CHAPTER 22

The judiciary

Philip Norton

> "Anybody who has the law on his side has the judges on his side. Whatever defects there may be in the law, the citizen is assured that it will be administered freely and fairly, without favour and without fear"
>
> Sir Ivor Jennings (1967: 147)

Learning objectives

- To identify the relationship of the judicial system to other parts of the political process.
- To describe the basic structure of that system, and how it has changed in recent years as a result of a greater willingness of judges to undertake judicial review, and as a consequence of constitutional change.
- To consider demands for change because of perceived weaknesses in the system.

Introduction

Britain does not have a system like the USA, where the Supreme Court acts as ultimate interpreter of the constitution and pronounces upon the constitutionality of federal and state laws together with the actions of public officials. Since 1688 British courts have been bound by the doctrine of parliamentary sovereignty. They have been viewed as subordinate to the Queen-in-Parliament and detached from the political process. However, the received wisdom has not always matched the reality, and recent years have witnessed a growth in judicial activism. British membership of the European Union added a significant juridical dimension to the constitution. That dimension has been enhanced by the incorporation of the European Convention on Human Rights (ECHR) into British law and legislation providing for devolution of powers to elected bodies in different parts of the United Kingdom. The UK has also acquired a Supreme Court, which came into being in October 2009, replacing the appellate committee of the House of Lords as the highest domestic court of appeal. The United Kingdom now has a court that has a physical similarity to, though not the powers of, its US namesake. The courts have become important political actors. Recent years have also seen criticism of the way the courts dispense justice. This chapter explores the nature of the British judicial system and growing concern about its powers and competence.

The judicial process

The literature on the judicial process in Britain is extensive. Significantly, most of it is written by legal scholars: few works on the courts or judges come from the pens of political scientists. To those concerned with the study of British politics, and in particular the process of policy making, the judicial process has generally been deemed to be of peripheral interest.

That this perception should exist is not surprising. It derives from two features that are considered to be essential characteristics of the judiciary in Britain. First, in the trinity of the executive, legislature and judiciary, it is a subordinate institution. Public policy is made and ratified elsewhere. The courts exist to interpret (within defined limits) and apply that policy once enacted by the legislature; they have no intrinsic power to strike it down. Second, it is autonomous. The independence of the judiciary is a much vaunted and essential feature of the rule of law, described by the great nineteenth-century constitutional lawyer A.V. Dicey as one of the twin pillars of the British constitution. The other pillar – parliamentary sovereignty – accounts for the first characteristic, the subordination of the judiciary to Parliament. Allied with autonomy has been the notion of political neutrality. Judges seek to interpret the law according to judicial norms that operate independently of partisan or personal preferences.

Given these characteristics – politically neutral courts separate from, and subordinate to, the central agency of law enactment – a clear demarcation has existed for some time, the study of the policy-making process being the preserve of political scientists, that of the judiciary the preserve of legal scholars. Some scholars – such as the late J.A.G. Griffith, Professor of Law at the University of London – have sought to bridge the gap, but they have been notable for their rarity. Yet in practice the judiciary in Britain has not been as subordinate or as autonomous as the prevailing wisdom assumes. The dividing line between politics and the law is blurred rather than rigid, and it is becoming more blurred.

A subordinate branch?

Under the doctrine of parliamentary sovereignty, the judiciary lacks the intrinsic power to strike down an Act of Parliament as being contrary to the provisions of the constitution or any other superior body of law. It was not always thus. Prior to the Glorious Revolution of 1688 the supremacy of statute law was not clearly established. In *Dr Bonham's Case* in 1610, Chief Justice Coke asserted that 'when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void'. A few years later, in *Judge v Savadge* (1625), Chief Justice Hobart declared that an Act 'made against natural equity, as to make a man judge in his own case' would be void. Statute law had to compete not only with principles of common law developed by the courts but also with the prerogative power of the King. The courts variously upheld the power of the King to dispense with statutes and to impose taxes without the consent of Parliament.

The Glorious Revolution put an end to this state of affairs. Thereafter, the supremacy of statute law, under the doctrine of parliamentary sovereignty, was established. The common lawyers allied themselves with Parliament in its struggle to control the prerogative powers of the King and the prerogative courts through which he sometimes exercised them. The supremacy of Parliament was asserted by the Bill of Rights of 1689. 'For the common lawyers, there was a price to pay, and that was the abandonment of the claim that they had sometimes advanced, that Parliament could not legislate in derogation of the principles of the common law' (Munro 1987: 81). Parliamentary sovereignty – a purely legal doctrine asserting the supremacy of statute law – became the central tenet of the constitution (see Chapter 14). However, the subordination of the common law to law passed by Parliament did not – and does not – entail the subordination of the judiciary to the executive. Courts retain the power of interpreting the precise meaning of the law once passed by Parliament and of reviewing the actions of ministers and other public agents to determine whether those actions are *ultra vires*: that is, beyond the powers granted by statute. The courts can quash the actions of ministers that purport to be, but that on the court's interpretation are not, sanctioned by such Acts.

If a government has a particular action struck down as *ultra vires*, it may seek parliamentary approval for a bill that gives statutory force to the action taken; in other words, to give legal force to that which the courts have declared as having – on the basis of existing statutes – no such force. But seeking passage of such a bill is not only time-consuming; it can also prove to be politically contentious and publicly damaging. It conveys the impression that the government, having lost a case, is trying to change the rules of the game. Although it is a path that governments have variously taken, it is one they prefer to – and often do – avoid.

The power of judicial review thus provides the judiciary with a potentially significant role in the policy cycle. It is a potential that for much of the twentieth century was not realised. However, recent decades have seen an upsurge in judicial activism, judges being far more willing both to review and to quash ministerial actions. The scope for judicial activism has also been enlarged over time by three other developments: British membership of the European Union, the incorporation of the European Convention on Human Rights (ECHR) into British law and the devolution of powers to elected assemblies in different parts of the UK. Whether they wanted to or not, the courts now find themselves playing a more central role in the determination of public policy. That role is likely to become more visible now that there exists a dedicated Supreme Court, housed in its own building in Parliament Square.

An autonomous branch?

The judiciary is deemed to be independent of the other two branches of government. Its independence is recognised in statute. The principal protection of the judiciary against encroachment by the executive was traditionally deemed to lay in the form of the Lord Chancellor, who could intervene in Cabinet if there were moves to threaten the independence of judges. Although the holder was a senior lawyer, and held the authority of an ancient office, much depended on the individual authority and willingness to act by the holder of the office. When the office of Lord Chancellor was reformed under the terms of the Constitutional Reform Act 2005, provisions were inserted in the Act to impose on ministers a duty 'to uphold the continued independence of the judiciary', with a particular obligation being placed on the Lord Chancellor to defend that independence.

Recognition of the need to protect the independence of the judiciary is longstanding. Since the Act of Settlement, senior judges hold office 'during good behaviour' and can be removed by the Queen following an address by both Houses of Parliament (see Jackson and Leopold 2001: 433–4). (Only one judge has ever been removed by such a process. Jonah Barrington, an Irish judge, was removed in 1830 after it was found that he had misappropriated litigants' money and had ceased to perform his judicial duties.) Judges of inferior courts enjoy a lesser degree of statutory protection. Judges' salaries are a charge upon the consolidated fund: this means that they do not have to be voted upon each year by Parliament. By its own resolution, the House of Commons generally bars any reference by MPs to matters awaiting or under adjudication in criminal and most civil cases. By convention, a similar prohibition is observed by ministers and civil servants.

For their part, judges by convention refrain from politically partisan activity. Indeed, they have generally refrained from commenting on matters of public policy, doing so not only of their own volition but also for many years by the direction of the Lord Chancellor. The Kilmuir guidelines issued in 1955 enjoined judges to silence, since 'every utterance which he [a judge] makes in public, except in the course of the actual performance of his judicial duties, must necessarily bring him within the focus of criticism'. These guidelines were relaxed in the late 1970s but then effectively reimposed by the Lord Chancellor, Lord Hailsham, in 1980. For judges to interfere in a contentious issue of public policy, one that is not under adjudication, would – it was felt – undermine public confidence in the impartiality of the judiciary. Similarly, for politicians to interfere in a matter before the courts would be seen as a challenge to the rule of law. Hence the perceived self-interests of both in confining themselves to their own spheres of activity.

However, historically the dividing line between judges and politicians – and, to a lesser extent, between judicial and political decision making – is not quite as sharp as these various features would suggest. In terms of personnel, memberships of the executive, legislature and judiciary are not mutually exclusive. Particularly in the higher reaches, there has been some overlap, though the degree of overlap has declined considerably in the twenty-first century. The most obvious and outstanding historical example of overlap is to be found in the figure of the Lord Chancellor. Prior to the passage of the Constitutional Reform Act 2005, he was head of the judiciary, the presiding officer of the House of Lords and a member of the Cabinet. The 2005 Act changed this situation, providing for the transfer of his judicial role to the Lord Chief Justice – the transfer took place in 2006 – and enabling someone other than a peer and senior lawyer to hold the post. The post of Lord Chancellor remains, as a conjoined role with that of Secretary of State for Justice, and has responsibility for the management of the courts system.

Other executive office holders with judicial appointments are the Law Officers: the Attorney General and the Solicitor General. They serve as legal advisers to the government and lead for the Crown in major prosecutions, especially where state security is concerned. The consent of the Attorney General is required for certain prosecutions to be launched. Within government the legal opinion of the Law Officers carries great weight and, by convention, is treated in confidence.

The highest court of appeal in the United Kingdom was, until 2009, the House of Lords (see Blom-Cooper, Dickson and Drewry 2009). For judicial purposes, this constituted an appellate committee of the House, comprising the law lords – appointed to the House for the purpose of fulfilling its judicial functions – and peers who had held high judicial office. Some Members of Parliament serve or have served as recorders (part-time but salaried judges in the Crown Court) and several sit as local magistrates. Judges in the High Court, Court of Appeal and Court of Session are barred by statute from membership of the Commons, and any MP appointed to a judgeship becomes ineligible to remain in the House. In 2009 the prohibition was extended to the House of Lords, so that some peers who were senior judges, such as the Lord Chief Justice, were excluded from membership for the period that they held judicial office (Gee, Hazell, Malleson and O'Brien 2015: 97).

Although those holding political office seek as far as possible to draw a clear dividing line between political and judicial activity, it is a line that cannot always be maintained.

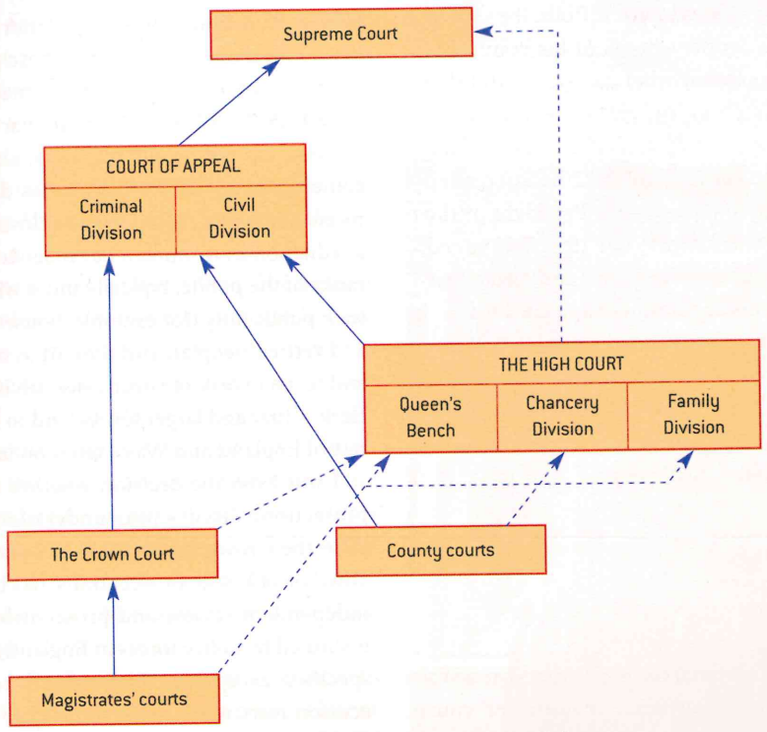
At times, they have to take judicial or quasi-judicial decisions. However, they remain members of an executive accountable, unlike judges, to Parliament. This remains the case with the Law Officers. (There are separate law officers for Scotland.) It used to be the case also with the Lord Chancellor and, to some extent, the Home Secretary, who exercised quasi-judicial functions, but the functions involved in both cases have now been transferred to the courts. The Attorney General may intervene to prevent prosecutions being proceeded with if he considers such action to be in the public interest. Under powers introduced in 1989 he may refer to the Appeal Court sentences that appear to the prosecuting authorities to be unduly lenient. He also has responsibility in certain cases for initiating proceedings, for example under the Official Secrets Act, and although he takes decisions in such matters independently of government colleagues, he remains answerable to Parliament for his decisions. These powers, along with the Attorney General's role as legal adviser to the government, can bring the Law Officers into the realms of political controversy. This was the case most notably with the Attorney General's advice to the Government in 2003 that it was lawful for it to commit troops to the invasion of Iraq. Some lawyers questioned the legality of the war, and rumours that the Attorney's advice as to its legality had been modified generated demands that it be published – the advice is normally confidential – and led eventually to it being put in the public domain.

Judges themselves do not completely stand apart from public controversy. Because they are detached from political life and can consider issues impartially, they are variously invited to chair public inquiries into the causes of particular disasters or scandals and to make recommendations on future action. This practice has been employed for many years. Examples of inquiries headed by judges or retired judges have included the inquiries into the collapse of the BCCI bank (Sir Thomas Bingham, 1991), into standards in public life (Lord Nolan, 1995), into the sale of arms-making equipment to Iraq (Sir Richard Scott, 1996), into the police handling of the murder of black teenager Stephen Lawrence (Sir William Macpherson of Cluny, 1999), into the death of Dr David Kelly (Lord Hutton, 2003–4), into the shootings during 'Bloody Sunday' in Northern Ireland (Lord Saville of Newdigate, 2000–10) and into the ethics of the press (Lord Justice Leveson 2011–2). In 2017, following a major fire in a tower block in London, with extensive loss of life, an inquiry led by former Court of Appeal judge, Sir Martin Moore-Bick, was immediately announced.

The inquiries or the reports that they issue are often known by the name of the judge who led the inquiry (the Nolan Committee, the Scott Report, the Hutton Report, the Leveson Report). The reports are sometimes highly controversial and may lead to criticism of the judge involved (see McEldowney 1996: 138). One irate Conservative MP berated Lord Nolan outside the Palace of Westminster in 1995, and his report was the subject of heated debate in the House of Commons. Sir Richard Scott was heavily criticised by many Conservative MPs and by a former Foreign Secretary, Lord Howe of Aberavon, for the way he conducted his inquiry. Lord Hutton's report, which led to the resignation of the director general of the BBC (Greg Dyke), was largely discredited when a subsequent report (the Butler Report) found that there had been significant changes to the government's dossier making the case for war with Iraq.

Judges themselves have also been more willing in recent years to enter public debate of their own volition. The past three decades have seen a tendency on the part of several judges to justify their actions publicly. In 1988 Lord Chancellor Mackay allowed some relaxation of the Kilmuir rules in order that judges may give interviews. One judge in particular – Judge Pickles – made use of the opportunity to appear frequently on television. A greater willingness to comment on issues of public policy has also been apparent on the part of the most senior judges. The appointment of Lord Justice Bingham as Master of the Rolls and Lord Justice Taylor as Lord Chief Justice in 1992 heralded a new era of openness. Both proved willing to express views on public policy, both advocating the incorporation of the European Convention on Human Rights into British law. Taylor not only gave press interviews but also used the floor of the House of Lords to criticise government policy. Their successors have maintained a similar degree of openness and this to some degree has become institutionalised: the Lord Chief Justice now publishes an annual report and usually appears annually before the Constitution Committee of the House of Lords to discuss any issues of concern. The committee 'has evolved into an indispensable venue for institutional dialogue with the judiciary' (see Gee, Hazell, Malleson and O'Brien 2015: 113). In 2017, the Lord Chief Justice, Lord Thomas of Cwmgiedd, used his appearance to criticise the Lord Chancellor, Liz Truss, for failing to defend judges from press attack following the judgments in the *Miller* case (see below). The judges have also appointed a spokesperson who can respond to public concerns or media criticism and explain the role of judges in the judicial process.

Thus, although the two generalisations that the judiciary constitutes a subordinate and autonomous branch of government – subordinate to the outputs of Parliament (Acts of Parliament) but autonomous in deciding cases – remain broadly correct, both are in need of some qualification. The courts are neither as powerless nor as totally independent as the assertion would imply. For the student of politics, the judiciary is therefore an appropriate subject for study. What, then, is the structure of the judicial system in Britain? Who are the people who occupy it? To what extent has the judiciary become more active in recent years in reviewing the actions of government? What has been the effect of membership of the EC/EU, the incorporation of the ECHR into British law, and of devolution? And what pressure is there for change?



Appeals possible to higher courts as shown by arrows, usually through the immediate superior court or, in certain cases (indicated by broken lines), through another route

Figure 22.1 The court system in England and Wales

The courts

Apart from a number of specialised courts and tribunals, the organisational division of courts is that between criminal law and civil law. The basic structure of the court system in England and Wales is shown in Figure 22.1 (Scotland and Northern Ireland have different systems.) Minor criminal cases are tried in the magistrates' courts, minor civil cases in county courts. Figure 22.1 also shows the higher courts that try serious cases and the routes through which appeals may be heard. The higher courts – the Crown Court, the High Court and the Court of Appeal – are known collectively, as the Senior Courts of England and Wales. At the head of the system stands the Supreme Court.

PROFILE

Lord Neuberger of Abbotsbury (1948–)

President of the Supreme Court (2012–7), the son of a professor of chemical pathology, David Neuberger studied chemistry at Oxford and worked for three years at the bankers N.M. Rothschild & Sons before being called to the Bar in 1974. He became a QC in 1987 and served as a Recorder from 1990 to 1996. He was a High Court Judge (Chancery Division) from 1996 to 2004. He was made a Lord Justice of Appeal in 2004 and became a Law Lord in 2007, making him the youngest member of the highest court. When the Supreme Court was created in 2009 – a move that he criticised (describing it 'as a result of what appears to have been a last-minute decision over a glass of whisky') – he moved from being

a Law Lord to serving as Master of the Rolls, the second highest judge in the country. Some of his comments attracted attention, including when he said in 2011 that social media sites (such as Twitter) were 'totally out of control' and society should consider ways to bring such websites under control. In 2012 he succeeded Lord Phillips of Worth Matravers as President of the Supreme Court. He was knighted in 1996 and joined the Privy Council in 2004: he became Lord Neuberger of Abbotsbury upon his appointment as a law lord.

Married – his wife is a TV producer and writer – with two sons and a daughter, he has been chair of the Schizophrenia Trust since 2003. His three brothers are all professors, and he is the brother-in-law of the rabbi and broadcaster Baroness Neuberger.

Criminal cases

More than 90 per cent of criminal cases in England and Wales are tried in one of approximately 330 magistrates' courts. Each year, about 1.5 million cases are heard. The figure used to be higher, but fell as a result of the use of out-of-court resolutions, such as the use of cautions and fixed-penalty fines for summary motoring offences. Summary proceedings, which cover relatively minor offences and are dealt with entirely within the magistrates' courts, make up more than two-thirds of cases. (Others include 'either way' offences, which can be dealt with either by magistrates or the Crown Court.) The courts have power to levy fines, the amount depending on the offence, and to impose prison sentences not exceeding six months for a single offence (or twelve months in total). The largest single number of cases tried by magistrates' courts constitute motoring offences. They comprise about 500,000 cases a year. Other offences tried by the courts range from allowing animals to stray onto a highway and tattooing a minor to burglary, assault, causing cruelty to children and wounding. On average it takes over 150 days from commission of an offence to completion of a case. (In the second quarter of 2015, it was 155 days; in the second quarter of 2016, it was 164 days.) Once before a court, a majority of minor offences are each disposed of in a matter of minutes; in some cases, in which the defendant has pleaded guilty, in a matter of seconds.

Magistrates themselves are of two types: professional and lay. Professional magistrates are legally qualified (usually barristers or solicitors prior to appointment) and are now known, under the provisions of the 1999 Access to Justice Act, as district judges (magistrates' courts); they were previously known as stipendiary magistrates. There are approximately 140 district judges and 170 deputy district judges; the former are full-time whereas the latter are fee-paid and sit for a minimum of 15 days a year. These professional magistrates sit alone when hearing cases. Lay magistrates, of whom there were 17,552 on 1 April 2016, are part-time and, as the name implies, are not legally qualified, although they do receive some training. Their number has declined significantly in recent years as a result of court closures, bench mergers and a reduction in workload. Lay magistrates are drawn from the ranks of the public, typically those with the time to devote to such public duty (for example, housewives, local professional and retired people), and they sit as a bench of between two and seven in order to hear cases, advised by a legally qualified clerk. Cities and larger towns tend to have district judges; the rest of England and Wales relies on lay magistrates.

Until 1986 the decision whether to prosecute – and the prosecution itself – was undertaken by the police. Since 1986 the Crown Prosecution Service (CPS), headed by the Director of Public Prosecutions, has been responsible for the independent review and prosecution of all criminal cases instituted by police forces in England and Wales, with certain specified exceptions. In Scotland, responsibility for prosecution rests with the Crown Office and Procurator Fiscal Service. Members of this service – like the CPS in England and Wales – are lawyers.

Appeals from decisions of magistrates' courts may be taken to the Crown Court or, in matrimonial cases, to the Family Division of the High Court, or – on points of law – to the Queen's Bench Division of the High Court. In practice, appeals are rare: just over 10,000 cases a year. The cost of pursuing an appeal would, in the overwhelming majority of cases, far exceed the fine imposed. The time of the Crown Court is taken up instead with hearing 'either way' offences and the serious cases – known as indictable offences – which are subject to a jury trial and to penalties beyond those that a magistrates' court can impose. In 2015, there were just over 57,000 'either way' cases and just over 30,000 indictable cases. Most, though, do not result in a trial, most defendants who enter a plea pleading guilty.

The Crown Court is divided into 92 courts. The most serious cases will be presided over by a High Court judge, the most senior position within the court; a circuit judge or a recorder will hear other cases. High Court and circuit judges are full-time, salaried judges; recorders are legally qualified but part-time, pursuing their normal legal practice when not engaged in court duties.

Appeals from conviction in a Crown Court may be taken on a point of law to the Queen's Bench Division of the High Court but usually are taken to the Criminal Division of the Court of Appeal. Appeals against conviction are possible on a point of law and on a point of fact, the former as a matter of right and the latter with the leave of the trial judge or the Court of Appeal. Only a minority of those convicted in the Crown Courts appeal and the number of appeals has decreased in recent years. In 2011–2 the Appeal Court Criminal Division received 7,442 applications and in 2015–6 it was 5,489. The court may quash a conviction, uphold it or vary the sentence imposed by the lower courts. Appeals against sentence – as opposed to the conviction itself – are also possible with the leave of the Appeal Court and, as we have already seen, the Attorney General now has the power to refer to the court sentences that appear to be unduly lenient. The number of cases referred in recent years has shown an increase. In cases referred by the Attorney General, the court has the power to increase the length of the sentence imposed by the lower court.

The Court of Appeal is divided into two divisions, the criminal and the civil. The court comprises the Lord Chief Justice, the Master of the Rolls, the three heads of each division of the High Court and 38 Lord Justices of Appeal. Appeals in criminal cases are usually heard by three judges, presided over by the Lord Chief Justice or a Lord Justice. Judges of the Queen's Bench may also sit on the court. Most appeals are against the sentence rather than against conviction.

From the Court of Appeal a further appeal is possible to the Supreme Court if the court certifies that a point of law of general public importance is involved and it appears to the court, or to the Supreme Court, that the point ought to be considered by the highest domestic court of appeal. Given this limited scope, the number of cases heard by the court is small. Between 1 April 2015 and 31 March 2016, 230 applications to appeal were received and 84 granted. During the year, 92 appeals were heard. The Supreme Court is presided over by a President and 11 Justices of the Supreme Court.

One other judicial body should also be mentioned. It does not figure in the normal court structure. That is the Judicial Committee of the Privy Council, essentially a product of the nation's colonial history. This committee was set up in 1833 to exercise the power of the Privy Council in deciding appeals from colonial, ecclesiastical and admiralty courts. It comprises usually three Justices of the Supreme Court and some other senior judges. Most of its functions have disappeared over time, though it has retained a limited role in considering particular appeals in certain cases from 29 overseas jurisdictions, such as Gibraltar, Jamaica and the Falklands Islands, and from certain ancient and ecclesiastical courts, including the Church Commissioners. It assumed a new – though, in the event, short-lived – significance as a consequence of devolution. Until 2009 legal challenges to the powers exercised by the devolved bodies were heard by the Judicial Committee. It lost these powers to the new Supreme Court. Five judges normally preside in cases involving appeals from Commonwealth courts and three in other cases. The court used to meet in Downing Street but now sits in the Supreme Court building in Parliament Square.

Figure 22.2 The Middlesex Guildhall, Supreme Court entrance

Source: David Levenson/Alamy Stock Photo

Civil cases

In civil proceedings some minor cases (for example, involving the summary recovery of some debts) are dealt with in magistrates' courts. However, most cases involving small sums of money are heard by county courts; more important cases are heard in the High Court.

County courts are presided over by circuit judges. The High Court is divided into three divisions, dealing with common law (the Queen's Bench Division), equity (Chancery Division) and domestic cases (Family Division). The Court comprises the three judges who head each division and judges known as 'puisne' (pronounced 'puny') judges. As of April 2017 there were 97 puisne judges. In most cases judges sit alone, although a Divisional Court of two or three may be formed, especially in the Queen's Bench Division, to hear applications for writs requiring a public body to fulfil a particular duty (*mandamus*), to desist from carrying out an action for which it has no legal authority (prohibition) or to quash a decision already taken (*certiorari*). Jury trials are

possible in certain cases tried in the Queen's Bench Division (for example, involving malicious prosecution or defamation of character) but are now rare.

Appeals from magistrates' courts and from county courts are heard by Divisional Courts of the High Court: appeals from magistrates' courts on points of law, for example, go to a Divisional Court of the Queen's Bench Division. From the High Court – and certain cases in county courts – appeals are taken to the Civil Division of the Court of Appeal. In the Appeal Court, cases are normally heard by the Master of the Rolls sitting with two Lords Justices of Appeal.

From the Court of Appeal an appeal may be taken – with the leave of the Court or the Supreme Court – to the Supreme Court. In rare cases, on a point of law of exceptional difficulty calling for a reconsideration of a binding precedent, an appeal may go directly, with the leave of the Supreme Court, from the High Court to the Supreme Court.

Cases brought against ministers or other public bodies for taking actions that are beyond their powers (*ultra vires*) will normally be heard in the Queen's Bench Division of the High Court before being taken – in the event of an appeal – to the Court of Appeal and the Supreme Court. The government has suffered a number of reverses in the High Court as a result of ministerial decisions being judicially reviewed.

Tribunals

Many if not most citizens are probably affected by decisions taken by public bodies – for example, those determining eligibility for particular benefits or compensation for compulsory purchase. The postwar years have seen the growth of administrative law, providing the legal framework within which such decisions are taken and the procedure by which disputes may be resolved.

To avoid disputes over particular administrative decisions being taken to the existing, highly formalised civil courts – overburdening the courts and creating significant financial burdens for those involved – the law provides for a large number of tribunals to resolve such disputes. There are now tribunals covering a wide range of issues, including unfair dismissal, rents, social security benefits, immigration, mental health and compensation for compulsory purchase. Those appearing before tribunals will often have the opportunity to present their own case and to call witnesses and cross-examine the other side. The tribunal itself will normally – although not always – comprise three members, although the composition varies from tribunal to tribunal: some have lay members, others have legally (or otherwise professionally) qualified members; some have part-time members; others have full-time members. Employment tribunals, for example, each comprise an independent chairman and two members drawn from either side of industry.

The activities of tribunals are normally dull and little noticed. On rare occasions, though, decisions may have political significance. In January 1996 an employment tribunal in Leeds held that the policy of the Labour Party to have women-only shortlists for some parliamentary seats breached sex discrimination legislation. Rather than pursue an appeal, which could take up to 20 months to be heard, the party decided not to proceed with such shortlists.

The judges

The most senior judges are the 12 members of the Supreme Court. They are eminent lawyers, normally drawn from the ranks of the Court of Appeal. The other most senior judicial appointments – the Lord Chief Justice (head of the judiciary and of the Appeal Court in criminal cases), Master of the Rolls (head of the Appeal Court in civil cases), President of the Family Division and the Lord Justices of Appeal – are drawn from High Court judges or from barristers of at least 10 years' standing, although solicitors are now also eligible for consideration. Other judges – High Court judges, circuit judges and recorders – are drawn principally from barristers of at least 10 years' standing, although solicitors and circuit court judges may be appointed to the High Court. Nominations for judicial appointments are made by an independent Judicial Appointments Commission.

The attraction in becoming a judge lies only partially in the salary (see Table 22.1) – the top earners among barristers can achieve annual incomes of several hundred thousand pounds. Rather, the attraction lies in the status that attaches to holding a position at the top of one's profession. For many barristers, the ultimate goal is to become Lord Chief Justice, Master of the Rolls or a Justice of the Supreme Court.

Judges, by the nature of their calling, are expected to be somewhat detached from the rest of society. However, some critics have argued that this professional distance is exacerbated by social exclusivity, judges being predominantly elderly upper-class males (see Griffiths 1997).

The UK does not have a career judiciary – that is, beginning a career as a judge following graduation – but instead, as we have seen, judges are drawn from lawyers of several years' standing. They will typically be appointed to the bench when they are middle aged. Senior judges retire at the age of 70 (though there are exceptional circumstances in which some may be allowed to sit beyond that age, up to age 75). By the time they reach the Supreme Court, typically in their 60s, judges may only have a few years of service remaining.

Concerns about the limited gender and racial background of judges have been expressed not only by academics, but also by government and by parliamentary committees. In 2011 the Ministry of Justice launched a consultation on

Table 22.1 Judicial salaries, as at 1 April 2016

Group		Annual salary (£) from
1	Lord Chief Justice of England and Wales	249,583
1.1	Lord Chief Justice of Northern Ireland, Master of the Rolls, President of the Supreme Court	222,862
2	Justices of the Supreme Court, President of the Queen's Bench Division, President of the Family Division	215,256
3	Lord Justices of Appeal	204,695
4	High Court judges	179,768
5	Senior Circuit Court judges, certain Tribunal Presidents, certain senior Recorders	144,172
6.1	Circuit judges, certain Tribunal Presidents	133,506
6.2	Deputy Senior District Judge (Magistrates' Court)	125,689
7	District Judges (Magistrates' Courts), Immigration Judges	107,100

Source: Ministry of Justice, *Judicial Salaries from 1 April 2016* (London: Ministry of Justice, 2016), www.gov.uk/government/uploads/system/uploads/attachment_data/file/518055/moj-judicial-salaries-1-april-2016.pdf

Table 22.2 Women and ethnic minority judges in the UK, 1995–2016

Court	Year	Women (%)	BAME (%)
Supreme Court	1995	0.0%	0.0%
	2007	8.3%	0.0%
	2016	8.3%	0.0%
Court of Appeal	1995	3.1%	0.0%
	2007	8.1%	0.0%
	2016	20.5%	0.0%
High Court	1995	7.3%	0.0%
	2007	9.3%	0.9%
	2016	20.8%	1.9%
Circuit Bench	1997	5.6%	1.0%
	2007	11.4%	1.4%
	2016	25.6%	3.7%

Source: JUSTICE (2017: 15).

judicial diversity, and in its 2012 report on the subject, the Constitution Committee of the House of Lords observed:

> Despite concerns raised over the last few decades, the proportion of women judges, black, Asian and minority ethnic (BAME) judges and others from under-represented groups has increased too slowly. Many of the causes for this appear to stem from the structures of the legal professions (barristers and solicitors) and the pool of available mid-career legal professionals eligible and interested in putting themselves forward for selection. However, other barriers arise as a result of the appointments process itself or of the structures of the courts and tribunals in which judges work.
>
> (Constitution Committee 2012: 25)

A 2017 report by JUSTICE acknowledged that important steps had been taken to improve diversity in the judiciary but recorded that, while there had been some improvements in the previous decade in the overall proportion of women in judicial posts, 'progress is slow and the absolute numbers remain low' (JUSTICE 2017: 6).

Only a minority of judges are women and the percentage decreases the higher the court (Table 22.2). In 2017 there was only one female Justice of the Supreme Court – Baroness Hale of Richmond, the first ever female to be appointed to the highest court of appeal (initially the House of Lords) – and 9 women among 38 Lord Justices of Appeal. Those from Black, Asian and minority ethnic (BAME) backgrounds are even scarcer (Table 22.2). There are no BAME judges in the Supreme Court or Court of Appeal and they comprise fewer than 2 per cent of High Court judges.

In their educational backgrounds, judges are also remarkably similar. More than three-quarters of judges in the High Court and Court of Appeal were privately educated 'and this has remained constant since the 1980s' (JUSTICE 2017: 7). The majority of judges are also graduates of Oxford or Cambridge Universities.

Senior judgeships are the almost exclusive preserve of barristers. It is possible for solicitors to become judges, though few have taken this route.

Judges thus form a socially and professionally exclusive or near-exclusive body. This exclusivity has been attacked for having unfortunate consequences. One is that judges are out of touch with society itself, not being able to understand the habits and terminology of everyday life, reflecting instead the social mores of 30 or 40 years ago. Courts that do not reflect society may undermine trust in the judicial process. As the Constitution Committee of the House of Lords recorded in its report on judicial diversity in 2012: 'we received evidence, with which we concur, arguing that diverse courts are better

equipped to carry out the role of adjudicating than courts that are not diverse and that the public will have greater trust and confidence in a more diverse judiciary' (Constitution Committee 2012: 11). The background of the judges has also led to allegations of inbuilt bias – towards the government of the day and towards the Conservative Party. Senior judges have been accused of construing the public interest as favouring law and order and upholding the interests of the state (Griffith 1997). The claim of deference to the executive is also one that has been pursued by Keith Ewing (Ewing 2004; Ewing and Tham 2008). Though accepting courts may be an irritant to the executive, he has argued that they are not an obstacle (Ewing and Tham 2008: 691).

Such concerns exist at a time when the judiciary has become more active (Norton 2015: 55–63). There has been a greater willingness on the part of judges to review the actions of ministers (Stevens 2003: 358–9). The UK's membership of the European Union also generated a new role for the courts. The incorporation of the ECHR into British law and the creation of devolved assemblies have also raised the courts in Britain to a new level of political activity – and visibility.

Judicial activism

The common law power available to judges to strike down executive actions as being beyond powers granted – *ultra vires* – or as contrary to natural law was not much in evidence in the decades prior to the 1960s. Courts were generally deferential in their stance towards government. This was to change in the period from the mid-1960s onwards. Although the judiciary changed hardly at all in terms of the background of judges – they were usually the same elderly, white, Oxbridge-educated males as before – there was a significant change in attitudes. Apparently worried by the perceived encroachment of government on individual liberties, they proved increasingly willing to use their powers of judicial review.

In four cases in the 1960s the courts adopted an activist line in reviewing the exercise of powers by administrative bodies and, in two instances, of ministers. In *Conway v Rimmer* in 1968, the House of Lords ruled against a claim of the Home Secretary that the production of certain documents would be contrary to the public interest; previously, such a claim would have been treated as definitive. Another case in the same year involved the House of Lords considering why, and not just how, a ministerial decision was made. It was a demonstration, noted Lord Scarman (1974: 49), that judges were 'ready to take an activist line'.

This activist line has been maintained and, indeed, become more prominent. Successive governments have found ministerial actions overturned by the courts. There were four celebrated cases in the second half of the 1970s in which the courts found against Labour ministers (Norton 1982: 138–40), and then several in the 1980s and the 1990s, when they found against Conservative ministers.

Perceptions of greater judicial activism derive not just from the cases that have attracted significant media attention. They also derive from the sheer number of applications for judicial review made to the courts (Stevens 2003: 358). At the beginning of the 1980s there were about 500 applications a year for leave to apply for judicial review. In the 1990s it generally exceeded 3,000 and by the start of the new century regularly exceeded 4,000. There was a sharp increase from 2010 onwards, and in 2013, there were 15,594 applications. Most of the increase, though, was accounted for by immigration and asylum cases. In 2013 responsibility for most such cases was transferred to the Upper Tribunal for Immigration and Asylum Chamber (UTIAC). As a result, the number of applications for judicial review, other than those going to UTIAC, fell back to fewer than 5,000 a year.

The importance of judicial review, however, has not just been in the number of applications made, but in some cases where the application has been granted and attracted media attention. In 1993 Lord Rees-Mogg challenged the power of the government to ratify the Maastricht Treaty which formed the European Communities into the European Union (EU) and transferred various policy competences to the EU. His case was rejected by a Divisional Court of the Queen's Bench Division. The same month – July 1993 – saw the House of Lords find a former Home Secretary, acting in his official ministerial capacity, in contempt of court for failing to comply with a court order in an asylum case. The ruling meant that ministers could not rely on the doctrine of crown immunity to ignore the orders of a court. *The Times* reported (28 July 1993):

> Five law lords declared yesterday that ministers cannot put themselves above the law as they found the former home secretary Kenneth Baker guilty of contempt of court in an asylum case. The historic ruling on Crown immunity was described as one of the most important constitutional findings for two hundred years and hailed as establishing a key defence against the possible rise of a ruthless government in the future.

Ironically, the case was largely overshadowed by attention given to the unsuccessful case pursued by Lord Rees-Mogg. Kenneth Baker's successor as Home Secretary, Michael Howard, also variously ran foul of the courts, the Appeal Court holding that he had acted beyond his powers. Indeed, tension between government and the courts increased notably in 1995 and 1996 as several cases went against the Home Secretary (Woodhouse 1996). In July 1996 the court found that he had acted unlawfully in taking into account

a public petition and demands from members of the public in increasing the minimum sentence to be served by two minors who had murdered the two-year-old Jamie Bulger. After the return of the Labour Government in 1997, successive Home Secretaries fell foul of the courts. In July 1999, for example, Jack Straw's attempts to retain his power to ban journalists who were investigating miscarriages of justice from interviewing prisoners were declared unlawful by the House of Lords. The same month, the Court of Appeal found against him after he sought to return three asylum seekers to France or Germany. In 2001 an order made by Mr Straw, and approved by Parliament, designating Pakistan as a country that presented no serious risk of persecution was quashed by the Court of Appeal. In a judgment at the end of 2004, in the *Belmarsh* case, the law lords held that powers in Part 4 of the Anti-Terrorism, Crime and Security Act 2001 were disproportionate and discriminatory because they applied only to foreign nationals. The Coalition Government returned in 2010 also fell foul of judicial decisions in some cases involving individuals suspected of being engaged in terrorist activity. There were also other clashes with the courts. In June 2012 a High Court judge held the Home Secretary, Theresa May, in contempt of court for failing to abide by an undertaking to release a foreign criminal. She thus became only the second Home Secretary, after Kenneth Baker, to be held in contempt of court. (As the foreign national was then released, no penalty was imposed.) In July 2012 Mrs May had to take emergency action when the Supreme Court declared unlawful recent changes to the UK Border Agency's points-based system of skilled migration, visitor's visas and family migration rules because they had not been directly approved by Parliament.

However, the most high-profile case of recent years occurred in 2016 when the Conservative Government sought to use prerogative powers, rather than legislation, to trigger notification of the UK's intention to withdraw from membership of the European Union. This was challenged in the High Court which, in the *Miller* case, ruled that it was not sufficient to rely on the prerogative. The judgment was upheld in January 2017 by the Supreme Court. Reflecting the constitutional importance of the case, the Government's team was led by the Attorney General and the case was heard by all Justices of the Supreme Court. As a result of the judgment, the Government introduced and achieved passage of the European Union (Notification of Withdrawal) Act. The case was highly contentious, the judges being attacked, sometimes in personal terms, by some media.

All these cases, along with several other high-profile judgments – including a number by European courts – combined to create a new visibility for the judiciary.

The courts, then, are willing to cast a critical eye over decisions of ministers in order to ensure that they comply with the powers granted by statute and are not contrary to natural justice. They are facilitated in this task by the rise in the number of applications made for judicial review and by their power of statutory interpretation. As Drewry (1986: 30) has noted:

> Although judges must strictly apply Acts of Parliament, the latter are not always models of clarity and consistency. . . . This leaves the judges with considerable scope for the exercise of their creative skills in interpreting what an Act really means. Some judges, of which Lord Denning was a particularly notable example, have been active and ingenious in inserting their own policy judgements into the loopholes left in legislation.

Judicial activism is thus well established. The courts have been willing to scrutinise government actions, and on occasion strike them down, on a scale not previously witnessed. Some commentators in the 1990s saw it as a consequence of the Conservative Party being in government for more than a decade. However, the courts maintained their activism under subsequent (Labour, Coalition, Conservative) governments, much to the displeasure of some ministers and resulting in some high-profile clashes between ministers and the courts.

However, the extent and impact of such activism on the part of judges should not be exaggerated. There are three important caveats that have to be entered. First, statutory interpretation allows judges some but not complete leeway. They follow well-established guidelines. Second, the large increase in applications for judicial review was accounted for largely by asylum and immigration cases. Third, most applications made for judicial review fail.

Even so, activism on the part of the courts constitutes a problem for government. Although government may win most of the cases brought against it, it is the cases that it loses that attract the headlines.

Enforcing EU law

The United Kingdom signed the treaty of accession to the European Community in 1972. The European Communities Act passed the same year provided the legal provisions necessary for membership. The UK became a member of the EC on 1 January 1973. The European Communities Act, as we have seen in Chapter 14, created a new juridical dimension to the British constitution.

The 1972 Act gave legal force not only to existing EC law but also to future law. Regulations promulgated by the Commission and the Council of Ministers had direct effect within the United Kingdom. Parliament could be engaged by giving approval to measures to implement directives, but there was no scope to reject the purpose of the directives.

And, as we recorded in Chapter 14, under the provisions of the Act, questions of law had to be decided by the European Court of Justice (ECJ), or in accordance with the decisions of that court. All courts in the United Kingdom were required to take judicial notice of decisions made by the ECJ. Cases in the UK that reached the Supreme Court were, unless the justices considered that the law has already been settled by the ECJ, referred to the European Court for a definitive ruling. Requests could also be made by lower courts to the ECJ for a ruling on the meaning and interpretation of European treaties. In the event of a conflict between the provisions of European law and those of an Act of Parliament, the former were to prevail.

The question that most exercised writers on constitutional law in the years after Britain's accession to the EC was what British courts should do in the event of the passage of an Act of Parliament that expressly overrode European law. The generally accepted view among jurists was that UK courts, by virtue of the doctrine of parliamentary sovereignty, must apply the provisions of the Act of Parliament that expressly overrides European law (see Bradley 1994: 97). In the event, there have been no opportunities to test whether that would be the case. By the time of the UK's notification in 2017 to withdraw from the EU, no legislation had been enacted that sought expressly to override any provision of EU law.

Given the absence of an explicit overriding of European law by statute, the most important question to which the courts had to address themselves was how to resolve apparent inconsistencies or conflict between European and domestic (known as municipal) law. During debate on the European Communities Bill in 1972 ministers made clear that the bill essentially provided a rule of construction: that is, that the courts were to construe the provisions of an Act of Parliament, in so far as it was possible to do so, in such a way as to render it consistent with European law. Where the courts have found UK law to fall foul of European law, the UK government has introduced new legislation to bring domestic law into line with EU requirements. But what about the position prior to the passage of such legislation? Did the courts have power to strike down or suspend Acts of Parliament that appeared to breach European law? The presumption until 1990 was that they did not. Two cases – the *Factortame* and *Ex Parte EOC* cases – demonstrated that presumption to be false. The former case involved a challenge, by the owners of some Spanish trawlers, to the provisions of the 1988 Merchant Shipping Act. The High Court granted interim relief, suspending the relevant parts of the Act. This was then overturned by the House of Lords (predecessor of the Supreme Court), which ruled that the courts had no such power. The European Court of Justice, to which the case was then referred, ruled in June 1990 that courts did have the power of injunction and could suspend the application of Acts of Parliament that on their face appeared to breach European law until a final determination was made. The following month the House of Lords granted orders to the Spanish fishermen preventing the Transport Secretary from withholding or withdrawing their names from the register of British fishing vessels, the orders to remain in place until the ECJ had decided the case. The case had knock-on consequences beyond EU law: having decided that an injunction could be granted against the crown in the field of EU law, the courts subsequently decided that it could then be applied in cases not involving EU law (Jacobs 1999: 242). However, the most dramatic case in terms of EU law was to come in 1994. In *R. v Secretary of State for Employment, ex parte the Equal Opportunities Commission* – usually referred to as *Ex Parte EOC* – there was a challenge to provisions of the 1978 Employment Protection (Consolidation) Act. The House of Lords held that the provisions of the Act effectively excluded many part-time workers from the right to claim unfair dismissal or redundancy payments and were as such unlawful, being incompatible with EU law (Maxwell 1999). Although the *Factortame* case attracted considerable publicity, it was the *EOC* case that was the more fundamental in its implications. The courts were invalidating the provisions of an Act of Parliament. Following the case, *The Times* declared 'Britain may now have, for the first time in its history, a constitutional court' (5 March 1994, cited in Maxwell 1999: 197).

The courts thus assumed a new role in the interpretation of European law, and the court system itself acquired an additional dimension. Under the Maastricht Treaty, which took effect in 1993, the powers of the ECJ were strengthened, the court being given the power to fine member states that did not fulfil their legal obligations. Although the cases heard by the ECJ may not often appear to be of great significance, collectively they have produced a substantial – indeed, massive – body of case law that has constituted an important constraint on the actions of the UK government.

The number of cases brought in the ECJ – now, under the Lisbon Treaty, the Court of Justice of the EU – against the UK, alleging a failure to fulfil its obligations, has been a relatively small one. Out of 237 cases brought before the Court in the period from 2012 to 2016, only 9 were brought against the UK. (This compares with 12 brought against Germany, 14 against Italy, 24 against Greece and 30 – the highest number – against Poland) (Court of Justice of the European Union 2017: 86). The number, however, was less significant than the perception of a supranational body determining issues that affected directly the UK, but which the government and Parliament of the UK could not overturn. Membership of the EC/EU gave a new role to the courts, one that it had not had since the time of the Glorious Revolution of 1688.

The fact that decisions could be taken by supranational bodies formed part of the campaign to withdraw from the EU in the 2016 referendum. UK withdrawal from the EU, however, will not excise the role of the courts, given that the legislation consequent to withdrawal will be significant, both quantitatively and qualitatively. The legislation to repeal the 1972 European Communities Act will also keep in place European law until Parliament has decided what to do with it. The extensive primary and secondary legislation to give effect to these decisions to amend or repeal law deriving from EU membership will fall within the purview of the courts, as with any other legislation.

Enforcing the European Convention on Human Rights

Reinforcing the importance of the courts has been the incorporation of the European Convention on Human Rights (ECHR) into British law.

The Convention was signed at Rome in 1950 and was ratified by the United Kingdom in March 1951. It came into effect in 1953. It declares the rights that should be protected in each state – such as the right to life, freedom of thought and peaceful assembly (see Figure 22.3) – and stipulates procedures by which infringements of those rights can be determined. Alleged breaches of the Convention are investigated by the European Commission on Human Rights and may be referred to the European Court of Human Rights.

The convention is a treaty under international law. This means that its authority derives from the consent of the states that have signed it. It was not incorporated into British law, and not until 1966 were individual citizens allowed to petition the commission. In subsequent decades a large number of petitions were brought against the British government. Although the British government was not required under British law to comply with the decisions of the court, it did so by virtue of its international obligations and introduced the necessary changes to bring UK law into line with the judgment of the court. By 1995 over 100 cases against the UK government had been judged admissible, and 37 cases had been upheld (see Lester 1994: 42–6). Some of the decisions have been politically controversial, as in 1994 when the court decided (on a ten–nine vote) that the killing of three IRA suspects in Gibraltar in 1988 by members of the British security forces was a violation of the right to life.

The decisions of the court led to calls from some Conservative MPs for the UK not to renew the right of individuals to petition the commission. Liberal Democrats and many Labour MPs – as well as some Conservatives – wanted to move in the opposite direction and to incorporate the ECHR into British law. Those favouring incorporation argued that it would reduce the cost and delay involved in pursuing a petition to the commission and allow citizens to enforce their rights through British courts. It was also argued that it would raise awareness of human rights. This reasoning led the Labour Party to include a commitment in its 1997 election manifesto to incorporate the ECHR into British law. Following the return of a Labour government in that election, the government published a White Paper, *Rights Brought Home*, and followed it with the introduction of the Human Rights Bill. The bill was enacted in 1998.

Although the courts are not empowered to set aside Acts of Parliament, they are required to interpret legislation as far as possible in accordance with the convention. They look to the jurisprudence of the European Court on Human Rights, but can develop it. The UK courts were criticised initially for adhering too closely to the 'mirror principle', following uncritically the interpretation of the Strasbourg court. They

Topics covered by Articles of the ECHR

Article 1	-	respecting rights
Article 2	-	life
Article 3	-	torture
Article 4	-	servitude
Article 5	-	liberty and security
Article 6	-	fair trial
Article 7	-	retrospecitivity
Article 8	-	privacy
Article 9	-	conscience and religion
Article 10	-	expression
Article 11	-	association
Article 12	-	marriage
Article 13	-	effective remedy
Article 14	-	discrimination
Article 15	-	derogations
Article 16	-	aliens
Article 17	-	abuse of rights
Article 18	-	permitted restrictions
Convention protocols		
Protocol 1		
Article 1	-	property
Article 2	-	education
Article 3	-	elections
Protocol 4	-	civil imprisonment, free movement, expulsion
Protocol 6	-	restriction of death penalty
Protocol 7	-	crime and family
Protocol 12	-	discrimination
Protocol 13	-	complete abolition of death penalty
Procedural and institutional protocols		

Figure 22.3 Articles of the European Convention on Human Rights

now regard themselves as loosely bound by the principle (O'Cinneide 2015: 89). The higher courts can issue declarations of incompatibility where they deem UK law to be incompatible with the ECHR: it is then up to Parliament to take the necessary action. The Act makes provision for a 'fast-track' procedure for amending law to bring it into line with the ECHR.

The incorporation of the ECHR into British law creates a new role for British judges in determining policy outcomes. In the words of one authority, 'it gives the courts an increased constitutional role, moving them from the margins of the political process to the centre and increasing the underlying tension between the executive and the judiciary' (Woodhouse 1996: 440). Indeed, the scale of the change was such that senior judges had to be trained for the purpose and, in order to give the courts time to prepare, the principal provisions of the Act were not brought into force until October 2000. (One effect, though, was immediate. The provision requiring ministers to certify that a bill complies with the provisions of the ECHR was brought in immediately following enactment.) By the end of July 2016 the courts had issued a total of 34 declarations of incompatibility, though 8 of these were overturned on appeal and 4 were or may be subject to appeal. Of the remaining 22 declarations, 13 had been remedied by later primary or secondary legislation, three had been remedied by a remedial order under section 10 of the HRA, one was intended to be dealt with through a remedial order, and one was under consideration as to how to remedy the incompatibility (Ministry of Justice 2016: 45). The majority of the declarations (22 of the 34) were in the first six years of the operation of the Act taking effect.

In April 2003, for example, in the case of *Bellinger v Bellinger*, the courts held that section 11(c) of the Matrimonial Causes Act 1973 was incompatible with Articles 8 and 12 of the Convention. This led to Parliament enacting the Gender Recognition Act conferring rights on those who changed gender, including the right to a new birth certificate. Also in April 2003 the courts in *Blood and Tarbuck v Secretary of State for Health* issued a declaration in respect of a provision of the Human Fertilisation and Embryology Act 1990 which prevented the use of a dead husband's sperm to be used by the mother to conceive. A private member's bill was employed, with government assistance, to change the law. However, the most significant case was to come in December 2004, in the *Belmarsh case*, to which we have already referred. In this case, the House of Lords held that powers in Part 4 of the Anti-Terrorism, Crime and Security Act breached the provisions of the convention in that they were disproportionate and discriminatory in applying only to foreign nationals. The decision, as we shall see, caused a political storm and contributed to a major clash between executive and judiciary. The Government nonetheless introduced a Terrorism Bill with new provisions in place of those embodied in the 2001 Act. However, provisions in the new Act, providing for control orders on individuals, also fell foul of the courts, the House of Lords holding that impositions of 18-hour curfews constituted a deprivation of liberty under Article 5 of the convention.

The Act has thus had a major effect on the relationship of the executive to the courts, the executive accepting the judgment of the courts, albeit not always with a good grace. Parliament has enacted remedial legislation as brought forward by government. However, there is one exception. The EctHR held in the *Hirst* case (2004) that the UK's blanket ban on prisoners having the vote conflicted with the provisions of Article 3 of Protocol 1 of the ECHR. In 2007, in the light of the *Hirst* case, the Registration Appeal Court in Scotland, in *Smith v Scott*, issued a declaration of incompatibility. The Government delayed taking action, Jack Straw conceding that as Justice Secretary he had 'kicked the issue into touch, first with one inconclusive public consultation, then with a second' (Straw 2012: 538). In 2011, MPs voted by 234 votes to 22 to maintain the ban. In 2013 a Joint Committee of the two Houses was appointed to consider options embodied in a draft Bill, the Voting Eligibility (Prisoners) Bill. Its report was published at the end of 2013 and recommended that prisoners serving sentences of up to 12 months (and those in the six months before their scheduled release) be eligible to vote (Joint Committee on the Draft Voting Eligibility (Prisoners) Bill 2013). The Government took no action and by 2017 had not replied to the committee's report.

Though the courts have not gone as far as some critics would wish, they have nonetheless used their powers to limit the executive (Kavanagh 2009). The position was summarised by Jeffrey Jowell, in writing that the Human Rights Act 'may on the face of it be just another unentrenched statute, but its effect is to alter constitutional expectations by creating the presumption across all official decision making that rights do and should trump convenience' (Jowell 2003: 597). It is the courts that decide when such trumping should take place.

The impact of devolution

The devolution of powers to elected assemblies in different parts of the United Kingdom (see Chapter 14) has also enlarged the scope for judicial activity. The legislation creating elected assemblies in Scotland, Wales and Northern Ireland – the Scotland Act, the Government of Wales Act and the Northern Ireland Act – stipulates the legal process by which the powers and the exercise of powers by the assemblies can be challenged.

There are complex provisions for determining whether a particular function is exercisable by a devolved body, whether it has exceeded its powers, whether it has failed to fulfil its statutory obligations or whether a failure to act puts it in breach of the ECHR. These are known as 'devolution issues'. A law officer can require a particular devolution issue to be referred to the Supreme Court (before 2009, it was to the Judicial Committee of the Privy Council). It is also open to other courts to refer a devolution issue to higher courts for determination. Devolution issues considered by the High Court or the Court of Appeal may be appealed to the Supreme Court, but only with the leave of the court or the Supreme Court. If a court finds that a devolved body has exceeded its powers in making subordinate legislation, it can make an order removing or limiting any retrospective effect of the decision, or suspend the effect of the decision for any period and on any conditions to allow the defect to be corrected. A law officer can also make a pre-enactment reference to the Supreme Court to determine whether a bill or a provision of a bill is within the competence of the devolved body. In other words, it is not necessary for the measure to be enacted: a law officer can seek a determination while the measure is in bill form.

The provisions of the devolution legislation create notable scope for judicial activity. There is scope for the courts to interpret the legislation in a constrictive or an expansive manner. The approach taken by the courts has major implications for the devolved bodies. Some cases have revolved round the status of the devolution Acts and whether they enjoy a special status as 'constitutional statutes', a concept developed by the courts and hence deemed to be a feature of common law. The concept was developed in the context of EU membership, but has been developed in some devolution cases, notably in the *Robinson* and *AXA* cases (see Anthony 2015: 95–115). It means that certain laws are deemed to form a higher form of law and can be changed only by explicit provision where the meaning is irrefutable.

> Common law constitutional statutes have, in that way, apparently imposed formal limitations on legal sovereignty and, given that development, it may well be that the courts could also impose substantive limitations on the Westminster Parliament's powers given the emerging political realities of devolution.
>
> (Anthony 2015: 104)

In other cases, however, some judges have rowed back from the concept and taken the view that devolution Acts should be interpreted in the same way as any other legislation. There is thus some disagreement between judges as to the status of devolution legislation, but there is a developing jurisprudence that gives it a special status.

However, not only may the UK Parliament be limited to some degree by the status accorded by the Supreme Court to the legislation establishing elected bodies in different parts of the UK, but those elected bodies are themselves constrained by the courts in their interpretation of what is permitted by the devolution legislation. The point has been well put by Craig and Walters. As they note, the Scotland Act, while giving the Scottish Parliament general legislative powers, also limits those powers through a broad list of reservations.

> At the minimum, this means that the Scottish Parliament will have to become accustomed to living with the 'judge over its shoulder'. Proposed legislation will have to be scrutinised assiduously lest it fall foul of one of the many heads of reserved subject matter. . . . The need for constant recourse to lawyers who will, in many instances, indicate that proposed action cannot be taken, is bound to generate frustration and anger in Scotland.
>
> (Craig and Walters 1999: 303)

As they conclude,

> The courts are inevitably faced with a grave responsibility: the way in which they interpret the SA [Scotland Act] may be a significant factor in deciding whether devolution proves to be the reform which cements the union, or whether it is the first step towards its dissolution.
>
> (Craig and Walters 1999: 303)

Not all legislation has survived the scrutiny of the courts. This was notably the case in 2013 when in *Salvesen v Riddell* the Supreme Court held for the first time that primary legislation enacted by a devolved legislature was outside of the legislature's competence. The Court held that section 72(10) of the Agricultural Holdings (Scotland) Act 2003, dealing with the relationship between agricultural tenants and landowners, was outside of competence, but – under the provisions of the Scotland Act 1998 – suspended the effect of the finding for 12 months to give the Scottish Parliament time to correct the 'defect'. The Parliament duly approved the Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014. In 2015, in *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill – Reference by the Counsel General for Wales*, the Supreme Court set another first in finding a Bill from a devolved legislature, approved but not yet enacted, was outside the Assembly's competence.

The 2015 case also reflected disagreement among judges, this time as to how far discretion should be accorded a devolved body by virtue of the fact it is a democratically elected body. Although devolved legislatures do not enjoy the sovereignty of the Westminster Parliament, the Scottish Parliament, declared Lord Hope of Craighead in the *AXA*

case, 'takes its place under our constitutional arrangements as a self-standing democratically elected legislature. Its democratic mandate to make laws for the people of Scotland is beyond question.' Other judges have taken a more restrictive view, allowing less deference to the electoral mandate and being more rigorous in examining the reasoning of the legislature in enacting the measure.

As with the Human Rights Act, devolution cases may be more significant for their quality, and their deterrent effect, than for their number. The number of devolution issues brought before the courts is relatively rare. However, those that have been brought have produced a growing body of case law with significant constitutional implications. As a House of Commons Library Briefing Note observed, the judgments in such cases:

> contain analysis, in the form of the interpretation of the devolution statutes, which informs the constitutional and legal meaning of the UK's devolution settlements. The influence of these judgments extends beyond the specifics of the relevant case. They affect how the constitutional framework is used and understood by the politicians and officials that engage with the legislation on a day-to-day basis.
>
> (House of Commons Library 2016: 3)

Demands for change

Recent years have seen various calls for change in the judicial process. Some of these have focused on the court's constitutional role in relation to government and the protection of rights. Others have focused on decisions of the courts in domestic criminal and civil cases.

Constraining the executive

In terms of the place of the courts in the nation's constitutional arrangements, there have been various demands to strengthen the powers of the courts, and some of these calls have borne fruit, primarily with the incorporation of the ECHR into British law. Some want to go further. Some want to see a more inclusive document than the ECHR. The ECHR, for example, excludes such things as a right to food or a right of privacy (see Nolan and Sedley 1997). The Liberal Democrats, Unlock Democracy and a number of jurists want to see the enactment of an entrenched Bill of Rights. In other words, they want a measure that enjoys some degree of protection from encroachment by Parliament. Formally, as we have seen, Parliament does not have to act on declarations of incompatibility issued by the courts. Under the proposal for an entrenched Bill of Rights, the courts would be able to set aside an Act of Parliament that was in conflict with the ECHR, rather in the same way that the courts have set aside the provisions of an Act deemed to be incompatible with EU law.

The powers acquired by the courts – and the calls for them to be given further powers – have not been universally welcomed (see Box 22.1). Critics view the new role of the courts as a threat to the traditional Westminster constitution (see Chapter 14), introducing into the political process a body of unaccountable and unelected judges who have excessive powers to interpret the provisions of a document drawn in general terms. Instead of public policy being determined by elected politicians – who can be turned out by electors at the next election – it can be decided by unrepresentative judges, who are immune to action by electors. As we have seen, the powerful position of the courts has not commended itself to all ministers. In 2001 Home Secretary David Blunkett attacked the interference by judges in political matters and even raised the possibility of 'suspending' the Human Rights Act (Woodhouse 2002: 261). In December 2004, following the decision of the House of Lords to issue a declaration of incompatibility in respect of certain provisions of the Anti-Terrorism, Crime and Security Act, Foreign Secretary Jack Straw said that the law lords were 'simply wrong' to imply that detainees were being held arbitrarily; it was for Parliament and not the courts to decide how best Britain could be defended from terrorism (see Norton 2006). Following terrorist bombings in London in July 2005, ministers wanted new anti-terrorist legislation but were worried it might fall foul of the courts. In announcing a series of measures to address the terrorist threat, Prime Minister Tony Blair in August 2005 stirred controversy by declaring 'the rules of the game are changing'. He conceded it was likely that the legislation would be tested in the courts. 'Should legal obstacles arise', he said, 'we will legislate further including, if necessary, amending the Human Rights Act in respect of their interpretation of the European Convention on Human Rights and apply it directly in our own law.' In 2008, Justice Secretary Jack Straw reiterated his 'great frustration' with the way the Act had been interpreted by the courts and wanted to 'rebalance' the legislation with an emphasis on responsibilities. Both Prime Minister Gordon Brown, in his *Governance of Britain* agenda, and Conservative leader David Cameron raised the prospect of a British Bill of Rights of Duties and Responsibilities. After the formation of the Coalition Government in 2010, a Commission on a Bill of Rights was established the following year to 'investigate the creation of a UK Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in UK law, and protects and extend our liberties'. It reported in 2012 (Commission on a Bill of Rights 2012), arguing that a UK Bill of Rights would offer a 'fresh beginning' and in 2014 the Conservative Party produced a policy document advocating a British Bill of Rights and Responsibilities. The proposal included making judgments of the European Court of Justice advisory, the determination to be made by UK courts. If such a change was not possible under the European Convention, then it envisaged the UK withdrawing from the Convention (see O'Cinneide 2015: 100–2).

No action was taken under the Coalition Government – the Liberal Democrats not being prepared to support such a change – and, in the event, none was pursued by the Conservative Government of David Cameron or Theresa May. Though both supported the proposal, there were political difficulties – the party was not united – and it was not clear if a British Bill of Rights would supplement or supplant the ECHR. The result of the 2016 referendum on EU membership also motivated putting the proposal on a back-burner while the Government addressed pressing issues affecting the EU rather than the ECHR.

BOX 22.1

More power to judges?

The European Convention on Human Rights has been incorporated into British law. This gives a new role to judges. Some proposals have been put forward to strengthen the courts even further by the enactment of an entrenched Bill of Rights, putting fundamental rights beyond the reach of a simple parliamentary majority. Giving power to judges, through the incorporation of the ECHR and, more so, through an entrenched document, has proved politically contentious. The principal arguments put forward both for and against giving such power to the courts are as follows:

The case for

- A written document, such as the ECHR, clarifies and protects the rights of the individual. Citizens know precisely what their rights are, and those rights are protected by law.
- It puts interpretation in the hands of neutral judges, independent of the political process.
- It prevents encroachment by politicians in government and Parliament. Politicians will be reluctant to tamper with a document, such as the ECHR, now that it is part of the law. Entrenchment of the measure – that is, imposing extraordinary provisions for its amendment – would put the rights beyond the reach of a simple majority in both Houses of Parliament.
- It prevents encroachment by other public bodies, such as the police. Citizens know their rights in relation to public bodies and are able to seek judicial redress if those rights are infringed.
- It ensures a greater knowledge of rights. It is an educative tool, citizens being much more rights-conscious.
- It bolsters confidence in the political system. By knowing that rights are protected in this way, citizens feel better protected and as such are more supportive of the political system.

The case against

- It confuses rather than clarifies rights. The ECHR, like most Bills of Rights, is necessarily drawn in general terms and citizens therefore have to wait until the courts interpret the vague language in order to know precisely what is and what is not protected.
- It transfers power from an elected to a non-elected body. What are essentially political issues are decided by unelected judges and not by the elected representatives of the people.
- It does not necessarily prevent encroachment by public bodies. Rights are better protected by the political culture of a society than by words written on a document. A written document does not prevent public officials getting around its provision by covert means.
- It creates a false sense of security. There is a danger that people will believe that rights are fully protected when later interpretation by the courts may prove them wrong. Pursuing cases through the courts can be prohibitively expensive; often only big companies and rich individuals can use the courts to protect their interests.
- If a document is entrenched, it embodies rights that are the product of a particular generation. A document that is not entrenched can be modified by a simple majority in both Houses of Parliament. If it is entrenched – as many Bills of Rights are – it embodies the rights of a particular time and makes it difficult to get rid of them after their moral validity has been destroyed, as was the case with slavery in the United States.

Applying the law

The courts have thus proved controversial in terms of their constitutional role. They have also been the subject of debate in terms of their traditional role in interpreting and enforcing the law. The debate has encompassed not only the judges but also the whole process of criminal and civil justice.

In 1999 the usually sure-footed law lords encountered criticism when they had to decide whether the former Chilean head of state, General Augusto Pinochet, who had been detained in the UK, should be extradited from Britain to Spain. The first judgment of the court had to be set aside when one of the law lords hearing the case was revealed to have been a director of a company controlled by a party (Amnesty International) to the case. It was the first time that the law lords had set aside one of their own decisions and ordered a rehearing. Especially embarrassing for the law lords, it was also the first case in which an English court had announced its decision live on television (see Rozenberg 1999).

Lower courts, including the Court of Appeal, came in for particular criticism in the late 1980s and early 1990s as a result of several cases of miscarriages of justice (see Mullin 1996; Walker and Starmer 1999). These included cases where people had been imprisoned for bombings ('Guildford Four', 'Birmingham Six', 'The Maguire Seven', the Ward case) or murder (the Bridgewater case) as a result of questionable forensic evidence, misconduct, non-disclosure of information or false confessions. The judges involved in the original cases were variously criticised for being too dependent on the good faith of prosecution witnesses – as was the Court of Appeal. The Appeal Court came in for particular criticism for its apparent reluctance even to consider that there might have been miscarriages of justice.

A Royal Commission on Criminal Justice was established in 1991 and two years later published its report recommending the appointment of an independent commission – independent of the executive – to refer cases back to the courts where there may have been a miscarriage of justice. The Criminal Cases Review Commission was created in 1997. From April 1997 through to 31 March 2017, it referred 631 cases back to the courts (out of just over 22,000 applications received), most of which resulted in the appeals being allowed. Of the 624 cases where appeals had been heard by the courts (by March 2017), 418 appeals were allowed and 193 dismissed. (684 cases were at the time under review and 302 were awaiting review (Criminal Cases Review Commission 2017).)

Another criticism has been the insensitivity of some judges in particular cases, notably rape cases. A number of judges have been criticised for their comments and lenient sentence handed out in such cases. In one case, for example, the judge had said that he received evidence that the girl in the case was 'no angel herself'. The comment attracted widespread and adverse criticism. The Appeal Court, while asserting that the judge had been quoted out of context, nonetheless condemned the sentence as inappropriate and increased the sentence. An earlier case, in which another judge had awarded a young rape victim £500 to go on holiday to help her to forget about her experience, attracted even more condemnation. In 2017, a female judge was criticised for suggesting that, while the blame rested solely with the perpetrators, women needed to protect themselves against the threat of being raped while drunk.

Such cases highlighted a problem that appears pervasive. Although the maximum sentence for rape is life imprisonment, and guidelines recommend that a five-year sentence should be the starting point after conviction in contested rape cases, there has been a substantial proportion of cases where the sentence has been less than five years. Lenient sentences in a number of cases involving other offences have also fuelled popular misgivings about the capacity of the courts to deliver appropriate sentences.

In 2000 the European Court of Human Rights ruled that the minimum term of imprisonment (or 'tariff') for murder committed by juveniles should be set by the courts and not by the Home Secretary. In effect, the power thus passed to the Lord Chief Justice. It was first used in the case of two young men, Thompson and Venables, who as minors had abducted and killed two-year-old Jamie Bulger. Lord Woolf recommended a reduction in the tariff set by a previous Home Secretary, a reduction that meant that both became eligible for parole immediately. The case had aroused strong feelings, and the Lord Chief Justice's decision was unpopular. Equally unpopular was a subsequent granting by a senior judge of an injunction, which remains in place, preventing publication of any information that might lead to the identity or future whereabouts of the two.

The result of such cases may have limited public regard for judges, albeit not on a major scale. Trust in judges to tell the truth in 1993 was recorded at 68 per cent, but in the twenty-first century has ranged from 72 per cent to 82 per cent. (In 2015, they were third in the list of most trusted professions.) Where public confidence has been more uncertain has been in prosecutions and access to justice.

The activity and policy of the Crown Prosecution Service (CPS) have also been particular targets. The CPS has been largely overworked and has had difficulty since its inception in recruiting a sufficient number of well-qualified lawyers to deal with the large number of cases requiring action. The CPS has also been criticised for failing to prosecute in several highly publicised cases where it has felt that the chances of obtaining a conviction were not high enough to justify proceeding. Despite reforms to the service following damning reports on the organisation and leadership of the CPS in 1998 and 1999, criticisms continue to be levelled. At times, these are because of a failure to prosecute and at other times because of a decision to prosecute when it was felt the case did not justify such action. In 2012, for example, a leading football player, John Terry, was prosecuted for allegedly racially abusing a black player on the pitch. He was acquitted and the CPS criticised for adopting what was seen as a heavy-handed approach. Though the case revealed a disturbing feature of behaviour in football, it was felt it was predominantly a matter for the sport itself to address rather than the courts.

Another problem has been that of access to the system. Pursuing a court case is expensive. In civil cases, there is often little legal aid available. Those with money can hire high-powered lawyers. In cases alleging libel or slander, or claiming invasion of privacy, only those with substantial wealth can usually afford to pursue a case against a well-resourced individual or organisation, such as a national newspaper. Millionaires such as motor racing executive Max Moseley have pursued cases successfully, but for anyone without great financial resources the task is virtually impossible. Cases can also be delayed. Many individuals have neither the time nor the money to pursue matters through the courts. According to one survey in 2015, 68 per cent of those questioned thought that there should be better access to the courts and the same proportion 'thought that you need to be rich to afford to pursue justice and exercise your rights' (Bar Council press release, 24 Nov. 2015).

Implementing change

Various proposals have been advanced for reform of the judiciary and of the system of criminal justice. A number, as we have seen, have been implemented. There have been moves to create greater openness in the recruitment of senior judges as well as to extend the right to appear before the senior courts. A Commissioner for Judicial Appointments, to oversee judicial appointments, was put in place in 2001. The Constitutional Reform Act 2005 created a Judicial Appointments Commission (JAC). This has been active in seeking to achieve greater judicial diversity. Although most judges are still white, male and middle aged, there has been progress (as can be seen in Table 22.2), albeit limited, in promoting women and members of Black, Asian and minority ethnic backgrounds to the bench. The problem remains and is one acknowledged by senior judges and the JAC.

In 1998 new judges were required to reveal whether they were freemasons. (It was feared that membership of a secret society might raise suspicions of a lack of impartiality.) The 1999 Access to Justice Act created a community legal service (CLS) to take responsibility for the provision of legal advice and for legal aid. It also created a criminal defence service, to provide that those charged with criminal offences receive a high-quality legal defence. Legal language has also been simplified. The Crown Prosecution Service has also undergone significant change.

There have also been various reforms to criminal law in terms of sentencing and the management of cases in the magistrates' courts. There has been the ending, in certain exceptional circumstances, of the double jeopardy rule and the creation of a Sentencing Guidelines Council. Attempts to reduce the number of jury trials have variously fallen foul of opposition in the House of Lords. And, as we have seen, the Lord Chancellor's position as head of the judiciary has been transferred to the Lord Chief Justice and, in 2009, the Supreme Court came into being.

The courts are undergoing significant change, but the pressure for reform continues. As the constitution has acquired a new juridical dimension, so the courts have become more visible and embroiled in political controversy. The creation of a Supreme Court, in the eyes of some, strengthens the position of the judiciary. The court, according to former Lord Chancellor Lord Falconer, 'will be bolder in vindicating both the freedoms of individuals and, coupled with that, being willing to take on the executive' (BBC News Online, 8 September 2009; http://news.bbc.co.uk/1/hi/uk/8237855.stm). A law lord, Lord Neuberger, who declined to move to the new Supreme Court and was instead appointed Master of the Rolls (though later becoming President of the Supreme Court in 2012), said in September 2009 that there was a real risk of 'judges abrogating to themselves greater power than they have at the moment' (BBC News Online, 8 September 2009). Others have argued that the court may actually become exposed and vulnerable to attack by ministers, lacking the buffer provided by the House of Lords (Norton 2005: 321–3). The presence of the law lords enabled peers to understand and appreciate their role, and provide something of a protective shield; the law lords, for their part, were able to understand the nature of the parliamentary system. The Lord Chancellor has also traditionally been in a position to protect the interests of the judicial system within government. The creation of a Supreme Court, and the ending of the traditional role of the Lord Chancellor, arguably left senior judges isolated and hence more exposed to criticism. As we have seen, judges in the *Miller* case in 2016 and 2017 were attacked in the media – portrayed by one newspaper as 'enemies of the people' – and some judgments against the government have not been well received by ministers.

The judges have become more important political actors and, as such, more significant targets of political attack. One cannot now study the making of public policy in the United Kingdom with the courts left out.

BOX 22.2

BRITAIN IN CONTEXT

Common law versus civil law

Courts in the UK differ from those in most other countries in that they do not have responsibility for interpreting a codified constitution. Their role has principally been that of engaging in statutory, not constitutional, interpretation; courts in other countries generally engage in both (though not always: there are countries with codified constitutions, such as the Netherlands, which maintain the principle of parliamentary sovereignty). The role of the courts in the UK has changed significantly as a consequence of the UK's membership of the EC/EU and the passage of the Human Rights Act 1998 – the treaties of the EU and the European Convention of Human Rights having the characteristics of higher law documents – but the basic distinction still remains. In so far as the courts are empowered to interpret such documents, they do so under the authority of Parliament and not a written constitution.

They also differ from their continental counterparts in that – along with the USA and most Commonwealth jurisdictions – they are based on the principles of common law rather than civil (or Roman) law. The common law tradition is based on law deriving from particular measures and their interpretation by the courts; much rests on judge-made law. The civil law tradition rests on a particular legal code stipulating the general principles of law that are to apply.

Not all systems follow the British in adopting an adversarial format – a feature of the common law tradition, the case being argued by competing counsel – nor in the presumption of being innocent until proven guilty. Some systems adopt a form of religious or socialist law, in some cases requiring the accused to prove their innocence or simply presuming guilt, with the accused having no real opportunity to put their case.

Though generalisations can be drawn about courts in the United Kingdom, these can only be taken so far. Scotland has its own legal system. Though the Act of Union 1707 resulted in a unitary state, Scotland nonetheless retained its legal system. There is thus one court system, and body of law, for England and Wales and another for Scotland.

However, though there are significant differences between the legal system (or rather systems) in the UK and those in other countries, there are also features that are increasingly common. The effect of international treaties is to create common obligations. Thus, for example, the United Kingdom is a signatory to the European Convention on Human Rights (ECHR); so too are more than 40 other countries. The European Court of Human Rights (ECtHR) is ultimately responsible for the interpretation of the convention. Though the British courts are now empowered to consider convention rights, their interpretation can be challenged in the European Court in Strasbourg. As a member of the EU, the UK has been bound by the treaties establishing the Union. The interpretation of the treaties lies ultimately with the Court of Justice of the EU, which sits in Luxembourg.

Chapter summary

Although not at the heart of the regular policy-making process in Britain, the courts are nonetheless now significant actors in the political system. Traditionally restricted by the doctrine of parliamentary sovereignty, the courts have made use of their power of judicial review to constrain ministers and other public figures. The passage of two Acts – the European Communities Act in 1972 and the Human Rights Act in 1998 – created the conditions for judges to determine the outcome of public policy in a way not previously possible. The passage of devolution legislation, creating elected bodies in Scotland, Wales and Northern Ireland, has also enlarged the scope for judicial activity, with potentially significant constitutional and political implications. The Constitutional Reform Act 2005 has resulted in the creation of a Supreme Court. The greater willingness of, and opportunity for, the courts to concern themselves with the determination of public policy has been welcomed by some jurists and politicians while alarming others, who are fearful that policy-making power may slip from elected politicians to unelected judges. The courts are having to meet the challenge of a new juridical dimension to the British constitution while coping – not always successfully – with the demands of an extensive system of criminal and civil justice.

Discussion points

- Why should the courts be independent of government?
- To what extent have the courts the capacity to shape the success of devolution?
- Can, and should, judges be drawn from a wider social background?
- Is the incorporation of the European Convention on Human Rights into British law a good idea?
- Has the creation of a Supreme Court strengthened or weakened the position of the senior judiciary?

Further reading

Basic introductions to the legal system can be found in texts on constitutional and administrative law, such as Bradley, Ewing and Knight (2015). For a succinct analysis of the changing role of judges in the nation's constitutional arrangements, see Feldman (2013) and Stevens (2003, 2002). On independence and accountability, see Gee, Hazell, Malleson and O'Brien (2015) and Bradley (2008). On possible future developments, see Le Sueur and Malleson (2008).

On the impact of membership of the EC/EU on British law, see Craig (2015). On the incorporation of the ECHR, see Horne and Tyrrell (2016) and O'Cinneide (2015); for a critical view, see Ewing and Tham (2008) and Ewing (2004). On the implications for the courts of devolution, see especially Dickson (2015). On the implications of the creation of the Supreme Court, see Hale (2015), Norton (2005) and Le Sueur (2004). On the role of the law lords, see Paterson (2013). On the Constitutional Reform Act, see Windlesham (2005). On the abolition of the role of Lord Chancellor, see Oliver (2004).

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Useful websites

Judicial process in the UK

Court Service: www.hmcourts-service.gov.uk

Criminal Cases Review Commission: www.ccrc.gov.uk/index.htm

Criminal Justice System – England and Wales: www.cjsonline.gov.uk

Judicial Committee of the Privy Council: www.privy-council.org.uk/output/page5.asp

Judiciary of England and Wales: www.judiciary.gov.uk/index.htm

Magistrates' Association: www.judiciary.gov.uk/index.htm

Ministry of Justice: www.judiciary.gov.uk/index.htm

Supreme Court: www.supremecourt.gov.uk/index.html

Other relevant sites

Court of Justice of the European Union (ECJ): http://europa.eu/institutions/inst/justice/index_en.htm

European Court of Human Rights: www.echr.coe.int/echr/