012.
- 169 Under s10 LASPO 2012.
- 170 A database of legal aid lawyers is available online at <http://find-legal-advice.justice.gov.uk/>.
- 171 The helpline also offers non-mandatory assistance in a range of other cases including welfare benefit and housing disputes.
- 172 Unlike in England, where all types of legal assistance for civil disputes are grouped together under the heading 'legal aid'.
- 173 The test is similar but not identical.
- 174 With some limited exceptions, such as libel and defamation claims.
- 175 At [www.slab.org.uk](http://www.slab.org.uk) and [www.nidirect.gov.uk/legal-aid](http://www.nidirect.gov.uk/legal-aid) respectively.

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## *Advisory Group*

**Paul Bowen QC,**

Brick Court Chambers

**Baroness Jane Campbell**

**Joanna Cherry QC MP**

**Andrew Denny,**

Allen & Overy

**Dr Hywel Francis**

**Professor Conor Gearty,**

London School of Economics

**The Rt. Hon. Dominic Grieve QC MP**

**Stephen Grosz QC (Hon)**

**Professor Colin Harvey,**

Queen's University Belfast

**Alistair MacDonald QC,**

Chairman of the Bar

**David Howarth,**

University of Cambridge

**Jessica Lee,**

42 Bedford Row

**Helen Mountfield QC,**

Matrix Chambers

**Colm O'Conneide,**

University College London

**Lord David Pannick QC,**

Blackstone Chambers

**Vicky Purtill,**

The Chartered Institute of Legal Executives

**Emily Thornberry MP**

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- Access to education and employment.

Within these themes, we bring together our resources and experience on multi-jurisdictional projects, as well as seeking to address local need in communities where we have an office. That ranges from staffing evening free legal advice clinics in London and providing strategic support to the education sector to developing the rule of law in Myanmar. We partner with a wide range of organisations in our pro bono and

community investment work to achieve results: for example with leading non-profit organisations such as JUSTICE to support the rule of law or with social enterprises to broaden access to the world of work. In 2011, we co-founded PRIME, an initiative to encourage law firms to provide more work experience opportunities to students from disadvantaged backgrounds. Our own flagship programme, the Smart Start Experience, has provided hundreds of students with an insight into life in corporate law and business.

Access to justice and maintaining the rule of law is important to both our pro bono and commercial clients. Allen & Overy recognises the considerable challenges to access to justice in the current environment, and the significance of the constitutional issues that will be debated during this Parliament. We hope the contents of this guide will be a useful point of reference for Parliamentarians in their legislative and representative work on these issues.

We are therefore delighted to have been invited by JUSTICE to assist on this project, which has involved lawyers from our Human Rights Working Group and UK Public Law Team. The Human Rights Working Group works with and advises pro bono and commercial clients on human rights issues, and brings together lawyers

from different disciplines across our network including our litigation/arbitration group, environmental compliance and risk management experts, anti-bribery specialists, public law experts as well as transactional lawyers from our Global Projects, Energy and Infrastructure Team. Our UK Public Law team has extensive experience in judicial review work, and has acted on many of the most high profile commercial judicial reviews of the last few years. This team is also committed to pro bono work, and regularly represents organisations on interventions in judicial review proceedings at Court of Appeal and Supreme Court level, particularly where access to justice issues are at stake.

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**Twitter:** @TheLawSociety

**Email:** [parliamentary@lawsociety.org.uk](mailto:parliamentary@lawsociety.org.uk)

**The UK has a reputation as a world leader in the provision of legal services. Coupled with the independence of our judiciary, and our commitment to upholding the rule of law, the quality of the English legal system is unrivalled and rightly celebrated.**

**Over the next few years, MPs will tackle a number of issues such as human rights reform, further devolution and Britain's membership of the EU. These significant constitutional and legal matters mean that the role of the UK justice system and the legal profession is once again under the spotlight.**

Magna Carta and the rule of law are the pillars of our Great British constitution. But is it time to ask ourselves, what challenges does the 21st century pose to these ancient principles?

The complexities of modern life need a judicial system that is able to deliver access to justice for all. From company mergers to the administration of wills, solicitors are an essential part of that system. In fact:

- solicitors make a direct economic contribution of 1.5% of the UK's GDP; and
- for every 100 jobs in the legal services sector, we support 67 jobs in other areas of the economy.

We need a justice system that works for everyone in society. MPs will be aware of the recent changes to the justice system, particularly to legal aid and court fees. The impact has been felt in constituency office post bags and parliamentary inboxes across England and Wales; more and more people are finding it difficult to access good quality legal advice, and many will turn to their elected representatives for help in such crises.

Fairness, equality and transparency in the law are just some of the key principles that make the British legal system great. In these times of austerity, we need parliamentarians and the legal profession to work together to build on what we have and develop a justice system fit for the future. The Law Society will be working with the new government and Parliament to make this vision a reality.



**For more information on the work of the Bar Council, please contact:**

**Web:** [www.barcouncil.org.uk](http://www.barcouncil.org.uk)

**Twitter:** @TheBarCouncil

**Email:** [LRobins-Grace@BarCouncil.org.uk](mailto:LRobins-Grace@BarCouncil.org.uk)

**The Bar Council is the governing body for all barristers in England and Wales. It represents and, through the Bar Standards Board, regulates about 15,000 barristers in self-employed and employed practice.**

**The Bar Council has been at the forefront of initiatives over many years to maintain access to justice, modernise legal services, promote access to the profession, and uphold the UK's constitutional arrangements and the rule of law.**

**It is available as a resource for Parliamentarians to assist them in the fulfilment of their parliamentary responsibilities and as a gateway to the Bar as a profession.**

Newly elected MPs must quickly come to terms with competing obligations. They must legislate to represent their constituents, support their party leadership, and act in the national interest, whilst at the same time vote on Bills according to their conscience.

This guide emphasises to new members, as they fulfil their representative and legislative duties, the importance of upholding the rule of law and access to justice as cornerstones of our constitutional arrangements.

These are principles the Bar has upheld for hundreds of years. As specialist advocates, barristers are proud to play a vital role in the administration of justice, representing their clients fearlessly and to the best of their abilities. Barristers in England and Wales are regarded as among the best legal practitioners in the world, providing the public, no matter who they are, with legal services of the highest standard.

The Bar Council is committed to:

- promoting fair access to justice for all;
- innovating to improve the efficiency of the administration of justice;
- strengthening the reputation of the UK legal system and promoting the rule of law internationally;
- improving the diversity of the Bar and judiciary; and
- serving the community through pro bono legal work.

The Bar Council is constructively engaged in working with government, Parliament and other stakeholders to make its contribution to a system of justice of which we can all be proud.





**For more information on the work of CILEx, please contact:**

**Web:** [www.cilex.org.uk](http://www.cilex.org.uk)

**Twitter:** @CILExLawyers

**Email:** [info@cillex.org.uk](mailto:info@cillex.org.uk)

**or Parliamentary matters**

**Email:** [rdoughty@cillex.org.uk](mailto:rdoughty@cillex.org.uk)

**The Chartered Institute of Legal Executives (CILEx) has been providing innovative vocational legal education for over 50 years, and we are specialists in supporting the advancement of practical legal knowledge and skills. CILEx is very proud to support this guide, and our continuing work with Parliamentarians and JUSTICE.**

**CILEx is the professional association representing over 20,000 Chartered Legal Executive lawyers, paralegals and legal professionals. We work with Parliamentarians on subjects relating to the justice and education systems, and on matters of law reform. We often provide briefings and guidance on issues under consideration by Parliament in the public interest.**

CILEx represents diversity in the legal profession. Because of the flexibility and affordability of the CILEx route, 74% of CILEx lawyers are women, and one third of our new students are from BAME backgrounds. 82% of members do not have a parent who attended university, and only 3% of members have a parent who is a lawyer. In the last 25 years, over 100,000 students have chosen CILEx for their career in law.

Chartered Legal Executive lawyers can become partners in law firms, coroners, judges or advocates in open court. They can also independently practise as litigators, immigration practitioners, conveyancers and probate practitioners – either as employed lawyers, or through their own legal businesses and law firms.

The education, qualification and practice standards of Chartered Legal Executive lawyers, CILEx members and CILEx Practitioners, are overseen by CILEx Regulation. They ensure that proper standards of professional and personal conduct are maintained. When necessary, CILEx Regulation deals with complaints against CILEx members.

CILEx provides bespoke and tailor-made legal training, as well as a full suite of qualifications for those working in legal areas, that may be of interest to Parliamentary and constituency staff and researchers.





**JUSTICE**

59 Carter Lane  
London EC4V 5AQ

[admin@justice.org.uk](mailto:admin@justice.org.uk)

020 7329 5100

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