JUSTICE

Law for Lawmakers

2024

Welcome note

We are pleased to open the second edition of an important guide to the law for lawmakers. Aimed at members of both houses as well as their staff, it provides a basic introduction to some of the core legal and constitutional principles with which parliamentarians grapple on a daily basis at Westminster, both in their work scrutinising legislation as well as supporting their constituents in times of difficulty.

Since it was founded over half a century ago, JUSTICE has worked hard to advocate for evidence-based policymaking in line with the best standards of governance. To that end, JUSTICE works with parliamentarians on a cross-party basis, striving to raise the profile of legal problems with constitutional significance for our justice system and for the rule of law. JUSTICE strives to create a useful bridge between politics and law, between public servants and experts, guided by the needs of those with lived experience.

This Parliament will have to address a number of urgent and pressing issues which face our justice system, from the crises in our courts to questions of our constitutional structure which underpins the daily reality for all those who live in the United Kingdom.

This guide aims to empower you during the course of your work, acting as a point of reference to inform discussion, debate and the vital scrutiny of often complex policy.

Every parliamentarian should care deeply about the rule of law, the foundation of our democratic society. When it is stable and secure, it protects the public from arbitrary state power, provides certainty for businesses and international trade, and safeguards the independence and impartiality of our judiciary.

However, we cannot rest on our laurels. Parliamentarians should be vigilant to any threats which arise, taking seriously their constitutional duty to ensure the lawmaking process upholds the highest standards of transparency, accountability, and inclusivity.

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

Baroness Helena Kennedy of the Shaws KC
President, JUSTICE Council

Dominic Grieve KC
Vice-President*

Baroness Sarah Ludford
Vice-President

*(c) UK Parliament 2024, UK Parliament Official Portrait [Dominic Grieve/3:2/web version], Creative Commons Attribution 3.0 Unported.

Contents

Foreword

The rule of law means the absence of arbitrary power. It requires that all citizens and institutions are subject to the law of the land and have access to independent courts where the law is interpreted and applied. By applying the law, the courts support the supremacy of Parliament, which is the primary source of law, and they support effective government, which operates through the application of the law. So the rule of law underpins our democracy and the stability of our society. It is something to which Parliament, Government and the courts have a shared commitment.

Lord Reed, President of the Supreme Court of the United Kingdom

Parliament, government and our independent and impartial courts are the three pillars of the British state. Through their complementary functions they together uphold the rule of law in the UK. Central to this most important purpose is judicial independence. It is this constitutional principle that gives confidence to those who come before our courts that they will receive a fair hearing in which their disputes will be decided in accordance with law. This can only be achieved if judges are independent of external political pressures and of each other. Judicial independence, therefore, requires the continued cooperation between judges and Parliamentarians.

Dame Sue Carr, Lady Chief Justice of England and Wales

A note on Law for Lawmakers

Whilst the legal profession is well represented in politics, it has never dominated the House of Commons. This is no bad thing. A Parliament full of lawyers would be deprived of the wider experience of our community.

In their work, Members of Parliament and Peers fulfil multiple roles. They are the makers of laws, they represent the public and their constituency, and they are charged with holding the Government to account.

Recent Parliaments have often had 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 underpin them.

The aim of Law for Lawmakers is to briefly introduce some of the key legal and constitutional principles MPs encounter in their work, and to serve as a handy reference guide.

It is designed to illustrate the connection between politics and the law, and to encourage discussion about independent legal support for MPs.

Although this guide refers to MPs throughout, much of it is equally applicable to the work of Peers, and we hope they will find it useful too.

Chapter 1: Law for Lawmakers

SUMMARY

- **The UK has no written constitution. It is contained in and governed by constitutional principles, conventions, precedents and legislation.**
- **Our constitution is built on parliamentary sovereignty and the rule of law.**
- **Key features of the constitution include the separation of powers and devolution.**

Lawmakers and the law

On any given day, an MP may interact with the law in several ways:

- **On the floor**: Every new Bill presented to Parliament is a proposal to change the law. These vary in their legal complexity and significance.
- **Conducting scrutiny**: Select Committees of both Houses of Parliament work hard to keep the Government in check. This work can include checking whether Ministers and agencies are acting lawfully.
- **In their constituency**: MPs regularly help constituents with their legal problems, including issues such as immigration, housing and eviction, access to health and social care services, and challenging local authority decision-making.

Each of these roles requires MPs to engage with the law every day. For most first-time MPs, this will be a new experience.

Our unwritten constitution

In most other countries, new MPs might arrive equipped with the procedural rules of Parliament and a well-thumbed copy of the constitution. In the UK, the first is easy to locate; the latter, less so.

The starting point for any conversation about the law is always the constitution. The UK is unusual in having no single constitutional document.

Instead, our constitution is contained in principles, conventions, precedents and pieces of legislation accumulated over many years.

Although you can't download a copy or borrow the constitution from the library, the absence of a physical constitution doesn't diminish the importance or significance of our constitutional rules and principles.

The UK is said to have an **uncodified** or **unwritten constitution**. This shorthand is popular but could be misleading.

It might suggest that we have never bothered to think 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 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.

Our constitution is derived from a range of sources. Ancient **statutes** like the Magna Carta and the Bill of Rights from 1689 coexist with modern legislation governing how we run the country. For example, the Constitutional Reform Act 2005, the European Union (Withdrawal Agreement) Act 2018, and the Acts which govern devolution all shape our constitution as it stands today.

Less simple to identify are the conventions which underpin our constitution. These include our system of **prerogative powers**. These are powers which traditionally belonged to the Crown by reason of its sovereign power, but which are now, in practice, exercised by the Government on the Crown's behalf.

The **common law**, a set of legal rules 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.

Statutes of constitutional importance

Historically important statutes in the UK's constitution include:

Magna Carta – issued in 1215, it established the limits of royal authority, granted certain liberties to individuals, and is viewed as one of the most influential legal documents in British history.

Bill of Rights and Claim of Right 1689 – established limits on the powers of the monarch as against Parliament, including the principles of frequent Parliaments, free elections and what is known today as 'parliamentary privilege'.

Acts of Union – passed in England in 1706 and in Scotland in 1707, these statutes created the United Kingdom of Great Britain. The Act of Union 1800 (Ireland) remains in force, with amendments and some provisions now repealed.

European Communities Act 1972 (now repealed) – the act of Parliament by which the UK acceded as a member state of the European Economic Area and incorporated European Community Law into its domestic law.

Human Rights Act 1998 – incorporated the rights contained in the European Convention on Human Rights (**ECHR**) into UK law, and granted the protections provided in it to individuals in the UK.

Scotland Act 1998, Northern Ireland Act 1998, and Government of Wales Act 1998 – allowed Westminster to devolve power to Scotland, Northern Ireland and Wales.

Constitutional Reform Act 2005 – established the Supreme Court and reformed the function of Lord Chancellor.

European Union (Withdrawal) Act 2018 – repealed the European Communities Act 1972 (together with the European Union (Withdrawal Agreement) Act 2020). EU law became no longer directly applicable in the UK, but to ensure continuity, some elements of EU law were retained in domestic law.

Parliamentary sovereignty and the rule of law

Our constitution rests on two 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**.

Parliamentary sovereignty

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 that has been enshrined by the courts over centuries, and dictates that:

- Parliament is the supreme legal authority in the UK. It can create, amend or repeal any law.
- The courts cannot overrule Parliament's legislation.
- No Parliament can pass laws that future Parliaments cannot change.

The rule of law

The rule of law lies at the heart of modern democracy. It is a principle that ensures:

- The law applies equally to everyone.
- No one is above the law.
- The Government must comply with the law and not exercise power arbitrarily.

The 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.

We will take a closer look at how the rule of law works in practice in Chapter 2.

The separation of powers

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

The principle of the **separation of powers** requires that all three functions 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.
- The **judiciary** interprets, enforces and applies the resulting law.

This allows for a system of mutual **checks and balances** designed to ensure that power is evenly distributed, and that each institution works within the confines of the constitution:

- For the UK as a whole, 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.
- The **judiciary** comprises the judges in the courts and tribunal systems.

Unlike some countries, the separation of powers between UK institutions is not absolute.

For example:

- Although the King exercises limited powers in practice, the Crown retains a unifying role across all three branches of government.
- Ministers are members of both the executive and the legislature.
- Parliament can make laws which affect how both the executive and the judiciary work.
- Parliament sets the budget with which the executive must work.
- When Ministers act unlawfully, we can ask the courts to step in.

Nevertheless, the independence of the arms of the state remains critically important. Some of the checks that each of these bodies performs on each other are explored in this guide.

The independence and impartiality of the judiciary

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

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 this responsibility to provide impartial justice.

The principle of judicial independence is a long-standing principle of common law which underpins the right of access to justice[1], the rule of law and the separation of powers. It was put into statute by the Constitutional Reform Act 2005, which places a duty on the Lord Chancellor and other Ministers (members of the executive), to uphold the independence of the judiciary.

The judicial oath

*"[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.**"*

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

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

"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*[2]

Preservation of this impartiality means that:

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

   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. 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.[3]

   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.[4]

2. 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. They are barred from trying to unduly influence judicial decisions.[5]

3. Crucially, both actual bias *and* the appearance of bias are prohibited.

   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.[6]

Institutional competence and respect

The relationship between Parliament and the courts is built on mutual respect for their respective constitutional roles. Central to this relationship are the principles of parliamentary sovereignty and the rule of law, which emphasise the distinct responsibilities of both Parliament and the judiciary.

Article 9 of the Bill of Rights 1689 establishes that domestic courts cannot directly challenge parliamentary proceedings. This **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 under the consideration of the courts.[7]

Just as Parliament recognises the impropriety of commenting on ongoing legal disputes, the courts recognise that there are boundaries to their expertise.

For instance, in judicial review cases, judges will not substitute their own decision for that of a public authority. They also demonstrate particular deference to decisions made by specialised tribunals and bodies appointed by Parliament or ministers. Moreover, courts are mindful of their constraints in determining resource allocation or socio-economic policies. We will cover this further in 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 its proper constitutional role.

Other key features of the constitution

There are a range of other conventions and principles which form part of the UK constitution.

Well-known constitutional conventions include:

- The King will 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.

There are many more conventions, but we do not have space to explore them in detail here. Most are grounded in common law and reflected in the **Ministerial Code**, the **Civil Service Code** or the **Cabinet Manual**.[8] These documents are a helpful guide to the work of Ministers and officials, and are often used to inform parliamentary scrutiny.

Devolution

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

One of the most important recent constitutional developments in the UK is the devolution of power away from Westminster to the Scottish Parliament (often referred to as **Holyrood**), the Welsh Parliament (the **Senedd Cymru**, or **Senedd**) and the Northern Ireland Assembly (**Stormont**), and more recently, major cities.

The framework for devolution in Northern Ireland, Scotland and Wales is set out in a series of Acts of Parliament:

– Northern Ireland: the Northern Ireland Act 1998, which was founded on the terms of the Good Friday Agreement.

– Scotland: the Scotland Acts 1998, 2012 and 2016.

– Wales: the Government of Wales Acts 1998 and 2006, and the Wales Acts 2014 and 2017.[9]

These Acts form an important part of our constitutional framework. They all share a common feature: the power to create legislation is shared by the Westminster Parliament and the devolved legislature.

– **Devolved powers** are under the primary control of the devolved legislature. These powers relate to matters such as education, health and agriculture.

– **Reserved or excepted powers** remain under the sole control of Westminster. These powers relate to matters such as foreign policy and defence.

In Northern Ireland, devolved powers are known as **transferred powers**. The Northern Ireland Assembly can only legislate in respect of reserved or excepted powers subject to obtaining certain consents such as from the Secretary of State, though in practice this rarely happens.

Under all three devolution settlements, Westminster may still make legislation which applies to the devolved areas. In practice, it will not normally act without the consent of the devolved Parliament or Assembly: a principle known as **the Sewel Convention**.

Devolution settlements are often described as **asymmetric**, as the scope of devolution varies across each of the nations.

Devolution has also extended to certain cities and regions in England. This started with London in 1999, followed by Manchester and Liverpool in the 2010s. More recently, several English regions have received devolved powers, with devolution deals agreed with 22 distinct areas in England as of March 2024.[10]

The devolved cities and regions have varying powers, dependent on the deal that was negotiated with Westminster (for example, some have powers to control local transport and energy planning, and others have more limited control over issues such as adult education budgets and local enterprise partnerships).[11]

Since 2012, elected Police and Crime Commissioners (and in some areas, Police, Fire and Crime Commissioners) have been responsible for generally overseeing police (and fire) services in areas of England and Wales. The elected Mayors in Greater Manchester, London and each of South, West and North Yorkshire carry out these functions in addition to their mayoral responsibilities.[12]

Our legal system

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

This section introduces the court systems in each of the three jurisdictions, highlighting relevant differences that may impact the constitutional considerations faced by MPs.

The courts and tribunals

The **Supreme Court** sits atop the UK's three legal jurisdictions.

It can give the last word on appeals from all jurisdictions and on all types of law in the UK, though it has limited power in Scots law criminal cases. The Supreme Court will generally only consider issues of major public and legal 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 District Judges sitting alone.

Serious criminal cases go to the Crown Court for trial before a jury. If permission to appeal is granted, appeals generally 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, like 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.

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.[13] The only Scots law criminal cases heard by the Supreme Court are those involving a compatibility issue, such as one that raises questions about rights under ECHR.[14]

The Sheriff Appeal Court was established in 2015, as part of the Scottish Civil Courts Reform, to deal with appeals in summary (less serious) criminal cases from both the Sheriff and the Justice of the Peace Courts. The jurisdiction of the Sheriff Appeal Court was extended to civil appeals in 2016.

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 multinational companies.

Complex, sensitive or high-value claims are heard in the High Court.

The High Court consists of three **divisions**:

- The King's Bench Division (**KBD**) is the largest division and deals with common law civil claims (such as those relating to contract or tort). The KBD includes within it a number of specialist courts, such as the Administrative Court (which hears applications for Judicial Review) and the Technology and Construction Court;
- The Family Division hears family cases (generally, less complex cases are heard separately, in the Family Court); and
- The Chancery Division, which hears a wide range of civil claims.

Where permitted, appeals generally go to the Civil Division of the Court of Appeal and then 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.

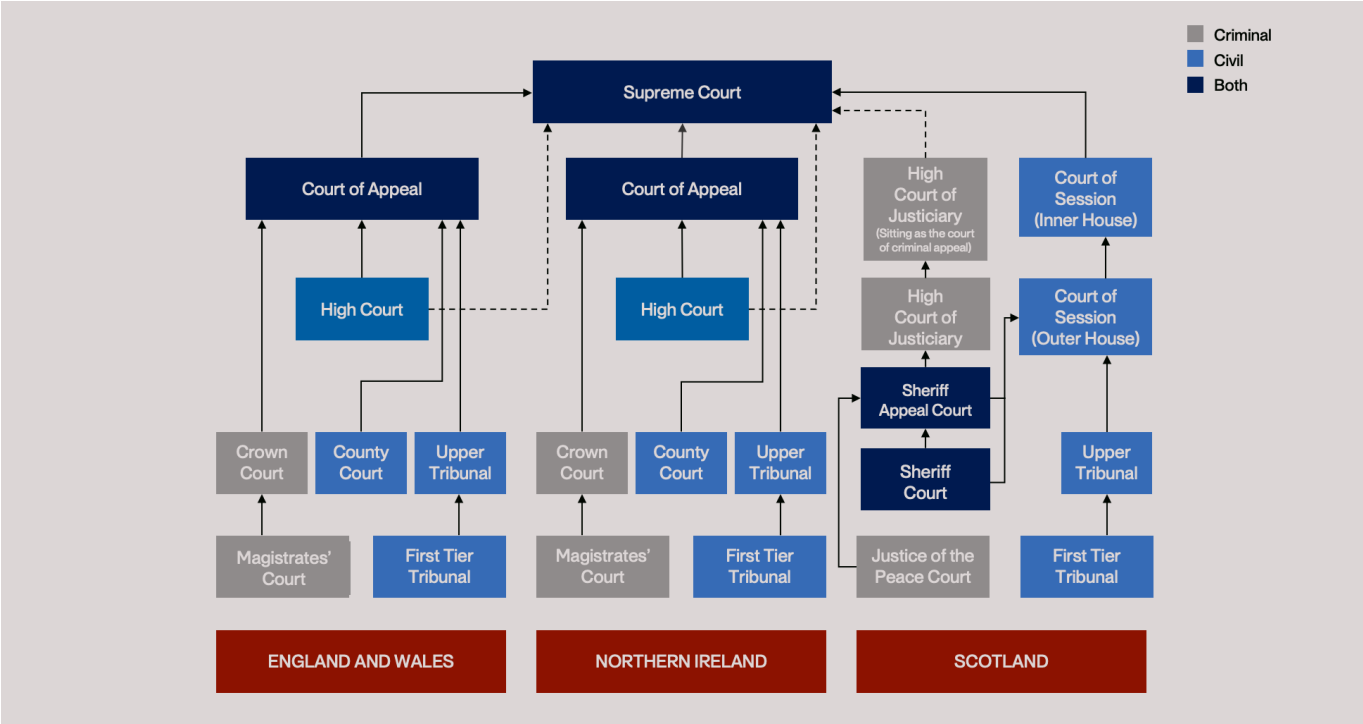
The Outer House of the Court of Session has powers like the High Court in England and Wales; the Inner House is broadly equivalent to the Court of Appeal. Where permitted, appeals generally go to the Inner House, and then to the Supreme Court.

Tribunals

Tribunals are bodies that, just like courts, decide on legal disputes between individuals, or between individuals and the state. 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.[15]

The United Kingdom Court System



This graphic gives a broad overview of the UK court system and typical roues of appeal. It does not illustrate all Courts or Tribunals operating in the three jurisdictions. It does not for example, show the Coroners' Court, the Family Court or the Employment Tribunals. 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

SUMMARY

- **The rule of law is the principle that no one is above the law.**
- **Everyone in the state is bound by and entitled to the benefits of the law.**
- **Core elements of the rule of law include legal certainty, access to justice, and respect of human rights.**

It is hard to overstate the importance of the rule of law. It is fundamental to a property functioning democracy and it sits alongside parliamentary sovereignty at the heart of our constitution.

The principle is now embedded in the Constitutional Reform Act 2005 and the Cabinet Manual.

"Wherever law ends, tyranny begins." **John Locke, 1690**[1]

"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**[2]

"The media may concentrate on the government's health, social security and education programmes, but these are both secondary, and rather recent, functions of government. The defence of the realm from abroad and maintaining the rule of law at home are the two sole traditional duties of a government. More importantly, they are fundamental. If we are not free from invasion, or the rule of law breaks down, then social security, health, and education become valueless, or at any rate very severely devalued." **Lord Neuberger**[3]

What is the rule of law?

Its precise scope is debated, yet at its core is the tenet that no one is above the law.

Lord Bingham, eminent jurist and former Senior Law Lord provided one of the best-regarded and most often used definitions when he said: "*the core of the existing principle is... that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts*".[4]

Elements of the rule of law

Lord Bingham outlined a series of principles necessary to support this core aim. Drawing on these, the Venice Commission of the Council of Europe[5] (of which the UK is a member) has identified the following "*necessary elements*" of the rule of law:

- Legality, including a transparent, accountable and democratic process for enacting law.
- Legal certainty.
- Prohibition of arbitrariness.
- Access to justice before independent and impartial courts, including judicial review of administrative acts.
- Respect for human rights.
- Non-discrimination and equality before the law.

Each of these components is explored here.

Legality, including a transparent, accountable and democratic process for enacting law

> *"To every subject of this land, however powerful, I would use Thomas Fuller's words over three hundred years ago, 'Be you never so high, the law is above you."*
> **Lord Denning**[6]

This principle holds that that nobody is above the law. It must be followed by individuals, authorities and governments alike.

It therefore requires public officials and Ministers to act within their powers as set by domestic law, as well as obligations under international law. Law should, within reason, be enforced but people should only be punished where they have breached an existing law.[7]

The principle encompasses the need to have an effective law-making process, which includes providing the public with adequate opportunity to comment on new laws and ensuring that they are subject to proper debate and scrutiny by Parliament.

A classic illustration of the legality principle is the 1765 case of Entick v Carrington.[8] The Government had decided that several articles written by the Rev. John Entick were seditious libels and a minister purported to issue a warrant authorising entry into Entick's house and seizure of his papers. The High Court decided that the warrant was unlawful because the minister was not a justice of the peace and said that public bodies could only act according to the powers which the law granted them. The Government was not above the law.

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**[9]

The law must be clear, intelligible and predictable enough to allow people to regulate their conduct. This doesn't mean that we must all be lawyers or require that the law be so simple that we can read it as easily in 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 the law:

(a) must be made public;

(b) must generally be 'prospective' and not 'retroactive' (i.e. forward-looking, not making behaviour unlawful after the event); and

(c) must be relatively stable, with fair warning given of any significant change.

Prohibition of arbitrariness

The prohibition of arbitrariness affects 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 unchecked or undefined. If it were, it would be extremely difficult for individuals to know how the discretion might affect them in practice. Individuals and businesses would be unable to plan for the future, lacking confidence that actions taken today might later be made unlawful or impossible by government action tomorrow.

To avoid this, guidance for the exercise of a delegated power is likely to be provided by Parliament. In addition, those powers must be exercised in accordance with the ordinary principles of the common law and subject to judicial review by the courts. We return to judicial review in Chapter 4.

Access to justice before independent and impartial courts

"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." **Lord Steyn**[10]

Rights in law mean little unless they can be interpreted and applied by a body with the power to enforce them. Workers who have been discriminated against or unfairly treated should be able to go to a tribunal to have their issue addressed. A tenant whose landlord has failed to maintain their property to a safe and habitable standard should be able to go to court to seek resolution. A person whose home has been unlawfully searched by the police should be able to challenge his or her treatment in court.

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. It reaches back to Magna Carta, which famously stated: "To no one will we sell, to no one will we deny or delay, right or justice".[11]

Our legal system is complex and is often difficult to navigate. It is therefore critical that where necessary legal advice, assistance and representation is readily available and affordable.

Open justice is fundamental to providing comprehensive access to justice.

"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[12]

Exceptions to the principle of open justice can be justified if it is in the public interest: for example, 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 restricted. In very limited circumstances, the principle of open justice must bend in order for the court to do justice.

Respect for human rights

Most, though not all, modern definitions of the rule of law incorporate respect for fundamental human rights, not least because, as Lord Bingham put it:

"It is a good start for public authorities to observe the letter of the law, but not enough if the law within a country does not protect what are there regarded as the basic entitlements of a human being."[13]

Without including respect for human rights (and non-discrimination) within a definition of the rule of law, states could pass legislation that oppresses minorities, deprives individuals of freedoms or property or prevents certain groups of people from equal participation in society, all whilst legitimately claiming to be complying with the rule of law. This would be antithetical to liberal democracies such as ours.

The benefits of living in a society which respects fundamental human rights are many and varied. From an individual detained in hospital after experiencing a mental health crisis, to bereaved family members wishing to investigate the death of their loved ones, people across the country rely on human rights protections every day, often in complex and sensitive circumstances.

Non-discrimination and 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 [14]

"From my two decades of practice, predominantly at the Criminal Bar, dealing every day with the liberty of the individual, the principle of equality before the law was one that I often cited when making speeches for the defence."

Sir Robert James Buckland KBE KC [15]

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. Legislation that does this is inconsistent with the rule of law. As Baroness Hale said:

"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."[16]

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. Distinctions between groups of people must be based on rational, objective evidence. A law barring people with red hair from being teachers would fail the test. However, treating children who have committed crimes differently to adults is justified by reference to their limited maturity, experience and capacity.

Chapter 3: Introduction to the law

SUMMARY

- **The UK has three legal systems, covering England and Wales, Northern Ireland, and Scotland.**
- **The UK Parliament legislates on a national basis through Acts of Parliament, also known as statutes.**
- **Common law or case law also acts as an important component of the legal systems, where the courts build on historical precedent or custom through their judgments.**
- **The devolved administrations can make law where it falls within their powers to do so.**

Making law takes up a significant amount of an MP's or a Peer's time at Westminster.

Laws passed by Parliament: a quick guide

- **Primary legislation** is an Act of Parliament. It is also known as statute or statute law. Judges can interpret primary legislation but generally cannot strike it down or disapply it (except in exceptional circumstances relating to the Windsor Framework - see Chapter 6).
- An **enabling Act** is an Act of Parliament which sets out a legal framework for making secondary legislation.
- **Secondary legislation** (also known as **delegated legislation**) is legislation made by public bodies under powers delegated by an enabling Act. Secondary legislation which is outside the scope of the powers permitted by the enabling Act can be struck down by the courts.
- **Henry VIII clauses** are provisions included in an Act of Parliament which allow a Government Minister to amend or repeal provisions in an Act of Parliament using secondary legislation
- **Devolved legislation** includes Acts of the Scottish Parliament, Acts of the Northern Ireland Assembly and Acts of the Welsh Parliament. These Acts are subject to the scrutiny of the courts and can be struck down if they exceed the legislative competency of the devolved Assembly or Parliament (or in the case of an Act of the Scottish Parliament, that it breaches certain parts of the United Nations Convention on the Rights of the Child).

Primary and secondary legislation

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.

Acts of Parliament create a basic legal framework but often 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 all of the detail.

Instead, it gives Ministers and other public bodies the power to create **secondary legislation**. A huge amount of secondary legislation is produced, far outweighing the amount of primary legislation. The volume of secondary legislation has increased following Brexit and the pandemic.

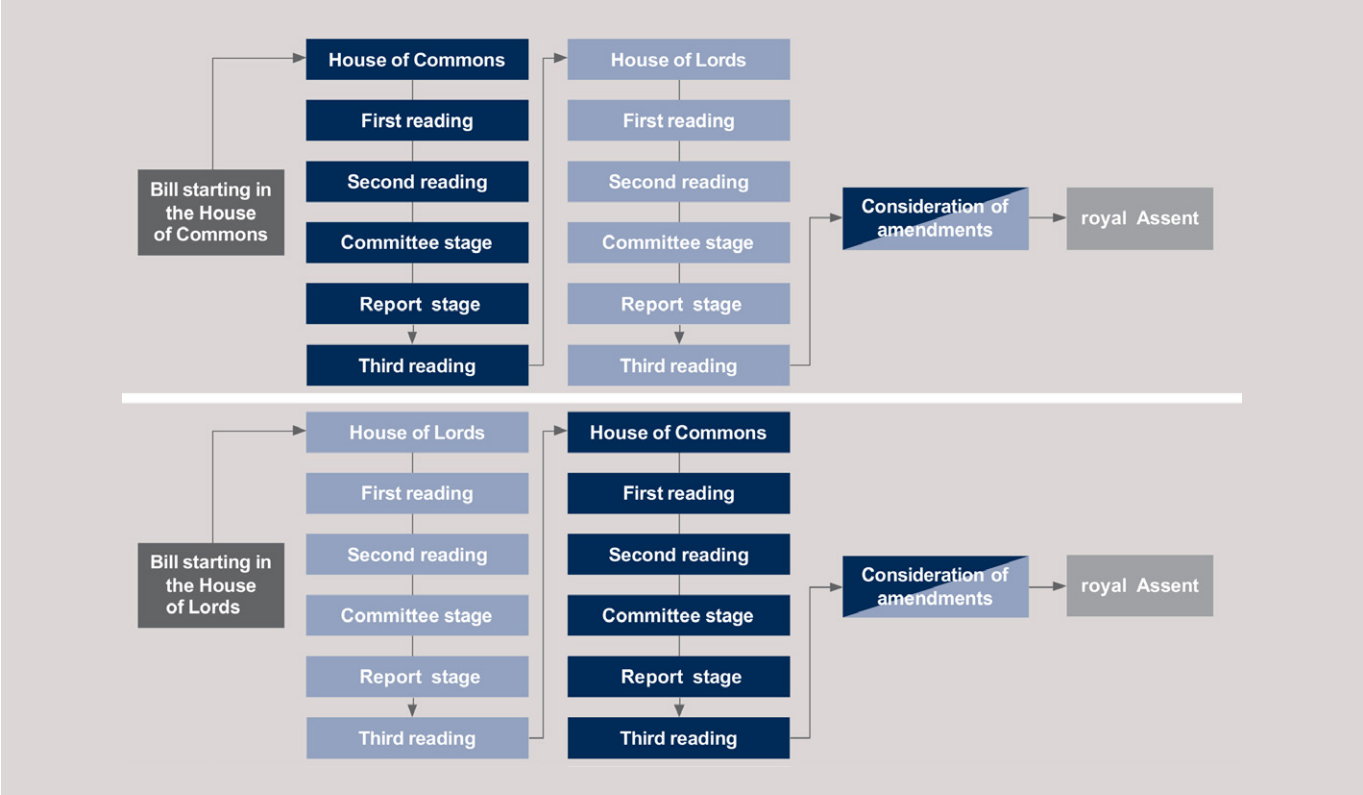
Importantly, public bodies can only create secondary legislation within the limits set by Parliament in the **enabling Act**. If the legislation exceeds the delegated power, the courts can strike down the secondary legislation (this is sometimes called **ultra vires** legislation, which essentially means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

Some Acts of Parliament include **Henry VIII powers** (also known as Henry VIII clauses). The powers allow a Government Minister to amend or repeal provisions in primary legislation using secondary legislation. This means that primary legislation can be changed without going through the full legislative procedure. Instead, amendments made using Henry VIII powers are subject to varying degrees of parliamentary scrutiny. These powers are more frequently included in modern legislation, for example in the European Union (Withdrawal) Act 2018, which we discuss in Chapter 6.

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.

Making legislation



The House of Commons library provides detailed guidance on the passage of primary and secondary legislation. A summary of the passage of a Bill is set out below.[1]

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 several stages in each House:

- First Reading
- Second Reading
- Committee Stage
- Report Stage
- Third Reading

The First Reading is when the Bill is first introduced to the House.

The Second Reading is a general debate on the principles of the Bill.

The Committee Stage involves review by either the Public Bill Committee (a select group of 16 to 50 MPs/Peers) or by the Committee of the Whole House (all MPs/peers). Both provide opportunities for detailed consideration of the Bill. In practice, review by the Public Bill Committee tends to be more in-depth.

There is an increasing trend of using the Committee of the Whole House. Amendments can be proposed by MPs and Peers during this stage.

The Report Stage is similar with the main difference being that scrutiny is always by the Whole House.

The Third Reading is the final chance for debate on the Bill. In practice, this tends to be quite short.[2]

Checklists to assist MPs in their review of legislation going through Parliament and the process of making legislative amendments are included at the back of this Guide. MPs can also find assistance from a range of sources including those set out in Chapter 7.

Additional scrutiny

In addition to the above stages, Bills are sometimes subject to:

- A consultation process.
- Pre-legislative scrutiny.
- Post-legislative scrutiny.

The **consultation process** involves the presentation of a Green Paper to the public for comment. A White Paper then details how the Government thinks it should proceed. This step is particularly important as it allows for a wide range of views from interested parties to be presented.

A draft bill might then be submitted for **pre-legislative scrutiny** by a parliamentary committee. The focus at this point is not so much a line-by-line review but to pose wider questions and present recommendations to the Government.

Lastly, after legislation is passed, Parliament still has an ongoing role in its review. The **post-legislative scrutiny** process involves the relevant government department presenting a Memorandum to the Commons Committee. The Commons Committee will then decide if further scrutiny is needed, which can be reviewed by a Select or Joint Committee.

Secondary legislation

The passing of secondary legislation takes less Parliamentary time and is subject to lesser scrutiny than primary legislation. There is no opportunity for amendment once it has been laid before Parliament

There are a number of different procedures which can be used to make secondary legislation:

- The **negative resolution procedure** where secondary legislation comes into force when it is placed – or 'laid' – before both Houses by the Government. It remains law unless Parliament strikes it down. The convention is that the legislation must be laid at least 21 days before it becomes law. Breaches of this convention will be reported by the Joint Committee for Statutory Instruments and the Government is expected to explain the breach.

- The **affirmative resolution procedure** where secondary 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 secondary legislation can take effect.

- Some secondary legislation is not laid before Parliament and becomes law on the date stated in the instrument. This generally applies to non-contentious instruments such as regulations setting out when a particular Act (or part of an Act) should come into force.

In practice, secondary legislation is considered primarily in Committee with limited debate on the floor of the Houses.

Since 1950, there have only been 17 instances of rejection of secondary legislation by either house. As of 2016 the rejection rate for secondary legislation was 0.01%.[5]

This is a worrying statistic given the increasing number of 'skeleton' bills – bills where there are few substantive provisions but broad delegated powers are granted. In those cases, the substantive provisions that matter are contained in the secondary legislation.

The Pandemic

- During the COVID-19 pandemic, the Government was granted a wide range of delegated powers. What is also striking is the amount of secondary legislation that was passed during this period. Between January 2020 and March 2022, 580 pieces of secondary legislation were passed by the Government to deal with the pandemic, accounting for 30% of the secondary legislation passed during that period.[3]

- Of these, more than two-thirds (417) utilised the negative resolution procedure (see below), and 228 of these breached the 21-day convention (which requires the secondary legislation to be presented at least 21 days before it comes into law).[4]

Scrutinising delegated powers

- 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. These are designed to explain to Parliament why the Government considers certain powers and discretions, including the power to make secondary legislation, are needed.

- The **Joint Committee on Statutory Instruments** reports to Parliament on most secondary 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. It also considers substantive concerns raised by third parties about the effect of the secondary legislation.

Devolution and legislation

In Northern Ireland, Scotland and Wales, legislation passed by the devolved legislatures is an important additional source of UK law.

It shares many features of primary legislation produced in Westminster. It is subject to review by the 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 main sources of law in the UK.

Generally, common law and statute law co-exist without any conflict. For example, freedom of expression is protected both as a fundamental principle of common law and by the Human Rights Act 1998 (**HRA**).

There are many important areas of common law where Parliament has passed very little or no legislation, such as the law of negligence.

If there is any direct conflict between statute and common law, the principle of parliamentary sovereignty dictates that the statute will take precedence.

If the courts develop a rule that Parliament doesn't like, MPs can legislate to override it. Conversely, where legislation is vague or unclear, the common law can help fill the gaps.

We will cover the rules of statutory interpretation in more detail below.

The role of the judiciary

The role of judges is to interpret, apply and enforce laws passed by Parliament, as well as developing and applying the common law.

Statutory interpretation

When courts interpret and apply statutes, they are trying to establish the 'will of Parliament'. This is not the subjective intention of any particular group of Parliamentarians but is the intention of the legislation by reference to the words used by Parliament in light of their context and purpose. This isn't always straightforward.

Some statutes use deliberately broad language, giving judges the flexibility to interpret and apply the law, depending on the facts of an individual case.

At other times, Acts of Parliament are unclear, or give an unquantified degree of discretion to officials. Even where the meaning of the law appears obvious, its application to specific facts may be unclear.

To help them, judges use rules of **statutory interpretation**. These include:

- **The literal rule**: Judges are seeking to enforce the will of Parliament. Their first insight into the will of Parliament is the ordinary meaning of the words in the statute.
- **The golden rule**: In some circumstances, the words in a statute might have multiple literal interpretations. In others, adopting its literal meaning might lead to an absurd result. The golden rule allows judges to adopt an interpretation that is reasonable considering the statute when read as a whole.

Statutory interpretation in action

Parliament criminalised the act of causing an obstruction "in the vicinity of" an air force base. A defendant argued that because he had caused a disruption inside an air force base, 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 in the work of the armed forces.[6]

- **The mischief rule**: In some cases, the intended practical effect of a statutory measure is unclear. Judges may use the mischief rule to identify the problem that the statute was trying to remedy, and interpret it in a way that addresses it.

External aids to interpretation

When interpreting legislation the courts will have regard primarily to the relevant provisions in the statute and the statue as a whole. However, the courts can consult resources external to the legislation to assist interpretation. These include: Explanatory Notes, Law Commission reports, reports of Royal Commissions and advisory committees and Government White Papers.[7]

Only where a statute is ambiguous or obscure the courts, the courts may also consider Ministerial statements, reported in Hansard.

For this reason, Ministers often take care to make clear statements about a Bill's intended effect as it passes through Parliament. (often called 'Pepper v Hart' statements after the case which established the rule).[8]

However, the courts will not treat such statements as conclusive.[9]

The increasing use of Explanatory Notes to accompany legislation means that the courts are referring to Hansard less frequently.

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

  Some statutes are considered 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 Human Rights Act 1998 and the various devolution statutes can only be expressly repealed.[10]

- **The principle of legality**: Special considerations arise when there is a direct conflict between a statute and the fundamental principles of the common law.

  The courts will try to interpret any ambiguous statute, as far as is possible, in a way that is consistent with the relevant common law principle.[11] It is presumed that Parliament intends to respect fundamental rights. Any step to restrict these core principles must be taken explicitly.

- **Parliamentary directions**: Judges will also follow clear instructions on statutory interpretation given by Parliament.

  The courts have a statutory duty to interpret legislation in a way that is compatible with the individual rights guaranteed by the HRA in "so far as is possible".[12]

- **EU Law**: Prior to Brexit, there was a duty to interpret legislation in a way that was compatible with EU law. However, this is no longer the case as EU law no longer forms part of domestic law.[13]

  EU legislation which was retained as part of domestic law post-Brexit must also now be interpreted "so far as possible" with domestic law in mind.[14] This principle is subject to exceptions.[15]

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 common law.

The 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.[16]

- 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, marital rape became a crime contrary to the common law.[17]

Precedent is the principle that the decisions of higher courts create laws which lower courts must follow.

Precedent is how the common law develops. It creates consistency of practice, but also allows the law to evolve and meet changing practices.

However, this does not mean that the courts are always bound by the decision of their predecessors. The Supreme Court has the power to depart from its previous decisions when it appears "right to do so".[18] In making this determination, the Supreme Court will look at if the previous decision was "clearly" wrong and also if the benefits of the change will outweigh the costs of undermining certainty.[19]

What about international law?

International treaties are agreements between countries that are legally binding in international law on the parties to the treaty.

These might be bilateral agreements between the UK and just one other state. 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**, akin to the common law in the UK. These rules develop and become binding when:

a. they are 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, however, has a **dualist** legal system which means that international treaties have limited effect domestically until Parliament incorporates them into UK law by legislation.

However, customary international law has been accepted by UK courts as a source of common law and can therefore be considered by our courts.

The **presumption of compatibility** is a common law rule for interpreting statutes. When construing a statute, the courts presume 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

SUMMARY

- **Public law operates as a check on the abuse of public power.**
- **Public decisions must be lawful, rational and follow a fair procedure.**
- **Public decisions can be challenged in the courts via 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 must bring a claim promptly.**
- **All remedies are at the court's discretion.**

What is public law?

Every day, public bodies, including Government Ministers and local authorities, as well as private parties exercising 'public functions', take decisions which impact on constituents' daily lives.

When taking decisions, public bodies and private bodies to whom public functions have been delegated[1] must respect public law principles. These ensure that their actions are lawful and that they do not abuse their power or neglect their duties.

Key public law principles include lawfulness, rationality and procedural fairness. These are explained in more detail below.

> *"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**[2]

Public law helps determine the scope of statutory powers and duties. It provides a starting point for the scrutiny of the work of public agencies, civil servants and Ministers. It can also help with the oversight of private parties who have been delegated public functions.

If public bodies act outside their powers or take decisions that are incompatible with public law principles, their decisions can be challenged in court through a process called **judicial review**.

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 way of putting right something which has gone wrong.

If a judicial review is successful, the court can:

- Strike down the decision in question (**quashing**).[3]
- Make an order requiring the public decision-maker to do or not do something.
- Make an authoritative declaration about the meaning of a particular law.
- In limited circumstances, award damages to the claimant.

However, all remedies arrived at through judicial review are discretionary.

Which decisions can be challenged by judicial review?

Many decisions by public and, in certain cases, private bodies can be subject to judicial review, including failures or refusals to act. The key test for whether a decision can be challenged in the English, Welsh or Northern Ireland courts is to ask if the relevant decision maker was exercising a **public function**. The test in Scotland is slightly different but often leads in practice to the same result.

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. The courts presume that Parliament intends these important delegated powers to be exercised lawfully.

However, the activities of Parliament itself are not subject to judicial review. Acts of the Westminster Parliament cannot be ruled invalid by judges exercising judicial review. In some human rights cases the courts can make a **declaration of incompatibility**. For more on this, see Chapter 5.

Legislation of the Scottish Parliament, Northern Ireland Assembly and Senedd can be disapplied by the courts if it is outside the legislative competence of that body.

With respect to Northern Ireland, the courts can disapply Acts of Parliament where a provision is incompatible with Article 2 of the Windsor Framework (formerly the Northern Ireland Protocol).

The Northern Ireland High Court held that certain provisions in the Illegal Migration Act 2023 must be disapplied in Northern Ireland as they breached Article 2 of the Windsor Framework and resulted in the diminution of rights under the Belfast/Good Friday Agreement as underpinned by the relevant EU legislation.

The Court also held that these same sections of the Illegal Migration Act 2023 were incompatible with articles 3, 4, and 8 of the European Convention on Human Rights. It made declarations of incompatibility in respect of those sections under section 4 of the Human Rights Act 1998.[4]

What kind of review?

Judicial review does not give a judge the power to step in and retake a disputed decision. A judicial review claim is not an appeal on the merits of a decision. The judge will not substitute their own view for that of the decision-maker.

In all cases, the concern for the court is not whether the body in question made a 'good' decision, but rather whether it was **lawful**.

This is particularly important when the decision-maker is a specialist in their field with experience which the court does not have, such as a medical professional.

However, the court retains the authority to assess whether the outcome for the applicant would have been substantially different if the decision-maker's conduct under challenge had not occurred. In England and Wales, if the court determines that the outcome would likely have remained unchanged, it must reject the relief sought, unless it is still appropriate to grant relief for reasons of exceptional public interest.[5]

Restricting judicial oversight

Parliament sometimes legislates to limit the courts' ability to review certain public decisions through **ouster clauses**. These clauses can be contentious because they can be seen to challenge the balance between Parliamentary sovereignty and the constitutional need for judicial scrutiny.

Consequently, courts have tended to interpret ouster clauses narrowly due to the principle of legality, assuming that Parliament did not intend to entirely exclude judicial review unless the language of the ouster clause explicitly states otherwise.[11]

Statutory appeal and judicial review

When Parliament creates a new power, it can make decisions taken under this power subject to a process known as **statutory appeal**. Examples of decisions giving rise to statutory appeals include: certain immigration and asylum decisions;[6] decisions regarding benefits entitlements;[7] education, health and care plans;[8] and decisions in relation to tax.[9]

Under this framework, an appeal court or tribunal may have the power to re-take a decision from the beginning. They can examine both the legal aspects and the evidence afresh. They can then substitute their own judgment for that of the initial decision-maker.

At times, the Joint Committee on Human Rights has raised concerns about the adequacy of judicial review in safeguarding the right to a fair hearing, as guaranteed by the Human Rights Act.

During its review of the Marine and Coastal Access Bill, the Committee recommended granting landowners a statutory right of appeal to an independent body in cases where the creation of public access over private land was involved.[10]

Controversy over ouster clauses

Privacy International sought judicial review of a decision by the Investigatory Powers Tribunal (IPT), a specialist tribunal which considers complaints relating to the exercise of investigatory powers. A key question was whether the language of section 67(8) of the Regulation of Investigatory Powers Act clearly showed that Parliament intended exclude the ability to judicially review the IPT's decisions. A majority of the UK Supreme Court held that, on the natural meaning of the words, the ouster clause was not sufficiently clear and therefore IPT decisions were amenable to judicial review.

Lord Carnwath, who wrote the leading judgment, also noted that *"I see a strong case for holding that, consistently with the rule of law, binding effect cannot be given to a clause which purports wholly to exclude the supervisory jurisdiction of the High Court to review a decision of an inferior court or tribunal, whether for excess or abuse of jurisdiction, or error of law. In all cases, regardless of the words used, it should remain ultimately a matter for the court to determine the extent to which such a clause should be upheld, having regard to its purpose and statutory context, and the nature and importance of the legal issue in question; and to determine the level of scrutiny required by the rule of law."*[12]

What are the grounds for judicial review?

There are limited public law reasons why a decision may be unlawful. These reasons are called **grounds for judicial review**.

- **Illegality:** Where a decision-maker has made a mistake in law, has tried to do something which it has no power to do, or has exercised their power unlawfully. This includes a failure to comply with the requirements of the Human Rights Act 1998.
- **Irrationality:** Where the decision-maker has made an unreasonable decision, failed to take relevant matters into account, or taken into account irrelevant matters.
- **Procedural unfairness:** Where the decision-maker has failed to follow relevant procedures, has shown or appeared to show bias.

These traditional labels for the grounds for judicial review are not rigid. Individual cases can fall under more than one category. For example, a decision-maker who reaches a conclusion without all of the necessary facts might be considered to have acted 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
- Does something it does not have the power to do,

then it has acted unlawfully (ultra vires). Its decision may be set aside for illegality.

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 their Fares Fair policy 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 therefore ultra vires. The GLC's decision was quashed.[13]

Where a discretion – including a power to make secondary legislation – is exercised in a way which is inconsistent with the fundamental principles ofthe 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.[14]

A judicial review can also consider whether a public body has complied with its duty under the Human Rights Act 1998 to respect individual rights. For more on this, see Chapter 5.

Irrationality

A decision can be successfully challenged if it is irrational.

A decision is irrational if no reasonable decision maker could justify it. This is often called Wednesbury unreasonableness, after the casethat established the principle.[15]

Wednesbury unreasonableness

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 arrived at it, it had discretion to set whatever limitations it saw fit. This high threshold was not reached, so the cinema entry restriction could stand.

Irrationality is a high threshold. It is rare for the courts to find that it has been met. One judge 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".[16]

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 demand a higher standard of justification from the public body. This is sometimes called anxious scrutiny.

Other grounds for determining that a decision is irrational 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.

Procedural 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.
- To be given **reasons** for a decision after it has been made.

In 2021, the School and Nursery Milk Alliance Limited challenged the legality of the Scottish government's decision to fund its Milk and Healthy Snack Scheme using a weighted average "Local Serving Rate" for each local authority area. The petitioner argued, amongst other things, that the Scottish Ministers failed to consult fairly on the proposal to base funding on a weighted average and on the rates at which the Local Serving Rates would be set, despite having said they would do so. The Scottish Court of Session held that the petitioner had a legitimate expectation that it would be consulted on the proposals, and that it was unfair of the Ministers to proceed without providing the petition with the opportunity to comment on the funding of the scheme. The court therefore upheld the challenge to the Local Serving Rate regulations and guidance.[17]

"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**[18]

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,[19] but a decision may be unlawful if there is enough evidence to show **a real possibility** that it was. Decision-makers should be above reproach and a real appearance of bias is enough to undermine their authority.

Apparent bias

In *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 2)*, Lord Hoffman had failed to declare his role as an unpaid director of a charity related to Amnesty International and his wife's role as an administrative assistant at Amnesty International, which had intervened in the appeal.[20] The House of Lords determined that its judgment, in which Lord Hoffman had formed part of the 3-2 majority, had to be set aside due to the possibility of apparent bias.

Legitimate expectation

In some circumstances there will be a **legitimate expectation** that a public authority will act in a certain way. For example, an individual or group affected by a decision 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.

Usually, a legitimate expectation will only give rise to a procedural right, such as the right to be consulted, but in some limited circumstances a legitimate expectation may lead to substantive rights, such as the right to insist that the status quo is not changed.

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.[21]

Proportionality

In some claims involving the Human Rights Act, the court will look at whether a particular decision is **proportionate**. This involves the judge asking whether a decision is proportionate to the harm caused. The court can check whether the public authority has gone further than is necessary to serve the public interest. For more information, see Chapter 5.

In cases involving fundamental common law rights such as citizenship, the courts have resisted adopting a general proportionality test. However, as explained above, the courts will adopt a higher intensity of review (anxious scrutiny) in such cases, which may produce similar results.[22]

When applying a **proportionality test** or applying **anxious scrutiny** to whether a decision is reasonable, the courts can play a special role in checking whether public decisions respect individual rights. Members of Parliament should consider this when creating new powers or duties for public bodies.

Who can bring a judicial review?

To bring a claim for judicial review, a person or body must have **sufficient interest**.[22] This is also known as **standing**. Sometimes this interest will be obvious – for example, if they have been refused asylum.

Community groups and non-governmental organisations may also be able to bring judicial review claims on the basis that they represent the public interest.[24]

However, a body representing a group of individuals may not have standing to bring a claim for judicial review if none of the individuals comprising the group would have had sufficient interest.[25]

Someone who simply does not like a decision or who disagrees with the policies of the decision maker does not have 'carte blanche' to bring a judicial review claim.[26]

The court will consider whether there are obviously better placed challengers and consider the challenge's underlying merits. Typically, the weaker the merits, the stricter the approach to standing.

Who has sufficient interest?

The Save Lewisham Hospital Campaign, a crowd-funded community group, were deemed to have 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.[27]

However, the Good Law Project (GLP) was not found to have sufficient interest to challenge an alleged UK Government policy of appointing individuals to Covid-19 taskforces without open competition. GLP's broad remit to promote high standards in public administration did not grant it a commercial or public law interest in the taskforce procurement process. GLP's co-claimant, the Runnymede Trust, was found to be a better-placed challenger given its interest in tackling racial discrimination.[28]

Finally, a person or organisation not otherwise involved in the litigation may apply for permission to submit evidence and make submissions on that evidence to assist the court, known as a third party intervention. The intervention must be relevant to the grounds already raised by the claimant, but provide evidence that the claimant does not otherwise have access to. In some cases, the intervener's evidence can play a key role in the court's ruling.[29]

How does judicial review work?

Stage 1: Pre-action protocol

First, decision-makers must be given an opportunity to correct their mistakes.

Claimants should write a formal letter setting out a summary of their concerns, called a **pre-action protocol**. In rare, urgent cases, such as if someone is due to be deported, this step might not be enforced by the court.[30]

Watch the clock

Applications for judicial review must be made promptly and, in any event, within three months of the decision being challenged.[31] The time limit for planning challenges is six weeks.[32] This time keeps running even after the pre-action protocol letter is sent.

If the decision-maker refuses to change its decision, the claimant can then ask the court for **permission** to bring a claim for judicial review.[33] The claimant must have an **arguable case** and **sufficient interest** to get permission.

Stage 2: Permission stage

There can be no judicial review without the court's permission. This check is intended to avoid timewasting challenges to public decisions.[34]

Judges can determine the issue of permission **on the papers**, without a hearing. If permission is refused on the papers, the claimant can ask for the issue of permission to be reconsidered at a hearing. Judges can rule this out if they think a case is **totally without merit**.[35]

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

Stage 3: Full judicial review hearing

If the court considers there is a case to answer, i.e. it grants permission for judicial review, there will then be a full judicial review hearing.[36]

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. The loser pays the winner's costs, and the conduct of the parties is considered.

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.[37]

What can the court do?

In some cases, the court may make temporary **interim orders** during a case to avoid a detriment to one of the parties pending its final judgment.

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

- **Strike down a decision** (known as **quashing** the decision[38]): This means the original decision never had any legal effect. Normally if the court makes a quashing order, it will ask the public authority to retake 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 that the decision-maker needs to follow.

- **Make a prohibiting or mandatory order**[39]: The court can either prohibit a public body from acting unlawfully in the future or require it to perform a particular act, such as retaking the decision within a specific time period. However, the court cannot order a public body to reach a particular decision.

- **A declaration**[40]: The court can make a statement that the decision-maker was wrong and acted unlawfully, explaining why. A declaration does not require the decision maker to do anything, but normally the decision-maker will comply with it.[41] 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[42]. 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 Human Rights Act, for example.

Judicial review in Scotland, Northern Ireland and Wales

The law on judicial review in Scotland and Northern Ireland is very similar to that in England and, in the case of Wales, substantially identical. The grounds of review are broadly the same and the courts refer to each other's case law.[43] The location of the public body determines where a challenge should start.

Scotland

In Scotland, the Court of Session deals with judicial review. The procedure in Scotland is now closely aligned with that south of the border.[44] Permission for judicial review requires **sufficient interest** and that the application has a **real prospect of success**.

However, 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).[45]

Northern Ireland

Although many familiar public law questions are routinely raised in Northern Ireland, the political context there has created some unique elements to judicial review.[46] The (amended) Northern Ireland Act 1998 has been described as a **constitution**[47] for Northern Ireland, and in subsequent judicial review proceedings the importance of paying "particular attention" to it has been noted.[48] The Northern Irish courts also appear to have taken a slightly different approach to the administrative acts that are subject to judicial review. [49]

Wales

As England and Wales share a legal system, the situation for judicial review in Wales is substantially identical to that in England, although Welsh decision-makers must take into account specific considerations which may give rise to additional grounds of challenge.

For example, Welsh Ministers, and any person exercising functions under the Social Services and Well-being (Wales) Act 2014, must have due regard to the United Nations Convention on the Rights of the Child. Public authorities exercising their functions in Wales must also seek to maintain and enhance biodiversity in Wales under the Environment (Wales) Act 2016.

Devolution issues

Decisions made by Welsh, Scottish and Northern Irish public bodies may give rise to challenges in connection with **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 human rights compatibility, which we will cover in Chapter 5.

Chapter 5: Rights and the individual

SUMMARY

- **The law protects people's rights in many ways.**
- **These include protections through the common law, the Human Rights Act 1998, and the European Convention on Human Rights.**
- **Acts of Parliament also provide further protections, including the protection of the right to equality.**

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

- UK Ministers, diplomats and lawyers were central to the development of the international human rights framework, 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 laws 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 signed 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.

In the UK, human rights are protected by both **common law** and **statute**.

The Human Rights Act 1998 (**HRA**) provides the cornerstone of the UK's framework for rights protection. The HRA enables the courts to give effect to, and protect, the rights of individuals whilst at the same time maintaining Parliamentary sovereignty and the balance between the different branches of government.

Whilst the Act has been subject to criticism, attempts to reduce its scope or repeal it outright have proved problematic due to the strong public support for its protections.[1] This is clear, for example, when examining efforts to introduce a new 'Bill of Rights' in June 2022 during the last Parliament. The consultation behind the proposal received over 12,000 responses, with up to 90% of people opposing key reforms suggested. The Bill was ultimately unsuccessful.

Beyond the HRA, there is a wide network of statutes which also aim to protect individual rights in practice:

- The Police and Criminal Evidence Act 1984 protects the right of individuals to fair treatment in police investigations.
- The Care Act 2014 covers eligibility for care and support for people living with disability.

This Chapter won't consider every Act of Parliament designed to protect individual rights, but we will look at one of the most significant 'rights-protecting' statutes which may affect the work of MPs: the **Equality Act 2010**.[2]

Common law rights

The courts play an important role in protecting individual rights against the state. Some rights to liberty, personal property and freedom of assembly have long been accepted as a matter of UK law.[3]

Today, the Supreme Court considers the common law as "the natural starting point in any dispute" involving civil liberties or human rights."[4] The common law might protect human rights in ways not required by the HRA.[5]

The courts use the common law to protect individual rights in several ways:

- The actions 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 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 prison rules. Lord Hoffman stated that: "[i]n the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."[6]
- 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 which introduced fees for bringing claims in employment tribunals had such a serious impact on individuals' ability to bring a case that it violated the right of access to justice. As a result, the measure was struck down.[7]
- 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. Before the HRA, the common law did not prevent:

- A well-known actor from publication of photographs of him seriously ill in hospital, taken without his permission;[8]
- State inflicted corporal punishment.[9]
- A ban on gay people from serving in the military.[10]

The individuals in these cases, like many others, were unable to secure a remedy at home but won their case in the European Court of Human Rights.

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

In 2015, the Michael family challenged a failure by the police to protect their daughter from a violent partner, after the police 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 of the ECHR.[11]

If Parliament enacts laws clearly and without 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 [12]

After several high-profile cases highlighted the limits of the common law, Parliament passed the Human Rights Act 1998.

The HRA protects the same rights in the ECHR, making those **Convention rights** part of UK domestic law.

Convention rights [13]

- 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 in action [13]

- Public authorities must act in a way which respects rights unless a statute passed by Parliament stops them from doing so (Section 6 of the HRA).
- Courts must read and apply all legislation in so far as is possible in a way which respects Convention rights (Section 3 of the 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 of the HRA).
- Courts must take into account the case law of the European Court of Human Rights (ECtHR). This includes all ECtHR case law, not just UK cases. 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 of the HRA).

To comply with Convention rights, public bodies might be required to refrain from doing something. This is called a **negative obligation**.

Sometimes, however, to protect a right, public authorities might have to take steps to make sure that it works in practice.
This is called a **positive obligation**.

In practice, it is often difficult to distinguish positive obligations from negative ones.[14]

For example, the right to life means public bodies must not unlawfully kill people. However, it also requires the state to take active steps to properly investigate any suspicious deaths and put in place a system to deter and punish those who do take others' lives unlawfully.

Examples of positive obligations

- The obligation to protect victims of serious sexual offences under Article 3 ECHR: several victims of the so-called 'Black Cab rapist' John Worboys were awarded compensation as serious investigative police failures violated Article 3 ECHR (the right to not be subject to torture or inhuman or degrading treatment). The police were under a duty to carry out a competent criminal investigation after credible evidence was received.[15]

- The obligation to protect children from neglect and abuse under Article 3 and Article 8 ECHR: Social services had failed to intervene for four and a half years to protect four children, despite being aware of serious neglect and abuse. They were under a duty to use the powers available to them to protect the children from serious, long-term neglect and abuse.[16]

- The obligation to facilitate freedom of expression under Article 10 ECHR: the court found that "free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having".[17]

Are rights absolute?

Some Convention rights are referred to as **absolute rights**. For example, states cannot for any reason infringe prohibitions on torture or slavery.

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 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. They 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 rights have express or inherent limits. These are known as **limited rights**.

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 detail.

The HRA allows this balancing exercise to be 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, in ***Elweida v the United Kingdom***, 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.[18]

Derogation

States are able to **derogate** from (or **expressly limit**) some Convention rights in times of war or other public emergencies "threatening the life of the nation".[19] Some rights are non-derogable, including the prohibitions on torture and slavery.[20]

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. 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* [21]

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.[22]
- 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 changed this rule.[23]
- Two victims of the Windrush scandal successfully challenged the Home Secretary for breaching their human rights when refusing their citizenship applications.

The individuals' applications were refused by the Home Office as they had not been physically present in the UK for five years as a result of the Windrush scandal. Section 3 HRA allowed the Court to interpret the British Nationality Act 1981 as permitting a discretion in these circumstances.

The victims were granted the chance to have their citizenship confirmed under Article 8 and Article 14 ECHR.[24]

How does the Human Rights Act work?

The public duty to respect rights

The Act creates a duty on all public authorities to comply with Convention rights.[25] 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 limited.

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

The duty to respect rights also applies to private bodies when they perform **public functions**. The public duty can, in some circumstances, apply to publicly funded providers of social housing and some private health facilities.[26]

The Care Act 2014 clarifies that the HRA applies to all care providers, including private providers, providing publicly funded care.

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.[27]

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 a meaning which would go against the grain or a fundamental feature of the statute.[28]

The use of Section 3 HRA

Section 3 HRA is used often in situations that were not foreseen or considered by Parliament when enacting legislation. For example, in *Warren v Care Fertility*[29], a widow wanted to extend the storage period of her late husband's sperm. The legislation allowed storage of up to 55 years, but the clinic had failed to advise her husband of the steps he needed to take to extend the storage. A restrictive interpretation of the legislation would have interfered with the couple's Article 8 rights to a family. The court used section 3 HRA to reach a Convention compatible interpretation which prevented the sperm being destroyed. The court noted that Parliament had 'intended to enable a [consenting] deceased man's sperm to be used by [his widow]', but that 'neither the Regulations nor statute' had made any provision about what should happen if the clinic failed to provide the correct documents.

The use of Section 3 HRA means that individuals who have had their rights breached will get that breach remedied straight away. This is in contrast to declarations of incompatibility (see below), where an individual will have to wait until the law is changed for the breach of their rights to be remedied. This can take some time.[30]

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.**[31]

A declaration of incompatibility 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 and the separation of powers.

Declarations of incompatibility are extremely rare, with an average of only two per year since the HRA was brought into force in October 2000.[32]

Responding to declarations of incompatibility

If a domestic court has issued a declaration of incompatibility or if the ECtHR has found the UK in breach of the Convention, Parliament may legislate in the ordinary way to fix the incompatibility.

Alternatively, the HRA provides for a **fast-track remedial order** procedure which allows a violation of Convention rights to be fixed quickly by Parliament. [33]

These orders allow the Government to use secondary legislation to change the law, but creates a special procedure which lets Parliament scrutinise the change. 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. This type of change will lapse if not approved by Parliament in 120 days.

Ministerial statements and parliamentary scrutiny

The front cover of every government Bill presented to Parliament has a Ministerial statement on whether the Bill respects Convention rights. [34]

This either:

a. gives the Minister's opinion that the legislation complies with Convention rights (a **statement of compatibility**); or

b. states that the government is unable to make a statement of compatibility but wants to go ahead with the Bill anyway.

The requirement to have this Section 19 statement encourages Ministers and their departments to address human rights issues when drafting new laws.

Ministers have rarely asked Parliament to pass legislation where they were unable to make a statement of compatibility. One example where they have done so is in relation to the Safety of Rwanda (Asylum and Immigration) Act 2024.

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. It consists 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 the Government.

Its work has included inquiries on protecting human rights in care settings, the Government's response to COVID-19, and the human rights implications of the and freedom of expression.[35]

Our 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 Equality and Human Rights Commission has specific duties in respect of the HRA and the Equality Act, set by Parliament.

There are also separate human rights commissions in Scotland – the Scottish Human Rights Commission – 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 Institution. They each have '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[36]

Although the Human Rights Act and the ECHR safeguard the same rights, they operate under distinct legal frameworks.

The HRA is an Act of Parliament which protects individual rights within domestic law. The ECHR is an international treaty binding on the UK through international law.

The original text of the ECHR was created in 1950 and brought into force in 1953. Since then, there have been several amendments and additions to keep it up to date. This is done through Protocols, and there are 16 Protocols to the ECHR at present. These deal largely with procedural aspects associated with the effective implementation of the ECHR and workings of the ECtHR.

Like the original text of the ECHR, a party to the ECHR has the option whether to ratify and be bound by a Protocol to the ECHR or not. The UK has ratified most but not all Protocols to the ECHR.[37]

The HRA is crafted to fulfil two primary obligations outlined in Articles 1 and 13 of the ECHR.

Article 1 of the ECHR mandates that the UK ensures everyone within its "jurisdiction" enjoys the rights it guarantees. This extends to individuals in the UK, but can sometimes include circumstances where the UK exercises sufficient control over an area or an individual overseas, such as the conduct of UK troops abroad.[38]

Article 13 of the ECHR necessitates the availability of effective remedies when rights are violated. For instance, effective criminal prosecution for murder is considered an essential remedy for protecting the right to life.

The Council of Europe

Contrary to common misconception, the ECHR is not an instrument of the European Union. Rather, it is overseen by the Council of Europe.

Established post-World War II, the Council of Europe comprises 46 member states. It surpasses the EU in size and includes non-EU states like the UK. The Council's membership decreased by one when Russia was suspended due to its invasion of Ukraine in March 2022.

All members of the Council of Europe must be parties to the ECHR. All EU member states are members of the Council of Europe.

The European Court of Human Rights

The European Court of Human Rights, headquartered in Strasbourg, interprets and applies the ECHR's provisions through case law and advisory opinions. Each state within the Council of Europe, including the UK, has agreed to "abide by the final judgment of the court"[39].

The Court comprises judges from each Council of Europe state, nominated by individual states but elected by the Council's Parliamentary Assembly, which includes MPs appointed from each member country.

Since 1966, individuals have been permitted to bring cases against the UK to the European Court of Human Rights. Since 1994 it has been compulsory for signatories to the Convention to allow individuals to take cases against them to the Court, however this route is considered a last resort.

As set out in Article 35 of the Convention, an applicant must have exhausted all domestic remedies before taking a case to the European Court of Human Rights.

The European Court of Human Rights may decline to consider a case that is manifestly ill-founded or abuses the right of individual application.

Considering Articles 34 and 35 of the Convention, a case may also be deemed inadmissible where the applicant is not recognised as a victim by the Court, or the applicant has not suffered a significant disadvantage by the alleged violation of the Convention.

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

a) pay compensation to affected individuals;

b) stop doing whatever is causing the problem; and/or

c) adopt 'general measures' to prevent the violation from happening again – often this means changing the law.

The ECtHR only found, on average, the UK to be in violation of the ECHR less than five times a year between 2012 and 2022. In 2022, just two ECtHR judgments found a violation against the UK.[40]

The ECtHR may also, under exceptional circumstances, order interim measures.

Considering European Court of Human Rights judgments

Under Section 2 of the HRA, UK courts must "take into account" judgments from the European Court of Human Rights. However, these judgments 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".[41]

This discretion allows the courts to refuse to adopt the European Court's approach in cases where it would not work in the UK. This was demonstrated in a case concerning UK rules on hearsay evidence in criminal trials.[42]

Such disagreements foster a 'dialogue' between the courts.

A conversation about rights?

The European Court of Human Rights 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 that opportunity, a whole-life term would be inhuman and degrading punishment (Article 3 of the 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 European Court of Human Rights agreed that the UK position was compatible with the Convention.[43]

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

1. The living instrument

The ECtHR treats the Convention as a living instrument. This means it is interpreted with reference to present-day conditions, in 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. [44] The right of people with disabilities not to be discriminated against has also been recognised by the ECtHR, even though it is not mentioned in the original text of the Convention.[45] This is similar to the common law doctrine.[46]

2. The margin of appreciation

States have a margin of appreciation in the application of limited and qualified rights.

Absolute rights, by their nature and the requirement for them not to be interfered within any circumstances, typically have no margin of appreciation. However, states can determine how best to ensure these rights are fully protected, as long as the steps taken are effective.

The European Court of Human Rights affords states some discretion when considering whether there has been a rights breach. This is known as the margin of appreciation. The Court recognises that national institutions are better placed to assess the necessity of an interference with a right, or the balancing of competing rights because of their knowledge of local law, policy and practice. The Court gives states a wide margin of appreciation in cases of raising issues of social, religious and moral controversy where there is a lack of consensus among the member states, such as assisted dying.[47] The preamble of the Convention has been amended to reflect this principle, acknowledging that parties to the ECHR "have the primary responsibility to secure the rights and freedoms defined" in the ECHR and its Protocols.[48]

Devolution and Human Rights

The Human Rights Act and the Convention rights hold constitutional significance within the devolution settlements in Scotland, Wales, and Northern Ireland.

Whilst the UK Government has the authority to enact legislation that may be incompatible with the Convention, the Scottish Parliament, Northern Irish Assembly, and Senedd cannot. Any legislation they pass which is incompatible with the Convention rights can be struck down by the courts.[49]

The first instance of a provision from an Act of the Scottish Parliament being struck down under the Scotland Act 1998 occurred in *Salvesen v Riddell*.

In this case, the Agricultural Holdings (Scotland) Act 2003 exceeded the Scottish Parliament's legislative competence because it infringed upon the rights of certain landlords of agricultural tenancies to the peaceful enjoyment of their possessions, as outlined in Article 1, Protocol 1 of the Convention.

The Convention also operates to limit the actions of the devolved administrations. Members of the Scottish Government, for example, are prohibited from enacting subordinate legislation or engaging in activities that are incompatible with any of the Convention rights.[50]

Similar constraints apply to the powers of the executive in Northern Ireland [51] and Welsh Ministers[52].

Northern Ireland

The Northern Ireland Human Rights Commission (NIHRC) and the Equality Commission for Northern Ireland were established prior to the Equality and Human Rights Commission for Great Britain. They were established by the Westminster Parliament following the Belfast (Good Friday) Agreement.

The NIHRC has a statutory duty to advise on compliance with the ECHR rights incorporated into UK law by way of the Human Rights Act 1998. In addition the Belfast (Good Friday) Agreement provided for the NIHRC to advise the Westminster government on a Bill of Rights for Northern Ireland.[53]

As part of the post-Brexit settlement in the Windsor Framework (formerly the Northern Ireland Protocol), the UK government has committed to protecting certain equality and human rights in Northern Ireland.[54] The commitment is that rights, safeguards, or equality of opportunity covered by the relevant chapter of the Belfast (Good Friday) Agreement shall not be diminished a result of the UK's withdrawal from the EU.[55]

In addition, the Windsor Framework requires that Northern Ireland equality law keeps pace with any changes to six specific EU equality directives, if protections are enhanced. There is also a dynamic alignment obligation associated with Windsor Framework Articles 2 and 13. These require the law in Northern Ireland to keep pace with any improvements to minimum standards of equality protection enshrined in six EU directives listed in Annex 1 to the Windsor Framework.

The NIHRC and ECNI are mandated in accordance with Article 2(1) of the Windsor Framework,1[56] formerly known as the Protocol on Ireland/ Northern Ireland of the UK-EU Withdrawal Agreement2[57] to oversee the UK Government's commitment to rights and equality in Northern Ireland after UK Withdrawal from the EU. The Commissions can exercise these functions separately or jointly.[58]

Scotland

The Scottish Human Rights Commission, established by the Scottish Parliament, serves various functions related to human rights issues concerning devolved matters in Scotland. The Commission has a general duty to promote awareness, understanding and respect for human rights and has powers to recommend changes to law, policy and practice; to promote human rights through education, training and research; and to conduct inquiries into the policies and practices of Scottish public authorities.

Its ongoing work involves monitoring and updating the implementation of Scotland's National Action Plan for human rights. Its most recent iteration, SNAP 2, was published in March 2023 and its work is set to continue until 2030.[59]

As part of a consultation between 15 June 2023 and 5 October 2023, seeking views on a Human Rights Bill for Scotland, the Scottish Government stated its commitment to implementing The New Scottish Human Rights Act.

The Equality Act 2010

While the common law ensures everyone's right to equal protection under the law, Article 14 of the European Convention on Human Rights and the Human Rights Act only safeguard against discrimination in the enjoyment of other Convention rights.[60]

These guarantees are supplemented by the Equality Act. It serves as a comprehensive legal framework for ensuring equal protection and treatment under the law.[61] The Act applies in England, Scotland and Wales. It has limited effect in Northern Ireland, which has its own equality legislation.

Protected characteristics

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

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race (including colour, nationality, and ethnic or national origins)
- Religion or belief
- Sex
- Sexual orientation

Key prohibitions

The Equality Act establishes five primary prohibitions for the protection of equality:

- **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 unfairly affects a particular group. If there aren't fair reasons – known as objective justification – for the treatment, it will be considered unlawful.
- **Failure to make reasonable adjustments**: When practices or premises that disadvantage disabled people are not changed.
- **Harassment**: When there is 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.
- **Victimisation**: When a person is treated less favourably because they are involved in a complaint of discrimination or harassment.

In addition, the Equality Act protects individuals from discrimination occurring because they are believed to be in a particular group or because they are associated with someone with protected characteristics, such as carers who care for disabled individuals.[62]

Application of the Equality Act

The Equality Act applies to both private and public bodies, including employers and service providers, whether public or private. Among others, 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-compliance with 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.[63]

The Equality Act applies to employment and recruitment, the provision of services, education and housing, and the decisions of public bodies.

Come one, come all

If a pub refuses entry to a group because they are Irish Travellers, then the pub have discriminated against them because of their race.[64]

A B&B owner who refuses to let a room to a gay couple discriminates on grounds of their sexual orientation.[65]

Disability and Reasonable Adjustments

Acknowledging the barriers faced by people with disabilities, the Equality Act requires **reasonable adjustments** to be made to ensure that people with disabilities receive the same opportunities, as far as possible, as people who are not disabled.

These adjustments are required if a disabled person would be at a **substantial disadvantage** if they were 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.

Failure by the Cabinet Office to provide British sign language interpretation for the broadcast of two live Government briefings about the COVID-19 pandemic amounted to a failure to make reasonable adjustments for deaf people.[66]

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.
- 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.[67]

One example where this may apply is where someone takes prolonged time away from work for reasons connected with their disability and is subsequently dismissed due to their sickness absence.

Equal pay

The Equality Act protects the presumption in law that men and women should earn equal pay for equal work. It enables women to challenge unequal pay and terms.[68]

Equal pay for equal work

- 251 women working as classroom assistants, support for learning assistants and nursery nurses for a local council won their Supreme Court claim for equal pay. 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 benefitted 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.[69]
- More recently, 35,000, predominantly female, Asda store workers alleged that they were not receiving equal pay in comparison to Asda's predominantly male distribution workers. The Supreme Court determined that the store workers were entitled to compare themselves with the distribution workers for the purposes of their ongoing equal pay claims, despite the fact that they were based at different sites.[70]

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:[71]

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

The duty requires public bodies to consider 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 applies to a range of public bodies specified by Parliament. This includes Ministers and government departments, local authorities and most public agencies.

Application of the Equality Act in Scotland and Northern Ireland

The Equality Act applies to Scotland and the power to legislate for equality is broadly reserved to Westminster.

Although the Equality Act 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.[72]

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 protections against disability-related discrimination don't apply in Northern Ireland.
- Protection against discrimination in private clubs is more limited in Northern Ireland.

In 2022, the Equality Commission for Northern Ireland recommended a single equality act for Northern Ireland, which would reflect international human rights standards and best practice, and build on equality law in Great Britain.[73]

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 several barriers to involvement and recommended reforms to increase representation and engagement.[74]
- Select Committees often examine how government departments and public bodies meet their duties towards people with protected characteristics. In 2020, for example, the Joint Committee on Human Rights looked at racial inequalities in the United Kingdom.[75] The House of Commons Women and Equalities Committee considered the accessibility of products and services to disabled people in 2024.[76]

Chapter 6: Assimilated EU law and international law

SUMMARY

- **Following Brexit, some EU law was retained as part of UK law and is now known as assimilated law.**
- **EU law continues to have direct applicability in the UK only in specified circumstances, including in Northern Ireland as provided for by the Windsor Framework.**
- **International law is not automatically part of domestic law, subject to certain exceptions.**

In earlier Chapters, we 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 after Brexit, and wider international law.

Assimilated EU law

The European Union

The **European Union** (EU) today draws together 27 states from across the continent. It promotes a common, pan-European approach to many political and economic issues. The UK joined in 1973 and, following the referendum on the UK's continued membership, withdrew on 31 January 2020 (with a transition period in place until 31 December 2020). EU law covers a broad range of areas, including agriculture, fishing, business, energy, health, justice, the environment and transport.

EU law in the UK

When the UK joined the European Economic Community in 1973 (the precursor to the EU), the **European Communities Act 1972** (ECA) provided for EU law to have direct applicability in domestic UK law.

In the decades that followed, a significant amount of EU law was introduced into UK domestic law. That included:

- **EU Directives**. These are the most common form of EU law and are the 'softer' version of EU legislation. They specify the outcome that must be achieved by member states but leave the method of achieving that outcome to the member states. The UK passed national legislation, through Parliament or the devolved legislatures (where the subject area was within devolved powers), to bring EU Directives into effect in the UK.
- **EU Regulations**. This form of EU legislation applies directly in each member state without any national legislation. Following the ECA, EU Regulations were directly applicable in the UK.
- **Decisions of the Court of Justice of the European Union** (CJEU) on matters of EU law, which were binding on UK courts.

Post-Brexit landscape

The post-Brexit landscape is complex and the overarching framework is subject to numerous exceptions. This section provides a high-level overview of the status of EU law in the UK and the powers available to Ministers to amend that law. We also look at specific issues relevant to Northern Ireland.

Key UK statutes to be aware of include the **European Union (Withdrawal) Act 2018** (the Withdrawal Act), the **EU (Withdrawal Agreement) Act 2020** and the **Retained EU Law (Revocation and Reform) Act 2023** (REUL Act).

The Withdrawal Act

Following the UK's decision to leave the EU, the ECA was repealed by the Withdrawal Act. The Withdrawal Act took a 'snapshot' of EU law that was in force and applicable in the UK at the end of the Brexit transition period, i.e. 11 pm on 31 December 2020, and provided that most of that law would continue to be part of UK law, subject to minor amendments aimed at ensuring that law operates effectively as part of domestic UK legislation.

This included ensuring that most EU-derived UK legislation (such as legislation to implement an EU Directive) and most EU Regulations, together with certain other instruments, directly applicable EU treaty articles, and certain general principles of EU law continued to be part of UK law and that the UK courts should continue to have regard to judgments of the CJEU in certain circumstances. In short, the Withdrawal Act ensured most EU law remained, on or was copied, onto the UK statute book, almost "as is".

The Withdrawal Act also:

- Ended the jurisdiction of the CJEU from a UK perspective, although UK courts are still expected to have regard to or follow judgments of the CJEU in certain circumstances – for example, CJEU decisions in respect to EU law that continues to apply in Northern Ireland; and

- Created temporary powers for Ministers and devolved governments to make the minor amendments necessary to ensure that the relevant EU law operates effectively as part of domestic UK law, using statutory instruments to correct the 'deficiencies' in the relevant EU law.

The Government has subsequently used these powers, some of which are known as Henry VIII powers, to correct these 'deficiencies' in the relevant EU laws. Typical changes include:

- Replacing references to the European Commission with references to UK Ministers or UK regulators; and

- Removing reciprocity, e.g. obligations that require EU or EEA persons to be treated in the same way as UK persons.

The REUL Act

Among other things, the REUL Act:

- Revoked some of the EU law that had been retained by the Withdrawal Act;

- Provided the Government with extensive powers to restate, revoke and replace any EU law that was retained post-Brexit that was not primary legislation. These powers can be exercised until 23 June 2026;

- Further regulated, from 1 October 2024, the interpretation by the UK courts of EU law that was retained post-Brexit, and provided factors for the UK courts to take into account when deciding whether to have regard to or depart from CJEU case law;

- Established that, where there is a conflict, UK legislation takes precedence over any EU Regulations; and

- Provided that EU law that had been retained post-Brexit should be known as 'assimilated law' as regards all times after the end of 2023 (it was previously known as 'retained EU law').

EU-UK International Relations

On an international level, the UK's membership of the EU has been replaced by two principal agreements:

- The **Withdrawal Agreement**. This agreement set out the terms of the UK's exit from the EU. It governs the relationship between the UK and the EU in several areas, including separation issues and citizens' rights and provides particular rules relating to Northern Ireland, which we explore on page 56.

  Article 4 of the Withdrawal Agreement requires the Withdrawal Agreement to be given effect in UK domestic law and provides for individual enforcement rights in the domestic courts. The European Union (Withdrawal Agreement) Act 2020 implemented the Withdrawal Agreement in UK law.

- The **UK-EU Trade and Cooperation Agreement**. Now that the UK is no longer part of the EU Single Market and Customs Union, the UK-EU Trade and Cooperation Agreement governs significant aspects of the trade relationship between the UK and EU and regulates a number of key areas previously regulated by the EU Single Market. It was implemented in UK law via the European Union (Future Relationship) Act 2020.

  - It establishes arrangements for future cooperation across a range of areas including trade, aviation, road haulage, fisheries, police and security, health insurance and continued UK participation in some EU programmes.

  - The Trade and Cooperation Agreement is subject to review every five years. The first review is due to start in May 2026.

Continuing application of EU law

Across the UK

EU law may continue to apply in certain cases, for example where rights were acquired or events took place before Brexit or, for certain rights retained under the Withdrawal Act, before the end of 2023.

Northern Ireland only

EU law ceased to apply in the whole of the UK on 31 December 2020. However, as part of the Withdrawal Agreement, the Northern Ireland Protocol provided that certain aspects of EU law continue to apply "to and in the United Kingdom in respect of Northern Ireland".

The purpose of the Northern Ireland Protocol included the protection of the Good Friday Agreement and the prevention of a hard border on the island of Ireland by requiring Northern Ireland to align with EU law in some areas and allowing it to maintain frictionless access to the EU.

Examples of EU law that continue to apply in Northern Ireland include:

- The EU state aid rules;
- Certain EU legislation relevant to goods (notably product standards), customs and VAT; and
- Certain EU legislation relating to wholesale electricity markets.

Following concerns around the implementation of the Northern Ireland Protocol, a further agreement was reached in February 2023. The Northern Ireland Protocol was renamed the Windsor Framework and changes were made in two key areas:

- Changing rules governing trade between Great Britain and Northern Ireland to reduce administrative costs and other potential trade barriers; and
- Allowing members of the Northern Ireland Assembly to seek to prevent certain changes to EU laws from applying in Northern Ireland under the Protocol (the so-called Stormont Brake).

Further, as explained in Chapter 4, judges have the power to disapply UK primary legislation where a provision is deemed to be incompatible with the Withdrawal Agreement, including any EU law that remains applicable in Northern Ireland in accordance with the Windsor Framework.

Scotland only

The UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 provides for EU law to be incorporated into the law of Scotland in devolved areas by regulations made by Scottish Ministers – i.e. without the need for primary legislation.

However, this "keeping pace" power does not give direct effect to EU law, even in devolved areas, and does not impact the power of the UK Parliament to make law in Scotland.

Practical points

Understanding the status of a particular aspect of assimilated EU law (including whether or not it has been fully retained, modified or removed), can be challenging in practice. The Government has set up a searchable database of assimilated EU law, which can be found here.

It is important to note that the database does not claim to be fully comprehensive and does not link directly to the full text of the relevant law, as modified by UK legislation (where applicable). If MPs are faced with an issue involving EU law – for example arising from an issue encountered by a constituent or when scrutinising primary or secondary legislation – MPs may want to seek out further help. We discuss some useful sources for MPs and constituents in Chapter 7.

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.

Respect for international law, and the treaties to which the UK is a member, is a crucial part of the rule of law. Adherence serves to demonstrate that the UK is a reliable and consistent actor within the rules-based international order, fostering the country's credibility among global institutions and partners in shaping norms and standards.

This is important across a range of policy areas, from human rights and climate change, to anti-terrorism and international trade. The UK's active membership of bodies such as the United Nations, the Council of Europe, the International Monetary Fund, and World Trade Organisation represent concrete examples of this reality.

How does international law affect our law?

As explained in Chapter 3, the UK is a "dualist" system, as international law is treated as separate and distinct from domestic law. This means that international law is not automatically part of domestic law, subject to certain exceptions.

There are two sources of international law: treaties and customary international law.

Treaties

Treaties can be viewed as a contract between states. A treaty creates binding international law obligations only for the states that have agreed to it. Entering into treaties or treaty-making is the responsibility of the Crown, exercised typically by the Foreign Secretary.

Once a treaty has been signed, there are two further steps that may need to be taken: **ratification** and **incorporation**.

Ratification

A treaty usually needs to be '**ratified**' before it binds a state on an international level. In the UK, ratification of treaties by the government is subject to the supervision of Parliament. The treaty is laid before Parliament for a set period, and, if neither House objects to the UK being bound by its terms, the treaty will be ratified.[1]

There are limited exceptions that allow for ratification either without following the full procedure or if one House objects to the treaty.[2]

Incorporation

Once ratified, Parliament may decide to '**incorporate**' the UK's international obligations into domestic law. Incorporation means passing domestic legislation that reflects the obligations under the treaty. 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 incorporated the obligations in the Convention by creating a framework for the prosecution of acts of torture.

International treaties can be incorporated in whole or in part – this is up to Parliament. For example, the entirety of the European Convention of Human Rights was incorporated as the Human Rights Act 1998 while only parts of the International Labour Conventions have been incorporated into employment law.

Devolution and international law

Within their devolved competences, Scotland, Wales and Northern Ireland may pass legislation to incorporate the UK's international obligations into their respective law. 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.[3]
- 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".[4]
- The Welsh Government intends to incorporate the UN Convention on the Rights of Disabled People and the Convention on the Elimination of all forms of Discrimination Against Women into Welsh law by the end of 2026.[5]

The legislation which devolves power to the Scottish and Welsh Parliaments and the Northern Irish Assembly requires their executives to act in accordance with the UK's international obligations.[6] They also provide for the Secretary of State to intervene to prevent a Bill of the devolved legislatures receiving Royal Assent if its incompatible with the UK's international obligations.[7]

Even if a treaty is not incorporated into UK law by Parliament, the treaty obligations 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.[8]

Unincorporated treaty obligations may also be taken into account by the courts in certain circumstances. The way in which judges interpret the law – both statutory law and common law – can be informed and influenced by the interpretation of treaties.[9]

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.[10]

Some treaties also provide specific international mechanisms for their interpretation and enforcement. The European Court of Human Rights and the UN Human Rights Committee are examples.

Although a treaty generally has no formal binding effect in domestic law until incorporated, Ministers, officials and Parliament will be aware that the UK's adherence to the treaty obligations is being monitored internationally by other treaty parties. This is particularly true of human rights treaties, which we look at later in this chapter.

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.[12]

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.[13]

International human rights treaties

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 following UN treaties:

- 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 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT);
- The Convention on the Rights of the Child (UNCRC); 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.

These monitoring bodies can also occasionally provide general comments or general recommendations which aim to assist with parties' understanding of how to ensure compliance with specific rights or aspects of a specific right in practice.

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.[11]

Implementing the UN Convention against Torture

The 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. The Joint Committee on Human Rights has recommended a number of reforms to UK law in the light of the UNCAT obligations.[14]

Customary international law

Customary international law is the other source of international law. It is comprised of obligations that are widely accepted and treated as law by states. It is generally accepted that customary international law is a source of the common law of England.[17] Similarly, Scots courts have been clear that "a rule of customary international law is a rule of Scots law".[18]

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:

- The subject matter of the dispute;
- Whether the claim has any other basis in domestic law;
- The importance of the dispute;
- The complexity of the issue; and
- 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).[19]

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.

In Scotland, there is also no absolute right to bring a claim before the Scottish courts solely on the basis of customary international 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.[20]

Children's rights and the UNCRC

The UK Government has committed to ensuring that children have the rights guaranteed to them under the UNCRC. The UN CRC influences the way in which Convention rights protected by the HRA are applied by the domestic courts of England and Wales.[15]

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.[16] 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: Legal help and resources for MPs

Supporting constituents with legal problems

Many MPs work with constituents with complex legal problems. Here, we provide information about legal aid, and signpost where further help is available to support constituents.

Free training is available to MPs and their caseworkers on how to spot legal problems and other commonly encountered issues through the House of Commons Learning and Development team, in collaboration with the APPG on Access to Justice.

Can my constituent get legal aid?

Legal aid can help pay for all or part of an individual's legal costs, provided their issue falls within the scope of legal aid provision and they satisfy the eligibility criteria.

In England and Wales, applicants should engage a legal aid solicitor, who will apply to the Legal Aid Agency for legal aid on their behalf, especially in more complex cases. In Scotland or Northern Ireland, the application for legal aid must be completed by a solicitor. Online databases of legal aid solicitors are available for each region of the UK.[1]

Save for limited exceptions, applicants must satisfy a strict **means test** and an additional **merits-based** test (for civil legal aid) or (**interests of justice**') test (for criminal legal aid). The means test requires applicants to provide details of their income, benefits, family circumstances, savings and property. The merits test assesses factors such as the likelihood of success and the benefit to the client. The interests of justice test looks at the seriousness of the case, such as whether a person's liberty is at stake.

Criminal Legal Aid

All individuals are entitled to free legal assistance if detained or questioned on police station premises. They can be assisted by a police custody officer to access this assistance.

For other criminal proceedings, individuals must satisfy the means test and the 'interests of justice' test (explained above).

Civil Legal Aid

To receive civil legal aid, in most cases individuals must satisfy the means test and the merits test. They must also show that the matter falls within an area capable of funding.

To satisfy the merits test, applicants must demonstrate they have reasonable grounds for taking or defending a case. Also considered is:

- The applicant's prospects of success.
- The likely cost of the claim versus the potential benefit of bringing it.
- The wider public interest.

Constituents in **England & Wales** [2] and **Scotland** [3] can check their eligibility for civil legal aid using online portals.

In England & Wales, civil legal aid covers…

- Some housing law
- Asylum and some immigration cases
- Actions against public authorities
- Private family cases, where there is evidence of domestic violence, child abuse, child abduction, forced marriage, or FGM
- Debt cases where the individual's home is at risk
- Mental health, mental capacity, and community care issues
- Special educational needs
- Public Law for human rights and public law challenges i.e. judicial review
- Discrimination

But it does not include…

- Consumer and contractual disputes
- Debt problems that do not put the individual's home at risk
- Welfare benefit appeals to the first-tier tribunal
- Most immigration claims
- Private family law cases unless there is evidence of domestic violence or child abuse
- Personal injury or death
- Advice on making a will
- Business law issues
- Defamation claims
- And many other disputes…

Unlike England & Wales, in **Scotland** and **Northern Ireland**, civil legal aid is available in principle for most kinds of dispute.[4] In these jurisdictions, 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 a merits test.[5]

More detailed information on the legal aid schemes in Scotland and Northern Ireland can be found online.[6]

Exceptional legal aid funding may be available where the absence of legal aid might breach an individual's rights under the European Convention on Human Rights. Examples of this would be if the absence of legal aid would deprive the individual of a fair trial, or where the absence of legal aid would infringe an EU citizen's right to legal representation which was assimilated into UK law following the UK leaving the European Union.

Evidence is key

Applicants should provide their legal aid solicitor 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.

For further information for how legal aid may apply to your constituents, you may wish to contact the Legal Aid Practitioners Group which offers resources for MPs and their casework staff.

When legal aid is not available

Many MPs will see constituents who are looking for help because they are not eligible for legal aid but cannot afford legal advice. In certain cases, it is possible for them to assist directly with a matter but there remain strict rules, particularly in immigration law, which state what an MP can and can't do.

MPs do not provide legal advice but they can provide support by helping individuals understand their options. They often act to help people better explain their complaints in writing.

MPs and their surgeries should build strong relationships with local law firms, law centres and advice services. They are able to refer individuals for help at a local level. MPs may also be able to deliver their surgery within a Citizen Advice or Law Centre community outreach setting.

Some national sources of legal advice and support are outlined below.

Where next for advice?

Across the UK

- Citizens Advice gives general free advice and information from its local bureaux and national phone line (0800 144 8848).
- Law Centres Network is a network of local law centres across England & Wales and in Northern Ireland which give people free independent legal advice on a range of civil law matters.[7]
- The Equality Advisory and Support Service may be able to provide advice in some equality cases (excludes Northern Ireland)
- ACAS gives advice on employment matters and provides mediation for employment disputes (excludes Northern Ireland)
- Turn2Us provides practical help and information for people who are struggling financially including a benefits calculator and a 'find an advisor' tool
- Some solicitors, barristers or chartered legal executives may offer advice on 'fixed-fee' or 'no-win, no-fee' conditional fee arrangements
- If the constituent is seeking advice on employment issues and is a member of a trade union, they may receive additional support and advice from their union.

In England & Wales

- "The Guide to Pro Bono and Other Free Advice in England & Wales" is a directory for MPs and caseworkers looking to signpost constituents to free legal and related help. This includes charities across England and Wales which offer legal advice, covering immigration, domestic abuse, employment, social security, family issues and how to access legal aid. Edited by the chair of the Attorney General's Pro Bono Committee's steering group, in the last Parliament it was supported by the APPG on Access to Justice, Solicitor General and Lord Chancellor. Download at https://probonoweek.org.uk/guide and for hard copies for MP's Offices email guide@probonoweek.org.uk.
- LawWorks Clinics Network provides free initial advice on various areas of social welfare law, employment law, housing, consumer disputes and debt.
- Advocate provides free legal assistance from volunteer barristers to those who cannot get legal aid.
- Advicenow provides accurate, up-to-date information on rights and legal issues.
- Support Through Court provides support for litigants in person in civil and family proceedings.
- Liberty Human Rights Information Line provides legal information about public law and human rights law.

In Scotland

- "The Guide to Pro Bono and Other Free Advice in Scotland" is a directory for MPs and caseworkers looking to signpost constituents to sources of free legal and other advice in Scotland. It is published jointly by the Faculty of Advocates, Law Society of Scotland and JustRight Scotland. It can be downloaded at https://probonoweek.org.uk/guide
- The Faculty of Advocates - Free Legal Services Unit provides free legal representation, subject to a referral from certain advice agencies.
- The Legal Services Agency provides advice and representation to people who cannot otherwise get legal advice.
- Money Advice Scotland provides help for people with money and debt worries.

In Northern Ireland

- AdviceNI provides free advice on tax, benefits, housing and debt problems.
- The Labour Relations Agency (LRA) gives advice on employment matters and provides mediation for employment disputes.
- The NI Bar Pro Bono Unit provides free legal assistance from volunteer barristers to those who cannot get legal aid, subject to a referral from certain advice agencies or solicitors.
- The Equality Commission for Northern Ireland may be able to give free advice on matters relating to discrimination.
- The NIHRC operates a free advice clinic on issues or queries relating to human rights in Northern Ireland.

Specific Issues

We have set out below some organisations which can provide constituents with support in key areas which frequently arise in a casework context:

Immigration and Asylum

- The Immigration Law Practitioners Association
- The Joint Council for the Welfare of Immigrants
- Asylum Support Appeals Project
- Migrant Help
- Refugee Action
- Refugee Council
- Right To Remain
- Bail for Immigration Detainees
- The Unity Project
- Migrants Organise

Constituents can also find an immigration advisor through the Government search portal[8].

Housing

- The Housing Law Practitioners Association is a forum for practitioners who use housing law for the benefit of the homeless, tenants and other occupiers of housing.
- Shelter provides housing advice covering the private sector, the social sector and homelessness.
- Crisis is the national charity for people experiencing homelessness (excludes Northern Ireland).
- Housing Rights provides housing advice in Northern Ireland covering the private sector, the social sector and homelessness.

Benefits

- Z2K
- Child Poverty Action Group
- Citizen's Advice Bureau – Help to Claim has a contract from the Department of Work and Pensions to provide a 'Help to Claim' service with respect to support those making Universal Credit claims.

Legal help and resources for MPs

Legal help and support at Westminster

There are several sources of legal support available at Westminster:

- The House of Commons Library – and their colleagues in the House of Lords – is often the first stop for MPs seeking legal assistance.

  While it doesn't provide legal advice, it offers impartial and independent research support to MPs and their staff, aiding them in scrutinising legislation, preparing for debates, formulating policies, and supporting constituents.

  The Library's qualified staff provide legal information and support, producing briefings on all bills passing through Parliament as well as topical matters. On other areas of legal interest, there may already be a **Research Briefing Paper**.

  Alternatively, MPs can request specific information and bespoke research from the Library's team of researchers via their website.

- **The Office of Speaker's Counsel (OSC)** provides legal advice and support to the Speaker, the Clerk and all departments of the House of Commons.[9]

  The OSC does not advise MPs and their staff directly, but it can assist MPs in finding alternative sources of information.

- **Specialist Select Committees**: There are a number of Select Committees in both Houses. They delve into specific legal issues, and many have access to their own dedicated legal advisers and specialist clerks. These include:

House of Commons

- The House of Commons Justice Select Committee
- The Commons Select Committee on Statutory Instruments
- The House of Commons Home Affairs Committee
- The House of Commons Women and Equalities Committee
- The House of Commons Scottish Affairs Committee
- The House of Commons Northern Ireland Affairs Committee
- The House of Commons of Welsh Affairs Committee
- The House of Commons European Scrutiny Committee [10]
- The House of Commons European Statutory Instruments Committee [11]

House of Lords

- The House of Lords Justice and Home Affairs Committee
- The House of Lords European Affairs Committee
- The House of Lords Constitution Committee
- The House of Lords Secondary Legislation Scrutiny Committee
- The House of Lords Delegated Powers and Regulatory Reform Committee

Joint Committees

- The Joint Committee on Human Rights
- The Joint Committee on Statutory Instruments
- Many APPG's exist for MPs and Peers with an interest in legal issues. These include groups on the Union, Access to Justice and the Rule of Law. The APPG on Access to Justice provides bespoke training to MPs and their caseworkers to address the increase in complex legal problems MPs are encountering with their constituents. Courses run several times a year and are free to attend. They cover a wide range of issues such as Housing, Anti-Social Behaviour, Mental Health and Community Care and Special Education Needs. Contact the House of Commons Members' Services Team for further details.

Legal help and support from outside Westminster

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.

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. For other organisations additional to those listed below, see the Guide to Pro Bono & Other Free Advice at https://probonoweek.org.uk/guide.

Professional bodies

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

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.

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
- LSE Institute of Public Affairs Team
- Cardiff University Wales Governance Centre

Checklist: How to review new laws

This checklist aims to help you to analyse, review, and critique Bills or specific provisions within them. You will find below some questions which you can ask yourself, ministers or experts during the course of your work.

Understanding the Bill

1. WHAT IS THE BILL AIMING TO DO/CHANGE?

- Make sure that the Bill is not trying to achieve the impossible, and that its purpose is clear and practical.

2. WHAT IS THE CURRENT LAW ON THIS ISSUE AND HOW EFFECTIVELY DOES IT OPERATE?

- How recently was the law changed in this area, and why is a new law needed?
- How effective (or not) is the existing law in this area? What are the key issues with it and how are these issues evidenced?
- Does the new Bill clearly state whether (and which) previous laws are repealed or amended?

3. WHO DOES THE BILL AFFECT, EITHER POSITIVELY OR NEGATIVELY AND HAS THE GOVERNMENT CONSULTED WITH THEM OR THEIR REPRESENTATIVES?

- Consider if specific groups of people or communities will be particularly impacted by the legislation.
- Has the government undertaken and published impact assessments (which will assist), particularly with respect to equalities and human rights issues?
- What is the evidence base for those impact assessments – have the government consulted with those who will be impacted?

4. IS THE BILL SUFFICIENTLY CLEAR?

- Is the Bill written in an intelligible manner such that the effects of the laws are foreseeable?
- Is the Bill sufficiently clear to enable it to be applied in practice? Have the institutions / bodies who will be responsible for using and applying the law commented on its practicality?
- Weigh this up against whether the Bill is general enough such that it does not only apply to a few single cases.

5. IS THERE A WELL-ESTABLISHED AND SUCCESSFUL INTERNATIONAL MODEL THAT COULD BE USED AS A STARTING POINT OR COMPARATOR FOR THE POLICY PROPOSAL?

Legal and Constitutional Consequences

6. ARE THERE ANY POTENTIAL NEGATIVE "SPILL-OVER EFFECTS" OR "UNINTENDED CONSEQUENCES" OF THE BILL THAT CAN BE IDENTIFIED AND ADDRESSED NOW?

7. IS THIS POLICY THE BEST MEANS OF ADDRESSING THE ISSUE AT HAND?

- Consider whether the Bill is focused on future events or whether it applies retroactively, and whether this is this practically possible.

8. DOES THE BILL ENSURE COMPLIANCE WITH THE UK'S OBLIGATIONS UNDER THE RELEVANT INTERNATIONAL TREATIES, INCLUDING WITH REGARD TO HUMAN RIGHTS?

Practical Considerations

9. WHAT INSTITUTIONS WILL THE BILL DEPEND ON?

- Identify all institutions (officials, agencies, courts etc.) that have a role to play in implementing the Bill.
- Do the relevant institutions or bodies that will be tasked with implementing this policy have the resources that they need to do so?

10. ARE THERE ANY OBSTACLES TO THE IMPLEMENTATION OF THIS BILL AND, IF SO, ARE THERE ANY EFFECTIVE SOLUTIONS TO ADDRESS THE RISK OF NON-IMPLEMENTATION?

- Has this Bill been properly costed? What are the budgetary impacts of this law?

Checklists for tabling and drafting amendments to Bills

Making legislative amendments is a technical, time-consuming exercise. This section aims to give you a high-level guide on the procedural steps for tabling legislative amendments, including some helpful points to note.

Part A looks at drafting amendments. Part B looks at the process of tabling amendments.

For more information see:

- The MPs' guide to procedure;
- The Style Manual for Amendments to Bills;
- Erskine May treatise on the law, privileges proceedings and usage of Parliament (25th edition, 2019)

Part A: Drafting legislative amendments

Checklist on drafting legislative amendments
What is an amendment? *Amendments change the text of a Bill to alter its meaning. They should do one of three things:* *1. Leave out words;* *2. Replace words with other words; or* *3. Add words.*
Does your amendment fall within the scope of the Bill? *Your amendment must be within the scope of the Bill. The scope of a Bill is usually determined by the Bill's existing clauses and schedules. It can also be determined by the 'long title' (at the beginning of the Bill) which describes what the Bill does.* *You cannot amend the title of a clause of the heading of a part of the Bill.* *You can submit an amendment about something that is not already in the Bill, but any new topic must be reasonably close to the Bill's existing content.* *If you think your amendment might be outside the scope, contact the PBO asap.*
Does your amendment relate to the right version of the Bill? *If the Bill has been amended in committee, it will likely have been republished. You will need the "As amended in Committee" version for amendments in the report stage. The PBO or the Vote Office can confirm if you have the latest version.*
Is your amendment clearly drafted? *Your amendment should clearly state which part of the Bill you are amending in the following order – clause, page, line.* *If your amendment refers to other portions of the Bill, you should describe them as 'sections' and 'the Act' rather than 'clauses' or 'the Bill' e.g. 'pursuant to section 1', 'in this Act'.* *If your amendment leaves out seven words or fewer, then quote the words that you're leaving out in full e.g. Leave out "the quick brown fox".* *If your amendment leaves out more than eight words from the middle of the text, you should use the formula Leave out from "x" to "y" (where "x" and "y" are the words you want to keep in the Bill).* *If you want to leave out the start or end of a line, you can use "from start to X" or "from Y to end".*
Have you defined all your terms? *Does your amendment contain words or phrase that may need defined? You might need to define some of the language you are using if it's not already defined e.g. 'In this section "regulator" means...'*
Does your amendment impact other areas in the Bill? *Amendments to one aspect of the Bill may require related amendments. E.g. an amendment to leave out a section might require other amendments to remove references to that particular elsewhere in the Bill.*

Checklist on drafting legislative amendments
Does your amendment propose to leave out a clause? *At committee stage, you can submit an amendment to leave out an entire clause. This will be printed in the amendment paper but will not be selected for debate. Each clause is voted on separately to determine whether it should remain part of the Bill (a "clause stand part" debate). If you want to leave out a clause you can vote against the clause standing part of the Bill.* *At report stage, there are no clause stand part debates, so if you want to leave out an entire clause, you need to submit an amendment to this effect.*
Have you included an explanatory statement to your amendment? *Although an explanatory statement is not compulsory, it is recommended. If you do include an explanatory statement, you should ensure that (a) it is about 50 words, and (b) it describes the effect of your proposed amendment objectively.*
Who can submit an amendment? *You can submit your own amendment or add your name to someone else's amendment to show your support for it.*
Do you need further help in drafting your amendment? *The MPs' Guide to Procedure provides example language, such as an example amendment and example new clause. You can also refer to Style Manual for Amendments to Bills.* *The PBO can help you write amendments and can be contacted by telephone on extension x3251 or email PBOHoC@parliament.uk.*

Part B: Tabling legislative amendments

Checklist on tabling legislative amendments
Do you have the most recent copy of the Bill (and any explanatory notes) you wish to add an amendment to? *Note: Bills and explanatory notes can be obtained either from Parliament's website or in hard copy from the Vote Office.*
What stage is the Bill currently at? *Amendments can be submitted at several different stages of a Bill's progress. The procedure that must be followed will depend on when the amendment is submitted:* *1. Second Reading – you can submit a reasoned amendment to oppose a Bill to the effect that 'this House declines to give the Bill a second reading because...'. If agreed to by the House, this will halt the Bill's progress through Parliament. Alternatively, you can submit an amendment which does not seek to prevent a second reading but instead seeks to put on record a particular view in agreeing to the second reading taking place.* *2. Committee stage – you can submit amendments for committee stage as soon as the second reading debate has finished. You can also do this immediately by handing your amendment to the Clerk at the Table in the Chamber after second reading.* *Although you can submit an amendment for the committee stage without being a member of the Public Bill Committee, please note you will need a member of the committee to act on your behalf in the committee meeting to 'move' the amendment so that it can be debated.* *3. Report Stage – you can submit amendments for report stage as soon as the committee stage has finished.* *You can submit the same amendment at report stage as you did at committee stage, but it's up to the Speaker to choose whether to select it for debate.* *It is also important to note that it is not possible to retable an identical amendment (or one of identical effect) to a Bill if it has already been voted on and defeated at the committee stage. However, an issue which has been debated and voted on in committee can be reopened, provided that the relevant amendment is more than cosmetically different from that moved in committee* *4. Third Reading – as with during the Second Reading, you can submit a reasoned amendment to oppose a Bill. to the effect that 'this House declines to give the Bill a third reading because ...'.* *5. Lords amendments - When the Bill has been amended by the Lords and has been returned to the Commons for consideration of Lords' amendments*
Do you have enough time to submit an amendment? *At committee and report stages the deadline for submitting amendments is three working days before the relevant part of the Bill is due to be considered. Amendments submitted after the deadline are not usually selected for debate.* *At third reading, the only textual amendments to the text of the Bill that can be made are to correct minor errors of wording (for example, a typo in the Bill).* *Reasoned amendments must be submitted by the time the House finishes meeting on the sitting day before the second/third reading.* *For detailed details on tabling deadline, please see here for textual amendments to the Bill and here for reasoned amendments.*

Checklist on tabling legislative amendments

Selection and Grouping

Your amendment will be given a number corresponding to the order in which it was tabled. The first amendment to be tabled will be number 1 and so on. Similar amendments can be grouped together for debate.

The Chair/Speaker has a discretion when choosing which amendments to put forward for debate. Below is a non-exhaustive list of some of the reasons why an amendment may not be selected:

1. was late;
2. doesn't make sense and/or would make a nonsense of all or part of the Bill;
3. has been tabled to the wrong bit of the Bill;
4. is vague;
5. is outside the scope of the Bill, clause or schedule;
6. would involve spending money that has not authorised by a money resolution; or
7. reopens an issue that has already been covered in depth.

Selection and grouping are done by the Chair during committee stage and the Speaker during the report stage. For reasoned amendments, the Parliamentary guide states that the Table Office will determine whether to accept the reasoned amendment and then the Speaker will decide whether to select it for debate.

Have you contacted the Public Bill Office (PBO) prior to starting your draft?

Before submitting an amendment, it may be helpful to speak to a Clerk at the PBO working on the Bill. You can speak to a Clerk about your proposed amendment and ask their advice on which part of the Bill to amend and how to write your amendment.

For reasoned amendments you should contact the PBO to discuss the amendment before it is submitted.

Does your draft amendment include (i) the name of the Bill, and (ii) which part of the Bill you are amending?

Your amendment can be either typed or handwritten.

Have you included an explanatory statement to your amendment?

Although an explanatory statement is not compulsory, it is recommended. If you do include an explanatory statement, you should ensure that (i) it is about 50 words, and (ii) it is objective in describing the effect of your proposed amendment.

Have you decided where your amendment will be put in the Bill?

If there's nowhere obvious to put your amendment within the existing text of the Bill, it might be better as a new clause (part of the body of the Bill) or a new schedule (additional information at the end of a Bill).

Every schedule has to be mentioned somewhere in the clauses of the Bill. So unless a new schedule is intended as a replacement for an existing schedule, it will be accompanied by a new clause or an amendment to an existing clause

You can submit a new clause or new schedule in the same way as you submit an amendment.

Checklist on tabling legislative amendments
Have you decided how to submit your amendment (and any explanatory statement)? *You can submit it by one of the following options:* *1. In person in the PBO or Table Office*. Reasoned amendments must be provided to the Table Office in person;* *2. In hard copy (including by post) with your handwritten signature (photocopied, stamped or faxed signatures are not accepted); and* *3. By email from your parliamentary email address (or another email address if you have agreed this in advance with the PBO*.* **Your staff can submit amendments for you via options 1. and 3. above but they must have been authorised by with the PBO. To do so, you need to send an email to the PBO (pbohoc@parliament.uk) giving authorisation for the member of staff to act on your behalf, and confirming their email address. The email must come from your parliamentary email account.*
Following submission of your amendment, has the PBO checked your amendment and flagged any problems? *Once the PBO accepts your amendment, it has been tabled.*
Other helpful information
Who can submit and withdraw amendments? *MPs can submit/withdraw their own amendments but can also do this on behalf of another MP if they have permission. If your staff is authorised with the PBO, they can also submit/withdraw amendments on your behalf.*

If you would like assistance with drafting amendments to Bills with respect to areas of JUSTICE's expertise, please do not hesitate to get in touch with us.

About JUSTICE

JUSTICE's work is known for its independence and rigor. Our research is grounded in deep subject-matter expertise: we bring together experts from within and beyond law – including people with lived experience of interacting with the justice system – to develop realistic solutions to key challenges.

We then advise policymakers, judges, civil servants, lawyers, service providers, and others on how to build a better justice system. As well as producing reports, briefings, and consultation responses, we regularly meet with senior civil servants and politicians from across the political spectrum, sit on key advisory bodies, and work with the media to widen understanding of justice system issues.

Help us build a fairer UK justice system within everyone's reach

Join:

Our members are amongst our greatest assets – their support and expertise enables and informs our work. JUSTICE members are eligible to participate in our groundbreaking working parties, gain access to exclusive events, and receive discounts for our paid-for events (including our annual conference). We offer individual, student, and corporate membership options.

To find out more and join, visit https://justice.org.uk/support-justice/join-justice/

Follow:

- X/Twitter: @JUSTICEhq
- Website: JUSTICE.org.uk
- LinkedIn: linkedin.com/company/justicehq

Donate:

https://support.justice.org.uk/donation-new

Get in touch:

admin@justice.org.uk

About A&O Shearman

A&O Shearman has the largest global footprint of any major law firm, with near 4,000 lawyers, across 48 offices, in 29 countries. We encourage our lawyers to make a positive impact on the lives of people around the world through pro bono work. Our pro bono programme uses the skills and time of our people, and our global reach, to tackle pressing issues, such as:

- Access to Justice
- Access to Education
- Inequality and the Protection of Rights
- Innovative Finance Solutions
- Supporting Forcibly Displaced People
- Sustaining and Protecting our Natural Environment

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 free legal advice projects for individuals, representing non-profits in interventions at domestic and international level, to helping NGOs with their legal needs. We partner with a wide range of organisations in our pro bono work to achieve results: for example with leading non-profit organisations such as JUSTICE, to support the rule of law.

Access to justice and maintaining the rule of law are important to both our pro bono and commercial clients. A&O Shearman 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 different disciplines across our network including our litigation/arbitration group and public law and human rights experts from our Human Rights Working Group and UK Public Law Team.

The Human Rights Working Group co-ordinates our pro bono work on human rights issues. 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.

We are known for providing our clients with pioneering solutions to the toughest legal challenges. We work hard to achieve the same levels of excellence in our pro bono work as in everything else we do.

For more information on A&O Shearman, please contact:

Web: www.aoshearman.com

Acknowledgements

JUSTICE would like to give particular thanks to **A&O Shearman** for their kind support of this project and their contribution to the drafting of the second edition of this guide. Specific thanks are owed to several individuals, including Andrew Denny, Michael Godden, Sarah Morreau, Frances Beddow, George Byrne Hill, Alexander Walsh, Alastair Madeley, Daisy Cutler, Rebecca Collins, Arthur Tan, Oliver Bradgate, Robert Thompson, Lauren Kennedy, Mark Maguire, Agata McCluskey, Rob Heigh and Amy Flynn.

We would also like to express thanks to those who provided further review and expertise, including Christine O'Neill KC, Finlay MacKenzie, Jamie Dunne and Kirstyn Burke (**Brodies**), the **Northern Ireland Human Rights Commission**, **Sir Michael Tugendhat**, Rohini Jana (**Legal Aid Practitioners Group**), and Toby Brown (**South Square Chambers**; Chair, Pro Bono Week Committee).

We are especially grateful to JUSTICE Deputy Legal Director, Tyrone Steele, and Legal Director, Stephanie Needleman, for drafting, reviewing, and coordinating this version of the guide in line with our mission to firmly establish the rule of law as a key feature of our democracy.

We are also extremely grateful to **JRSST Charitable Trust** and the **Legal Education Foundation** for their important contribution to this work.

The first edition of the guide, published in 2015, benefited from the support and advice of an Advisory Group of politicians, officials from the House of Commons, academics, and practitioners during the project. We reiterate our gratitude to this original group, whose time and expertise on the original project made this possible.

Original 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'Cinneide, University College London
- Lord David Pannick QC, Blackstone Chambers
- Vicky Purtill, The Chartered Institute of Legal Executives
- Emily Thornberry MP

(Note: titles and positions as of the date of the original Law for Lawmakers guide)

References

Chapter 1

[1] The terms “access to justice”, “fair trial”, “fair hearing” and “due process” are used interchangeably throughout this guide.

[2] A and others v Secretary of State for the Home Department [2004] UKHL 56, at [42].

[3] S.7(1) Constitutional Reform Act 2005.

[4] S.63 Constitutional Reform Act 2005. Further guidance is available online at: https://judicialappointments.gov.uk/about-the-jac/.

[5] S.3 Constitutional Reform Act 2005.

[6] Regina v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2) [2000] 1 AC 119.

[7] 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, Session 2013-14, HL Paper 30/HC 100, provides a helpful background (available online at: http://www.publications.parliament.uk/pa/jt201314/jtselect/jtprivi/30/3002.htm). On the sub judice rule, see the Report from the Joint Committee on Parliamentary Privilege, Session 1998-99, HL Paper 43-I/HC 214-I (available online at: https://publications.parliament.uk/pa/jt199899/jtselect/jtpriv/43/4302.htm). See also the Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice, May 2011, para 5.1, (available online at: https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/super-injunction-report-20052011.pdf).

[8] The Ministerial Code (last updated December 2022) is available online at: https://assets.publishing.service.gov.uk/media/63a4628bd3bf7f37654767f2/Ministerial_Code.pdf. The Civil Service Code (last updated March 2015) is available online at: https://www.gov.uk/government/publications/civil-service-code/the-civil-service-code. The Cabinet Manual (last updated December 2010) is available online at: https://assets.publishing.service.gov.uk/media/5a79d5d7e5274a18ba50f2b6/cabinet-manual.pdf. At the time of going to print, more recently updated versions of the Civil Service Code and Cabinet Manual had not been made available online.

[9] David Torrance, Introduction to devolution in the United Kingdom (May 2024), House of Commons Library, pp. 8-29, (available online at: https://researchbriefings.files.parliament.uk/documents/CBP-8599/CBP-8599.pdf).

[10] Mark Sandford, Devolution to local government in England (March 2024), House of Commons Library, pp.8-9, (available online at: https://researchbriefings.files.parliament.uk/documents/SN07029/SN07029.pdf).

[11] The Institute for Government (Duncan Henderson, Akash Paun and Briony Allen), English Devolution (December 2023), (available online at: https://www.instituteforgovernment.org.uk/explainer/english-devolution).

[12] The Association of Police and Crime Commissioners, The Police and Crime Commissioner Guidance: The role and responsibilities of PCCs (2024), pp.37-38, (available online at: https://www.apccs.police.uk/media/9600/apcc_police_and_crime_commissioner_guidance_-_the_role_and_responsibilities_of_pccs.pdf).

[13] McInnes v HM Advocate [2010] UKSC 7, at [5] (Lord Hope).

[14] Scotland Act 1998, Schedule 6, para 13(a), as amended. Criminal Procedure (Scotland) Act 1995, s.124(2), as amended. Once the compatibility issue is resolved, the Supreme Court must remit the case back for disposal, meaning that the High Court of Justiciary remains the final court of appeal for all criminal matters in Scotland.

[15] The UK tribunal system is largely arranged on a two-tier basis. The First-tier Tribunal comprises several 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, appeals generally go 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 Appeals Tribunal and the Competition Appeal Tribunal, make up separate jurisdictions which exist outside the two-tier structure.

Chapter 2

[1] Locke, Second Treatise of Government (1689), chap. XVIII, s.202.

[2] Bingham, The Rule of Law (2010), p. 9.

[3] Neuberger, Tom Sargant Memorial Lecture 2013: Justice in an Age of Austerity (15 October 2013).

[4] Bingham, The Rule of Law (2010), p. 8.

[5] European Commission for Democracy through Law (Venice Commission), Report on the Rule of Law (4 April 2011).

[6] Gouriet v Union of Post Office Workers [1977] 2 WLR 310 at [331].

[7] See European Commission for Democracy through Law (Venice Commission), Report on the Rule of Law (4 April 2011), p. 10.

[8] Entick v Carrington [1765] EWHC KB J98.

[9] Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591 at [638].

[10] R v Secretary of State for the Home Department ex p. Leech [1993] 3 WLR 1125, at [210].

[11] ‘English translation of Magna Carta’ (British Library, 2014), art. 40.

[12] 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.

[13] Lord Bingham, The Rule of Law (2010), p. 84.

[14] R (Secretary of State for The Home Department) ex parte Khawaja [1983] 2 WLR 321 at [1134].

[15] Buckland, “The model of a modern solicitor general: thoughts on the constitution in the time of Brexit”, (Politeia, 2017).

[16] A v Secretary of State for the Home Department (‘Belmarsh’) [2004] UKHL 56 at [237].

Chapter 3

[1] UK Parliament website, How does a bill become a law?, available online at: https://www.parliament.uk/about/how/laws/passage-bill/. See also the Cabinet Office guide to Making Legislation, available online at: https://www.gov.uk/government/publications/guide-to-making-legislation.

[2] 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.

[3] Hansard Society, Coronavirus Statutory Instruments Dashboard, 2020-2022, available online at: https://www.hansardsociety.org.uk/publications/data/coronavirus-statutory-instruments-dashboard#which-parliamentary-scrutiny-procedures-applied-to-the-c.

[4] Hansard Society, Coronavirus Statutory Instruments Dashboard, 2020-2022, available online at: https://www.hansardsociety.org.uk/publications/data/coronavirus-statutory-instruments-dashboard#which-parliamentary-scrutiny-procedures-applied-to-the-c.

[5] The Constitution Committee, ‘Delegated Legislation and Parliament: A response to the Strathclyde Review’, (2016), available online at: https://publications.parliament.uk/pa/ld201516/ldselect/ldconst/116/116.pdf. There were still only 17 rejections as of September 2023.

[6] Adler v George [1964] 2 QB 7.

[7] R (on the application of O (a minor, by her litigation friend AO)) v Secretary of State for the Home Department [2022] UKSC 3.

[8] Pepper v Hart [1993] AC 593.

[9] Wilson v First County Trust (No.2) [2003] UKHL 40, at [66].

[10] Thoburn v Sunderland City Council [2002] EWHC 195 Admin. at [62].

[11] R v Secretary of State for the Home Department Ex p Pierson [1998] AC 539, 575.

[12] And in relation to Acts of the Scottish Parliament a duty to interpret them compatibly with certain parts of the United Nations Convention on the Rights of the Child: United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2014.

[13] European Withdrawal Act 2018, s5(A1)), 5(7), s7A and s7C; See also SSWP v AT [2023] EWCA Civ 1307 at [83] - [92].

[14] European Withdrawal Act 2018, s5(A2).

[15] European Withdrawal Act 2018, s5(A3); Retained EU Law (Revocation and Reform) Act 2023, s22(3).

[16] Donoghue v Stevenson [1932] AC 562.

[17] R v R [1992] 1 AC 599.

[18] House of Lords' Practice Statement of 26 July 1966 (Practice Statement (Judicial Precedent) [1966] 1 WLR 1234).

[19] Re Dalton for Judicial Review (Northern Ireland) [2023] UKSC 36.

Chapter 4

[1] In Scotland some purely private bodies including sporting associations like the Scottish Football Association are also subject to judicial review.

[2] R v Somerset County Council and ARC Southern Ltd, ex p Dixon [1998] Env LR 111.

[3] Known as 'reducing' in Scotland.

[4] In re Northern Ireland Human Rights Commission and JR 295 (Illegal Migration Act 2023) [2024] NIKB 35.

[5] Section 84 of the Criminal Justice and Courts Act 2015, amending section 31 of the Senior Courts Act 1981.

[6] See https://www.gov.uk/immigration-asylum-tribunal.

[7] See https://www.gov.uk/appeal-benefit-decision.

[8] See https://www.gov.uk/appeal-ehc-plan-decision.

[9] See https://www.gov.uk/tax-tribunal.

[10] 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.

[11] Joint Committee on Human Rights, Legislative Scrutiny: Judicial Review and Courts Bill, "Chapter 4: Ouster Clauses", available online at: https://publications.parliament.uk/pa/jt5802/jtselect/jtrights/884/88407.htm; R v Secretary of State for the Home Department Ex p Pierson [1998] AC 539, 575.

[12] R (on the application of Privacy International) v Investigatory Powers Tribunal and others [2019] UKSC 22, at [144].

[13] Bromley London Borough Council v Greater London Council [1983] 1 AC 768.

[14] R v Secretary of State for the Home Department Ex p. Simms [2000] 2 AC 115.

[15] Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223.

[16] Council of Civil Service Unions and Others v Minister for the Civil Service Respondent [1985] A.C. 374 (Lord Diplock).

[17] Re School and Nursery Milk Alliance Ltd [2022] CSOH 11.

[18] AG of Hong Kong v Ng Yuen Shiu [1983] 2 AC 629 at p.638.

[19] Southey, Weston and Bunting, Judicial Review: A Practical Guide, 3rd Edn (2017), p.50 citing R v Gough [1993] AC 646 at p.661G.

[20] [2000] 1 AC 119. This case is considered further in Chapter 2.

[21] R v North and East Devon Health Authority (ex parte Coughlan) [2001] QB 213.

[22] Pham v Secretary of State for the Home Department [2015] UKSC 19.

[23] S31(3), Senior Courts Act 1981.

[24] For example, R v Secretary of State for Trade and Industry ex p Greenpeace Ltd [2000] 2 CMLR 94.

[25] R v Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617 at 633D.

[26] R v Somerset County Council and ARC Southern Ltd, ex p Dixon [1998] Env LR 111; R (on the application of (1) Good Law Project Limited (2) Runnymede Trust) v (1) The Prime Minister (2) Secretary of State for Health and Social Care [2022] EWHC 298 (Admin).

[27] R (on the application of London Borough of Lewisham and another) v Secretary of State for Health and another [2013] EWHC 2381 (Admin).

[28] R (on the application of (1) Good Law Project Limited (2) Runnymede Trust) v (1) The Prime Minister (2) Secretary of State for Health and Social Care [2022] EWHC 298 (Admin).

[29] In R (on the application of AAA and others) v Secretary of State for the Home Department [2023] UKSC 42, which challenged the UK Government's decision to enter into arrangements with Rwanda for the processing of asylum claims, the Supreme Court determined that the arrangements were unlawful on the basis of evidence provided by the United Nations High Commissioner for Refugees (as intervener) about the status of Rwanda's asylum processes and treatment of asylum seekers at the time of the Government's decision.

[30] It is not formally required for judicial reviews brought in the Court of Session in Scotland.

[31] In Scotland there is no 'promptness' requirement but there is a three month time limit. See s27A, Court of Session Act 1988.

[32] 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.

[33] CPR 54.4 and s27B Court of Session Act 1988.

[34] R v Inland Revenue Commissioners ex p National Federation of Self-Employed and Small Business Ltd [1982] AC 617 at p.643 (Lord Diplock).

[35] The process and the test are slightly different in Scotland.

[36] Southey, Weston and Bunting, Judicial Review: A Practical Guide, 3rd Edn (2017), p.164. For Scotland see Drummond, McCartney & Poole, A Practical Guide to Public Law Litigation in Scotland (2020).

[37] CPR 44.3(2).

[38] Known as 'reducing' in Scotland.

[39] An order for specific performance in Scotland.

[40] A 'declarator' in Scotland.

[41] R (National Council for Civil Liberties) v SSHD and others [2018] EWHC 975 (Admin) at para 52.

[42] The position is different in Scotland where the Court of Session can award damages in judicial review proceedings.

[43] O'Neill, Judicial Review in Scotland, in Supperstone, Goudie, Walker and Fenwick (eds.), Judicial Review, 7th Edn (2024), para.22.1. See also, for example, in Re Board of Governors of Loreto Grammar School's Application for Judicial Review [2011] NIQB 30.

[44] See section 89 of the Courts Reform (Scotland) Act 2014.

[45] For more information see West v Secretary of State for Scotland [1992] SC 385.

[46] Anthony, Devolution, in Supperstone, Goudie, Walker and Fenwick (eds.), Judicial Review, 7th Edn (2024), para.21.7

[47] Robinson v Secretary of State for Northern Ireland [2002] UKHL 32.

[48] Re McComb's Application for Judicial Review [2003] NIQB 47.

[49] For a summary of judicial review in Northern Ireland, see Dickson, Law in Northern Ireland, 4th Edn (2023) at pp.148-152.

Chapter 5

[1] See for example Independent Human Rights Act Review findings in Human Rights Act Reform: A Modern Bill of Rights available online at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1084540/modern-bill-rights-consultation-response.pdf).

[2] The Equality Act 2010 does not apply in Northern Ireland.

[3] 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.

[4] Kennedy v The Charity Commission [2014] UKSC 20, at [46] (Lord Mance).

[5] A v BBC [2014] UKSC 23, at [56] and [57] (Lord Reed).

[6] R v Secretary of State for the Home Department Ex p. Simms [2000] 2 AC 115.

[7] R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51.

[8] 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.

[9] Tryer v UK (application No. 5856/72).

[10] Smith and Grady v the United Kingdom [2000] 29 EHRR 493.

11 Michael and others v The Chief Constable of South Wales Police & Anor [2015] UKSC 2.

[12] For further reading, see Blackstone's Guide to the Human Rights Act 1998 (7th Edn, 2015).

[13] Schedule 1, Parts 1 and 2 HRA.

[14] R (on the application of T and another) v Secretary of State for the Home Department and another [2014] UKSC 35, at [26].

[15] Commissioner of Police of the Metropolis v DSD [2018] UKSC 11.

[16] Z & Others v United Kingdom [2001] ECHR 333.

[17] Redmond Bate v. Director of Public prosecutions [1999] EWHC Admin 733, at [20]

[18] 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 Convention, Liberty and others intervened in the case (Eweida and others v the United Kingdom [2013] 57 EHRR 8).

[19] Article 15(1) ECHR. See also s14 HRA.

[20] Article 15(2) ECHR.

[21] 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.

[22] A and others v East Sussex County Council and another [2003] EWHC 167 (Admin).

[23] R (on application of HC) v Secretary of State for the Home Department and another [2013] EWHC 982 (Admin).

[24] R (on the application of Vanriel & Tumi) v SSHD [2021] EWHC 3415.

[25] S6 HRA.

[26] YL v Birmingham City Council [2007] UKHL 27. See also Weaver v London & Quadrant Housing Trust [2009] EWCA Civ 587 (social housing) and R (on the application of A) v Partnerships in Care Ltd [2002] 1 WLR 2610 (publicly funded mental health care in a private facility).

[27] S3 HRA.

[28] R (on the application of O (a minor, by her litigation friend AO)) v Secretary of State for the Home Department [2022] UKSC 3; R (on the application of The Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department [2022] UKSC 3 (Lord Hodge).

[29] Warren v Care Fertility [2014] EWHC 602 (Fam).

[30] Justice, The Independent Human Rights Act Review Call for Evidence - Response" March 2021, available online at: https://files.justice.org.uk/wp-content/uploads/2021/03/08164531/Response-to-IHRAR-March-2021.pdf.

[31] S4 HRA.

[32] As of July 2023, there have been 47 declarations of incompatibility. 45 of these had been fully addressed meaning they are no longer subject to appeal, and 2 were ongoing. See Responding to human rights judgments Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2022–2023, Ministry of Justice (November 2023): https://assets.publishing.service.gov.uk/media/654cf01c014cc9000d677371/responding-human-rights-judgments-2022_2023.pdf.

[33] S10 HRA.

[34] S19 HRA.

[35] See online at: https://committees.parliament.uk/committee/93/human-rights-joint-committee/work/inquiries/

[36] For further reading, see Harris, O'Boyle and Warbrick, Law of the European Convention on Human Rights (4th Edn. 2018).

[37] However, it should not be ignored that each human rights treaty is stand alone, therefore it is possible that the UK has agreed to be bound by rights it has rejected in one treaty, through its ratification of another international treaty. Thus, when considering human rights compliance, the full array of human rights treaties that the UK has ratified should be considered.

[38] Al-Skeini v the United Kingdom [2011] ECHR 1093.

[39] Art. 46 ECHR.

[40] UK in a Changing Europe, Compliance with the European Convention on Human Rights: the UK and Europe, May 2023 https://ukandeu.ac.uk/explainers/compliance-with-the-european-convention-on-human-rights/.

[41] Manchester City Council v Pinnock [2010] UKSC 45 at [48] (Lord Neuberger).

[42] R v Horncastle [2009] UKSC 14.

[43] Hutchinson v the United Kingdom [2016] ECHR 021.

[44] Maymulakhin and Markiv v Ukraine [2023] ECHR.

[45] Mathieson v Secretary of State for Work and Pensions [2015] UKSC 47.

[46] See for example Henrietta Muir Edwards and Others Appellants v Attorney-General for Canada and Others Respondents [1930] A.C. 124.

[47] Pretty v the United Kingdom [2002] 35 EHRR 1.

[48] 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.

[49] Axa General Insurance Ltd v HM Advocate [2012] 1 AC 868, at [136]-[141] (Lord Reid). See s6(2) Northern Ireland Act 1998.

[50] S57(2) Scotland Act 1998.

[51] 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."

[52] 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."

[53] More information about both of these bodies can be found online: The Northern Ireland Human Rights Commission is available online at: http://www.nihrc.org/about-us/who-we-are, and the Equality Commission for Northern Ireland available online at: http://www.equalityni.org/HeaderLinks/About-Us.

[54] NIHRC/ECNI working paper : NI Human Rights Commission and Equality Commission for NI, 'Working Paper: Scope of Article 2(1) of the Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement 2020' (NIHRC and ECNI, 2022).

[55] Article 2(1) Protocol on Ireland/ Northern Ireland (2021).

[56] Decision No 1/2023 of the Joint Committee established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 24 March 2023 laying down arrangements relating to the Windsor Framework.

[57] Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 24 January 2020.

[58] IHRC and ECNI Working Paper: The Scope of Article 2(1) of the Ireland/Northern Ireland Protocol | Northern Ireland Human Rights Commission, available at: https://nihrc.org/publication/detail/nihrc-and-ecni-working-paper-the-scope-of-article-21-of-the-ireland-northern-ireland-protocol.

[59] The Scottish Human Rights Commission website provides helpful information on its duties and history, available online at http://www.scottishhumanrights.com/. Scotland's National Action Plan for human rights is available online at: https://www.snaprights.info

[60] 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.

[61] 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

[62] Coleman v Attridge Law [2008] All ER (D) 245.

[63] Mandla v Lee [1983] 2 WLR 620.

[64] Traveller Movement and others v JD Wetherspoon PLC [2015] 5 WLUK 440.

[65] Hall v Bull [2013] UKSC 73.

[66] R (on the application of Rowley) v Minister for the Cabinet Office [2021] EWHC 2108; AECOM Ltd v Mallon [2023] EAT 104.

[67] s15 Equality Act 2010.

[68] Part 5 Equality Act 2010.

[69] Dumfries and Galloway v North [2013] UKSC 45.

[70] Asda Stores Ltd v Brierley and others [2021] UKSC 10.

[71] s149 Equality Act 2010.

[72] 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.

[73] Equality Commission for Northern Ireland: Equality Commission for NI, 'The need for a NI Single Equality Act: Policy Position Paper' (ECNI, 2022). Available here: https://www.equalityni.org/ECNI/media/ECNI/Publications/Delivering%20Equality/SingleEqualityAct-ECNI-PolicyPosition-2022.pdf

[74] Full details on the Speaker's Conference on Parliamentary Representation are available online at: https://publications.parliament.uk/pa/spconf/239/239i.pdf.

[75] Joint Committee on Human Rights, Eleventh Report of Session 2019-21: Black People, Racism and Human Rights (2020), HL 165 / HC 559., available online at: https://committees.parliament.uk/publications/3376/documents/32359/default/

[76] House of Commons Women and Equalities Committee, Fourth Report of Session:2023-24 Accessibility of Products and Services to Disabled People (2024), HC605, available online at: https://committees.parliament.uk/publications/43831/documents/217608/default/

Chapter 6

[1] Constitutional Reform and Governance Act 2010, s20(1). See also, Part 2 Constitutional Reform and Governance Act 2010.

[2] Constitutional Reform and Governance Act 2010, s20 and 22.

[3] Commissioner for Older People Act (Northern Ireland) 2011 s2(3)(a-b).

[4] Justice (Northern Ireland) Act 2004 s8.

[5] Ymwchil y Senedd | Senedd Research, Wales, devolution and international obligations, available online at https://research.senedd.wales/research-articles/wales-devolution-and-international-obligations/; Welsh Government annual report 2023, available online at: https://www.gov.wales/equality-welsh-government-annual-report-2023-html.

[6] Scotland Act 1998, s58; Northern Ireland Act 1998, s26; and Government of Wales Act 2006, s82.

[7] Scotland Act 1998, s.35; Northern Ireland Act 1998, s.14(5)(a); and Government of Wales Act 2006, s114(1)(d).

[8] See Chapter 2.

[9] Although they tend to follow international consensus when doing so, see Lord Hope in R v Asfaw [2008] UKHL 31, at [53].

[10] P v Cheshire West and Chester Council & Anor [2014] UKSC 19, at [32].

[11] 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.

[12] Equality and Human Rights Commission, The United Nations Convention on the Rights of People with Disabilities: What does it mean for you?, available online at: https://www.equalityhumanrights.com/sites/default/files/uncrpdguide_0.pdf.

[13] P v Cheshire West and Chester Council & Anor [2014] UKSC 19, at [36].

[14] 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.

[15] HH v Deputy Prosecutor of the Italian Republic; F-K (FC) v Polish Judicial Authority [2012] UKSC 25, at [98]. The UNCRC has been given substantially greater force in relation to Scottish public bodies and Acts of the Scottish Parliament by the United Nations Convention on the Rights of the Child (Incorporation) Scotland Act 2024.

[16] Children Act 2004, s2(11).

[17] 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.

[18] Lord Advocate's Reference (No.1 2000) [2001] S.C.C.R. 296, at [23].

[19] R v Jones & Ors [2006] UKHL 16 at [27-31] (Lord Bingham); R (Abassi) v. Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ. 1598, at [85]; and R (Al Rabbat) v Westminster Magistrates' Court [2017] EWHC 1969 (Admin), at [19].

[20] Available online at: https://publications.parliament.uk/pa/cm199900/cmselect/cmfaff/28/2813.htm

Chapter 7

[1] http://find-legal-advice.justice.gov.uk/ (England & Wales), https://www.slab.org.uk/new-to-legal-aid/find-a-solicitor/ (Scotland), https://www.lawsoc-ni.org/solicitors (Northern Ireland).

[2] https://www.gov.uk/check-legal-aid.

[3] https://www.slab.org.uk/new-to-legal-aid/eligibility-estimators/estimator-civil-legal-aid/.

[4] With some limited exceptions, such as libel and defamation claims.

[5] Unlike in England, where all types of legal assistance for civil disputes are grouped together under the heading 'legal aid'.

[6] At www.slab.org.uk and www.nidirect.gov.uk/legal-aid respectively.

[7] They do not help with: wills and probate; personal injury claims; or traffic or parking offences.

[8] https://www.gov.uk/find-an-immigration-adviser.

[9] https://erskinemay.parliament.uk/section/6396/speakers-counsel.

[10] Assesses EU documents which fall within the scope the Windsor Framework (formerly the Northern Ireland Protocol) to the UK/EU Withdrawal Agreement and looks at UK/EU relations and affairs.

[11] Considers proposed negative statutory instruments used to make revisions to the law as part of the UK withdrawal from the EU.

This JUSTICE project has been kindly supported by

A&O SHEARMAN