Legal Systems in the UK (England and Wales): Overview

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A Q&A guide to the legal system in the UK.

The Q&A gives a high level overview of the key legal concepts including the constitution, system of governance and the general legislative process; the main sources of law; the court structure and hierarchy; the judiciary and its appointment; the general rules of civil and criminal litigation, including reporting restrictions, evidentiary requirements, the roles of the judge and counsel, burdens of proof and penalties.

Constitution

Form

1. What form does your constitution take?

The United Kingdom (the UK) has three separate legal systems: one each for England and Wales, Scotland and Northern Ireland. This reflects its historical origins. The answers below deal primarily with the legal system of England and Wales but make reference to other parts of the UK where relevant.

The UK has an unwritten constitution in that there is no single written document that sets out the rights of individual citizens and how the Government should act. The UK constitution is comprised of a variety of sources, some of which are written (such as statutes) and others (such as constitutional conventions), which are unwritten (*see Question 10*).

The constitution is unitary in that the Parliament in Westminster is the supreme law-making authority. Since 1999, devolution has provided for the transfer of powers from the Westminster Parliament to assemblies in Cardiff (Wales) and Belfast (Northern Ireland), and the Scottish Parliament in Edinburgh. However, other law-making bodies, such as the devolved assemblies or local authorities, derive their law-making authority from powers that they have been granted by the Parliament in Westminster.

Constitutional conventions are an important non-legal and unwritten source of the constitution. Constitutional conventions may be defined as: "…rules of constitutional behaviour which are considered to be binding upon those who operate the constitution but which are not enforced by the law courts…nor by the presiding officers in the House of Commons" (*Marshall and Moodie, Some Problems of the Constitution*). An example of a constitutional convention is that the monarch always gives Royal Assent to a bill, if advised to do so by the Prime Minister.

As constitutional conventions are "non-legal" they do not require a procedure for their creation. If they become obsolete, they can be dispensed with without any formal step being taken.

General Constitutional Features

2. What is the system of governance?

System

The UK has a parliamentary system of governance, with the Westminster Parliament being the supreme law-making body. The doctrine of supremacy (or sovereignty) of Parliament means that the courts accept that legislation enacted by Parliament takes precedence over the common law (essentially, judge-made law as developed through cases).

Head of state

The head of state is the monarch (currently, King Charles III) who is unelected and who occupies that position by virtue of birth. In practice, the role of the monarch is largely ceremonial.

Some powers that the Government exercises are derived from the Royal Prerogative and are exercised in the name of the monarch, although the monarch remains legally responsible for their exercise. The Royal Prerogative is what remains of the absolute powers that were formerly exercised by the monarch and which have not been removed by Parliament. These powers include matters of national security, the defence of the realm and the deployment of the armed forces.

Structure

The UK Parliament comprises two separate Houses: the House of Commons and the House of Lords.

The House of Commons is a representative body, the membership of which is elected. Certain persons are disqualified from membership by profession or occupation (for example, full-time judges) or by status (for instance, persons under the age of 21).

The Speaker is the Chairman of the House of Commons and carries out their duties impartially such as by ruling on procedural points. By convention, the Prime Minister is a member of the House of Commons.

The House of Lords is not elected and is not a representative body. Most members of the House of Lords are life peers appointed under the Life Peerages Act 1958. Such peers are appointed by the monarch on the advice of the Prime Minister, who receives advice on who to put forward from a non-political Appointments Commission.

3. Does the constitution provide for a separation of powers?

There is no formal separation of powers in the UK constitution, but it is possible to identify persons or bodies that make up branches of the state:

- The executive branch is made up of the monarch, the Prime Minister and other Government Ministers, the civil service and members of the police and armed forces.
- The legislative branch is made up of the monarch, the House of Commons and the House of Lords.
- The judicial branch is made up of the monarch, legally qualified judges and magistrates (non-legally qualified members of the public).

Although the monarch is part of all three branches, her role is largely ceremonial. Most of the monarch's legal powers are exercised by the Government on her behalf. The monarch is part of the legislative process because she must give Royal Assent before a bill that has passed through Parliament becomes an Act of Parliament. The monarch is also head of the judiciary.

The Constitutional Reform Act 2005 improved the separation of powers between the executive and the judiciary, in particular by transferring the Lord Chancellor's role as the head of the judiciary to the Lord Chief Justice and creating the Judicial Appointments Committee as an independent body to ensure that the appointment of judges is solely on merit.

The judiciary prevents the state or the "executive" from exercising its powers in an unlawful manner. It has developed the following checks and balances through the common law:

- Residual freedom. A citizen is free to do or say whatever they wish unless the law (expressed primarily through Acts of Parliament) clearly states that such an action or statement is prohibited.
- Actions of the state, including state officials (for example, the police), must have legal authority.
- Legal disputes should be resolved by the judiciary. A monarch has no power to decide legal matters by way of arbitrary rulings (*Case of Prohibitions (Prohibitions del Roy) (1607)*).
- *Habeas corpus* and individual liberty. An individual who has been detained by the state has the right to have the legality of that detention reviewed by a court. Although the principle was originally developed through the common law, the right to liberty is also contained in Article 5 of the European Convention on Human Rights (ECHR), which now forms part of UK law pursuant to the Human Rights Act 1998 (HRA98).
- Right to a fair hearing. Although this principle was originally developed through the common law, the right to a fair trial is also contained in Article 6 of the ECHR, which now forms part of UK law pursuant to the HRA98.
- Royal Prerogative. Parliament's ability to scrutinise actions of the Government under the Royal Prerogative is limited. One area in which Parliament can scrutinise the Government's actions is international treaties. Following the enactment of the Constitutional Reform and Governance Act 2010, most international treaties entered into by the UK in the future will require ratification by Parliament.
- Judicial review of executive actions. As a result of the doctrine of Parliamentary supremacy and the UK having no written constitution, the UK courts do not have the ability to review the way in which public bodies exercise the powers that Parliament has conferred on them. Judicial review is the mechanism by which the courts ensure that public bodies act within their powers and do not exceed or abuse their powers (*see Question 5*).

4. What is the general legislative process?

Legislation is created by Parliament, which consists of the House of Commons and the House of Lords. Acts of Parliament apply in all four countries of the UK. The Scottish Parliament, the Northern Ireland Assembly and the National Assembly for Wales can only pass laws on devolved matters that just apply in their countries.

The two types of bill that can be placed before Parliament are public bills and private bills:

- Public (or Government) bills seek to change the law that concerns the public at large. Government bills are adopted by the Cabinet into the Government's legislative programme.
- Private members' bills are non-Government bills introduced by non-ministerial Members of Parliament (MP). These bills have priority on certain days in each session but can fail for lack of Parliamentary time. Private bills concern matters of individual, corporate or local interest and affect particular persons or localities (for example, a bill authorising a new railway).

A bill can start in the House of Commons or the House of Lords and must be approved in the same form by both Houses before becoming an Act of Parliament. The procedure to be followed for a bill to become an Act of Parliament is, briefly:

- **First reading.** This stage is formal. The title of the bill is read and it is then published.
- **Second reading.** This stage involves the main debate in the House of Commons on the general principles of the bill.
- **Committee stage.** The purpose of this stage is to examine the bill in detail. Amendments can be made to it at this stage.
- **Report stage.** If amendments are made to the bill in committee, a report stage is needed and the House votes on any amendments. The Speaker can select the amendments to be subject to debate.
- **Third reading.** This is the final stage, involving consideration of the bill as amended. This is the final opportunity for MPs to vote on the bill.
- **Proceedings in the House of Lords.** This stage begins after the third reading in the House of Commons. The procedure is similar to that in the Commons. If the Lords have amendments to the bill, it must be sent back to the Commons. In principle, the bill can go backwards and forwards between the Lords and the Commons until the proceedings are ended by prorogation.
- **Royal Assent.** Once Royal Assent is received, a bill becomes law and is referred to as an Act of Parliament. The Act may suspend its commencement date, which can be determined by delegated legislation.

Although a bill must be passed by both Houses, the Lords play a secondary role. There is a constitutional convention that the House of Lords will not reject a bill giving effect to a major part of the democratically elected Government's legislative programme.

If the House of Lords rejects a bill that has passed the House of Commons, the bill may still become law under the Parliament Acts of 1911 and 1949.

5. Is there a procedure by which the judiciary can review legislative and executive actions?

The judiciary scrutinises, via judicial review, delegated legislation and the exercise of statutory (and in some limited cases prerogative) powers by the Government and other public bodies.

Grounds of Judicial Review

The issue in judicial review proceedings is not whether the decision was right or wrong, nor whether the court agrees with it, but whether it was a decision that the decision-maker was lawfully entitled to make.

The following are the basic grounds of challenge:

- **Illegality.** This arises in the following situations:
  - the public body misdirects itself in law, such as by "getting the law wrong" or asking itself the wrong legal question;
  - the public body exercises a power wrongly, such as by purporting to act in pursuance of one statutory objective but applying the wrong legal test under that objective;
  - the public body purports to exercise a power that it does not have. Using this ground, it would be possible to challenge a decision of a public body that is inconsistent with an Act of Parliament or delegated legislation; or
  - the public body exercises its power for an improper purpose that is not the purpose for which the particular power was granted.

- **Irrationality/unreasonableness.** A decision can be challenged as irrational or unreasonable in limited circumstances, namely, if:
  - it "is so unreasonable that no reasonable authority could ever have come to it" (Wednesbury unreasonableness); or
  - the public body, in reaching its decision, took into account irrelevant matters and/or failed to consider relevant matters.

  Despite attempts to broaden the scope of judicial review, the courts are very reluctant to challenge decisions as unreasonable. This ground of appeal implies

that the merits of the decision (that is, whether the public body made the right decision) is not within the scope of review.

It may be easier to establish a claim based on a failure to take proper account of appropriate considerations than pure unreasonableness. It is clear that the error must be material to the decision to establish illegality. The test has been described as being: "whether a consideration had been omitted which, had account been taken of it, might have caused the decision-maker to reach a different conclusion" (*R v Parliamentary Commissioner for Administration, ex parte Balchin [1998] 1 PLR 1*).

- **Procedural impropriety.** The ground of procedural unfairness arises if:
  - the public body has not properly observed relevant procedures such as a requirement to consult on the proposed measures; or
  - the public body has failed to observe the principles of natural justice, such as by showing (apparent or actual) bias.

- **Legitimate expectations.** A potential challenge may be founded on the basis of breach of a legitimate expectation in that the public body may, by its own statements and/or conduct, be required to act in a certain way, where the affected party has an expectation as to the way in which the public body will act. A successful judicial review founded on breach of a legitimate expectation will arise only in a limited number of cases.

A legitimate expectation may have both substantive and procedural dimensions, and therefore overlaps with irrationality and procedural impropriety:

- A legitimate expectation may be substantive where the appellant has an interest in some benefit that it hopes to obtain, and fairness may require that expectation to be upheld if it is shown that the appellant relied on the expectation to their detriment. The court is generally slow to find a substantive legitimate expectation.
- A legitimate expectation may arise where the public body has made a clear representation that it will adopt a particular procedure and then the public body departs from that purported procedure.

Judicial Review and Prerogative Powers

Traditionally, the courts do not have power to regulate the way in which prerogative powers are exercised, even though the existence and the extent of the prerogative power may be reviewed by the courts. However, there has been a gradual recognition by the courts that they can review the exercise of prerogative powers. In *CCSU v Minister for Civil Service* (*[1983] UKHL6*), it was held that the exercise of prerogative powers was not automatically outside the scope of judicial review. The

only exception was if the power being exercised was not justiciable (that is, not an appropriate area for the courts to be involved in).

The scope of judicial review of prerogative powers has been the subject of significant litigation in the context of the UK's withdrawal from the EU. On 24 January 2017, the Supreme Court upheld the judgment and declaration issued by the High Court to the effect that the government could not issue notice under Article 50 of the Treaty on European Union to withdraw the UK from the EU by way of the royal prerogative, and would require authorisation of an Act of Parliament in order to do so (*R (Miller and Santos) (Respondents) v Secretary of State for Exiting the European Union (Appellant) [2017] UKSC 5*). The Supreme Court in *R (Miller) v The Prime Minister, Cherry and others v Advocate General for Scotland [2019] UKSC 41* unanimously held that the prorogation of Parliament for five weeks by the Prime Minister was unlawful and that, therefore, the prorogation was void and of no effect. The Supreme Court confirmed that the issue was justiciable and that the power to prorogue Parliament is a prerogative power, however it is not unlimited and therefore is capable of being subject to judicial scrutiny.

These are essentially areas of high politics. It is the nature of the power rather than its source that determines its justiciability.

6. Are certain emergency powers reserved for the executive?

The Civil Contingencies Act 2004, and accompanying non-legislative measures, is separated into two substantive parts: local arrangements for civil protection (Part 1); and emergency powers (Part 2). Part 2 of the Act was brought into force in December 2004.

Part 2 of the Act updates the Emergency Powers Act 1920 to reflect developments in the intervening years and the current and future risk profile. It allows for the making of temporary special legislation (emergency regulations) to help deal with the most serious of emergencies. The use of emergency powers is a last resort option. Their use is subject to a robust set of safeguards and they can only be deployed in exceptional circumstances.

7. Are human rights constitutionally protected?

The UK became a signatory of the European Convention on Human Rights (ECHR) in 1951. It was not until 1965 that the UK Government gave UK citizens a right to petition the European Court of Human Rights in the exercise of their rights under the ECHR.

It was only with the enactment of the HRA98 that the ECHR became part of UK domestic law, with UK citizens being permitted to bring proceedings before the domestic courts founded on breaches of human rights.

The Human Rights Act 1998 (HRA98) incorporates the ECHR into UK law in a weak manner and does not allow courts to invalidate legislation if it infringes the ECHR. If a domestic court considers that an Act of Parliament infringes the ECHR, the court can make a declaration of invalidity under section 4 of the HRA98. This does not invalidate the relevant piece of legislation, which will remain in force unless and until it is amended.

Some of the rights that are protected by the ECHR are not absolute. This means that in certain circumstances the state can limit their exercise (limited or qualified rights). This is particularly the case with:

- Article 8 (the right to respect for private and family life).
- Article 9 (freedom of thought, conscience and religion).
- Article 10 (freedom of expression).
- Article 11 (freedom of assembly and association).

In addition, all signatories of the ECHR, including the UK, are afforded a margin of appreciation by the European Court of Human Rights, which gives the state a degree of latitude as to how limited rights contained in the ECHR are to be protected. It is permissible for a state to derogate from some of the rights and freedoms contained in the ECHR. Article 15 provides, however, that derogations can be made only in time of war or other public emergency.

The HRA98 cannot be said to be a full constitution because it does not set out how the different branches of the state should operate. Rather, it sets out the fundamental rights and freedoms of citizens. The HRA98 is not entrenched, and like any other statute, it can be repealed by an ordinary Act of Parliament.

Amendment

8. By what means can the constitution be amended?

As a result of the UK's constitution being unwritten, it has developed over time in *ad hoc* fashion. This also means that it is flexible and is comparatively easy to change because no special procedures are necessary for it to be amended. While, from a political perspective, it might be difficult to amend the constitution, legally it can be changed relatively easily due to the absence of lengthy or complex procedures to follow.

Legal System

Form

9. What form does your legal system take?

England and Wales has a common law legal system, which has been established by the subject matter heard in earlier cases and so is the law created by judges. It originated during the reign of King Henry II (1154-89), when many local customary laws were replaced by new national ones, which applied to all and were thus "common to all".

Scotland has its own independent and, in parts, clearly different judicial system with its own jurisdiction. The law of Scotland is not a pure common law system, but a mixed system. This law shows many similarities to Roman-Dutch law.

At present, many modern laws are applicable across the whole United Kingdom of Great Britain and Northern Ireland but there can be differences (for example, in property law where the law of Scotland resembles civil systems more than English law).

Main Sources of Law

10. What are the main domestic sources of law?

The main sources of domestic law are set out below.

Acts of Parliament

Although the UK has an unwritten constitution, many important elements of it are found in statutes that have been enacted by Parliament. The following are of most importance to the constitution and civil liberties:

- **Magna Carta 1215.** This embodies the principle that government must be conducted according to the law and with the consent of the governed.
- **Bill of Rights 1689.** This imposed limitations on the powers of the monarch and provided that Parliament should meet on a regular basis.
- **Act of Settlement 1701.** This prohibited Catholics from succeeding to the throne and gave precedence to male heirs. It also established the constitutional independence of the judiciary.
- **Acts of Union 1706-07.** These united England and Scotland under a single Parliament of Great Britain (that is, the Westminster Parliament).
- **Parliament Acts 1911 and 1949.** These ensured that the will of the elected House of Commons would prevail over that of the unelected House of Lords by enabling legislation to be enacted without the consent of the House of Lords.
- **Police and Criminal Evidence Act 1984.** This provides the police with wide powers of arrest, search and detention as well as accompanying safeguards to ensure that the police do not abuse such powers.
- **Public Order Act 1986.** This allows limitations to be placed on the rights of citizens to hold meetings and demonstrations in public places.
- **Human Rights Act 1998.** This incorporates the European Convention on Human Rights into domestic law and allows citizens to raised alleged breaches of their human rights before the domestic courts.
- **Acts of devolution (for example, Scotland Act 1998).** These created a devolved system of government in parts of the UK, establishing a Scottish Parliament and assemblies in Wales and Northern Ireland.
- **Constitutional Reform Act 2005.** This reformed the office of Lord Chancellor by transferring their powers as head of the judiciary to the Lord Chief Justice. It also created the Supreme Court and a new Judicial Appointments Committee.

Case Law

The common law is an important source of key legal principles, particularly in relation to the preservation of the rights of the individual against the state and the rule of law.

11. To what extent do international sources of law apply?

European Union law

EU membership. The UK formally joined the European Community (now the European Union) on 1 January 1973. European law was incorporated into UK law by the European Communities Act 1972 (ECA). Until 31 January 2020 (exit day), EU law applied in the UK under the provisions of the ECA.

Retained EU law. The ECA was repealed with effect from 31 January 2020. The EU (Withdrawal) Act 2018 (Withdrawal Act) provided that EU law would continue to apply in and to the UK (as if it were still a member state) during the transition period) which ended on 31 December 2020. At the end of the transition period, EU law in force at that moment become part of the UK's domestic legal framework as a new category of retained EU law, pursuant to the Withdrawal Act.

The following provides an overview of the framework within which EU law (as at 31 December 2020) becomes part of UK law.

This summary is informed by a complex legal position and readers are advised to take legal advice in relation to the application of retained EU law in specific areas, particularly in view of proposed changes (*see below*):

- **EU derived domestic legislation**. Domestic legislation which implements EU obligations, made before the end of the transition period, is preserved and retained. This can be primary or secondary legislation.
- **EU legislation with direct effect.** Certain categories of EU legislation which were directly applicable in the UK before the end of the transition period, and so had effect without the need for implementing legislation, have been converted into domestic law. This includes EU regulations and EU decisions.
- **Any remaining "rights, powers, liabilities, obligations, restrictions, remedies and procedures".** Any such rights which were directly applicable in the UK before exit day as a result of section 2(1)of the ECA, have been converted into domestic law. This primarily refers to provisions of EU treaties which are sufficiently clear and unconditional to confer rights directly on individuals. Where these rights are no longer appropriate following the UK's departure, or arise from reciprocal arrangements which have come to an end, they are likely to be repealed or amended by statutory instrument.
- **Retained EU case law.** Case law of the Court of Justice of the European Union (CJEU) in judgments delivered before the end of the transition period remains binding on most UK courts, and domestic law interpreting EU rights

and obligations is retained (but can be overturned by a subsequent UK Supreme Court decision).

The retained EU law version of a provision may not mirror the corresponding provision in EU law. Retained EU law will have effect subject to amendments made by regulations by the UK government and devolved administrations enabling them to correct "defects" of EU law that would otherwise cause the measure not to operate effectively in a purely UK context (for example, references to the UK as a member state are modified as it no longer has that status).

The UK Government has introduced the Retained EU Law (Revocation and Reform) Bill 2022 which will enable the government, through parliament, to amend more easily, repeal and replace retained EU Law and include a sunset date by which all remaining retained EU Law will either be repealed, or assimilated into UK domestic law.

See the following for more information about Brexit and its effect on UK legislation:

Beyond Brexit: the legal implications.

Trade and Cooperation Agreement. The UK and the EU have agreed a Trade and Cooperation Agreement (TCA) with effect from 1 January 2021, the salient features of which are:

- The UK and the EU have agreed to 100% tariff liberalisation. This means there will be no tariffs or quotas on the movement of goods between the UK and the EU.
- The TCA:
    - explicitly recognises UK sovereignty over its fishing waters;
    - provides for co-operation on law enforcement to tackle serious organised crime and to counter terrorism;
    - is based on international law, not EU law. There is no role for the CJEU and no requirements for the UK to continue to follow EU law;
    - ends the EU state aid regime in Great Britain (with some exceptions). The position as to the continued application of the EU state aid regime in relation to trade between Northern Ireland and the EU and between GB and Northern Ireland requires careful assessment, in particular in the light of the Northern Ireland Protocol;
    - includes arrangements for airlines and hauliers. It also includes a social security agreement including provisions on accessing healthcare when travelling in the EU; agreements on energy provision; and collaboration on scientific research.

International Law

The UK is subject to international law obligations and is a signatory to numerous international treaties and conventions, notably the European Convention on Human Rights. However, the mere fact that the UK Government accepts treaty obligations does not of itself have any effect on Parliamentary supremacy, as treaties are made by the Government and so do not change the law.

If the Government signs a treaty that requires a change in domestic law it is for Parliament to authorise such a change by legislation. In *Blackburn v Attorney-General [1971] 2 All ER 1380* Lord Denning stated that "we take no notice of treaties until they are embodied in laws enacted by Parliament, and then only to the extent that Parliament tells us".

Court Structure and Hierarchy

12. What is the general court structure and hierarchy?

The general court structure and hierarchy is set out below.

There was an extensive review of the civil court system in England and Wales in 2016, commissioned by the Lord Chief Justice. The final report "*The Civil Courts Structure Review*" was published on 27 July 2016. The review made a series of recommendations intended to inform the current programme of wider court modernisation being undertaken by HM Courts and Tribunals Service. It also made a number of recommendations on different aspects of the civil justice system, such as enforcement of court rulings, the structure of the courts and deployment of judges.

The Supreme Court

The Supreme Court is the final court of appeal in the UK. It hears appeals on arguable points of law of public importance for the whole of the UK in civil cases, and for England and Wales and Northern Ireland in criminal cases. In Scotland, appeals can be made from the lower courts in criminal cases to the High Court of Justiciary.

The Judicial Committee of the Privy Council, which comprises justices of the Supreme Court and some senior Commonwealth judges, is the final court of appeal for a number of Commonwealth countries, as well as the UK's overseas territories, Crown dependencies and military sovereign bases.

The Court of Appeal

The Court of Appeal and the High Court constitute the "senior courts" of England and Wales. The Court of Appeal is an appellate court and is divided into two divisions, Criminal and Civil.

The High Court

The High Court hears the more serious and complex civil and family cases at first instance. It contains three divisions: Queen's Bench, Family and Chancery.

The Queen's Bench Division is the biggest of the three High Court Divisions. Included within it are a number of specialist courts: the Admiralty, Commercial, Mercantile, Technology and Construction, and Administrative Courts.

The Chancery Division deals with company law, partnership claims, conveyancing, land law, probate, patent and taxation cases. This Division has three specialist courts: the Companies Court, the Patents Court and the Bankruptcy Court.

England and Wales is split into six circuits or distinct geographical regions for the practice of law. They are the areas around which the High Court judges travel. The six circuits are: South Eastern, North Eastern, Midland, Northern, Wales and Western.

The County Court

There are about 160 county courts that hear cases within their geographic catchment area. These courts deal with civil (non-criminal and non-family) cases. The county court hears (subject to exceptions) money claims with a value up to and including GBP100,000 and claims for damages for personal injury with a value up to GBP50,000. Cases are ordinarily held where the defendant resides.

The Family Court

The Family Court was established in 2014 and it has national jurisdiction. Matters are dealt with by either Family Panel Lay Magistrates or District Judge (Magistrates' court) or by a District, Circuit or High Court Judge, depending on the type of case (*see also Question 14*).

The Crown Court

The Crown Court sits in centres around England and Wales. This deals with indictable criminal cases that are transferred from the Magistrates' Courts, including serious criminal cases.

Magistrates' Courts

These courts hear all criminal cases at first instance. Less serious cases and those involving juveniles are tried in the Magistrates' Courts, as well as some civil cases.

Magistrates deal with three kinds of offence: summary (less serious cases); either-way (cases that can be heard either in a Magistrates' Court or before a judge and a jury in the Crown Court); and indictable-only (serious cases).

13. To what extent are lower courts bound by the decisions of higher courts?

Within the English common law system, judges have more authority to interpret law but are bound by precedent.

A judgment contains the facts of a case, the legal position or reason for the decision (ratio) and the decision itself. The ratio sets a binding precedent for the lower courts. There is flexibility built into the system by the ability to overrule (usually by a higher court) and to distinguish one case from another. Note that:

- A ratio can be overruled. For instance, a ratio set out in one case can be overruled if it is held to be incorrect in a later case in the same or a higher court.
- A decision can be reversed on appeal. A party that is unsuccessful in a case against another can appeal to a higher court on the ground that the lower court incorrectly applied the law. The appeal court may decide to hold the ratio given by the lower court to be incorrect and reverse the decision.

14. Are there specialist courts for certain legal areas?

In addition to the courts mentioned in *Question 12*, there are a number of specialist courts. For example, Coroners' Courts investigate sudden, violent or unnatural deaths. They do this by holding an inquest. The evidence is considered and, from that, a cause of death is established.

The Court Martial deals with the criminal trials of servicemen and women in the Royal Navy, the Army and the Royal Air Force for serious offences, or cases where the defendant chooses not to be dealt with by his or her commanding officer.

Since October 2015, a specialist Financial List handles claims related specifically to the financial markets. The claim is brought on the basis that it raises issues of general importance to the financial markets.

Family magistrates and Family judges are specially trained by the Judicial College to deal with issues affecting families, including training on domestic abuse and coercive and controlling behaviour. They receive regular updating training to ensure their expertise in family law remains up to date.

15. Are quasi-legal authorities commonly used?

Tribunals

Tribunals are an independent, specialised part of the justice system of England and Wales. They are set up by Parliament to rule on disputes between individuals or private organisations and state officials. Tribunals sit across the UK. Within England and Wales, there are approximately 100 different tribunals, each dedicated to a distinct area. The most common include those dealing with agricultural land, employment, asylum and immigration and mental health.

Tribunals operate their own procedures that are less complicated and more informal than those usually associated with courts. Tribunals are made up of panels comprising a tribunal judge and tribunal members who are often drawn from relevant professions. These members are not necessarily legally qualified but they have valuable specialist knowledge and experience.

Ombudsmen

There are also specialist ombudsmen who have been appointed to deal with complaints about an organisation. Using an ombudsman is often a way of trying to resolve a complaint without going to court.

There are a number of ombudsmen, including the:

- Parliamentary and Health Service Ombudsman, who investigates complaints about Government departments and certain other public bodies.
- Local Government Ombudsman, who investigates complaints about local councils and some other local organisations.
- Financial Ombudsman Service.
- Legal Ombudsman.

- Housing Ombudsman.

Judiciary

16. Does the constitution provide for an independent judiciary?

Judicial independence from the executive is achieved by the following means:

- Judicial appointments are dealt with by the Judicial Appointments Commission, which is politically impartial.
- Security of tenure is given to judges of the senior courts in its modern form under the Senior Courts Act 1981, and to justices of the Supreme Court under the Constitutional Reform Act 2005. Senior judges can be dismissed by the monarch only following a vote of both Houses of Parliament.
- Judicial salaries are determined by the Senior Salaries Review Board, an independent body, and are paid from the Consolidated Fund, which does not require annual approval. This insulates the payment of judicial salaries from executive and parliamentary control.
- Common law contempt of court and statutory contempt of court under the Contempt of Court Act 1981 ensure that there is no interference with the administration of justice by the courts.
- Judges have wide immunity from claims in tort in respect of carrying out their judicial functions.
- Under the "*sub-judice*" rule Parliament does not discuss matters that are being heard or pending hearing by the courts.
- By constitutional convention, members of the executive do not criticise judicial decisions and the judiciary do not engage in party political activity. This convention has not always been honoured.

17. How are members of the judiciary typically appointed?

Appointment

Judges are appointed by the monarch on the recommendation of the Lord Chancellor. The exception is Justices of the Peace who are recruited by Local Advisory Committees.

The Judicial Appointments Commission, established as an independent body, selects and recommends candidates for appointment. The Judicial Appointments Commission has a statutory duty to "encourage diversity in the range of persons available for selection for appointments".

Justices of the Court of Appeal are appointed by the monarch on the advice of the Prime Minister and the Lord Chancellor, following the recommendation of an independent selection panel chaired by the Lord Chief Justice.

Qualifications

All potential applicants must be a citizen of the UK, the Republic of Ireland or a Commonwealth country (or a holder of dual nationality in respect of any of the above).

There is a statutory retirement age of 70 for judges and Justices of the Peace.

Judges in England and Wales tend to be older than their counterparts in other countries as they are expected to have a career in law prior to sitting on the bench. Judges must have had a right of audience for a certain number of years before taking up the position.

Litigation (Civil and Criminal)

18. Do the courts use an adversarial, non-adversarial or other system?

The UK has a predominantly adversarial court system in which the parties investigate their own cases and call their own evidence. A case is argued by two opposing sides who have the primary responsibility for finding and presenting facts.

In civil cases, the claimant tries to prove that the defendant has committed a breach of a legal duty and the defendant argues that it did not commit such a breach. The introduction of the Civil Procedure Rules (CPR) in 1999 has to some extent altered the role of the judge in civil cases to allow for a more interventionist judicial case management role but their role in the trial is generally a passive role.

In a criminal case, the Crown (prosecutor) tries to prove that the defendant is guilty and the defendant's lawyer argues for their acquittal (that is, that they did not commit the crime charged).

19. Who is responsible for gathering evidence?

Civil Cases

The parties are responsible for gathering evidence. As soon as litigation is contemplated, the parties' legal representatives must notify their clients of the need to preserve disclosable documents (*Civil Procedure Rules*) (CPR). Once an obligation to disclose has arisen, the party has an obligation to disclose all relevant documents (apart from those protected by legal privilege) and this is a continuing obligation.

The court has flexibility to reduce the scope of disclosure generally in furtherance of the overriding objective of dealing with cases justly and at proportionate cost (*CPR 31.5*). Ultimately, the court can make any order for disclosure that it considers appropriate.

Criminal Cases

In a criminal case, the police arrest and question suspects and witnesses. They gather evidence and take witness statements. The Crown Prosecution Service (CPS) is the independent public authority responsible for prosecuting people in England and Wales who have been charged by the police with a criminal offence. The CPS decides whether there is enough evidence to go to court.

20. Is evidence independently examined before a trial?

Civil Cases

The parties must exchange written statements of evidence before trial. At the case management conference, the court usually gives directions regarding the exchange of witness statements.

There is no independent examination of evidence before trial but the courts have the power to identify or limit the issues for witness evidence, identify which witnesses

give evidence and limit the length of witness statements. Parties who seek to adduce expert evidence must identify the issues the evidence will address and provide a cost estimate.

Criminal Cases

Once the police have completed their investigations, they refer the case to the Crown Prosecution Service (CPS) for advice on how to proceed in all but the most minor and routine cases. The CPS then makes a decision on whether a suspect should be charged, and what that charge should be.

The CPS prosecutor reads the file and considers the two tests in The Code for Crown Prosecutors, which sets out the basic principles that Crown prosecutors must follow when making prosecution decisions. The prosecutor must first decide whether or not there is enough evidence against the defendant for a realistic prospect of conviction. If the CPS decides that there is a realistic prospect of conviction, they must then consider whether it is in the public interest to prosecute the defendant.

21. Are trials/hearings open to the public?

Civil Law

In general, hearings take place in public. However, the court may order that a hearing (or part of it) may be held in private, including where the court considers it necessary in the interests of justice.

Criminal Law

In accordance with the open justice principle, the general rule is that all court proceedings must be held in open court, to which the public and the media have access.

The Criminal Procedure Rules contain the applicable procedure governing when a court can order a trial in private. A party who wants the court to hear a trial in private must apply by notice in writing not less than five business days before the start of the trial. The application must be displayed within the vicinity of the courtroom and give notice to reporters. The media should be given an opportunity to make representations in opposition to the application.

The public is generally barred from attending Youth Court proceedings, but specific exceptions apply for representatives of the media (*section 47, Children and Young Persons Act 1933*). However, the court has the discretion to admit other members

of the public and has been encouraged by the Home Office and Ministry of Justice to do so.

22. Are reporting restrictions typically imposed in relation to a trial?

Civil Law

In general, there are no reporting restrictions, whether prior to, during or after the trial. Non-parties to a case can obtain any statement of case filed after 2 October 2006. The statement of case includes the claim form, the particulars of claim, the defence, the reply to the defence, and any further information given in relation to those documents. An exception applies for documents confining the issues.

Permission of the court may be sought to obtain other documents on the court's file.

Copies of judgments made and orders are available without the permission of the court.

Supreme Court hearings and legal arguments and delivery of the final judgment in the Court of Appeal may be broadcast live. The Supreme Court has a live streaming service.

Skeleton arguments (anonymised in family proceedings) are provided to accredited reporters in cases being heard in the Court of Appeal.

Criminal Law

The general rule is that the administration of justice must be done in public and that the public and the media have the right to attend all court hearings and the media is able to report those proceedings fully and contemporaneously.

Any restriction on these usual rules is exceptional and must be based on necessity. The burden is on the party seeking the restriction to establish it is necessary on the basis of clear and cogent evidence. The terms of any order must be proportionate.

There are a number of automatic reporting restrictions, which are statutory exceptions to the open justice principle. For example, victims of a wide range of sexual offences are given lifetime anonymity under the Sexual Offences (Amendment) Act 1992.

Before imposing a discretionary reporting restriction, courts should check that no automatic reporting restriction already applies that would make a discretionary restriction unnecessary.

The Contempt of Court Act 1981 provides the framework for all reporting of criminal proceedings in England and Wales. The strict liability rule makes it a contempt of court to publish anything to the public which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced, even if there is no intent to cause such prejudice (*sections 1 and 2, Contempt of Court Act*).

23. What is the main function of the trial and who are the main parties to it?

Civil Cases

The main function of the trial is for the judge to hear the evidence and decide on the claim. The parties may have agreed some relevant facts or preliminary issues prior to trial. These issues may concern the law to be applied or the terms of the judgment to be given, but usually written and oral evidence will be given by the parties and their witnesses and live witnesses may be cross-examined. Factual and expert witnesses are generally called to give evidence at trial. Their written statements tend to stand as evidence-in-chief, so they do not need to provide oral evidence on the matters contained in their witness statements.

Criminal Cases

The function of the trial is for the Crown to present and prove their case and for the defence to argue for an acquittal or conviction on a lesser charge. (Where the defendant enters a guilty/no contest plea the judge is informed in advance. Assuming that the judge accepts the plea they hear the plea in open court so that it forms part of the record. The defendant is then sentenced.)

The judge plays an active role in the trial, controlling the way the case is conducted. In both the Crown Court and Magistrates' Court, advocates prosecute the case on behalf of the Crown. The defendant has their own legal representative in court to defend them against the charges.

24. What is the main role of the judge and counsel in a trial?

Civil Cases

The judge ensures that all parties are given the opportunity to have their case presented and considered as fully as possible. During the case the judge asks questions

on any point of fact or law that they need clarification on. The judge decides on all procedural matters that arise in the hearing.

A party can appear as a litigant in person, or they can be represented by lawyers. A party can be represented by solicitors who have conduct of the litigation, and who attend the hearing but generally take a passive role. A party can also instruct an advocate to present their case in court (this can be a barrister or another professional who has relevant rights of audience).

Criminal Cases

When both the prosecution and the defence have presented their evidence, the prosecutor and the defence lawyer summarise the evidence and present arguments to support their case. Then, depending on where the case is heard, the jury (in the Crown Court), or the magistrate or the district judge (in the Magistrates' Court) then decide whether or not the defendant is guilty.

The judge decides whether evidence is admissible.

In cases involving a jury, the judge sets out, for the jury, the law on each of the charges made and what the prosecution must prove. The judge also gives directions about the duties of the jury before they go to the jury deliberation room to consider the verdict.

25. To what extent are juries used?

A jury is a panel of independent citizens selected to assess the evidence produced by the parties involved in a dispute in court, and in criminal cases to come to a verdict on the guilt or innocence of the defendant at the end of a trial. Juries are considered a fundamental part of the English justice system.

Juries are mainly used in criminal cases. The function of the judge is to advise the jury on the law, but it is for the jury to decide whether an accused is guilty or innocent as charged.

Civil cases are generally heard at first instance by a single judge. Exceptions include claims for malicious prosecution, false imprisonment and, if a court so orders, defamation, where there is a right to a trial by jury. When juries sit in civil cases, their function is typically to decide on how much money should be paid in damages.

Citizens of England and Wales are obliged to undertake jury service when asked. The Jury Central Summoning Bureau is responsible for finding juries for trials and selects names at random from the electoral register. Certain persons are not eligible for jury service, such as persons who have served a custodial sentence in the last ten years.

26. What restrictions exist as to the evidence that can be heard by the court?

Civil Cases

There are limited restrictions on the presentation of "hearsay" evidence in civil cases. Hearsay is "a statement made, otherwise than by a person while giving oral evidence in proceedings, which is tendered as evidence of the matters stated" (*Civil Procedure Rules, Rule 33.1(a)*).

A party can rely on a witness statement of fact at trial, even where a witness is not subsequently called to give oral evidence. The party relying on the statement must inform the opposing parties, who may apply to the court for permission to call the witness for cross-examination. Where a party fails to call a witness to give oral evidence, the court is likely to attach less weight to their statement.

Criminal Cases

The Criminal Procedure Rules set out detailed rules on the types of evidence that can be presented in criminal trials and matters of evidence handling. Reference should be made to the following Parts in particular:

- Part 16: written witness statements.
- Part 17: witness summonses, warrants and orders.
- Part 18: measures to assist a witness or defendant to give evidence.
- Part 19: expert evidence.
- Part 20: hearsay evidence.
- Part 21: evidence of bad character.
- Part 22: evidence of a complainant's previous sexual behaviour.
- Part 23: restriction on cross-examination by a defendant.

27. Which party has the burden of proof in a trial and at what standard is this burden met?

Civil Law

The claimant must prove its claim on a balance of probabilities. The burden of producing evidence is initially carried by the claimant. Once the claimant has satisfied the burden, and made out a *prima facie* case, the burden usually shifts to the defendant. The defendant must then produce evidence either to support a defence or to rebut the evidence produced by claimant. The burden of producing evidence may shift back and forth several times.

Criminal Law

Defendants in a criminal trial are considered innocent until proven guilty. The prosecution in a criminal trial must prove that the defendant is guilty "beyond reasonable doubt". The defendant only carries the burden of producing trial evidence if they wish to assert an affirmative defence.

28. What verdicts can the court give?

Civil Law

The claimant typically seeks relief from the court in the form of a declaration that the defendant has breached a relevant legal duty, as well as a remedy.

If the claimant has sought damages, the court decides whether the claimant is entitled to damages and then decides the amount. If the damages assessment is complicated, the court can order an inquiry into damages.

Where the claimant has sought an injunction, for example, preventing the defendant from trespassing on the claimant's property, the court must decide what is an appropriate remedy, if any, and the precise terms of it.

When judgment has been delivered, the judge must deal with costs of the case, which may include the fees of any lawyers, court fees, fees of expert witnesses, allowances for litigants in person, lost earnings and travel expenses of the parties and their witnesses. The general rule is that the losing party must pay the costs of the successful party but the court has discretion on the cost award that it can make. The judge can hear representations about this at the end of the case or in a separate cost hearing.

Criminal Law

The verdict can be either "not guilty" or "guilty". In Scotland, the verdict of "not proven" is also available. There may be different verdicts for different counts in the same case.

29. What range of penalties/relief can the court order upon a verdict?

Civil Law

The court has wide power to grant the parties interim relief, including interim injunctions, freezing injunctions, search orders, specific disclosure and payments into court.

Usual substantive remedies awarded by the courts include damages (whose objective is typically to compensate the claimant rather than to punish the defendant, although exemplary damages may be available in distinct circumstances), declarations (for example, that the defendant has breached a legal duty), injunctions (requiring the defendant to do, or refrain from doing, an action) or specific performance (a mandatory order for the sale, mortgaging, exchange or partition of land).

Criminal Law

There are four main types of sentence (punishment) that a court can impose for a criminal offence:

- Imprisonment.
- Community sentences (combining rehabilitation with activities carried out in the community).
- Fines.
- Discharges (used for the least serious offences where the experience of being prosecuted is considered sufficient punishment).

In the case of a discharge, if the offender commits another offence within a set period, a sentence for the original offence, as well as the new one, may be given.

Contributor Profile

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