The consideration of such legislation by an *ad hoc* Select Committee affords an opportunity for detailed discussion of matters relating to the organisation and discipline of the armed forces.

Legislation was necessary to legalise not only the raising of a standing army but also the enforcement of military discipline, which would infringe the common law, as well to provide the money for its upkeep. The practice of authorising the keeping of an army for one year at a time was devised to ensure the observance of the convention that Parliament should be summoned at least once a year. The money is now provided by annual Appropriation Acts, which might be taken to imply the lawfulness of maintaining the forces for which funds are appropriated.

Public opinion has never feared the existence of a standing navy, so that the history of the Royal Navy has been free from constitutional problems.[2] It was the customary duty of the coastal towns, and especially the Cinque Ports, to provide ships and men in an emergency. The maintenance of the Navy has always been, and still is, within the royal prerogative; but terms of enlistment and naval discipline are now regulated by the Naval Discipline Act, and of course in modern times the money has come from Parliament. The Naval Discipline Act is now subject to continuance in the same manner as the Army and Air Force Acts.

Conscription, or compulsory military service, was introduced by statute in both world wars.[3]

The law relating to the various Reserve forces is now to be found in the Reserve Forces Act 1980 and the Reserve Forces Act 1996.

Legal position of members of the armed forces[4]

The control of the armed forces is part of the royal prerogative: *Chandler v. D.P.P.*[5] Despite the power of judicial review claimed in the *G.C.H.Q.*[6] case over acts done by virtue of the royal prerogative it is probable that the direction and disposition of the forces of the Crown will continue to be regarded as non-justiciable. The prerogative powers in relation to such matters as the training of the forces are preserved by section 11 of the Crown Proceedings Act 1947. The provisions of the Employment Rights Protection Act 1996 apply for the most part to members of the armed forces.[7] **19–004**

Contract of service

Officers are commissioned by the Crown. They may be dismissed at the pleasure of the Crown, but may not resign their commission without leave.[8] **19–005**

Other ranks are recruited—apart from statutory conscription or compulsory national service—by voluntary enlistment by attestation before a recruiting

[2] But *cf. The Case of Ship Money* (*R. v. Hampden*) (1637) 3 St.Tr. 825.

[3] The prerogative of "impressment" or "pressing" mariners into the Navy whenever the public safety requires, has never been abolished by statute although in practice it is obsolete: *R. v. Broadfoot* (1743) 18 St.Tr. 1323; Foster, *Crown Law*, p. 154; *R. v. Tubbs* (1776) C. wp. 512, *per* Lord Mansfield; *Ex p. Fox* (1793) 5 St.Tr. 276, *per* Lord Kenyon; *Barrow's Case* (1811) 14 East 346; Foster, 158.

[4] Peter Rowe, "The Crown and Accountability for the Armed Forces", in *The Nature of the Crown* (Sunkin and Payne ed. 1999).

[5] [1964] A.C. 763 (HL). *ante* para. 15–013; *post*, para. 26–003.

[6] *C.C.S.U. v. Minister for Civil Service* [1985] A.C. 374; *ante*, para. 15–004.

[7] s.192.

[8] *Vertue v. Lord Clive* (1769) 6 Burr. 2472; *R. v. Cuming, ex p. Hall* (1887) 19 Q.B.D. 13; *Hearson v. Churchill* [1892] 2 Q.B. 144; *Marks v. Commonwealth of Australia* (1964) 111 C.L.R. 548.

officer. Enlistment being a civil contract, its terms cannot be varied without the consent of the soldier, but he can be discharged at the pleasure of the Crown.

No action lies against the Crown to enforce the terms of service for damages for wrongful dismissal or to recover arrears of pay.[9]

Subject to ordinary law

19–006 A soldier becomes subject to military law, but he also remains bound by the ordinary civil and criminal law.[10] It is hardly correct to say that he is governed by two systems of law, for military law is part of the law of the land.[11] Statutory exceptions include the right to make an informal will on actual military service[12] or at sea, exemption from jury service, and the right to a "service qualification" under the Representation of the People Act 1983, ss.14–17.[13]

Superior orders as a defence

19–007 A member of the armed forces is primarily bound to obey the civil (*i.e.* non-military) law, even though such obedience may render him liable to be tried by court-martial. "A soldier for the purpose of establishing civil order," it has been said,[14] "is only a citizen armed in a particular manner." Although military regulations forbid the firing on rioters except under an order from a magistrate who is present, the existence or absence of a magistrate's order neither justifies what is done nor excuses what is not done in the eyes of the civil law. The soldier may therefore sometimes find himself in a dilemma if he is ordered by a superior officer to do something which is unlawful; and the question has arisen how far, if at all, he can plead obedience to superior orders—one of the first duties of a soldier—as a defence. In *R. v. Smith*,[15] a case heard by a special tribunal of three civilian judges set up in the Cape of Good Hope during the Boer War, Solomon J. said: "I think it is a safe rule to lay down that if a soldier honestly believes he is doing his duty in obeying the commands of his superior, and if the orders are not so manifestly illegal that he must or ought to have known that they were unlawful, the private soldier would be protected by the orders of his superior officer." In that case it was held that the order to shoot an African if he did not fetch a bridle was not so plainly illegal that the accused would have been justified in the circumstances in refusing to obey it, and it was therefore not necessary to decide whether in the circumstances the order was unreasonable or unnecessary. The accused was therefore not guilty of murder.

In *Keighley v. Bell*,[16] Willes J., a great authority on the common law, said *obiter*: "I hope I may never have to determine that difficult question, how far the orders of a superior officer are a justification. Were I compelled to determine that

[9] *Grant v. Secretary of State for India* (1877) 2 C.P.D. 445; *Mitchell v. R.* [1896] 1 Q.B. 121; *Leaman v. R.* [1920] 3 K.B. 663. See Z. Cowen, "The Armed Forces of the Crown (1950) 66 L.Q.R. 478.

[10] The subjection of the soldier to English law is indeed wider than that of a civilian in that the soldier takes English law with him wherever he goes; *post*, para. 19–008.

[11] *Burdett v. Abbot* (1812) 4 Taunt. 401, *per* Mansfield C.J.; *Grant v. Gould* (1792) 2 H.Bl. 98, *per* Lord Loughborough.

[12] *Re Wingham* [1949] P. 187. *Re Jones decd.* [1981] Fam. 7. (Privilege extends to service in N. Ireland: actual military service not confined to war between sovereign states).

[13] *ante* para. 10–029.

[14] *Report of the Commission on the Featherstone Riots* (1893) C. 7234. See also *Att.-Gen. of Northern Ireland's Reference (No. 1 of 1975)* [1977] A.C. 105; *post*, para. 19–021, where Lord Diplock pointed out the unreality of the comparison in many cases, such as that of the continuing emergency in Northern Ireland.

[15] [1900] Cape of Good Hope S.C. 561.

[16] (1866) 4. F. & F. 763, 790.

question, I should probably hold that the orders are an absolute justification in time of actual war—at all events, as regards enemies or foreigners—and I should think, even with regard to English-born subjects of the Crown, unless the orders were such as could not legally be given. I believe that the better opinion is, that an officer or soldier acting under the orders of his superior—not being necessarily or manifestly illegal—would be justified by his orders." If modified to the extent that the soldier's belief in the lawfulness of the order must be reasonable, Willes J.'s opinion would probably be accepted by the legal profession.

19–008 The soldier's obligation is to obey any *lawful* command. "Lawful command" is described in the *Manual of Military Law*[17] as a command which is not contrary to English or international law and is justified by military law. "A superior has the right," says the *Manual* "to give a command for the purpose of maintaining good order or suppressing a disturbance or for the execution of a military duty or regulation or for a purpose connected with the welfare of troops. . . . If a command is manifestly illegal the person to whom it is given would be justified in questioning and even refusing to execute it." With regard to a soldier's responsibility for carrying out an order which is not manifestly illegal, on the other hand, the *Manual* disagrees with the dictum in *Keighley v. Bell* (*ante*), but says that "It may give rise to a defence on other grounds, *e.g.* by establishing a claim of right made in good faith in answer to a charge of larceny, or by negativing a particular intent which may be a complete defence or reduce the crime to one of a less serious nature, or by excusing what appears to be culpable negligence."[18]

Whichever view is accepted it is obvious that a soldier may be placed in a serious dilemma, with the prospect of being proceeded against in the ordinary courts if he commits a crime or tort and of being court-martialled if he refuses to obey the command. So far as criminal liability is concerned, the soldier's position is somewhat mitigated by the power of the Crown to enter a *nolle prosequi* or to pardon after conviction, and the jurisdiction of the Courts-Martial Appeal Court to hear appeals from courts-martial which provides a forum for resolving any conflict of jurisdictions. Ultimately, the House of Lords could dispose of the problems as regards liability in tort as well.

With regard to liability for war crimes, *i.e.* violations of the principles of international law relating to warfare, the edition of the *Manual of Military Law* still issued at the beginning of the Second World War allowed superior orders as a valid defence. An amendment drafted by the Law Officers of the Crown was made in 1944 so as to read: "Obedience to the orders of a government or of a superior, whether military or civil, or to a national law or regulation, affords no defence to a charge of committing a war crime but may be considered in mitigation of punishment."[19] The Nuremberg Charter similarly provided that: "The fact that the defendant acted pursuant to orders of his government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment" (Art. 8). The true test, said the International Military Tribunal, is not the existence of the order but whether moral choice is in fact possible.[20]

[17] Part I (12th ed., 1972). *The Manual* is not authoritative: *R. v. Tucker* [1952] 2 All E.R. 1074; 36 Cr.App.R. 192.

[18] Citing *R. v. James* (1839) 8 C. & P. 131; *R. v. Trainer* (1864) 4 F. & F. 105.

[19] Part III, p. 176, *cf.* Shakespeare, *Henry V*, Act IV, sc. 1, ll. 138–140.

[20] See Viscount Kilmuir, *Nuremberg in Retrospect* (Holdsworth Club, University of Birmingham, 1956), pp. 14–17.

Military law[21]

19–009 When a person joins the armed forces he becomes subject to the special code of military law in addition to the ordinary law. The objects of military law are disciplinary and administrative. It provides in the first place for the maintenance of discipline and good order among the troops, and secondly, for administrative matters such as terms of service, enlistment, discharge and billeting.

The sources of military law are statutes supplemented by the Queen's Regulations and royal warrants. The laws and customs of war established by international conventions (*i.e.* multilateral treaties) are also required to be observed by members of the forces. It was argued in *R. v. Durkin*[22] that there is also a "common law of the army," and the Courts-Martial Appeal Court did not reject it, but the existence of such a common law is doubtful. In addition to legally binding rules, there is "the custom of the service and military usage."

Employed civilians and followers with the Regular forces anywhere whether or not on active service are subject (with modifications) to Part II of the Army Act, which deals with discipline and the trial and punishment of military offences. All civilians listed in Schedule 5 to the Army Act are subject to the "civil offences" and certain specific offences within the jurisdiction of the Act, when in the command area of any part of the Regular forces abroad at any time. These include employed persons, persons attached to the forces for the purposes of their profession, and resident families.[23] The Armed Forces Act 1976 provides for the creation of Standing Civilian Courts to deal, in the case of minor offences, with civilians who would otherwise be liable to be tried by courts-martial.[24]

The civil courts have jurisdiction to determine in proceedings brought before them, *i.e.* in the exercise of their supervisory jurisdiction by way of judicial review and in actions for damages in tort, whether a person is subject to military law.

Courts-martial

19–010 The King's troops in medieval times were governed by regulations or articles of war issued by the King and administered in the Court of the Constable and the Marshal, two hereditary officers of state.[25] The office of Constable became extinct in the reign of Henry VIII, but the Court of the Constable and the Marshal continued to exist. During the early eighteenth century the Court ceased to function although it was never formally abolished.[26] From that time articles of war governing Army discipline were issued under parliamentary authority. The modern system of courts-martial for the trial of persons subject to *military law*

[21] It is convenient here to speak of "military law," which is the law of the Army; but similar considerations apply to Air Force law and Naval discipline. Stuart Smith J., "Military Law: Its History, Administration and Practice," (1969) 85 L.Q.R. 478.

[22] [1953] 2 Q.B. 364 (C.-M.A.C.).

[23] See G.J. Borrie, "Courts-martial, civilians, and civil liberties" (1969) 32 M.L.R. 35. In *R. v. Martin* [1998] A.C. 917, the House of Lords upheld the trial by court martial in Germany of the 19 year old civilian son of a soldier who had, with his son, returned to England more than a year before the trial.

[24] ss.6–8.

[25] For the history of this Court, see Holdsworth, *History of English Law* (5th ed.), Vol. I, pp. 573–580. See also Clode, *Military Forces of the Crown*, Vol. I, pp. 76–77; Richard O'Sullivan, *Military Law and the Supremacy of the Civil Courts* (1921), pp. 1–12.

[26] The last case tried by the Court of the Marshal appears to be *Sir H. Blount's Case* (1737) 1 Atk. 296. *Cf.* Court of Chivalry, *ante*, para. 18–002.

was established by the Mutiny Act 1688, and the Army Act 1881 combined it with the statutory articles of war.

The courts-martial that exist today enforce military law, Air Force law and Naval discipline, but do not administer martial law, although there has inevitably been some confusion on the point. "As a matter of etymology," says Maitland,[27] "*marshall* has nothing whatever to do with *martial*—the marshall is the master of the horse—he is marescallus, mareschalk, a stable servant—while of course Martial has to do with Mars, the God of war. Still, when first we hear of martial law in England, it is spelt indifferently *marshali* and *martial*, and it is quite clear that the two words were confused in the popular mind. . . . " Courts-martial have jurisdiction to try and to punish persons subject to military law for two classes of offences: first, military offences created by Part II of the Army Act, as to which their jurisdiction is exclusive; and secondly, under certain conditions, civil offences (*i.e.* criminal offences under non-military law), as to which their jurisdiction in this country is concurrent with the civil (*i.e.* non-military) courts.[28] Civil offences are acts or omissions punishable by the law of *England*, even where the accused is a Scottish soldier in a Scottish regiment stationed in Scotland.[29] Courts-martial have no jurisdiction, however, to try cases of treason, murder, manslaughter, treason-felony or rape committed in the United Kingdom.

19–011 The Army Act does not restrict the offences for which persons may be tried in the civil courts, or the jurisdiction of the civil courts to try a person subject to military law for any offence; but where a person is tried by a civil court the fact that he has been punished by a court-martial must be taken into consideration in awarding punishment. On the other hand, a person subject to military law who has been tried by a civil court may not subsequently be tried by court-martial for the same offence.

19–012 The functioning of the Courts Martial system was reformed by the Army Act 1996, following the decision of the European Court of Human Rights in *Findlay v. United Kingdom*[30] that the system as it existed before that Act did not comply with the terms of Article 6 of the European Convention on Human Rights which guarantees a right to a hearing before an independent and impartial tribunal in the determination of any criminal charge. The Commission was concerned at the role of the Convening Officer who carried out the role of prosecutor, chose the members of the Court (who were fellow officers and often junior to him) and had the power to confirm the decision and confirm or vary the sentence. Advice on questions of law is given to a court martial by a Judge Advocate but formerly he was not a member of the court, another matter of concern for the Commission.

[27] *Constitutional History*, p. 266. For martial law, see *post*, para. 19–023.

[28] See, *e.g. R. v. Gordon-Finlayson* [1941] 1 K.B. 171; *Cox v. Army Council* [1963] A.C. 48 (HL, on appeal from C.-M.A.C.). With regard to murder committed abroad, see *R. v. Page* [1954] 1 Q.B. 170 (C.-M.A.C.); *cf.* M. J. Prichard, "The Army Act and Murder Abroad" (1954) C.L.J. 232.

[29] Army Act 1955, s.70(2); Air Force Act 1955, s.70(2); Naval Discipline Act 1957, s.42(1). For comments on this anomalous position see Sir T. B. Smith, *British Justice: The Scottish Contribution* (1961), pp. 30–33; *Studies Critical and Comparative* (1962), p. 20.

[30] (1997) 24 E.H.R.R. 221. The decision of the Court was based on the law in effect before the 1996 Act. The Court refrained from expressing any view on whether the reforms, introduced following the decision of the Commission on Human Rights, were sufficient to satisfy Article 6. Nine other signatory states had the foresight to sign the Convention subject to a reservation relating to military discipline.

Following *Findlay*, the role of Convening Officer has been split between a Prosecuting Authority, an officer with legal qualifications, independent of the military chain of command, and a Court Administration Officer. The Judge Advocate is now a member of the court and the power of the Convening Officer to confirm the court's decision has been transferred to a Reviewing Authority, an officer entirely independent of the prosecution.[31] The presidents of courts martial are now appointed on a four year term of office: the appointment constitutes an officer's last posting and offers no prospect of further promotion.

In the light of these changes the Court Martial Appeal Court concluded in *R. v. Spear*[32] that the new system satisfied the requirements of Article 6 of the Convention: to hold otherwise would involve the court according to Laws L.J., in adopting an unduly formalistic approach, one approaching a neurotic distrust.[33]

The system of detention of members of the Armed Forces pending trial by court martial and the exercise by commanding officers of powers of summary jurisdiction in cases not regarded as sufficiently serious to merit trial by court martial have been reformed by the Armed Forces Discipline Act 2000 in an attempt to make them compatible with the terms of the European Convention.[34] The procedures for investigating offences including powers of entry and seizure have been placed on a statutory footing by the Armed Forces Act 2001.

19–013 Since 1951[35] it has been possible to appeal against conviction by a court-martial to a Courts-Martial Appeal Court, composed of judges of the Court of Appeal and Queen's Bench Division, nominated by the Lord Chief Justice; Lords Commissioners of Justiciary nominated by the Lord Justice General; judges of the Supreme Court of Northern Ireland, nominated by the Lord Chief Justice of Northern Ireland, and other persons of legal experience, nominated by the Lord Chancellor. Appeal lies to the House of Lords with leave of the Appeal Court or the House where the Appeal Court has certified that a point of law of general public importance is involved in the decision and the Court or the House of Lords thinks that the point is one which ought to be considered by the House.[36]

Jurisdiction of the High Court

19–014 Formerly courts martial were regarded as inferior courts, subject to the supervisory jurisdiction of the High Court exercised through an application for judicial review.[37] The Armed Forces Act 2001, section 23, however, puts courts martial on the same footing as the Crown Court and excludes the High Court's supervisory jurisdiction. A sufficient remedy is provided by the right of appeal to the Courts-Martial Appeal Court.

[31] P. Camp, "Court Martial—an independent impartial trial?", (1998) New L.Jo. 1156 and 1209.
[32] *The Times*, January 30, 2001.
[33] Nor, clearly, was Laws L.J. favourably disposed to the suggestion, made after the hearing of the case, that his own earlier appointment as junior counsel to the Treasury had involved him acting on behalf of the Ministry of Defence and he could therefore be suspected of partiality.
[34] *Hood v. United Kingdom* (2000) 29 E.H.H.R. 365.
[35] Courts-Martial (Appeals) Act 1951. See now the Courts-Martial (Appeals) Act 1968. See, *e.g. R. v. Tucker* [1952] 2 All E.R. 1074; 36 Cr.App.R. 192; *R. v. Bisset* [1980] 1 W.L.R. 335 (unsuccessful attempt to rely on defence of "condonation" by superior officer under Army Act 1955, s.134; for comment on this "most unusual" provision see *per* Lawton L.J. at p. 339.
[36] *e.g. R. v. Garth* [1986] A.C. 268, HL.
[37] *post* para. 32–011.

Civil actions may be brought against individual officers for damages for false imprisonment, assault, malicious prosecution, defamation, etc. Criminal proceedings against officers may take the form of a prosecution for *e.g.* murder, manslaughter or assault.

Actions for damages

19–015 As regards actions in tort the true principles are probably those stated by McCardie J. in *Heddon v. Evans*,[38] an action brought by a private soldier against his commanding officer for false imprisonment and malicious prosecution in confining him to barracks on charges of making a frivolous complaint and conduct to the prejudice of good order and military discipline. His Lordship stated that: (1) an action lies if the court-martial or officer commits what would be a wrong at common law while acting without or in excess of jurisdiction[39]: but (2) no action lies if the court-martial or officer commits what would be a common law wrong while acting within its or his jurisdiction, even if the act was done maliciously[40] or without reasonable and probable cause.[41] The first proposition His Lordship thought was clear from the authorities as well as on principle. The second proposition he based on five cases, two of them in the Court of Appeal.[42] Only the House of Lords is free to hold that an action will lie for malicious abuse of military authority (within jurisdiction) without reasonable and probable cause.

In *Dawkins v. Lord F. Paulet*[43] an officer sued a superior officer for libels contained in letters written by the superior to the Adjutant-General in the course of his duty. The majority of the Court of Queen's Bench (Cockburn C.J. dissenting) held that the civil courts would not interfere in such cases even if the superior officer acted maliciously,[44] first, because the alleged wrong was done in the course of duty, and motive is therefore irrelevant; secondly, on grounds of convenience and public policy, as otherwise a superior officer would be unduly hampered in the performance of his duty; and, thirdly, because the party complaining of injustice has his remedy under military law.

19–016 In *Johnstone v. Sutton*[45] Lord Mansfield and Lord Loughborough in the Court of Exchequer Chambers gave it as their opinion that even if malice were proved, an action would not lie by a person subject to naval or military law against someone who had used his authority under that law to injure him: but the question was admittedly left undecided. Johnstone, an admiral, had Sutton, a naval captain, put under arrest for disobedience to orders and sent to England to be tried by a court martial. He was honourably acquitted and then brought an action for malicious prosecution against Johnstone. The jury found for Sutton. Johnstone moved for arrest of judgment and was successful in the Court of

[38] (1919) 35 T.L.R. 642. McCardie J. went on to hold (although he did not consider it necessary for the decision) that the plaintiff had not established that the defendant did act maliciously or without reasonable and probable cause. A verbatim report is given in R. O'Sullivan, *Military Law and the Supremacy of the Civil Courts* (1921), pp. 43 *et seq.*

[39] *Grant v. Gould* (1792) 2 H.Bl. 100.

[40] *Dawkins v. Lord F. Paulet* (1869) L.R. 5 Q.B. 94.

[41] *Johnstone v. Sutton* (1786) 1 T.R. 493, 510, 784.

[42] *Dawkins v. Lord F. Paulet (ante)*; *Dawkins v. Lord Rokeby* (1866) 4 F. & F. 806; *Marks v. Frogley* [1898] 1 Q.B. 888; *Fraser v. Hamilton* (1917) 33 T.L.R. 431; *Fraser v. Balfour* (1918) 34 T.L.R. 502.

[43] (1869) L.R. 5 Q.B. 94.

[44] The occasion was privileged: see *Dawkins v. Lord Rokeby* (1875) L.R. 7 H.L. 744.

[45] (1786) 1 T.L.R. 493, 510, 784.

Exchequer Chamber and the House of Lords, not, however, on the broad ground that an action did not lie against a superior officer but because there had been reasonable and probable cause for the prosecution.

A court-martial would act without jurisdiction if it proceeded against a person who was not subject to military law,[46] or if it was not properly convened or properly constituted in accordance with the relevant Act, or if it convicted a man of an offence which is not an offence under the Act. It would exceed its jurisdiction if it awarded a heavier punishment than it had authority to award.

Visiting Forces

19–017 The Visiting Forces Act 1952 provides that visiting forces belonging to the member states of the Commonwealth and other countries specified by Order in Council under arrangements for common defence (*e.g.* NATO),[47] may be tried in the United Kingdom by the service courts of their own country according to their own service law; but a death sentence may not be carried out in the United Kingdom unless the law of the United Kingdom provides for the death sentence in such a case. In *R. v. Thames Justices, ex p. Brindle*,[48] the Court of Appeal held that although the jurisdiction of the relevant military courts under Part I of the Act extended only to members of visiting forces stationed in the United Kingdom, the provisions in Part II of the Act dealing with deserters were not so limited. Hence a deserter from an American army unit stationed in Germany who was arrested in England could properly be handed over to the American army authorities under the Act.

This jurisdiction does not oust the jurisdiction of British criminal courts over such visiting forces except in relation to offences arising in the course of service duty, offences against the person of a member of the same or another visiting force, and offences against the property of the visiting force or of a member of such force; and in these cases the appropriate authority may waive its jurisdiction. British courts may not try a member of a visiting force for an offence for which he has already been tried by his service court.

19–018 Civil actions may be brought in the ordinary courts against members of visiting forces; but the Secretary of State for Defence may arrange, under regulations issued by the Lord Chancellor's department, for the settlement of claims in tort. (Section 9).

Although the Act gave effect to certain provisions of the Agreement regarding the status of Forces of Parties to the North Atlantic Treaty 1951 it did not enact the Agreement as a whole into the law of the United Kingdom. Thus in *Luttrell v. U.S.A. (No. 2)*[49] a claim in tort by an American serviceman who alleged that he had been negligently injured in a British military hospital failed because his right of action depended on a provision in the Agreement. In the absence of legislation, however, a treaty cannot create rights enforceable at the instance of individual litigants.[50]

[46] *R. v. Wormwood Scrubs Prison (Governor), ex p. Boydell* [1948] 2 K.B. 193.

[47] See G.I.A.D. Draper, *Civilians and the Nato Status of Forces Agreement* (1966).

[48] [1975] 1 W.L.R. 1400. See also *R. v. Tottenham Magistrates' Court ex p. Williams* [1982] 2 All E.R. 705, DC. (Magistrate must be satisfied beyond reasonable doubt that prisoner is subject to foreign military law and that there is evidence to justify the bringing of proceedings against him).

[49] [1995] 1 W.L.R. 82, CA.

[50] *ante*, para. 15–030.

II. Emergency Powers of the Executive

Common Law Powers to Deal with an Emergency

Use of force to maintain public order[51]

19–019 Before the development of statutory professional police forces during the nineteenth century, the duty of maintaining internal order rested mainly on the sheriffs, mayors of boroughs and county magistrates, who were charged with the duty of suppressing riots and dispersing unlawful assemblies. This duty has never been expressly abrogated, but in practice the function of maintaining order is now the responsibility of the local chief constable.[52] Force must not be used unless necessary, and then only in a degree proportionate to the necessity. Those who adopt excessive or cruel measures will be criminally liable (*Wright v. Fitzgerald*[53]), but if the right amount of force is applied, incidental assaults or trespasses will be justified. It is only as a last expedient that the civil authority should invoke the assistance of the military.

At the time of the Gordon Riots in 1780 Wedderburn, the Attorney-General, advised that as soldiers are also citizens they may lawfully be used to prevent felony, even without the Riot Act proclamation being read. The military, if invoked, should act under the direction of the civil authority (usually a magistrate): 'they should not, in ordinary cases, fire without his orders, nor fail to fire when ordered by him. Exceptional circumstances may exist which make it the duty of the troops to ignore or act in independence of the orders of the magistrate. In *R. v. Kennett*[54] Lord Mansfield laid it down that magistrates who neglected their duty of "reading the Riot Act" were guilty of misdemeanour. Alderman Kennett, Lord Mayor of London, was convicted of neglect of duty in failing to act during the Riots and releasing some prisoners, but he died before sentence was passed.

In *R. v. Pinney*[55] the Mayor of Bristol was charged with neglect of duty in failing to suppress a serious riot, directed in the first instance against the Recorder who had expressed unpopular views in Parliament about parliamentary reform. "A person, whether a magistrate or peace officer, who has the duty of suppressing a riot," Littledale J. told the jury, "is placed in a very difficult situation: for if, by his acts, he causes death, he is liable to be indicted for murder, or manslaughter, and if he does not act he is liable to an indictment on an

[51] G. Marshall, *Constitutional Conventions* (1984) Ch. 9; D. Bonner, *Emergency Powers in Peacetime* (1985); C.J. Whelan, "Military Intervention in Industrial Disputes," (1979) 8 Ind. L.J. 222; S. L. Greer, "Military Intervention in Civil Disturbances: The Legal Basis Reconsidered," [1983] P.L. 573; K. Jeffery and P. Hennessy, *States of Emergency: British Governments and Strikebreaking since 1919* (1983).

[52] *post* Chap. 21.

[53] (1799) 27 St.Tr. 759; Forsyth, *Cases and Opinions on Constitutional Law*, p. 557; and *cf. Wolfe Tone's Case* (1798) 27 St.Tr. 613, 624–625.

[54] (1781) 5 C. & P. 282. The Riot Act 1714 was repealed by the Criminal Law Act 1967; *post* para. 27–019.

[55] (1832) B. & Ad. 947. See also *Case of Armes* (1597) Pop. 121. Mayors were formerly *ex officio* magistrates. And see the charge of Tindal C.J. to the Bristol Grand Jury, as reported in 3 St.Tr.(N.S.) 11, approved by Willes J. in *Phillips v. Eyre* (1870) L.R. 6 Q.B. 1, 15. (Ct.Exch.Ch.). The plaintiff, in the latter case brought a civil action for damages against the defendant, the former Governor of Jamaica, for assault and false imprisonment in the course of suppressing rebellion. The defendant successfully pleaded an Act of Indemnity passed by the legislature of Jamaica; *post*, para. 35–023n.

information for neglect. He is, therefore, bound to hit the exact line between excess and failure of duty." The jury found that the Mayor had acted "according to the best of his judgment, with zeal and personal courage," and acquitted him. A prosecution for such neglect of duty is in fact extremely rare.

19–020 The common law principles, particularly in relation to the use of military force, were explained in the report of the commission appointed to report on the disturbances at Featherstone Colliery, near Wakefield, during a coal strike in 1893. All the available Yorkshire constables were concentrated at Doncaster, and the Home Secretary (Asquith) at the request of the local magistrates approved the sending of an infantry platoon. A magistrate, who was present with the troops, appealed repeatedly to the crowd to cease destroying property; the proclamation in the Riot Act was read; a bayonet charge proved unavailing; and as the defensive position held by the soldiers was becoming untenable and the complete destruction of the colliery was imminent, the magistrate gave orders to the commander to fire. Two men on the fringe of the crowd were killed. The coroners' juries disagreed on whether there had been sufficient reason for the troops to fire. Asquith appointed a Special Commission consisting of Lord Justice Bowen (afterwards Lord Bowen), Haldane (later Lord Chancellor), and Sir Albert Rollitt, M.P., a solicitor.[56] "Officers and soldiers," said the Commissioners in their Report,[57] "are under no special privileges and subject to no special responsibilities as regards this principle of the law. A soldier for the purpose of establishing civil order is only a citizen armed in a particular manner. . . . One salutary practice is that a magistrate should accompany the troops. The presence of a magistrate on such occasions, although not a legal obligation, is a matter of the highest importance. . . . The question whether, on any occasion, the moment has come for firing on a mob of rioters, depends, as we have said, on the necessities of the case. . . . An order from the magistrate who is present is required by military regulations . . . but the order of the magistrate has at law no legal effect. Its presence does not justify the firing of the magistrate is wrong. Its absence does not excuse the officer to fire when the necessity exists. . . . The justification of Captain Barber and his men must stand or fall entirely by the common law [*i.e.* it was not affected by the Riot Act]. Was what they did necessary, and no more than was necessary, to put a stop or to prevent felonious crime? In doing so, did they exercise all ordinary skill and caution, so as to do no more harm than could reasonably be avoided?" The Commission exonerated the magistrates, officers and troops from blame.

19–021 In *Attorney-General for Northern Ireland's Reference (No. 1 of 1975)*,[58] which concerned the use of force by soldiers to effect an arrest under the Northern Ireland (Emergency Provisions) Act 1973, Lord Diplock, speaking of the position at common law, said[59] that the little authority in English law concerning the rights and duties of a member of the armed forces of the Crown when acting in aid of the civil power relates almost entirely to the duties of soldiers when troops are called on to assist in controlling a riotous assembly. Where used for such temporary purposes it may not be inaccurate to describe the legal rights and duties of a soldier as being no more than those of an ordinary citizen in uniform. But such a description was misleading in the circumstances in which the army

[56] H. H. Asquith, *Memories and Reflections*, Vol. I, p. 130.
[57] (1893) C. 7234. See also *Lynch v. Fitzgerald* [1938] I.R. 382, *per* Hanna J.
[58] [1977] A.C. 105. The common law rule had been replaced by the Criminal Law (Northern Ireland) Act 1967, s.3 which, like the English Act, refers to force "reasonable in the circumstances."
[59] At p. 136.

was employed in aid of the civil power in Northern Ireland where in some parts of the province there has existed for some years a state of armed and clandestinely organised insurrection against the lawful government.

Although the duty on a private citizen may be described as one of imperfect obligation, it was held in *R. v. Brown*[60] to be an indictable misdemeanour for a bystander to refuse to aid a police officer in suppressing a riot, if reasonably called upon by him to do so. Alderson B. said that liability for this offence requires three conditions: (i) the constable must actually see a breach of the peace committed by two or more persons; (ii) there must be a reasonable necessity for the constable to call on other persons for assistance; and (iii) the defendant must have refused to render assistance without any physical impossibility or lawful excuse. It is immaterial whether the help the defendant could have given would have proved sufficient or useful. Prosecutions for failing to assist the police are very rare.

19–022 The degree of force that may properly be exercised in the preservation of the Queen's peace is unclear. Section 3 of the Criminal Law Act 1967, which replaces the common law rule, refers to "such force as is reasonable in the circumstances." It is thought that the destruction of life or property might well be reasonable in circumstances of grave disorder.[61] The question, what degree of force is reasonable, is one of fact for the jury.[62]

In circumstances where a chief constable felt unable to cope with serious civil disturbance, even with the help of men from other police forces,[63] the decision to use troops would be taken by the Home Secretary and not, as in earlier times, by the local magistrates.[64] In such circumstances he would, no doubt, consult colleagues including the Prime Minister and the Secretary of State for Defence, if, indeed, the decision were not regarded as one to be taken by the Cabinet.

Martial Law[65]

Uses of the term "martial law"

19–023 The question is often raised, whether the Crown has a prerogative power to declare martial law. The term "martial law" is sometimes incorrectly used to cover any one or more of the following:

(i) Military law, *i.e.* the codes governing the armed forces at home and abroad, in war and in peace. In former times, what we now call military law was sometimes referred to as martial law.

[60] (1841) C. & Mar. 314. See also *R. v. Pinney*, 1832 3 S.T. (N.S.) 4; H.E.L., viii, 350. *cf. Miller v. Knox* (1838) 4 Bing N.C. 574.

[61] Lord Diplock in *Att.-Gen. for Northern Ireland's Reference (No. 1 of 1975)* [1977] A.C. 105, quoted *ante*, seems so to have assumed. See also Report of the Widgery Tribunal of Inquiry (H.C. 200 1971–72)). *Farrell v. Secretary of State for Defence* [1980] 1 W.L.R. 172. Possibly a private citizen acting on his own initiative may not be justified in using as much force as the Crown itself may be entitled to use; *cf. Burmah Oil v. Lord Advocate* [1965] A.C. 75.

[62] *Att.-Gen. for Northern Ireland's Reference (No. 1 of 1975)*.

[63] Police Act 1966, s.24. Mutual help is now co-ordinated through the Mutual Aid Co-ordination Centre. The effectiveness of the Centre was demonstrated during the Miners' Strike of 1984–1985; *post* p. 415.

[64] Mr Jenkins, replying as Home Secretary, to a question in the House of Commons on April 8, 1976: H.C.Deb., Vol. 909, col. 617. See further Wilcox, "Military aid to the civil power" (1976) 126 New L.J. 404.

[65] "Martial Law" in D. Clark and G. McCoy, *The Most Fundamental Legal Right* (2000), pp. 61–82.

(ii) The law administered by a military commander in occupied enemy territory in time of war. This is sometimes called martial law by international lawyers. It is unnecessary to say more than that the law so administered amounts to arbitrary government by the military, tempered by international custom (*e.g.* the Hague Convention), and such disciplinary control as the British Government think fit to exercise.

(iii) The common law right and duty to maintain public order by the exercise of any degree of necessary force in time of invasion, rebellion, insurrection or riot (*ante.*)

Martial law in the strict sense means the suspension of the ordinary law, and the substitution therefor of discretionary government by the executive exercised through the military.[66]

Is martial law known to English law?[67]

19–024 Dicey asserted that martial law in this last sense is unknown to our Constitution.[68] Other writers have drawn a distinction between martial law in time of peace and in time of war, and contend that while the Petition of Right (1628) declared it illegal in the former case, it may still validly be proclaimed in the latter. The Petition of Right complained that commissions had been issued to certain persons giving them power to proceed "within the land" against such soldiers or mariners or other dissolute persons joining with them as should commit crimes, and to try them by such summary course "as is agreeable to martial law and as is used in armies in time of war"; and it prayed that no such commissions should thereafter issue. Cockburn C.J. in his charge to the grand jury in *R. v. Nelson and Brand*[69] pointed out that no distinction was made until after the time of Blackstone between "martial law" in the modern sense and what is now called "military law." In Great Britain, at any rate, the Crown cannot proclaim martial law by prerogative in time of peace. Nor has the Crown purported to proclaim it in time of war since the reign of Charles I, and it makes no difference whether or not a state of war has been proclaimed.

What on rare occasions has been called "martial law" since 1628 by British constitutional writers has been a state of affairs outside Great Britain in which, owing to civil commotion, the ordinary courts were unable to function, and it was therefore necessary to establish military tribunals. It is merely an extended application of the principle, discussed above, that the executive has such powers as are necessary for the preservation of public order. Even then specific powers have usually been obtained from Parliament, as in Ireland in 1799 and Jamaica in 1865.

Some authorities hold, nevertheless, that martial law may validly be called into operation in time of war both in Great Britain and outside, and that when this has been done the civil courts have no authority to call in question the actions of the

[66] The principles generally recognised for the imposition of martial law are: (i) necessity, *i.e.* the ordinary courts are unable to function; (ii) proportionality *i.e.* acts done should be proportional to the need; (iii) limitations of area *i.e.* only in areas (which might include the whole country) where the ordinary courts are unable to function; (iv) limitation of time, *i.e.* martial law should continue only so long as the necessity lasts.

[67] On the position before the Petition of Right see J. V. Capua, "The early history of Martial Law in England from the fourteenth century to the Petition of Right" (1977) 36 C.L.J. 152.

[68] Dicey, *Law of the Constitution* (10th ed.), p. 293.

[69] (1867) *Special Report*, pp. 99–100.

military authorities. They rely on the preamble to certain Irish Acts of Parliament, *e.g.* (1799) 39 Geo. 3, c.11, which referred to "the wise and salutary exercise of His Majesty's undoubted prerogative in executing martial law." They also pray in aid language used by Lord Halsbury in *Ex p. D. F. Marais*[70]: "The framers of the Petition of the Right well knew what they meant when they made a condition of peace the ground of the illegality of unconstitutional procedure." One answer to this line of reasoning was anticipated by Lord Blackburn when he said in his charge in *R. v. Eyre*[71]: "It would be an exceedingly wrong presumption to say that the Petition of Right, in not condemning martial law in time of war, sanctioned it." Another answer is afforded by the fact that when martial law has been proclaimed, the Crown has almost invariably protected its servants after the event by obtaining the passing of Acts of Indemnity.[72]

19–025 It is sometimes difficult to determine when a state of war exists in a particular district. Coke, Rolle and Hale were of the opinion that time of peace is when the civil courts are open, and that when they are closed it is time of war. The decision of the Privy Council in *Ex p. D. F. Marais*,[73] however, shows that this test is not conclusive and that the existence of a state of war in a given district is compatible with the continued functioning for some purposes of the civil courts within that district. To exclude the legality of martial law, says Holdsworth,[74] "the courts must be sitting in their own right and not merely as licensees of the military authorities."

The judicial decisions are few and inconclusive and mostly Irish, but the following seem to be the general principles:

(i) The ordinary courts have jurisdiction to determine as a question of fact whether a state of war exists, or did exist at the relevant time, in a given area so as to justify the setting up of a military tribunal (*R. v. Allen*[75]; *R. (Garde) v. Strickland*[76]).

(ii) If it is held that a state of war does or does not exist, then the military tribunal—not being a court but merely a body of military officers to advise the military commander—would not be bound by the ordinary law or procedure. In *Re Clifford and O'Sullivan*[77] the appellants had been sentenced to death for being in possession of firearms by a military tribunal constituted under the authority of the Commander-in-Chief in Ireland, and they applied for a writ of prohibition. The House of Lords held that if in fact a state of war exists or existed at the time of question, a military tribunal is not a court in the ordinary sense, but merely a body of military officers advising their commander; such a tribunal is not bound by the ordinary law of procedure, and therefore prohibition would not lie. Further, in this case the military "court" had concluded its business, so that prohibition was too late anyway; relief might be sought by habeas corpus when order was restored if the appellants were still alive. There is no remedy during the

[70] [1902] A.C. 109. This decision gave rise to four articles on martial law in (1902) 18 L.Q.R. 117, 133, 143 and 152.
[71] (1868) Finlayson, 75.
[72] See *R. v. Nelson and Brand* (1867) F. Cockburn's Reports, 59, 79; Forsyth, *Cases and Opinions on Constitutional Law*, pp. 198, 199, 553, 556–557; Holdsworth, *History of English Law*, Vol. X, pp. 705–713.
[73] [1902] A.C. 109, and see *Elphinstone v. Bedreechund* (1830) 1 Knapp 316.
[74] Holdsworth, *History of English Law*, Vol. I, p. 576.
[75] [1921] 2 I.R. 241.
[76] [1921] 2 I.R. 313. And see *R. (O'Brien) v. Military Governor, N.D.U. Interment Camp* [1924] 1 I.R. 32.
[77] [1921] 2 A.C. 570.

state of war (*Ex p. D. F. Marais, ante*). During the disturbances in Ireland that followed the passing of the Irish Free State Constitution Act 1922, many persons were sentenced to death by courts-martial, among them Erskine Childers. He applied for a writ of habeas corpus, which was refused on the ground that a state of war existed in Ireland at the time, and that the civil courts were unable to discharge their duties (*R. v. Portobello Barracks Commanding Officer, ex p. Erskine Childers*[78]). Nor is there any remedy after the war is over, if what was done was done in good faith or at least was dictated by necessity (*Wright v. Fitzgerald*[79]).

(iii) If on the other hand it is held that a state of war does not or did not exist at the relevant time, the person injured has his remedy by habeas corpus (*Wolfe Tone's Case*[80]) or otherwise for injury done to him, subject to the terms of an Act of Indemnity which will probably have been passed in the meanwhile (*Tilonko v. Att.-Gen. for Natal*[81]).

Statutory Powers to Deal with an Emergency: In Time of Peace[82]

The Emergency Powers Act 1920

19–026 This is a *permanent* statute, and was designed to meet emergencies such as the coal strike of 1921 or the General Strike of 1926. The Act, as amended in 1964,[83] provides that Her Majesty may by proclamation declare a state of emergency if at any time it appears that there have occurred, or are about to occur, events of such a nature as to be calculated, by interfering with the supply and distribution of food, water, fuel or light, or with the means of locomotion, to deprive the community, or any substantial portion of the community, of the essentials of life. No such proclamation remains in force for more than a month, without prejudice to the issue of a fresh proclamation during that period (section 1(1)). Where a proclamation of emergency has been made Parliament is to be informed thereof forthwith, and if the Houses be then adjourned or prorogued they are to be summoned to meet within five days (section 1(2)).

Where a proclamation of emergency has been made, and so long as it is in force, Her Majesty in Council may make regulations for securing the essentials of life of the community; and those regulations may confer on a Secretary of State or other government department, or any other person in Her Majesty's service or acting on Her Majesty's behalf, such powers and duties as Her Majesty may deem necessary for preserving the peace, securing to the public the necessaries of life, the means of locomotion and the general safety. Nothing in the Act authorises the making of regulations imposing military or industrial conscription, the alteration of the rules of criminal procedure, or making it an offence to take part in a strike or peacefully to persuade other persons to take part in a strike (section 2(1)).

All regulations so made must be laid before Parliament as soon as may be after they are made, and cease to remain in force after the expiration of seven days

[78] [1923] I.R. 5.

[79] (1799) 27 St.Tr. 759; P. O'Higgins, "*Wright v. Fitzgerald Revisited*" (1962) 25 M.L.R. 413.

[80] (1798) 27 St.Tr. 613. "No more splendid assertion of the supremacy of the law can be found than the protection of Wolfe Tone by the Irish Bench": Dicey, *Law of the Constitution* (10th ed.), p. 294. See further, R. F. V. Heuston, *Essays in Constitutional Law* (2nd ed., 1969) pp. 56 *et seq.* Before the dispute between the Courts and the military could be settled, Wolfe Tone had cut his throat.

[81] [1907] A.C. 93.

[82] K. Jeffery and P. Hennessy, *States of Emergency* (Routledge & Kegan Paul, 1983).

[83] Emergency Powers Act 1964.

from the time they were laid before Parliament unless a resolution is passed by both Houses providing for their continuance (section 2(2)). Regulations may provide for the trial by courts of summary jurisdiction of persons offending against the regulations. The maximum penalty for breach of the regulations is imprisonment for three months or a fine of £100 or both, together with the forfeiture of any goods or money in respect of which the offence has been committed. Regulations may not alter criminal procedure or confer any right to punish without trial (section 2(3)).

The Act was fully invoked during the General Strike of 1926. Proclamations of a state of emergency have been issued during strikes a number of times since. On some occasions regulations have been laid before Parliament, but they are usually dormant until put into force by orders, and they have not often needed to come into operation as most strikes are not sufficiently serious or are settled before the need arises. A proclamation of emergency was issued at the time of the seamen's strike in 1966. Regulations were then laid before Parliament making provision for control over maximum prices for such foods as might be specified; control of ports and dock labour; direction of the supply of fuel, food and animal foodstuffs, restriction of postal services, and control of home trade, shipping and cargoes; and the requisitioning of land, including houses and buildings. At the time of a miners' strike in February 1972, which cut off supplies of coal to power stations, emergency regulations come into force authorising electric power cuts and restricting the use of electricity in advertising and display-lighting. In 1973, emergency regulations were made to deal with the consequences of industrial action taken by miners and electricity workers.

The Emergency Powers Act 1964

19–027 Section 1 of the 1964 Act amended and expanded section 1 of the Emergency Powers Act 1920. Section 2 gives permanent effect to a regulation made under wartime legislation which permits the Defence Council to authorise the temporary employment of members of the Armed Forces in agricultural work or other urgent work of national importance. Under this section troops may be employed without any need for Parliamentary approval or the proclamation of a state of emergency. The section has been relied on in a number of cases; troops, for example, in 1975 went into action to remove refuse when Glasgow dustmen went on strike and in 1977–1978 when there was a national strike of firemen. In 2001 the Army was called on to help deal with the crisis following an outbreak of foot and mouth disease among farm animals.

Energy Act 1976

19–028 The sudden crisis in the distribution of petrol in the Autumn of 2000 required the government to exercise its powers under the Energy Act 1976, section 1 to regulate the production, supply, acquisition or use of liquid petroleum, allied products, and electricity.

19–029 *Civil Contingencies Unit* The co-ordination of measures to deal with emergencies is the responsibility of the Civil Contingencies Unit, a standing Cabinet Committee of ministers and civil servants which was set up in 1972 to replace the Emergencies Committee.

It is understood that in the light of experience gained in the recent emergencies the Home Office is reviewing government procedures for dealing with such occurrences.

Emergency Legislation in Northern Ireland

19–030 Members of the Armed Forces have not, since the General Strike, been employed in England, Scotland or Wales for the purposes of maintaining law and order. In Northern Ireland, however, the Army has been involved in preventing civil disorder since 1969. To rely on vague common law powers would have been impossible. At first legislation was passed by the Northern Ireland Parliament. When that was successfully challenged in the Courts,[83a] legislation was passed by the Westminster Parliament. The Northern Ireland Act 1972, in one short section provided that

> "The limitations imposed on the powers of the Parliament of Northern Ireland to make laws shall not have effect, and shall be deemed never to have had effect, to preclude the inclusion in laws made by that Parliament for the peace, order or good government of Northern Ireland of all provisions relating to members of Her Majesty's forces as such or to things done by them when on duty, and in particular shall not preclude, and shall be deemed never to have precluded, the conferment on them by, under or in pursuance of any such law of powers, authorities, privileges or immunities in relation to the preservation of the peace or maintenance of order in Northern Ireland."

In 1972 direct rule was introduced[84] and subsequently various statutes have been passed by the United Kingdom Parliament conferring emergency powers on the civil authorities and armed forces in Northern Ireland.[85] The legislation gave wide powers of arrest, search and entry to troops, as well as police constables. It created new offences and provided for the proscribing of organisations. It provided for detention without trial and for trial without jury. Without considering the details of such provisions it is necessary to emphasise the width of the powers conferred. Apart, for example, from specific provisions relating to entering and searching premises, section 19(1) of the 1978 Act allowed any member of the forces or any constable to enter any premises if he considers it necessary to do so in the course of operations for the preservation of peace or the maintenance of order; or if authorised to do so by or on behalf of the Secretary of State. Powers of detention—which have not been used since 1975—allowed persons to be detained

> "where it appears to the Secretary of State that there are grounds for suspecting that a person has been concerned in the commission or attempted commission of any act of terrorism or in directing, organising or training persons for the purpose of terrorism."

(defined as the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear).

Fears of widespread intimidation of juries led to the introduction of trials of "Scheduled Offences" by a judge sitting alone. These courts were known as Diplock Courts, after the author of the report which led to their adoption.[86]

[83a] *R. (Hume) v. Londonderry Justices* [1972] N.I. 91.

[84] *ante*, para. 5–003 *et seq.*

[85] Northern Ireland (Emergency Provisions) Act 1973; Northern Ireland (Emergency Provisions) Act 1978; Northern Ireland (Emergency Provisions) Act 1991; Northern Ireland (Emergency Provisions) Act 1996.

[86] *Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland*, Cmnd 5185 (1972).

The present constitutional situation in Northern Ireland, following the Good Friday Agreement of 1998 has been discussed earlier in Chapter 5. The emergency, anti-terrorist legislation will be discussed in Part IV of this chapter where it will be seen that the law relating to scheduled offences and trial by Diplock Courts will be continued for a fixed period as part of a permanent Terrorist Act which will apply throughout the United Kingdom.

Statutory Powers to Deal with an Emergency: In Time of War

Defence of the Realm Act 1914–15

19–031 The experience of the two great wars of the last century shows that the executive rely in time of war almost exclusively on statutory powers. Shortly after the outbreak of war in 1914, the United Kingdom was in effect placed under military law by the Defence of the Realm Act 1914, and British subjects and aliens were triable by court-martial in connection with certain offences for some months. Subsequent Defence of the Realm Acts allowed British subjects to claim a civil trial on taking the prescribed steps, and gave to the King in Council such powers as were necessary for the efficient prosecution of the war. The doctrine of *ultra vires*, of course, still applied (*Chester* v. *Bateson*[87]; *Att.-Gen.* v. *Wilts. United Dairies*.[88] But as Scrutton L.J. is reported to have said in *Ronnfeldt* v. *Phillips*[89]: "It has been said that a war could not be conducted on the principles of the Sermon on the Mount. It might also be said that a war could not be carried on according to the principles of Magna Carta. Very wide powers had been given to the Executive to act on suspicion on matters affecting the interests of the State."

The Indemnity Act 1920 The liability of the executive for action taken to put down grave civil disturbances, and acts done in the prosecution of a war, may be greatly limited by Acts of Indemnity. These may be quite narrow in scope, or they may be framed in general terms as in the Indemnity Act 1920. This provided that no civil or criminal proceedings should be instituted for anything done in or outside British territory during the war before the passing of the Act, if done in good faith, and done or purported to be done in the execution of duty or for the defence of the realm or the public safety, or for the enforcement of discipline or otherwise in the public interest, by any servant of the Crown, military or civil, or any person acting under his authority.

The Emergency Powers (Defence) Acts 1939 and 1940

19–032 The main provisions of the Emergency Powers (Defence) Act 1939, which was passed a week before the outbreak of war with Germany, were as follows: section 1 gave a special power to His Majesty by Order in Council to make such Regulations "as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community." Without prejudice to the generality of the preceding powers, it specified certain particular matters which might be the subject of Defence Regulations, viz.: the

[87] [1920] 1 K.B. 829.
[88] (1922) 91 L.J.K.B. 897, *cf. Yoxford and Darsham Farmers' Association Ltd.* v. *Llewellin* (1946) 62 T.L.R. 347.
[89] (1918) 35 T.L.R. 46, 47 (confirming Darling J. at (1917) 34 T.L.R. 556).

apprehension, trial and punishment of persons offending against the Regulations; the detention of persons whose detention appeared to the Secretary of State to be expedient in the interests of public safety or the defence of the realm; the taking of possession or control of any property or undertaking; the acquisition of any property other than land; the entering and searching of any premises; and the amendment, suspension or modification of any enactment.[90]

Section 2 of the Act of 1939 authorised the Treasury to impose charges in connection with any scheme of control authorised by Defence Regulations, *e.g.* the grant of licences or permits (*cf. Att.-Gen. v. Wilts. United Dairies, ante*); but any such order had to be laid before the Commons and would cease to have effect unless approval within 28 days by a resolution of the House.

19–033 Every Order in Council containing Defence Regulations had to be laid before Parliament, subject to annulment by either House within 28 days.

The Emergency Powers (Defence) Act 1940, passed at a time when invasion seemed to be imminent, allowed Defence Regulations, issued for the purposes prescribed by the Act of 1939, to make provision "*for requiring persons to place themselves, their services, and their property at the disposal of His Majesty.*" This very remarkable piece of legislation, which was passed through all its stages in both Houses and received the Royal Assent in one day, described itself as an extension of powers, but it is doubtful whether it did extend the powers already contained in the earlier Act.[91] The Emergency Powers (Defence) (No. 2) Act 1940, which was passed a few months later in order to remove doubts, declared that provision might be made by Defence Regulations "for securing that, where by reason of recent or immediately apprehended enemy action the military situation is such as to require that criminal justice should be administered more speedily than would be practicable by the ordinary Courts, persons, whether or not subject to the Naval Discipline Act, to military law, or to the Air Force Act, may . . . be tried by such special courts, not being courts-martial, as may be so provided."

The Emergency Powers Act 1964, s.2, as we have seen, made permanent the Defence (Armed Forces) Regulations 1939, which authorise the temporary employment of members of the armed forces in agricultural work or other urgent work of national importance. Otherwise the Emergency Laws (Re-enactments and Repeals) Act 1964 repealed the remaining Defence Regulations, re-enacting some of them with modifications.

Emergency powers and personal freedom

19–034 Judicial review of the legality of ministers' acts under legislation conferring emergency powers and of the validity of delegated legislation made under such legislation is subject to the same principles as apply to other cases involving statutory interpretation, which must, of course, now take account of the Human Rights Act 1998.[92] Nonetheless cases dealing with this particular type of legislation cannot safely be taken as authorities in other spheres because of the courts' reluctance to interfere with ministerial decisions when the safety of the state may be at risk.

[90] This meant any enactment passed before the Emergency Powers (Defence) Act 1940.

[91] Sir Ivor Jennings suggested that it was rather an act of defiance to the all-conquering Germans which "put into a legal formula the 'blood and tears and sweat' that Mr Churchill had promised as the British contribution to the war effort": *Law and the Constitution* (3rd ed.) pp. xxv–xxvi.

[92] [2000] para. 51–005

In *Liversidge v. Anderson*[93] Regulation 18B(1) of the Defence (General) Regulations issued under the Emergency Powers (Defence) Act 1939 provided that: "If the Secretary of State *has reasonable cause to believe* any person to be of hostile origin or associations . . . and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained." Persons aggrieved by a detention order might make objections to an advisory committee, and it was the duty of the chairman to inform the objector of the grounds on which the order had been made against him. A detention order was made by the Home Secretary against Liversidge (alias Perlzweig) on the ground that he had reasonable cause to believe that Liversidge was a person of hostile associations, and that by reason thereof it was necessary to exercise control over him. Liversidge was accordingly detained in Brixton Prison, and next year he issued a writ against the Home Secretary claiming a declaration that his detention was unlawful and damages for false imprisonment. The Home Secretary did not make any affidavit showing why, or on what information, he had reached his decision, but merely produced the order purporting to be made under Regulation 18B(1).[94] The action proceeded on a claim for particulars of defence: there was no suggestion that the Home Secretary had not acted in good faith; and the House of Lords (Lord Maugham L.C. and Lords Macmillan, Wright and Romer, with Lord Atkin dissenting) held that the order was valid and the Home Secretary's answer sufficient.

Lord Maugham L.C. emphasised the points that this was a matter for executive discretion; the Home Secretary was not acting judicially, his decision must necessarily be based on confidential information, and he was responsible to Parliament. It may be noticed that this last point was not merely a constitutional convention, for the Regulation required the Home Secretary to make a monthly report to Parliament of his exercise of this power. His Lordship further said that the words "if he has reasonable cause to believe" drew the attention of the Home Secretary to the fact that he should personally consider the matter himself; the only requirement was that he must have acted in good faith. The other majority opinions emphasised the facts that these were emergency executive powers, conferred at a time of great national danger on a responsible Minister who was answerable to Parliament, and whose sources of information were confidential on security grounds.

Lord Atkin, in his spirited dissenting judgment,[95] contended that the words "if he has reasonable cause" to believe did not mean "if he *thinks* he has reasonable cause": they have an objective meaning and give rise to justiciable issue. He supported his argument by references to the common law and statutory power of arrest, statutes dealing with other criminal matters, and actions at common law for malicious prosecution. His Lordship did not consider that the case of *R. v. Halliday (ante)* was relevant, as in that case (on which he had sat as a member of the Divisional Court) the appellant's contention was that the Regulation was *ultra vires*. Nor was he suggesting that the courts should substitute their opinion **19–035**

[93] [1942] A.C. 206. See R. F. V. Heuston, "*Liversidge v. Anderson* in retrospect" (1970) 86 L.Q.R. 331, and note in (1971) 87 L.Q.R. 161.

[94] *cf. R. v. Home Secretary, ex p. Lees* [1941] 1 K.B. 72 (application for habeas corpus; Court of Appeal held Home Secretary's affidavit sufficient answer).

[95] *ibid.* at pp. 225–247. See further, G. Lewis, *Lord Atkin*, (Butterworths, 1983) pp. 132–57; D.N. Pritt, *Autobiography: From Right to Left* (Lawrence and Wishart 1967). Pritt was counsel for Liversidge. A similar stand had been taken in his dissenting speech by Lord Shaw in *R. v. Halliday, Ex p. Zadig* [1917] A.C. 260.

for that of the Home Secretary as to whether, for example, a person is of hostile origin: the question was, whether the Home Secretary had reasonable cause to believe that he was of hostile origin.

In *Greene v. Home Secretary*[16] the House of Lords dismissed an appeal on an application for habeas corpus arising out of the same regulation. Lord Atkin in this case agreed with his colleagues, as the Home Secretary had filed an affidavit setting out a number of particulars and stating that he had acted on information from responsible and experienced persons.

Both Liversidge and Greene were, in fact, released shortly after these decisions.

Liversidge v. Anderson and *Greene v. Home Secretary* were applied by Asquith J. in *Budd v. Anderson*[17] a case arising out of Regulation 18B(1A). The decision in *Liversidge v. Anderson*, however, met with a mixed reception outside the courts,[18] and we cannot do better than adopt the conclusion of the late Professor Berriedale Keith: "The question is one of great difficulty, but the concurrent view of so many judges leaves little doubt that the decision has been rightly taken on the wording of the regulation."[19]

19–036 In *Nakkuda Ali v. Jayaratne*[1] a strong Privy Council held that *Liversidge v. Anderson* must not be taken to lay down any general rule on the construction of the expression "has reasonable cause to believe." Subsequently *Liversidge v. Anderson* was described by Lord Reid in *Ridge v. Baldwin*[2] as a "very peculiar decision." Lord Diplock in *I.R.C. v. Rossminster Ltd*[3] thought that "the time has come to acknowledge openly that the majority of this House in *Liversidge v. Anderson* were expediently and, at that time, perhaps, excusably, wrong and the dissenting speech of Lord Atkin was right." Lord Scarman, in the same case, said that the ghost of *Liversidge v. Anderson* had been laid to rest by Lord Radcliffe in *Nakkuda Ali v. Jayaratne*.[4] It should not, however, be forgotten that the House of Lords, as evidenced by *McEldowney v. Forde*[5] in construing powers for dealing with emergencies may still give greater scope to ministerial discretion than subsequent judicial criticisms of *Liversidge v. Anderson* might suggest.

[16] [1942] A.C. 284. See R. F. V. Heuston in (1971) 87 L.Q.R. 163. The Court of Appeal refused habeas corpus in *R. v. Home Secretary, ex p. Lees* [1941] 1 K.B. 72, in a case arising under Regulation 18B(1A).

[17] [1943] K.B. 642. *Cf. R. v. Home Secretary, ex p. Budd* [1942] 2 K.B. 14, where the Court of Appeal held that the Home Secretary must apply himself to each case under the Regulation, and sign the detention order, otherwise the person detained was entitled to release under habeas corpus; but if the procedure is regularised after release, the person may be detained again for the same cause. For a survey of other jurisdictions, see Clark and McCoy, *op. cit.*, Chapter 4.

[18] For: Keith, *Journal of Comparative Legislation* (1942) 3rd Ser., Vol. XXIV, Pt. I, pp. 63–64; Holdsworth (1942) 58 L.Q.R. 1–3; Goodhart, *ibid.* pp. 3–8 and 243–246. Against: Allen, *ibid.* pp. 232–242; Keeton (1942) 5 M.L.R. 162–173; Allen, *Law and Orders* (2nd ed.), App. 1. Neutral: Jennings, *The Law and the Constitution* (3rd ed.), pp. xxx–xxxi. For an account generally of detention and the role of the Security Services, A.W.B. Simpson, *In the Highest Degree Odious: Detention Without Trial in Wartime Britain*.

[19] *The Constitution under Strain* (1942), p. 51.

[1] [1951] A.C. 66. The application for certiorari failed on the ground that the Controller's function was executive and not judicial.

[2] [1964] A.C. 40.

[3] [1981] A.C. 952, 1011.

[4] At p. 1025. See also *Att.-Gen. of St. Christopher v. Reynolds* [1980] A.C. 637, PC.

[5] [1971] A.C. 632, Lord Diplock and Lord Pearce dissenting; *post* para. 31–005. Further evidence is to be found in *McKee v. Chief Constable for Northern Ireland* [1984] 1 W.L.R. 1358, (H.L.) (Power of arrest under anti-terrorist legislation; question is state of mind of constable, not reasonableness of his belief).

Other war legislation

Legislation for the purposes of the last war was mostly carried out by means of Defence Regulations, but Acts of Parliament were necessary where: (i) what was wanted to be done was outside the scope of the Emergency Powers (Defence) Acts 1939 and 1940, or (ii) the provisions were not to be limited to the war period, or (iii) it was necessary to raise money. The practice with regard to the last was for the Government to ask Parliament periodically for votes of £1,000,000,000, while for security reasons the estimates for each of the service and supply departments were put at the nominal figure of £100. **19–037**

Many of the Emergency Acts[6] passed on account of the war contained a provision to the effect that they were to continue in force until such date as His Majesty might by Order in Council declare to be the date on which the emergency which was the occasion of the passing of the Act should have ended. In *Willcock v. Muckle*[7] it was held that there must be an order in Council declaring the end of the emergency in relation to the particular Act.

The reluctance of the executive to abandon the powers contained in such legislation was revealed in the Scott Inquiry Report[8] which drew attention to continued reliance on the Import, Export and Customs Powers (Defence) Act 1939 until, finally, the Import and Export Control Act 1990 removed the reference in the 1939 Act to "the emergency which was the occasion for its passing" and so made permanent an Act which should long before have been terminated by Order in Council.

The dearth of judicial decisions after 1939 on the nature and extent of the prerogative in time of war is due to the fact that the Emergency Powers (Defence) Acts and the other emergency statutes mentioned covered practically everything that the Government would want to do, except for taxation and the acquisition (as distinct from the taking possession) of land.[9]

III. The Security Services

Although it has been suggested that the covert gathering of intelligence can be traced back for over three thousand years to the sending of secret agents by Moses to spy out the land of Canaan,[10] the origins of the modern British intelligence services date to the last quarter of the nineteenth century when the War Office, in 1873, and the Admiralty, in 1886, established departments to obtain information on military and naval developments in Germany. In 1883 the Special Irish Branch was established as part of the Metropolitan Police; in 1887 it became the Special Branch of the Metropolitan Police. In the twentieth century there evolved MI5 (the Security Service) which dealt with internal issues of espionage and state security and MI6 (Secret Intelligence Service) which dealt with intelligence gathering outside the United Kingdom. Following the lead of the Metropolitan Police, each police force established its own Special Branch. **19–038**

[6] See Carr, *Concerning English Administrative Law*, Chap. 3, for the spate of legislative activity in the first week of the war.
[7] [1951] 2 K.B. 844.
[8] *Inquiry into the Export of Defence Equipment to Iraq*, 1995–1996, H.C. 115.
[9] *cf.* Requisitioned Land and War Works Acts 1945 and 1948; Land Powers (Defence) Act 1958. And *cf. Burmah Oil Co* case, *ante*, para. 15–017.
[10] Numbers, Chap. 13, cited by C. Andrew, *Secret Service* (1985).

Until the last quarter of the twentieth century MI5 and MI6 operated on a non-statutory basis, their very existence hardly officially acknowledged. A central part of the government's intelligence gathering activities was, of course, given considerable publicity by the litigation following the banning of trades union activities at the Government Communications Headquarters: *Council of Civil Service Unions v. Minister of Civil Service*.[11] Legislation to put these services on a statutory footing was passed as a result of the decision of the European Court of Human Rights in *Harman and Hewitt v. United Kingdom*.[12] The Security Service Act 1989 provided that "there shall continue to be a Security Service" whose function is to be the protection of national security, in particular its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means. The Security Service was also given the responsibility of safeguarding the economic well-being of the United Kingdom against threats posed by the actions or intentions of persons outside the British Islands. These functions have been extended by the Security Services Act 1996, the Police Act 1997 and the Regulation of Investigatory Powers Act 2000 to enable the Security Service to act in support of the police in the prevention and detection of serious crime. The Intelligence Services Act 1994 similarly "recognised" the continued existence of a Secret Intelligence Service whose role related to obtaining information relating to persons outside the British Islands in the interests of national security with particular reference to defence and foreign policies or in the interests of the economic well-being of the United Kingdom or in support of the prevention or detection of serious crime. The 1994 Act also recognised the existence of the Government Communications Headquarters and made explicit its role in monitoring electromagnetic, acoustic and other emissions and in the field of cryptography.

19–039 As further evidence of the changing climate the names of the Directors of the services became public and, indeed, the former Director of MI5, Dame Stella Rimington, has announced plans to publish her memoirs. The locations of the headquarters of the services similarly were formally acknowledged—new and very visible buildings in London for MI5 and MI6 and a new home for GCHQ at Benhall, near Cheltenham.[13] Less desirable publicity has, of course, been attracted to their activities by the publication of the memoirs of Peter Wright, leading to the *Spycatcher* litigation,[14] the further memoirs of Richard Tomlinson and, most recently, criminal proceedings against David Shayler, a former member of MI5 on charges of breaches of the Official Secrets Act.

The Acts of 1989 and 1994 provided a statutory basis for the surveillance activities of both security services[15] and a system of control via a need for authorisation before exercising these powers, a tribunal to which complaints of misuse of powers could be made and annual reports by a Commissioner to the Prime Minister which would be laid before Parliament after the deletion of any

[11] [1985] A.C. 374.

[12] [1989] 14 E.H.R.R. 657.

[13] MI5 at Thames House and MI6 at Vauxhall Cross. The costs of fitting out both buildings exceeded estimates by £300m. GCHQ's new home has so far cost £400m, against an original estimate of £20m.

[14] *post* para. 25–020.

[15] And so made glaringly anomalous the exercise of similar powers by the police without statutory authority which was exposed by *R. v. Khan* [1996] 2 Cr.App.R. 440, HL. Legislation followed: the Police Act 1997.

material required by considerations of national security.[16] The efficacy of this regime as a guarantee against abuse of an individual's rights was open to question.[17] A new basis for the exercise and regulation of powers of surveillance and investigation has been introduced by the Regulation of Investigatory Powers Act 2000, the provisions of which are discussed in Chapter 26.[18]

A degree of Parliamentary accountability was introduced by section 10 of the Intelligence Services Act 1994 which established the Intelligence and Security Committee, composed of nine members drawn from both Houses of Parliament with the responsibility of examining the expenditure, administration and policy of the security services and G.C.H.Q. The Committee lacks the powers of a Select Committee. It reports to the Prime Minister who must lay its report before Parliament but with the deletion of any material prejudicial to the functioning of the services. 19–040

The Committee's lack of effectiveness is clear from its Interim Report for 2000–2001[19] in which it points out that the Cabinet Committee on the Intelligence Services has not met despite an assurance from the Prime Minister that it would do so while the Chief Secretary to the Treasury continues to refuse to talk to the Committee and the government continues to refuse to give any breakdown of the allocation of funds to specific agencies within the overall role for the Intelligence Services. Not merely were the Tribunals established under the 1989 and 1994 Acts of limited efficacy in terms of jurisdiction: the Committee reveals that they were so deprived of resources that they lacked the staff to open the mail which they received, let alone deal with complaints. Meanwhile the Committee continues to look at the systems of oversight of intelligence services in countries such as America, Australia, Canada and New Zealand which operate through an Inspector General.

IV. Terrorism

In earlier[20] and later[21] chapters we discuss threats posed to the state by treason and sedition, both topics which reflect the realities of earlier centuries of constitutional law. Terrorism is a phenomenon of more recent years[22] which poses the dilemma of how to take effective steps to curtail its evils without, at the same time, destroying the very liberties which the law is seeking to protect.[23] Article 17 of the European Convention on Human Rights provides that nothing in the Convention creates any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms contained in the Convention. 19–041

[16] The two Acts followed the model of the Interception of Communications Act 1985.
[17] H. Fenwick, *Civil Rights* (Longman, 2000) Chap. 8. The author concludes that the systems for dealing with complaints share characteristics which "render them almost irrelevant as a means of providing oversight" (p. 313).
[18] Fenwick, *op. cit.*, Chaps 9 and 10.
[19] Cm 3126. Its effectiveness is unlikely to be increased by the appointment, following the election in June 2001, of the former Government Chief Whip to the position of Chair of the Committee.
[20] Chap. 14.
[21] Chap. 25.
[22] But not unknown in earlier times, as shown by cases such as *Re Meunier* [1894] 2 Q.B. 415 or novels such as Joseph Conrad's *The Secret Agent*. See George Woodcock, *Anarchism* (2nd ed., 1986).
[23] H. Fenwick, *Civil Rights* (Longman, 2000) Chap. 3.

Nonetheless it recognises certain rights are not subject to any restriction: no-one shall be subjected to torture or to inhuman or degrading treatment or punishment (Article 3). But other rights, as will be seen in Chapter 22, may be restricted on grounds such as the protection of public order and states may, by Article 15, derogate from their obligations under the Convention "in time of war or other public emergency threatening the life of the nation ... to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."

Terrorism often raises issues of extra-territorial jurisdiction, and international agreements to suppress a particular type of activity, for example, the hi-jacking of aircraft or to simplify extradition proceedings between the requesting state and the state where the alleged terrorist has taken refuge.[24] All these matters are reflected in a wide range of United Kingdom statutes—for example the Aviation Security Act 1982, the Taking of Hostages Act 1982 and the Aviation and Maritime Security Act 1990. The Suppression of Terrorism Act 1978 amended the law of extradition in the light of the European Convention on the Suppression of Terrorism. The Terrorism Act 2000 contains provisions amending the Extradition Act 1989 and enabling the United Kingdom to ratify United Nations Conventions for the Suppression of Terrorist Bombings and the Suppression of the Financing of Terrorism (Sections 62–64).

19–042 The original impetus for anti-terrorist legislation at the end of the last century was provided by the situation prevailing in Northern Ireland which led, *inter alia* to the enactment of the Prevention of Terrorism (Temporary Provisions) Act 1974.[25] Later, similarly named, Acts in 1976, 1984 and 1989 extended anti-terrorist provisions to the whole of the United Kingdom while further powers were included in other statutes of which the last, rushed through Parliament in two days, was the Criminal Justice (Terrorism and Conspiracy) Act 1998.

The current legislation is to be found in the Terrorism Act 2000,[26] which contains complicated transitional provisions in relation to the earlier statutes.[27] In accordance with the requirements of the Human Rights Act 1998, section 19, ministers in both Houses certified that the Act is compatible with the terms of the European Convention on Human Rights.[28] As will be seen, however, a number of provisions in the legislation may be open to question on the ground of incompatibility with the Convention.

Whereas earlier legislation required periodic renewal by Parliament, the 2000 Act represents a belief in the need for permanent anti-terrorist legislation. Section 126, however, requires the laying before Parliament of an annual report on the working of the Act.

Terrorism is defined in section 1 as the use or threat of action for the *purposes* set out in subsection (1) when the action is of the *kind* set out in subsection (2). To fall within subsection (1) the use or threat of action must satisfy a twofold test: it must (i) be designed to influence the government or to intimidate the public or a section of the public, and (ii) be made for the purpose of advancing a political, religious or ideological cause.

[24] Chap. 23.
[25] Chap. 5.
[26] On the background to the legislation, see the report of Lord Lloyd of Berwick, *Inquiry into legislation against terrorism*, Cm 3420 (1996) and the White Paper, *Legislation Against Terrorism*, Cm 4178.
[27] s.2 and Sched. 15 Pt VII.
[28] *Post*, para. 22–010, for the need for and the effect of such ministerial statements.

19–043 The *kind* of action defined in subsection (2) is any that (a) involves serious violence against a person, or (b) serious damage to property, or (c) endangers a person's life other than that of the person committing the action, or (d) creates a serious risk to the health or safety of the public or a section of the public, or (e) is designed seriously to interfere with or seriously to disrupt an electronic system. The use of firearms or explosives in circumstances falling with in subsection (2) is terrorism if it satisfies subsection (1)(c)—the advancement of a political, religious or ideological cause—whether or not it also satisfies subsection 1(b)—influencing the government or intimidating the public or a section of a public: subsection (3). Subsection 4 explicitly provides that all the elements of the definition of terrorism are to be given extraterritorial effect.[29] In relation to later provisions of the Act, subsection (5) provides that any reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation (that is an organisation falling within section 3). A terrorist is defined for the purposes of Part V of the Act (which confers on the police counter-terrorist powers) as a person who has committed any of a number of offences under the Act or is or has been concerned in the commission, preparation or instigation of acts of terrorism (section 40).[30]

Part II of the Act deals with the proscribing of organisations and offences connected with membership of proscribed organisations. Under section 3, an organisation is proscribed if it is listed in Schedule 2 of the Act or if it is added to the list by the Secretary of State if it believes it is concerned in terrorism, as defined in the wide terms of subsection 5 which after listing such specific forms of being concerned in terrorism as committing or participating in acts of terrorism or prepares for terrorism goes on to conclude "or is otherwise concerned in terrorism". The proscription of organisations has a long history in Northern Ireland.[31] Modern anti-terrorist legislation contained distinct provisions for Northern Ireland and Great Britain. The Terrorism Act provides a system for the whole of the United Kingdom and extends it to all terrorist organisations, not merely those concerned with terrorism in Northern Ireland—although only such bodies appear in the original list forming Schedule 2. Any organisation which has been proscribed, or any person affected by the organisation's proscription may apply to the Secretary of State to remove the organisation from the list: section 4. Where an application is unsuccessful, the applicant may appeal to the Proscribed Organisations Appeal Commission, established by section 5, from which there is a further right of appeal to the Court of Appeal under section 6.[32] The constitution and procedure of the Commission are set out in Schedule 3. These provisions are intended to ensure that the proscription and (in the language of the sidenote to section 5) deproscription procedures are compatible with the Human Rights Act 1998.[33] Whether they are held to be so, or not, Schedule 3 makes it clear that the Commission does not function like a conventional court. Full particulars of the reason for proscription or refusal to deproscribe may be

[29] Thus eliminating any doubt arising from the normal presumption of non-extraterritoriality: *ante* para. 3–020.

[30] s.11 (membership of a proscribed organisation); s.12 (inviting support for a proscribed organisation); ss.15–18 (fund-raising offences); s.54 (weapons training); ss.56–63 (directing, possessing, inciting offences).

[31] See, for example, *McEldowney v. Forde* [1971] A.C. 632, HL.

[32] Or, as appropriate, the Court of Session or the Court of Appeal in Northern Ireland.

[33] See further the detailed, consequential provisions of s.9. Evidence given in the course of deproscription proceedings is not admissible in proceedings relating to certain statutory offences connected with membership of terrorist organisations: s.10.

withheld from the organisation or applicant and from any person representing such parties; parties and their representatives may be excluded from all or part of proceedings (paragraph 4(4)). It is open to question whether these provisions satisfy Article 6 of the Convention.[34]

19–044 Part II creates three criminal offences relating to proscribed organisations: membership (section 11); inviting support (beyond the provision of money or property) (section 12) and the wearing in a public place of an item of clothing or the wearing or carrying of an article so as to arouse reasonable suspicion of membership of a proscribed organisation (section 13).[35] These sections are similar to those familiar in earlier legislation such as the various Prevention of Terrorism (Temporary Provisions) Acts and the Northern Ireland (Emergency Provisions) Acts.

The later Parts of the Act deal with offences relating to terrorism generally, as defined in section 1, and grant wide powers to the police in conducting terrorist investigations and engaging in counter-terrorist activities. Part III deals with terrorist property, that is property likely to be used for the purposes of terrorism (including any resources of a proscribed organisation) and the proceeds of the commission of acts of terrorism (section 14). Subsequent sections render criminal the raising of funds for the purposes of terrorism (section 14), the use or possession of property for such purposes (section 16), and money laundering (section 18). Courts may, after convictions under sections 15–18 make forfeiture orders (section 23). Cash which is being taken from or brought into the United Kingdom may be seized by an authorised officer if he has reasonable grounds that it is intended to be used for the purposes of terrorism, forms part of the resources of a proscribed organisation or is terrorist property within the meaning of section 14 (section 25). Provision is made for detention of the property and ultimately forfeiture by court order (sections 26–31). Part IV empowers the police to designate "cordoned areas" for the purpose of carrying out terrorist investigations as defined in section 32. Extensive powers of search in such areas are conferred by section 37 and Schedule 5. Part V deals with counter-terrorist powers. Section 41, for example, provides for arrest without warrant of a person reasonably suspected of being a terrorist. Section 42 authorises searching premises for the purpose of arresting a person reasonably suspected of being a terrorist. Section 43 authorises the stopping and searching of anyone whom a police constable suspects to be a terrorist to discover whether he has in his possession anything which may constitute evidence that he is a terrorist. Powers of stopping and searching vehicles or persons in designated areas are conferred by section 44.

19–045 Those provisions may raise questions in relation to the European Convention. Article 5, for example, refers to arrest on reasonable suspicion of having committed an offence. But the 2000 Act does not make "being a terrorist" an offence in itself.[36] Similarly rights of search may infringe Article 8 which protects the right to respect for one's home and private life.[37] The powers of detention conferred by section 41(3) have been drafted to require judicial approval for any

[34] *post* para. 22–036.

[35] *cf.* Public Order Act 1936, s.1; *O'Moran v. D.P.P.* [1975] Q.B. 864; *post* para. 27–040. The Public Order Act uses the word uniform in the body of the section. In the Terrorism Act uniform is used only as a sidenote.

[36] A point made by Lord Lloyd of Berwick during debates on the Bill in the House of Lords. H.L.Debs. vol. 613, col. 676. On Article 5, see later, para. 22–033.

[37] *post*, para. 22–039.

extension after the initial period of 48 hours, up to the maximum period of 7 and as a response to the decision in *Brogan v. UK* which held a system of detention dependent on authorisation by the executive to be in breach of Article 5(3).[38]

Part VI creates a number of specific offences. Section 54 relates to training or providing instruction in the making of firearms, explosives or chemicals, biological or nuclear weapons, or receiving training or instruction in using such weapons. It is for the defence to prove that such training or instruction was wholly for a purpose other than assisting or participating in an act of terrorism. The compatibility of this shifting of the burden of proof from the prosecution to the defence will be considered later in connection with section 118 of the Act. A similar shift is to be found in section 57 (possession of article for the commission of an act of terrorism) and section 58 (collecting or recording information of a kind likely to be useful in the commission of an act of terrorism). Sections 59–61 relate to inciting terrorism outside the United Kingdom.[39] Sections 62 and 63 give jurisdiction to the courts of the legal systems in the United Kingdom over acts committed abroad which fall within the terms of the United Nations Conventions for the Suppression of Terrorist Bombings and the Suppression of the Financing of Terrorism.

19–046 A number of sections of the Act require the defendant to prove a defence to an offence arising, for example, from possession of articles for the commission of terrorism (section 57). Article 6(2) of the European Convention on Human Rights recognises the right to be presumed innocent until proved guilty. The shifting of the burden of proof to the defence in criminal proceedings raises questions about the meaning and scope of the Convention guarantee. Section 112 of the Act is intended to strike an acceptable balance between the presumption of innocence and placing on the defence the burden of disproving a criminal inference from facts proved by the prosecution. Where it is a defence for a person charged with an offence to prove a particular matter it is only necessary to adduce evidence which is sufficient to raise an issue with respect to that matter. The court shall then assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not: subsections 1 and 2.[40] In those provisions where the court makes an assumption unless a particular matter is proved or may accept a fact as sufficient evidence unless a particular matter is proved, the defence again is only required to adduce evidence sufficient to raise an issue—unless the prosecution can disprove the issue beyond reasonable doubt: subsections 3 and 4.[41]

Section 118 had no counterpart in earlier legislation and is a response to dicta *R. v. D.P.P. ex p. Kebilene*[42] where the House of Lords refused to interfere with a decision of the Director of Public Prosecutions to consent to the prosecution of the applicants under section 16A of the Prevention of Terrorism (Temporary

[38] (1989) 11 E.H.R.R. 177. As a result the United Kingdom entered a derogation (which was upheld in *Brannigan and McBride v. UK* (1999) 17 E.H.R.R. 539. *post* para. 22–026). As a result of the new procedure the Government has felt able to withdraw the derogation.

[39] In s.59 (inciting terrorism overseas) subs. 5 deserves special mention: "Nothing in this section imposes criminal liability on any person acting on behalf of, or holding office under, the Crown."

[40] s.12(4), defence to prove no reasonable cause to believe address supporting proscribed organisation would be made; s.39(5)(a), disclosure of information; s.54(5) instruction or training in weapons; s.57(2), possession of articles; s.58(3) collection of information.

[41] This refers to two sections in Pt VII, which relates to Northern Ireland: s.77, possession of article in circumstances such as to constitute an offence under certain statutes; s.103, terrorist information.

[42] [2000] 2 A.C. 326, HL.

Provisions) Act 1989 (the terms of which are re-enacted in the Terrorism Act 2000, section 57). The House expressed views, in the event the trial took place, of the possibility of interpreting section 16A in a way which was consistent wit the European Convention's recognition of the presumption of innocence. Contrary to the Divisional Court their Lordships thought section 16A could be interpreted as being consistent wit the Convention if it were read, not as requiring he defendant to *prove* his innocent possession but to put on the defendant the obligation to produce evidence which raised a reasonable doubt on the issue. Section 118 clearly attempts to enact the substance o the dicta in *Kebilene*.

Part IV

Justice and Police

CHAPTER 20

THE ADMINISTRATION OF JUSTICE

20–001 In much of the earlier part of this book it has been convenient, and often correct, to refer to the British Constitution or to the United Kingdom without adverting to the existence of separate legal systems in England, Scotland and Northern Ireland. In this chapter, however, it is impossible to ignore the fact that the legal systems of England and Scotland developed separately in the centuries before 1707 and have remained largely distinct since then.[1] Although the Scotland Act 1998 will ensure that the systems remain distinct, the single system of courts in Scotland: "has to be made serve both the devolved Scottish and reserved UK interests".[2] The differences between the legal systems of England and Northern Ireland are less marked. Ireland it has been said, was the scene of "The First Adventure of the Common Law"[3] and over 800 years the law developed along similar lines in both countries.

The main emphasis of this chapter will be on the English legal system and while important distinctions between the systems will be referred to, it must not be assumed that any statement is equally true of the three parts of the United Kingdom unless such is said to be the case.

I. PREROGATIVE AND ADMINISTRATION OF JUSTICE

20–002 The administration of justice is one of the prerogatives of the Crown, but it is a prerogative that has long been exercisable only through duly appointed courts and judges.[4] The various courts and their jurisdictions are now almost entirely on a statutory basis. The Sovereign is "the fountain of justice" and general conservator of the peace. "By the fountain of justice," Blackstone explains,[5] "the law does not mean the *author or original*, but only the *distributor*. . . . He is not the spring, but the reservoir; from whence right and equity are conducted, by a thousand channels, to every individual." In the contemplation of the law the Sovereign is always present in court and therefore cannot be non-suited. Instances are recorded of Plantagenet Kings personally dealing with criminal cases, and Edward IV sat with his judges for three days to see how they did their work; but the personal interference of the Sovereign with the judges was infrequent, and Coke told James I that although he might be present in court he could not give an opinion (*Prohibitions del Roy*[6]). Criminal proceedings, whether

[1] See in particular Articles XIX and XVIII of the Union with Scotland Act 1807 *ante*, para. 1–006.

[2] C.M.G. Himsworth, "Securing the tenure of Scottish judges: a somewhat academic exercise", [1999] P.L. 14, at p. 14.

[3] W.J. Johnston, "The First Adventure of the Common Law", (1920) 36 L.Q.R. 9; A.G. Donaldson, *Some Comparative Aspects of Irish Law* (1957) Chap. 1 and *passim*; F. E. Moran, "The Migration of the Common Law: The Republic of Ireland", (1960) 76 L.Q.R. 69.

[4] *Prohibitions del Roy* (1607) 12 Co.Rep. 63.

[5] Bl.Comm.I. 266.

[6] (1607) 12 Co.Rep. 63, 64. And see Holdsworth, *History of English Law* (5th ed.), Vol. 1, pp. 194, 207.

initiated by the Crown or a private individual, are conducted on behalf of the Crown and indictments are in the Queen's name. Claim forms commencing civil actions are not issued in the Queen's name,[7] and although judgment is executed in her name, the Crown has no control over the conduct of civil cases. The prerogative power to create courts is now virtually useless, because, first (if Coke was right), such courts could not administer equity or any other system except the common law; and secondly, the expense of maintaining such courts would require parliamentary authority. For practical purposes, then, the following may be regarded as the most significant of the existing prerogatives relating to the administration of justice.

The maxim "the King can do no wrong" extended to the Sovereign in his public capacity and in effect to the government generally. The common law rule that no civil action might be brought against the Crown must now be read subject to the important exceptions contained in the Crown Proceedings Act 1947; although even then there are savings with regard to prerogative powers, such as defence and the training of the forces. The Crown still has procedural privileges with regard to disclosure and interrogatories, and no execution may be levied against the Crown.[8]

20–003 Time does not run against the Crown at common law, *Nullum tempus occurrit regi*.[9] But there are numerous statutes providing that specified criminal proceedings must be taken within a limited period; and the Crown Proceedings Act 1947 expressly makes the Crown bound by statutes limiting the time within which civil proceedings must be commenced, *e.g.* Limitation Acts.

The Attorney-General has a discretion by his fiat (*nolle prosequi*) to discontinue any criminal proceedings on indictment, whether the proceedings were initiated by the Crown or a private prosecutor.[10] He is answerable *ex post facto* to Parliament for the exercise of this power, although it is seldom questioned. The wide statutory powers given to the Director of Public Prosecutions by the Prosecution of Offences Act 1985 to discontinue criminal proceedings[11] means that this power is seldom used.[12] A *nolle prosequi* does not have the effect of an acquittal, although if further proceedings were brought the Attorney-General could enter a *nolle prosequi* again.

The prerogative of mercy[13]

20–004 The Sovereign, acting in England and Wales by the Home Secretary,[14] may pardon offences of a public nature, which are prosecuted by the Crown.[15] Although it is a personal power of the Sovereign, it was described by Lord Slynn

[7] In 1999, claim forms replaced writs, which had ceased to be issued in the name of the Crown in 1980.

[8] *post*, Chap. 33.

[9] *Magdalen College Case* (1615) 11 Co.Rep. 66b.

[10] *R. v. Allen* (1862) 1 B. & S. 850. See J. Ll.J. Edwards, *The Law Officers of the Crown* (1964), pp. 227–237.

[11] *post*, para. 20–015.

[12] It was used in 1998 to stop the trial of Richard Gee J. who had been accused of a £1m fraud.

[13] C.H. Rolph, *The Queen's Pardon* (1979). A.T.H. Smith, "The Prerogative of Mercy, The Power of Pardon and Criminal Justice", [1983] P.L. 398; C.H.W. Gane, "The Effect of a Pardon in Scots Law", [1980] J.R. 18.

[14] In Scotland and Northern Ireland, pardons are granted on the advice of the respective Secretaries of State.

[15] Although this is the traditional formulation of the extent of the prerogative it has been suggested that there are no legal obstacles to the pardoning power being exercised after a private prosecution. A.T.H. Smith, *op. cit., supra*, p. 409.

as, "part of the whole constitutional process of conviction, sentence and the carrying out of the sentence."[16] Since 1997 the Home Secretary may seek the assistance of the Criminal Cases Review Commission in connection with the exercise of this power; in addition the Commission can suggest to the Home Secretary that he should exercise the prerogative of mercy.[17] A full or free pardon removes all "pains penalties and punishments whatsoever" ensuing from a conviction but does not eliminate the conviction itself which can only be quashed by a court.[18] In addition to a full pardon it is possible to grant a posthumous pardon, to partially remit the penalty imposed, or to grant a conditional pardon whereby a lesser penalty is imposed.[19]

For many years the view was that the exercise of the prerogative was not subject to judicial review: "Mercy is not the subject of legal rights. It begins where legal rights end."[20] In *R. v. Secretary of State for the Home Department, ex p. Bentley*[21] the Divisional Court suggested that review of the prerogative of mercy was possible for error of law. The Home Secretary in refusing a posthumous exercise of the prerogative of mercy had applied the practice of previous Home Secretaries that a free pardon should only be granted in cases where the convicted individual was both technically and morally innocent. The court concluded that he had made an error of law in not considering the alternative forms of pardon available, and invited him to reconsider his decision in the light of the court's conclusion that a posthumous conditional pardon, retrospectively annulling the sentence of death, would be possible.[22] In *Reckley v. Minister of Public Safety (No. 2)*,[23] *Bentley* was distinguished and it was held that the exercise of the prerogative of mercy by the Governor-General of the Bahamas in a death sentence case was not amenable to judicial review. However in *Lewis v. Attorney General*[24] *Reckley* was not followed, and the majority of the Privy Council accepted that the prerogative of mercy was capable of judicial review, and that the rules of natural justice applied to the exercise of this prerogative power. The Privy Council accepted that the exercise of the prerogative of mercy involved an exceptional breadth of discretion, but did not consider that it was inconsistent with that discretion to require proper procedures to be followed.[25]

[16] *Lewis, v. Attorney-General of Jamaica* [2001] 2 A.C. 50; [2000] 3 W.L.R. 1735 at p. 1804.
[17] Criminal Appeal Act 1995, s.16.
[18] *R. v. Foster* [1985] Q.B. 115, CA. The quashing of a conviction does not operate as a declaration of a defendant's innocence: *R. v. McIlkenny and others* 93 Cr.App.R. 287, CA.
[19] There are certain restrictions to granting a pardon: it may not be pleaded as a bar to impeachment (Act of Settlement 1700) *cf. Danby's Case* (1679) 11 St.Tr. 599; the penalties prescribed by the Habeas Corpus Act 1679 for sending a prisoner out of the realm cannot be remitted; a third party cannot be deprived of his rights, *Thomas v. Sorrell* (1674) Vaughan 330.
[20] *De Freitas v. Benny* [1976] A.C. 239, 247, *per* Lord Diplock; *dicta* in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374.
[21] [1994] Q.B. 349, and see Hare, (1994) 53 C.L.J. 4.
[22] The court had declined to make a formal order against the Home Secretary; the Home Secretary accepted its invitation to grant Bentley a partial posthumous pardon, recognising in effect that he should not have been executed. The conviction was eventually quashed by the Court of Appeal, *Derek William Bentley (Deceased)* [2001] 1 Cr.App.R. 307.
[23] [1996] A.C. 239, PC.
[24] [2000] 3 W.L.R. 1785; [2001] 2 A.C. 50.
[25] See also *Burt v. Governor-General* [1992] 3 N.Z.L.R. 672. The Privy Council declined to follow *de Freitas v. Benny* [1976] A.C. 239, PC.

20–005 Pardons also used to be granted before conviction in order to guarantee immunity from prosecution to Crown witnesses. There is no reason to believe that such a prerogative no longer exists.[26]

The prerogative power of pardon exists to remedy the miscarriages of justice which must occur from time to time in any legal system. Such occasions should be exceptional. The first safeguards against the conviction of the innocent are to be found in the rules of evidence and procedure to be applied in criminal trials. Further protection is given by statutory rights of appeal to higher courts. Dissatisfaction with the system dealing with alleged cases of wrongful conviction[27] and a spate of miscarriage of justice cases[28] lead to the establishment of a Royal Commission on Criminal Justice which reported in 1993.[29] Among the recommendations made by the Royal Commission and accepted by the Government was the establishment of a Criminal Cases Review Commission (CCRC) independent of the court structure which could consider and investigate allegations of miscarriages of justice. The CCRC was established by the Criminal Appeal Act 1995, and came into existence in 1997. It took over the power previously exercised by the Home Secretary to refer possible miscarriages of justice cases back to the Court of Appeal.[30] In addition it has power in certain circumstances to refer cases to the Crown Court (section 13). The CCRC can act on its own initiative or after an application by or on behalf of the convicted person. However there is evidence that the CCRC is under-resourced and under-funded, casting doubt on its effectiveness.[31] The 1995 Act also amended the Court of Appeal's powers when dealing with appeals against convictions.

Appointment of judges

20–006 The appointment of judges by the sovereign will be considered below[32] in the context of the discussion of judicial independence.

II. The Courts

20–007 In states with written constitutions it may be a matter of great moment whether a particular body which has power to deal with certain matters or disputes is a "court" exercising "judicial powers". It is common for written constitutions to provide that only courts established under the constitution or by a special

[26] Prerogative powers are not lost by disuse: *ante*, para. 15–04. Immunity from the risk of prosecution for treason was granted to Bishop Muzurewa and Mr Ian Smith when they attended the constitutional conference on Rhodesia in London in 1979 by the making of the Southern Rhodesia (Immunity for Persons attending Meetings and Consultations) Order 1979 (S.I. No. 820), p. 2, under powers conferred by the Southern Rhodesia Act 1965: see J.Ll.J. Edwards, *The Attorney General, Politics and the Public Interest* (1984), p. 475. The Attorney-General has said of the undertaking given with respect to statements of evidence given at the Saville Inquiry into the events of "Bloody Sunday" that it is not an immunity, see www.bloody-sunday-inquiry-org.uk.

[27] Sixth Report, Home Affairs Committee of the House of Commons, *Miscarriages of Justice* (1981–82; H.C. 421); Government Reply Cmnd. 8856 (1983).

[28] See Joshua Rozenberg, "Miscarriages of Justice", in *Criminal Justice under Stress* (Stockdale and Casale eds, 1993).

[29] Cmnd. 2263.

[30] *e.g.* the case of *Bentley op.cit.*, note 24.

[31] See remarks in *R. v. Secretary of State for the Home Dept, ex p. Simms* [2000] A.C. 115 at p. 128 and in *Arthur J.S. Hall v. Simons* [2000] 3 All E.R. 673, HL at 681.

[32] *ante* para. 12–026.

legislative procedure can exercise judicial power. In the United Kingdom the question whether a body is a court or not is most likely to arise when there is a doubt about whether its activities are protected by the law of contempt, whether its members are entitled to absolute privilege under the law of defamation and whether they are immune from liabilities for errors they have committed in performing their duties.[33] The difficulties in answering such questions are illustrated by *Attorney-General v. BBC*[34] where the House of Lords considered whether a local valuation court, which determined appeals from the rating assessments of valuation officers, was a court to which the law of contempt applied. The House of Lords held that it was not such a body but their Lordships gave various reasons for their conclusions. Viscount Dilhorne, Lord Fraser and Lord Scarman thought that it was a court, but one discharging administrative functions, not a court of law and only the latter type of court was within the law of contempt. Lord Salmon was prepared to hold that it was an "inferior court" but the law of contempt did not extend to "the host of modern inferior courts and tribunals". Lord Edmund-Davies concluded that the valuation court was not, despite its name, a court at all. There is, as Lord Edmund-Davies said, no sure guide, no unmistakable hall-mark by which a court may unerringly be identified. (The problem will be discussed later in Chapter 30). Various features have been suggested as the means of distinguishing courts from other bodies. While, as we have seen, there is no unmistakable hall-mark, the more of these features possessed by a particular institution the less likelihood there is of its not being regarded a court. For our present purposes some of the more important features, all of which are possessed by the courts considered in the following pages, are that:

(1) The tribunal is established by the State, as opposed, for example, to an arbitral tribunal established by the parties.

(2) It usually decides a dispute between two parties.

(3) Its decision is on the basis of evidence given to it by the parties.

(4) The hearing of a dispute takes place in public unless of national security or public decency.

(5) Its decision is on the basis of law and legal rights.

(6) Its decision is final, subject only to an appeal to a higher court.

The name of a tribunal does not necessarily settle whether it is a court: the Employment Appeal Tribunal, for instance, is a superior court of record.[35] Nor must the members of a court be legally qualified, as evidenced in England by the magistrates' courts. The fact that a body is exercising a judicial function and does so in the public interest, does not mean that it is part of the judicial system of the state.[36]

[33] See *post*, para. 20–041.

[34] [1981] A.C. 303. See also *R. v. Cripps, ex p. Muldoon* [1984] Q.B. 68, CA. (Is local election court an "inferior court"?)

[35] Employment Tribunals Act 1996, s.20; *Pickering v. Liverpool Daily Post and Echo Newspapers plc and others* [1991] 2 A.C. 370, where it was held that a mental health tribunal was a court for the purpose of the law on contempt of court.

[36] *General Medical Council v. British Broadcasting Corporation* [1998] 1 W.L.R. 1573, CA, where it was held that the Professional Conduct Committee of the General Medical Council was not a court.

The United Kingdom

20–008 Although within the United Kingdom there are three separate systems of courts, two courts are shared by all three systems.

The House of Lords has appellate jurisdiction over the three systems although in the case of Scotland, appeal lies only on civil matters.

The Judicial Committee of the Privy Council[37] has jurisdiction under the Government of Wales Act 1998, the Scotland Act 1998 and the Northern Ireland Act 1998 to determine "devolution questions".[38]

In many matters the Courts, in whatever part of the United Kingdom they sit, administer the same statutory provisions and the English Court of Appeal may, for example, follow a decision of the Court of Session on the interpretation of an Act which both Courts have to apply.[39]

England

20–009 Since the Judicature Act of 1873 the superior English courts have formed part of one Supreme Court of Judicature which is divided into a Court of Appeal and a High Court.[40] The latter, for convenience of business, is divided into three divisions but each judge of each division possesses unlimited jurisdiction. Two judges of a particular division may sit together in a Divisional Court which has powers not possessed by a single High Court Judge.[41] The Divisional Court through its supervisory jurisdiction[42] plays a particularly important role in the field of constitutional and administrative law.

The Courts Act 1971 which reformed the administration of criminal justice created the Crown Court which also forms part of the Supreme Court. County Courts were created by statute in the mid-nineteenth century to provide a cheaper and more expeditious trial of civil matters, falling within certain limits, than could the superior courts of law sitting at Westminster.[43]

One of the most remarkable features of the English system of the administration of justice is the large part played by laymen, either as lay magistrates or as jurymen.[44] The appointment of lay justices dates from the earliest days of English law. Statutes of Edward I (Statutes of Winchester 1285) and Edward III confirmed and extended the practice of commissioning conservators, custodians or guardians of the peace. They have been known as Justices of the Peace since the justices of the peace Act 1361 which remains in force, despite later consolidating

[37] *ante*, para. 16–009.
[38] *ante*, para. 5–015.
[39] *Prasad v. Wolverhampton B.C.* [1983] Ch. 333.
[40] See now Supreme Court Act 1981. On the long history of the many ancient courts swept away by the Judicature Act 1873, see *Radcliffe and Cross The English Legal System* (G.J. Hand and D.J. Bentley eds, 6th ed 1997). The Civil Procedure Act 1997 facilitated reform of the civil justice system, including the establishment of an advisory body, the Civil Justice Council.
[41] Paul Jackson, "The Divisional Court, Precedent and Jurisdiction" (1985) 101 L.Q.R. 157. The Access to Justice Act 1999 provides for cases to be heard by a single judge, apart from substantive applications for judicial review.
[42] *post*, Chap. 31
[43] See now County Court Act 1984, the jurisdiction of the County Courts can be extended by the Lord Chancellor under powers given to him by the Courts and Legal Services Act 1990.
[44] Sir Carleton Allen, *The Queen's Peace* (1953) Chap. 5; Glanville Williams, *The Proof of Guilt*, Chap. 11; Maitland, *Justice and Police* (1885), Chaps. 8 and 9; Leo Page, *Justice of the Peace* (3rd ed.); B. Osborne, *Justices of the Peace, 1361–1848* (1960).

legislation,[45] and is the source of the useful and sometimes controversial power of justices to "bind over".[46] Lay magistrates are supplemented by district judges (magistrates' courts) who are legally qualified[47]; but the system they represent—involving the trial of 97 per cent of all criminal cases, and the preliminary examination of the rest—is perhaps an even more remarkable feature of our judicial system than the jury system as it now survives. In addition to their criminal jurisdiction magistrates also have an important civil jurisdiction in the field of family proceedings.

Northern Ireland

20–010 The structure of the superior courts in Northern Ireland is similar to that in England.[48] Justices in the Magistrates' Courts is administered by legally qualified Resident Magistrates. Lay justices of the peace perform such tasks as signing warrants and issuing summonses.

Scotland[49]

20–011 The Court of Session, which dates from 1532, is the superior court of civil jurisdiction in Scotland. The Outer House corresponds to the High Court in that its jurisdiction is first instance and an appeal from a judge of the Outer House (Lord Ordinary) lies to the Inner House which sits in two Divisions. Criminal jurisdiction is exercised by the High Court of Justiciary which consists of the same judges as the Court of Session. The senior judge of the Court of Session is the Lord President who, as Lord Justice—General, presides in the High Court of Justice.

Limited but important civil and criminal jurisdiction is exercised by Sheriffs, legally qualified judges. The role of stipendiary magistrates and lay justices of the peace who, since 1975, sit in District Courts, is far less significant in England.[50]

Initiation of proceedings

20–012 Article 6 of the E.C.H.R. provides for a right to a fair trial. This article has been interpreted widely and applies to the pre-trial processes as well as the trial itself. It has also been interpreted so that, for example, rights specifically granted with respect to criminal offences, such as the right to legal assistance (Article 6(3)(c)), have been implied as applying to civil proceedings as a necessary aspect of the general right to a fair hearing.[51] Aspects of Article 6 which could cause future reconsideration of civil and criminal proceedings include: the requirement that a trial is held within a reasonable time; that a case is heard in the open and by an independent and impartial tribunal; and rules of evidence.

[45] Magistrates' Courts Act 1980, Justices of the Peace Act 1997.
[46] *post*, Chap. 27.
[47] Justices of the Peace Act 1997, s.10A–D, as inserted by the Access to Justice Act 1999. Unlike lay justices, district judges, (formerly known as stipendiary magistrates) may sit alone. The 1999 Act expanded their jurisdiction.
[48] See the Judicature (Northern Ireland) Act 1978, as amended by the Administration of Justice Act 1982, s.70 and Sched. 8.
[49] D.M. Walker, *The Scottish Legal System* (8th ed., 2001).
[50] District Courts (Scotland) Act 1975.
[51] *Airey v. Ireland* (1979) 2 E.H.R.R. 305.

Civil litigation

20–013 The right of access to the courts is in itself an important constitutional right, and for that reason, the courts have been unwilling, for example, to accept that Parliament meant to authorise a Minister to remove the right of access by delegated legislation.[52] Anyone may commence a civil action, subject to the risk of losing money if he is unsuccessful. The courts also possess jurisdiction to strike out actions which are frivolous, vexatious or an abuse of process[53] and under section 42 of the Supreme Court Act 1981 any person who has habitually instituted vexatious legal proceedings may, on the application of the Attorney-General, be restrained from instituting further proceedings without the leave of the High Court. A review of the civil justice system was carried out by Lord Woolf, and his 1996 report[54] recommended far reaching reforms many of which were implemented by the Civil Procedure Act 1997, and new Civil Procedure Rules (1998).[55]

For many people, a right of access to the courts is meaningless unless they can claim assistance from the State with the costs of litigation. Legal aid in civil proceedings was first introduced on a statutory basis by the Legal Aid 1949, and before the 1999 reforms there were several different schemes making up the legal aid scheme. Although legal aid is extremely costly, there were allegations that it was underfunded and that too many people were ineligible by virtue of a lowering of the means test level in 1992. There were also allegations of fraud and misuse and criticisms of the gaps in its availability. The Access to Justice Act 1999 provides for a complete overhaul of legal aid and advice. A Community Legal Service Fund to be run by a *Legal Services Commission* is established. Each year, as part of government spending plans, a fixed amount of money will be allocated to this fund. The Commission, with the approval of the Lord Chancellor, has established a Funding Code containing the criteria and procedures for how this fund is to be spent. The 1999 Act removes certain types of case from the legal aid scheme completely. These include: personal injury[56] (except clinical negligence); defamation and malicious falsehood[57]; disputes arising in the course of business; the law relating to companies, trusts or partnership disputes; boundary disputes. It was estimated that the above list accounted for 60 per cent of the civil cases previously funded by the State. Eligibility is based on both merit[58] and need, and the Lord Chancellor can set different limits for eligibility for different types of case. Clients who want to take advantage of the new scheme may only do so with those law firms to which a contract to provide such services has been awarded. The Commission has additional functions to liaise with other funders of legal services and to help and encourage the voluntary sector to reach more people.

[52] *Chester v. Bateson* [1920] K.B. 829, DC; *R. v. Secretary of State for the Home Dept, ex p. Anderson* [1984] Q.B. 778, DC; *R. v. Lord Chancellor ex p. Witham* [1997] 2 All E.R. 779, (changes to court fees which also removed the right to exemptions to those suffering various types of financial hardship were declared illegal; the exemptions were reinstated).

[53] R.S.C. Ord. 94, r.15

[54] *Access to Justice: Final Report* (1996).

[55] See Ian Grainger, *The Civil Procedure Rules in Action* (2000).

[56] The Courts and Legal Services Act 1991 made provision for the introduction of contingency fee schemes, which the Government thought provided sufficient access to justice for these cases.

[57] The former was not covered by the previous scheme.

[58] As provided in the Funding Code.

Criminal proceedings

20–014 In general, anyone may commence criminal proceedings subject to the risk of paying the costs of an unsuccessful action and, in some cases, of being sued for malicious prosecution. Certain statutes, however, require the consent of the Attorney-General[59] or the Director of Public Prosecutions[60] to the bringing of prosecutions. The Law Commission has recommended a rationalisation of the consent regime.[61]

The prosecution system was reformed by the Prosecution of Offences Act 1985.[62] Until 1986 in England and Wales,[63] most criminal offences were both investigated and brought by the police; in theory they were private prosecutions. The 1985 Act does not take away the right of private prosecution,[64] nor does it deprive the police of their investigatory role or their power to decide whether or not to initiate proceedings. It entrusts the final decision whether or not to prosecute and the conduct of prosecutions begun at the instance of the police, to a national Crown Prosecution Service (CPS), and gives to that Service the power to discontinue proceedings. Thus indirectly, there is a control over the police discretion to prosecute in individual cases.

The Director of Public Prosecutions is the head of the Crown Prosecution Service. The office of Director of Public Prosecutions was established in 1879.[65] He is appointed by and acts under the general "superintendence" of the Attorney-General (section 2 of the 1985 Act), and his powers and duties are to be found largely in that section. He is under a duty to take over the conduct of all criminal proceedings (other than those excluded from the section by the Attorney-General) which have been instituted by a police force; to institute and conduct proceedings where the importance or the difficulty of a case makes it appropriate that he should do so, or where it is otherwise appropriate; to appear for the prosecution when directed by the Court to do so in certain categories of criminal appeals. He may give advice to police forces on all matters relating to criminal offences and must discharge such other functions as may be assigned to him by the Attorney-General.

20–015 The conduct of proceedings is the responsibility of members of the Service designated Crown Prosecutors. Since 1999 the CPS is divided into 42 prosecution areas each headed by a Chief Crown Prosecutor; within each area there are one or more local branches headed by a Branch Crown Prosecutor who is responsible for a teams of lawyers and caseworkers.[66] Section 10 of the Act requires the Director to issue a code to Crown Prosecutors giving guidance on the

[59] *e.g.* Explosive Substances Act 1883; Official Secrets Act 1911; Public Order Act 1986.

[60] *e.g.* Theft Act 1968, s.30(4); the power to consent can be exercised by any member of the CPS see below.

[61] Law Commission Report No. 255, H.C. 1085 (1997–98).

[62] See the Royal Commission on Criminal Procedure, Cmnd. 8092 (1981) and *An Independent Prosecution Service for England and Wales*, Cmnd. 9074 (1983).

[63] *cf.* Scotland where the decision to prosecute was, and still is taken by procurators fiscal who, under the Lord Advocate, are entirely independent of the police.

[64] It is expressly preserved by s. 6 which is of importance not merely to the individual but to government departments, local authorities and other public bodies such as the RSPCA and the NSPCC. In magistrates' courts 25 per cent of prosecutions are private prosecutions.

[65] Prosecution of Offences Act 1879. See J.Ll.J. Edwards, *Law Officers of the Crown* (1964), Chaps 16 and 17; *The Attorney General, Politics and the Public Interest* (1984), Chap. 2; Sir Theobald Mathew, *The Office and Duties of the Director of Public Prosecutions* (1950); Sir Norman Skelhorn, *Public Prosecutor* (1981).

[66] These reforms were introduced in 1999 following recommendations made in the Glidewell Report: *The Review of the Crown Prosecution Service* (1998) Cm. 3960.

general principles to be followed by them in deciding whether to institute proceedings, and what charges should be preferred. The terms of the code, which has been revised from time to time, is contained in the report which the Director must make each year to the Attorney-General who then lays it before Parliament (section 9).[67] Crown Prosecutors have all the powers of the Director as to the institution and conduct of proceedings but they must exercise their powers under his direction. The most important power is that contained in section 23[68] which authorises the Director to discontinue proceedings. This helps to provide an independent check on whether or not police prosecutions are justified.[69] The accused may, however, give notice that he requires the proceedings to continue. (He may wish to establish his innocence clearly in open court.) If the Director does not discontinue, or the accused wishes the proceedings to proceed, there is nothing to stop the Director (or Crown Prosecutor) from deciding to offer no evidence, with the inevitable result of an acquittal: *Raymond v. Attorney-General*.[70] The Attorney-General may also end any criminal proceedings brought on indictment by entering the *nolle prosequi*.[71] Section 24 extends the law relating to vexatious litigation[72] to criminal proceedings.

20–016 Legal aid in criminal proceedings was introduced in 1903.[73] In addition to assistance with the cost of legal representation the Legal Aid Act 1982 introduced a Duty Solicitor Scheme under which solicitors were available at magistrates' courts to advise accused persons. Following the provision in section 59 of the Police and Criminal Evidence Act 1984 for legal advice and assistance to be available to persons detained at police stations, a scheme was established for police stations.[74] Problems with criminal legal aid identified by the Royal Commission on Criminal Justice 1993,[75] included poor standards in legally aided criminal defence work in general and in particular at the police station. There were also concerns about underfunding and with the application of the means test. The Access to Justice Act 1999 also reforms criminal legal aid, which is to be covered by the newly created Criminal Defence Service. Like its civil equivalent it is run by the Legal Services Commission, and consists of a mix of private practitioners and salaried defenders employed by the Commission. Unlike civil legal aid there is not a set budget for criminal legal aid; all cases which fit the merits test—which is unaltered from the previous legislation—will be funded. However there are new powers to enable the recovery of some or all of the costs incurred in defending an individual. As in civil cases, solicitors who

[67] The most recent version was issued in November 2000; it takes account of the Human Rights Act 1998, and other developments in the criminal justice system.

[68] As amended by s.119 and sched. 8 of the Crime and Disorder Act 1998, to enable the discontinuance of proceedings after the accused has been sent for trial at Crown Court.

[69] The courts in certain circumstances have been willing to consider applications for judicial review of prosecution decisions: *R. v. Chief Constable of Kent ex p. L* [1993] 1 All E.R. 756; *R. v. Secretary of State for the Home Department ex p. Manning* [2000] W.L.R. 463. Dotan, "Should Prosecution Discretion Enjoy Special Treatment in Judicial Review? A Comparative Analysis of the Law in England and Israel", [1997] P.L. 513. The Crown Prosecution Service Inspectorate Act 2000, established a new independent inspectorate to scrutinise the CPS.

[70] [1982] Q.B. 839, CA.

[71] *ante*, para. 20–003.

[72] *ante*, para. 20–013.

[73] Poor Prisoners' Defence Act 1903

[74] *post*, Chap. 24, para. 24–016.

[75] Cmnd. 2263.

wish to provide services to defendants will have to secure a contract with the Commission and meet certain standards.

Trial by Jury[76]

20–017 Despite the exalted terms in which the right to trial by jury has been described in earlier centuries,[77] the use of the jury has declined in both civil and criminal cases over the last fifty years. The Royal Commission on Criminal Justice challenged the "so-called right to jury trial",[78] and it is not a right mentioned in, or required by, the E.C.H.R.

A prisoner who is indicted is tried by a petty jury, except that some indictable offences may be dealt with summarily by the magistrates with the consent of the accused.[79] Summary offences are triable on information by magistrates' courts without formal indictment or jury. At the present day about 90 per cent of *indictable* offences are in fact tried summarily. Of those sent for trial by jury, about 60 per cent plead "guilty".[80] Only about 2 to 3 per cent even of indictable offences are actually tried by jury. A majority verdict may be accepted in criminal proceedings where not fewer than ten out of 12 (or nine out of 11) jurors agree, provided that the jury have had at least two hours for deliberation.[81]

20–018 A coroner must summon a jury (or seven to 11 jurors) in certain cases, and may accept a majority verdict if the dissentients are not more than two.[82]

The use of the jury in civil cases has declined greatly since World War I. The Supreme Court Act 1981, s.69 provides that where a party to an action in the Queen's Bench Division so requests the action will be tried by a jury if the Court is satisfied (i) that there is in issue a charge of fraud; a claim in respect of libel, slander,[83] malicious prosecution or false imprisonment or any other issue added to the list by a Rule of Court; and (ii) that the trial will not involve any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury. In other cases the court may in its discretion order a trial with a jury. Less than 1 per cent of all civil cases are tried by a jury. The power to summon jurors in the Chancery Division introduced by the Chancery Amendment Act 1858, and the right to apply for a jury (of eight) in the county courts are practically obsolete.[84] Majority verdicts may now be accepted in civil proceedings in the High Court if ten out of 12 (or nine out of 11) jurors agree, and in a country court if seven (out of eight) jurors agree;

[76] See W.R. Cornish, *The Jury* (1968); J. Baldwin and M. McConville, *Jury Trials* (1979); James Gobert, *Justice Democracy and the Jury* (1997).

[77] See Blackstone, Bl.Comm.III, 379, and more recently Lord Devlin, *Trial by Jury* (1971).

[78] Cmnd. 2263 (1993).

[79] Magistrates' Courts Act 1980, ss.17A– [illegible], as inserted by the Criminal Procedure and Investigations Act 1996.

[80] The figure has dropped since October 1997 as a system of "plea before venue" under the Crime Sentence Act 1997 allows the magistrates' courts indictable-either-way cases to deal with defendants who indicate that they will plead guilty.

[81] Juries Act 1974, s.17; *R. v. Pigg* [1983] 1 W.L.R. 6 (HL). A verdict of "not guilty" similarly requires unanimity or not more than two dissentients. For a criticism of this rule see G. Maher, "Jury Verdicts and the Presumption of Innocence", (1983) 3 Leg.Stud. 146.

[82] Coroners Acts 1988, which consolidated and amended the previous legislation.

[83] The right to jury trial in civil cases is exercised most frequently in defamation cases; the Defamation Act 1996 introduced a summary procedure before a judge for claims of less than £10,000, which may reduce the number of jury trials.

[84] The current statutory provision is the County Courts Act 1984, s.66(3).

provided that it appears to the court that the jury have had a reasonable time for their deliberations having regard to the nature and complexity of the case.[87]

Jury service

20–019 Persons between the ages of 18 and 70 are liable to jury service if they have been resident for five years in the United Kingdom.[88] Jurors are entitled to travelling and subsistence allowances, and compensation for loss of earnings. The jury list is based on the Electoral Register. Various classes of person are ineligible for jury service, including councillors, clergymen, practising barristers, solicitors, police and prison officers, medical practitioners, members of the armed forces, justices of the peace and persons who are mentally ill.[89]

The Juries Act 1974 and the Juries (Disqualification) Act 1984[90] disqualify from jury service anyone who at any time has been sentenced within the United Kingdom, the Channel Islands or the Isle of Man to imprisonment for life, for a term of five years or more or to be detained during Her Majesty's pleasure. No one may serve on a jury who, within the preceding ten years, has served any sentence of imprisonment, youth custody or detention; been detained in a Borstal or been the subject of a suspended prison sentence of imprisonment or detention or of a community service order. An order of probation disqualifies a person from serving on a jury for the following five years. A person who is on bail in criminal proceedings is disqualified from jury service in the Crown Court. Any prospective juror may be questioned by the appropriate officer to establish whether he is disqualified from jury service.[91]

Certain persons are entitled if they so wish to be excused as of right from jury service. These include: members of either House of Parliament, of the devolved legislative bodies and the European Parliament; doctors, nurses, vets; those who can show that they have served on a jury within the previous two years; members of certain religious bodies; those over the age of 65. Failure to attend jury service without excuse, or serving on a jury while disqualified, is punishable by fine.

The impartiality of the jury: challenge and vetting

20–020 The Lord Chancellor undertakes the responsibility for summoning and preparing panels of jurors, and making arrangements for payment in respect of jury service. The right to a jury chosen at random from among those qualified to serve is recognised by "the right of challenge to the array" that is the right of challenge on the ground that the official responsible for summoning the jurors was biased or acted improperly.[92] Although a trial judge has a residual power to stand a juror down, he has no jurisdiction to order a multiracial jury[93] or order that a jury should be brought in from outside the normal catchment area.[94] Both prosecution and defence can challenge as many individual jurors as they wish for cause, or on the basis that a juror is ineligible or disqualified from jury service, or on the basis that he is, or is reasonable suspected of being, biased.

[87] Juries Act 1974, s.17.
[88] Juries Act 1974, s.1, as amended by the Criminal Justice Act 1988.
[89] Juries Act 1974, Sched. 1.
[90] As amended or added to by the Criminal Justice and Public Order Act 1994. Similar provisions apply to Coroners' Juries by virtue of the Coroners' Juries Act 1983.
[91] Juries Act 1974, s.2(5); Administration of Justice Act 1982, s.61.
[92] Juries Act 1974, s.12(6); such challenges are virtually unknown today.
[93] *R. v. Ford* [1989] 3 All E.R. 445, CA; but see the recommendations from the R.C.C.J. Cmnd. 2263 (1993), p. 133.
[94] *R. v. Tarrant* [1998] Crim.L.R. 342.

The alleged bias may be thought to arise from some particular circumstances such as the relationship of a juror to someone involved in the proceedings.[93] In the absence of *prima facie* evidence a juror cannot be questioned in an attempt to discover a disqualifying bias.[94] A juror is not disqualified from serving by reason of some possible general prejudice based on racial or religious or sexual grounds and a judge should not excuse a juror on such general ground.[95] In *R. v. Pennington*[96] the Court of Appeal held that a miner who had not been on strike was not thereby disqualified from serving on a jury which was trying miners on various charges arising out of the strike in which the accused had been involved.

20–021 The trial judge may discharge individual jurors in certain circumstances, which include where there was a real danger of bias affecting the mind of an individual juror.[97] He may also discharge a whole jury in these circumstances if the matter cannot be satisfactorily dealt with by the discharge of individual jurors. A failure to dismiss a jury where there were doubts as to its impartiality could mean that the defendant had not been tried by an impartial tribunal as required by Art. 6 E.C.H.R.[98]

The right of a defendant to challenge up to three jurors without cause was abolished by section 118(1) of the Criminal Justice Act 1988. However the Crown retains its power to "stand-by" without cause, potential jurors. Although there is no limit to the exercise of this right,[99] a *Practice Note*[1] published after the 1988 Act stated that this power should be exercised sparingly and only in exceptional circumstances, and that it should not be used to influence the overall composition of a jury. One circumstance when it can be used is where a jury check or vet has revealed information which strongly suggests that in the circumstances of the case a particular juror might be a security risk, be susceptible to improper approaches or influenced by improper motives. This practice of jury vetting became public knowledge in the late 1970s, and in 1978 after pressure from M.P.s the Attorney-General published his *Guidelines on Jury Checks*.[2] There is no statutory authority for jury vetting and the permission of a judge is not required before it can take place. The legality of vetting a jury panel for criminal convictions was upheld in *R. v. Mason*,[3] and in *R. v. McCann and others*[4] the Court of Appeal accepted that the jury vetting in accordance the Attorney-General's Guidelines was constitutional.

20–022 The Guidelines on jury vetting state as a basic principle that a jury should be chosen by random selection and only those who fall within the provisions of the

[93] *R. v. Spencer* [1987] A.C. 128. Trial of nurses at Rampton Hospital accused of ill-treating patients; juror discharged when it became known that his wife worked at another mental hospital which had been mentioned in evidence; risk of bias arising from remaining jurors having discussed case with him. See *Practice Note (jury: juror: excuse)* [1988] 3 All E.R. 177.

[94] *R. v. Chandler (No. 2)* [1964] 2 Q.B. 322; *R. v. Andrews The Times* October 15, 1998, trial judge right to refuse defence request to issue a questionnaire to the jury panel to discover if any of them was biased against her; questioning of the panel should be avoided in all but the most exceptional cases.

[95] *Practice Note (Jurors: Excusal from Service)* [1988] 3 All E.R. 177.

[96] (1985) 81 Cr.App.R. 217.

[97] *R. v. Gough* [1993] A.C. 646.

[98] *Sander v. United Kingdom* (2000) Crim.L.R. 767.

[99] *R. v. Burns* [1982] Crim.L.R. 522.

[1] [1988] 3 All E.R. 1086.

[2] For the latest version see (1989) 88 Cr.App.R. 123.

[3] [1981] Q.B. 881; *cf. R. v. Crown Court at Sheffield, ex p. Brownlow* [1980] Q.B. 530.

[4] (1990) 92 Cr.App.R. 239.

Juries Act 1974 should be excluded. Jury vetting is envisaged in two types of case, (a) cases involving national security and part of the evidence is likely to be heard *in camera* and (b) terrorist cases. In security cases there is a danger that a juror, either voluntarily or under pressure, may make an improper use of evidence which has been given *in camera*. In both security and terrorist cases there is a danger that a juror's political beliefs may be biased as to go beyond normally reflecting the broad spectrum of views and interest in the community to reflect the extreme views of sectarian interest or pressure group to a degree which might interfere with his fair assessment of the facts of the case or lead him to exert improper pressure on his fellow jurors. In order to ascertain whether in such cases either of these factors might seriously influence a potential juror's impartial performance of his duties, further investigation beyond one on criminal records made for disqualifications may only be made on the records of police Special Branches. No investigation of the records of police Special Branches should be made save with the personal authority of the Attorney-General on the application of the Director of Public Prosecutions, to whom the matter has been referred by a chief officer of police.

The result of any authorised check is sent to the Director of Public Prosecutions who decides what information ought to be brought to the attention of prosecuting counsel.

20–023 No right of stand-by should be exercised by counsel for the Crown on the basis of information obtained as a result of an authorised check unless the information is such as, having regard to the facts of the case and the offences charged, to afford strong reason for believing that a particular juror might be a security risk, be susceptible to improper approaches or be influenced in arriving at a verdict. Where a potential juror is asked to stand by for the Crown, there is no duty to disclose to the defence the information on which it was founded; but counsel may use his discretion to disclose it if its nature and source permit it.

When information revealed in the course of an authorised check is not such as to cause counsel for the Crown to ask for a juror to stand by, but does give reason to believe that he may be biased against the accused, the defence should be given, at least, an indication of why that potential juror may be inimical to their interests.

Reform[5]

20–024 The jury system has been under attack for some years. Since 1977 the right to jury trial has been significantly reduced, with more and more offences being made summary only. The RCCP in 1993 recommended that in either way offences defendants should no longer have the right to insist on a trial by jury, and the Narey Report (1997) recommended that the choice of venue in either way offences should be for the magistrates.[6] Despite being against further reforms to the availability of trial by jury when in opposition, the Labour Government changed tack, and legislation was introduced to give effect to the Narey proposals.[7] However the Criminal Justice (Mode of Trial) Bill 2000 was defeated by the House of Lords, as was a No. 2 Bill, and the Government abandoned the

[5] See Derbyshire, "The Lamp that Shows that Freedom Lives: is it worth the candle?" [1991] Crim.L.R. 743.

[6] *Review of Delay in the Criminal Justice System*, Home Office (1997).

[7] A consultative paper, *Determining Mode of Trial in Either Way Offences* Home Office (1998), put forward a variety of alternatives.

measure.[8] A possible alternative reform would be to establish a unified criminal court to replace the separate system of Crown and Magistrates' courts, with most offences being tried by a district judge and two lay magistrates, jury trial would be available only for the most serious cases.[9] The Government has also proposed restricting the use of juries in trials for fraud.

III. The Judiciary[10]

Judicial independence[11]

20–025 The independence of the judiciary from interference by the executive has been mentioned in Chapter 2 as one of the most important principles of British constitutional law. Here we will say something more about the means by which this independence is secured. The main topics under this heading are the appointment of the judiciary, tenure of the judicial office and the manner in which judges may be disciplined and removed. Aspects of these procedures must now be considered in the light of, in particular, Article 6, E.C.H.R.

Judicial appointments

20–026 The appointment of judges by the sovereign is now largely governed by statute[12] supplemented by convention.[13] The fact that members of a court are appointed by the executive is not in itself incompatible with the E.C.H.R.[14] The sovereign appoints the Lords of Appeal in Ordinary,[15] the Lord Chief Justice, the Master of the Rolls, the President of the Family Division, the Vice-Chancellor and the Lords Justices of Appeal,[16] by convention on the advice of the Prime Minister, who consults the Lord Chancellor. The Queen appoints the puisne judges of the High Court by convention on the advice of the Lord Chancellor, who no doubt consults the Prime Minister.

The Queen on the recommendation of the Lord Chancellor also appoints Circuit judges to serve in the Crown Court and country courts, and Recorders to act as part-time judges of the Crown Court.[17] District judges (magistrates'

[8] See *ante*, para. 7–023.

[9] Auld Report (2001): *Criminal Justice: The Way Ahead* Cm. 5074 (2001). Legislation to reform the criminal courts system in the light of this report was promised in the 2001 Queen's Speech.

[10] Lord Devlin *The Judge* (1979), David Pannick, *Judges* (1987).

[11] See generally, S. Shetreet, *Judges on Trial* (1976); Aiden O'Neill, "The E.C.H.R. and the Independence of the Judiciary—The Scottish Experience", (2000) 63 M.L.R. 429.

[12] Which provides the qualifications required to fill each post. By changing the necessary qualifications it is possible to make certain judicial appointments open to a wider pool e.g. the Courts and Legal Services Act 1990 opened the way for solicitors to be judges in the higher courts.

[13] For the appointment of judges to the Court of Session and the High Court of Justiciary in Scotland see Scotland Act s.95, which puts in legislative form requirements as to appointment that are constitutional conventions for non-Scottish judicial appointments. The practice of appointing temporary sheriffs (s.11(4) Sheriff Courts (Scotland) Act 1971) was held *Starrs v. Ruxton* 2000 S.L.T. 42 to infringe Art. 6 E.C.H.R.; in consequence the office of temporary sheriff was abolished and replaced by part-time sheriffs, see Bail, Judicial Appointments etc. (Scotland) Act 2000.

[14] *Campell and Fell v. United Kingdom* (1984) 7 E.H.R.R. 165.

[15] Appellate Jurisdiction Act 1876, s.2.

[16] Supreme Court Act 1981, s.10. See too Judicature (Northern Ireland) Act 1978, s.12.

[17] Courts Act 1971, ss.16, 21. The possibility that such appointments could be in breach of the E.C.H.R. (see *Starrs v. Ruxton* S.L.T. 42, H.C.J.) caused a review of the of arrangements for part-time judicial appointments for which the Lord Chancellor is responsible, see H.C.Deb. Vol. 348, *col.* 222W, April 12, 2000.

courts)[15] are appointed by the Crown on the advice of the Lord Chancellor.[16] Lay justices are appointed to the Commission of the Peace in the name of the Queen, but on the nomination of the Lord Chancellor in consultation with local advisory committees by or the Chancellor of the Duchy of Lancaster.[17] The Lord Mayor and aldermen of the City of London are *ex officio* justices of the peace.[18] The method of appointing lay members to the Employment Appeals Tribunal by the Secretary of State for Trade and Industry was revised to take account of E.C.H.R. requirements.[19]

Judges and magistrates on appointment take the judicial oath, by which they promise "to do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will."[20]

Reform of the judicial appointment system[21]

20–027 The selection process followed by the Lord Chancellor in advising on and making judicial appointments is described in a booklet issued by the Lord Chancellor's Department.[22] The system of judicial selection and appointment has been subject to a variety of criticisms: the extensive involvement of the Lord Chancellor, a government minister, means it is a political process, and until after World War II it was perceived as having been used in a partisan way; the reliance on "secret soundings" taken by civil servants in the Lord Chancellor's Department from leading barristers and judges, is one that favours the appointment of similar types of people and is potentially discriminatory to women and ethnic minorities[23]; the emphasis in advocacy skills excludes most solicitors; the higher judiciary does not reflect the composition of the community.[24]

20–028 Changes have been made in recent years: since 1994 appointments to circuit judge and below are filled by open competition following advertisements; since 1998 High Court judges may be appointed on application following advertisement or by invitation[25]; since 1998–99 the Lord Chancellor has made an annual report to Parliament on the judicial appointments system[26]; new directions were issued in 1998 which set out a job description for magistrates and the qualities

[15] Formerly known as stipendiary magistrates.
[16] Justices of the Peace Act 1997, s.10 A–E as inserted by the Access to Justice Act 1999.
[17] Justices of the Peace Act 1997, s.5.
[18] Justices of the Peace Act 1997, s.21 retains this anomaly.
[19] See *Seanmature UK Ltd. v. Secretary of State for Trade and Industry, The Times*, April 26, 2001 [2001] I.R.L.R. 416.
[20] Promissory Oaths Act 1868.
[21] "*JUSTICE*" *The Judiciary in England and Wales* (1992); Third Report from the Home Affairs Committee, *Judicial Appointments Procedures*, H.C. 52 (1995–96); Sir Thomas Legg, "Judges for the New Century", [2001] P.L. 62; Report to the Lord Chancellor by Sir Leonard Peach, *An Independent Scrutiny of the Appointment Processes of Judges and Queen's Counsel in England and Wales* (1999); *Broadening the Bench: Law Society proposals for reforming the way judges are appointed* (2000); Malleson and Banda, *Factors Affecting the Decision to Apply for Silk and Judicial Office*, Lord Chancellor's Department Research Series No. 2/2000.
[22] *Judicial Appointments* (1999) it was first published only in 1985.
[23] See H.C. Deb. Vol. 336, *col. 565W*, October 19, 1999, for details of the procedures used and the persons and organisations consulted. In 1999 the Law Society announced that it would no longer participate in the process.
[24] The argument does not apply with such force to the magistracy, where women and ethnic minorities are better represented. For a defence of the system see Gladwell, "Judicial appointments", [2001] 152 N.L.J. 737.
[25] Of the 19 High Court judges appointed between February 1998 and May 2000, eight had applied for appointment and 11 were invited to accept appointment, H.C.Deb. Vol. 350, *col. 456W*, May 25, 2000.
[26] See Cm. 4785 (2000).

required for the position, as well as new application forms; an independent Judicial Appointments Commissioner, to oversee and monitor the appointment process was appointed in 2000.[30] The most senior appointments are not advertised, and appointment is not subject to any formal interview or selection panel: the Lord Chancellor makes such appointments from eligible judges having taken "soundings". Lower level judges are interviewed, but the final decision is for the Lord Chancellor. Before coming into office the Labour Party had favoured a Judicial Appointments Commission composed of lay members and lawyers to advise the Lord Chancellor on judicial appointments, but Lord Irving indicated in 1998 that such a change was not a priority. A further possibility, which could be used in conjunction with an Appointments Commission, would be to introduce a hearings system whereby a candidate for judicial office could be questioned by a parliamentary committee as to his views or opinions.[31] The role of the higher judiciary in the application of the Human Right Act 1998, has given impetus to this suggestion.

Judicial tenure[32]

Judges of superior courts[33] Before the Act of Settlement 1700, judges in England (other than the Barons of the Exchequer) usually held office *durante bene placito nostro* (during the King's pleasure).[34] The Act of Settlement, which was to come into force when the Hanoverians ascended the throne, provided "that . . . judges' commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established, but upon the address of both Houses of Parliament it may be lawful to remove them." The statutory provisions now in force are the Supreme Court Act 1981, s.11 under which all the Judges of the High Court and the Court of Appeal, with the exception of the Lord Chancellor, hold their offices during good behaviour subject to a power of removal by Her Majesty on an address presented to Her Majesty by both Houses of Parliament,[35] and the Appellate Jurisdiction Act 1876, s.6: "Every Lord of Appeal in Ordinary shall hold his office during good behaviour . . . but he may be removed from such office on the address of both Houses of Parliament." Such an address must be introduced in the House of Commons. Most Commonwealth countries prescribe a more judicial procedure for the removal of judges, in some cases involving a reference to the Judicial Committee of the Privy Council. **20–029**

It is commonly but erroneously stated that since the Act of Settlement judges can be dismissed by the Crown *only* on an address from both Houses of Parliament.[36] The true position, however, is stated by Anson: "the words mean simply that if, in consequence of misbehaviour in respect of his office or from any other cause, an officer of state holding on this tenure has forfeited the

[30] Following a recommendation in the Peach Report *op. cit.* note 24, p. 432

[31] Following a report by the Home Affairs Select Committee, *Freemasonary in the Police and Judiciary*, H.C. 192 (1996–97); in July 1998 the Lord Chancellor's Department sent a questionnaire to all judges and magistrates in connection with membership of the freemasons, see H.C. 467 (1998–99). There was judicial disquiet at the subsequent decision of the Lord Chancellor to publish a register of all judges indicating whether or not they were masons, or had refused to answer a question on membership.

[32] See Rodney Brazier, *Constitutional Practice* (3rd. ed., 1999), Chap. 12.

[33] For the position of judges in Scotland see Scotland Act s.95; C.M.G. Himsworth, "Securing the tenure of Scottish judges: a somewhat academic exercise?" [1999] P.L. 14.

[34] See *ante*, para. 2–018.

[35] Re-enacting Judicature Act 1875, s.5; Supreme Court of Judicature (Consolidation) Act 1925, s.12(1). For Northern Ireland, see Judicature (Northern Ireland) Act 1978, s.13(1).

[36] This is the position in some Commonwealth countries.

confidence of the two Houses, he may be removed, although the Crown would not otherwise have been disposed or entitled to remove him."[37] The Crown could remove without an address for official misconduct, neglect of official duties, or (probably) conviction for a serious offence (*Earl of Shrewsbury's Case*[38]). The Queen would be bound by convention to act on an address from both Houses.[39] The first case in which Parliament initiated proceedings for the removal of a judge under the Act of Settlement was that of Mr Justice Fox, of the Irish Bench, in 1805; but it was abandoned on the ground that the proceedings should have commenced in the Commons instead of in the Lords. The only case which has resulted in removal under the Act of Settlement procedure was that of Sir Jonah Barrington, another Irish judge, in 1830. Most of the cases—and they are few—have concerned colonial judges, or judges accused of partiality in hearing election petitions.[40]

There is a compulsory retiring age of 70 for Lords of Appeal in Ordinary and judges of the Supreme Court.[41] However, beyond that age retired judges may be asked to sit from time to time under the Supreme Court Act 1981, s.9. It is hardly necessary to add that judges could be removed by Act of Parliament.

Judges' salaries are charged by statute on the Consolidated Fund, so that they do not come up for review by the Commons every year as do most estimates of national expenditure. They may be increased, though not reduced, by Order in Council.[42]

20–030 *Circuit judges*[43] Circuit judges are judges of the superior courts in so far as they sit in the crown court which is a superior court of record.[44] They also sit in the county court which is not a superior court. They may be removed by the Lord Chancellor "on the ground of incapacity of misbehaviour".[45] They are subject to a retiring age of 70, except that the Lord Chancellor may in the public interest continue them in office up to the age of 75.[46] The Lord Chancellor may terminate

[37] Anson, *Law and Custom of the Constitution* (4th ed., Keith 1922), Vol. II, Part I, pp. 234–235.
[38] (1611) 9 Co.Rep. 42a, 50.
[39] As to what amounts to misbehaviour in a public office, and the methods by which an office in which a person has a life interest may be forfeited, see Todd, *Parliamentary Government in England* (2nd ed.), Vol. II, pp. 857–859; Anson, *ibid.*, at pp. 235–236. But all judges (except the Lord Chancellor) are now subject to a statutory age of retirement.
[40] For an account of a number of cases, and the principles and proceedings established, see Keith, *Responsible Government in the Dominions*, II, pp. 1073–1074. In 1987 a motion supported by more than 100 M.P.s called for the removal of the Lord Lane L.C.J. after revelations of a miscarriage of justice in the case of *R. v. McIlkenny* 93 Cr.App. R. 287, C.A.
[41] Judicial Pensions Act 1959; Supreme Court Act 1981, s.11(2), as amended by the Judicial Pensions and Retirement Act 1993. See Supreme Court Act 1981, s.11(8) for the compulsory retirement of judges incapacitated by ill health from resigning.
[42] Administration of Justice Act 1973; Supreme Court Act 1981, s.12. On judicial pensions see Judicial Pensions and Retirement Act 1993; Supreme Court Act 1981, s.12(7).
For the position of Scottish Sheriffs see, Sheriffs Courts (Scotland) Act 1971, s.12; *Stewart v. Secretary of State for Scotland* 1998 S.L.T. 385.
[43] Courts Act 1971, s.4.
[44] Courts Act 1971, s.17(4). A circuit judge who was convicted on a charge of smuggling was removed from office by the Lord Chancellor in 1983: *The Times*, December 6, 1983. In July 1994 the Lord Chancellor stated that "misbehaviour" could include: a conviction for drink-driving; any offence involving violence, dishonesty, or moral turpitude; behaviour likely to cause offence on religious or racial grounds or which amounted to sexual harassment. The resignation of Richard Gee (*ante*, note 12, p. 418) pre-empted any decision by the Lord Chancellor to remove him from office.
[45] Courts Act 1971, s.17 as amended by the Judicial Pensions and Retirement Act 1993.

the appointment of a Recorder on the ground of incapacity or misbehaviour or of failure to comply with the terms of his appointment.[47]

Other judicial officers Justices of the peace may be removed from the Commission of the Peace by the Lord Chancellor[48] if he thinks fit, although by convention he does not remove them except for good cause, such as refusal to administer the law because the justice does not agree with it. The Justices of the Peace Act 1997 also requires the Lord Chancellor to keep a Supplemental List of justices who are no longer entitled to exercise judicial functions. The Lord Chancellor may direct that the name of a justice be put on the Supplemental List on the ground of "age or infirmity or other like cause," or if he "declines or neglects" his judicial functions, and his name must be put on this List when he reaches the age of 70.[49] A district judge (magistrates' court) is only dismissable by the Lord Chancellor on grounds of incapacity or misbehaviour.[50]

Discipline, resignation and training

There is no formal machinery for complaints against judges. It is very difficult to remove members of the senior judiciary from office,[51] although on occasion criticism from colleagues may induce resignation.[52] Criticism by the appellate courts may be viewed as part of the disciplinary machinery.[53] It has been suggested that the importance attached to the separation of powers and the independence of the judiciary has resulted in pressure being put on judges to resign on the grounds of ill-health rather than invoke more formal measures.[54] Occasionally the Lord Chancellor may make it known that he has rebuked a judge. **20–031**

Judicial training by the Judicial Studies Board was established in 1979 and reconstituted in 1985 when it was given additional responsibilities. It responsibilities now include training on sentencing, criminal law, family law, civil matters and the Human Rights Act 1998. It has been questioned whether it was proper for the Home Secretary to describe the purpose of training the judiciary to deal with the Human Rights Act as including explaining how to deal with "sharp lawyers" who would make "disruptive points".[55]

No general duty to advise the executive[56]

It is often said that one of the hallmarks of the independence of the English judiciary is that they have no duty to advise the executive on cases that do not come before the courts in the ordinary course of litigation. In 1925 a great outcry was raised in the House of Lords when it was proposed in the Rating and **20–032**

[47] Courts Act 1971, s.21(6). Section 21(3) provides that a Recorder's appointment shall specify the frequency and duration of the occasions on which he must be available to perform his duties.
[48] Or the Chancellor of the Duchy of Lancaster: Justices of the Peace Act 1997, s.26.
[49] Justices of the Peace Act 1979, s.7(2).
[50] Justice of the Peace Act 1997, s.10A as substituted by the Access to Justice Act 1999.
[51] See Brazier *Constitutional Practice* (1999), pp 294–6.
[52] Harman J. resigned in 1998 following criticism of his conduct by the Court of Appeal in *Goose v. Wilson Sandford*, *The Times*, February 13 and 19, 1998.
[53] See Brazier *op. cit.*, pp. 289–290 for examples.
[54] A. Patterson and St. J. Bates, *The Legal System of Scotland* (4th ed., 1999).
[55] J.A.G. Griffith, *Daily Telegraph*, April 23, 2001.
[56] See J.A.G. Griffith, *Politics of the Judiciary*, (5th ed., 1997), Chap. 2.

Valuation Bill that advisory judgments should be allowed on rating questions.[57] That such a duty does not necessarily impair the independence of the courts is shown by the fact that it exists in many constitutions, including some in the Commonwealth, and also in our judicial system in the case of the Judicial Committee[58] and the Courts-Martial Appeal Court. In addition, following an acquittal, the Attorney-General may refer a case to the Court of Appeal for its opinion a point of law which has arisen in the case.[59]

Such advisory functions should be distinguished from the ancient duty of the judges to advise the House of Lords in its judicial capacity, and from the binding declaratory judgments that may be given in certain cases.[60]

The role of the Law Lords in the legislative function of the House of Lords is governed by convention.[61] Their position is arguably more problematic since the enactment of the Human Rights Act 1998. Lord Phillips M.R. has indicated that he will not get involved in the legislative function of the House of Lords.[62]

20–033 Apart from their strictly judicial duties, judges of the superior courts are, from time to time, called upon to conduct inquiries of one kind and another[63]: "a role which the judiciary do not seek, but which is thrust upon them."[64] The inquiries have been formally established under the Tribunals of Inquiry (Evidence) Act 1921,[65] under a specific statutory provision, or on an *ad hoc* basis.[66] The matters inquired into have included events in Northern Ireland,[67] rail crashes, public health matters, standards in public life,[68] murder.[69] Whether such a practice is desirable is a question on which different views have been expressed. "The employment of judges in extra-judicial inquiries may be entirely acceptable, as a means of reassuring the public, where there has been a tragic event such as Aberfan or Dunblane or Paddington. There are more serious issues of the separation of powers where the inquiry raises overtly political and contentious matters . . . ".[70] A further danger of relying on judges to examine contentious issues is that they become themselves controversial figures. The new and important roles of the House of Lords and the Judicial Committee of the Privy Council in constitutional matters such as the interpretation of the Human Rights Act 1998 and the devolution legislation could result in a reduction in this type of extra-judicial activity in order to avoid compromising judicial impartiality. There is

[57] See E.C.S. Wade, "Consultation of the Judiciary by the Executive" (1930) 46 L.Q.R. 169.
[58] *ante*, para. 16–009.
[59] Criminal Justice Act 1972, s.36. This section has not, however, "created a system for referring mere 'moots' to appellate courts": *Att.-Gen. for Northern Ireland's Reference No. 1 of 1975* [1977] A.C. 105, 156 *per* Lord Edmund Davies.
[60] *Dyson v. Att.-Gen.* [1911] 1 K.B. 410.
[61] See *ante*, para. 9–012.
[62] *The Times*, May 22, 2001.
[63] See S. Shetreet, *Judges on Trial* (1976), pp. 354–363; Zellick [1972] P.L. 1.
[64] Lord Woolf in the course of a debate in the House of Lords, H.L. Deb., Vol. 572, col. 1272, June 5, 1996.
[65] The Crown Agents inquiry, H.C. 364 (1981–82); the inquiry by Lord Cullen into the Dunblane massacre 1996.
[66] The Scott inquiry into the "Arms for Iraq" affair, H.C. 115 (1995–96).
[67] *e.g.* by Lord Widgery C.J., into the events of "Bloody Sunday" H.L. 101, H.C. 220 (1971–72), being re-investigated by Lord Saville (1998); Bennett J. into interrogation methods, Cmnd. 7497.
[68] Lord Nolan Cm. 2850 (1995).
[69] The Macpherson inquiry into the death of Stephen Lawrence, Cm. 4262 (1999).
[70] Sir David Williams, "Bias: the Judges and the Separation of Powers", [2000] P.L. 45 at p. 54; see also Drewry, "Judicial Inquiries and Public Reassurance", [1996] P.L. 368.

also the practical matter of availability: if judges are busy with a lengthy inquiry they will not be available in court.

Terms, conditions and administration

The independence of the judiciary can be threatened by changes to the administration of the courts,[71] by increasing the powers of the Lord Chancellor to control the education, training and conduct of advocates, or by changes in the rules relating to judicial pensions. The relaxation of the doctrine or convention that judges—except the Lord Chancellor—should not take part in political and party controversy,[72] has ensured that these matters are not ignored.[73] The jurisdiction of the Parliamentary Commissioner for Administration was extended in 1990 to include alleged maladministration in the courts.[74] **20–034**

Sentencing[75]

An aspect of judicial independence is the discretion that judges have in determining the sentences of those convicted. Attempts have been made from time to time to restrict this discretion by the use of legislation to enable government policy on sentencing to be reflected by the judiciary. A White Paper published in 1996 proposed to increase the availability of mandatory sentences for certain offences, and to impose heavy mandatory minimum sentences. Despite criticisms of the proposals, many of the proposals made in the White Paper were enacted in the Crime (Sentences) Act 1997. One of the provisions in this Act is the requirement that where an offender is convicted of a second serious offence (as defined in section 2) no matter how long between the two offences, the court is obliged to impose a sentence of life imprisonment unless there are "exceptional circumstances". This section requires careful interpretation to avoid being incompatible with Articles 3 and 5 of the E.C.H.R.[76] **20–035**

Judicial impartiality

The impartiality of the judiciary is recognised as an important, if not the most important element, in the administration of justice. It is recognised in British law and by Article 6(1) E.C.H.R. which establishes a right to a fair and public hearing by an independent and impartial tribunal established by law. The E.C.t.H.R. has held that impartiality requires a judge not only to be impartial, but also to appear to be impartial.[77] Certain legal rules and constitutional conventions are clearly intended to facilitate the impartial administration of justice so far as that is possible.[78] **20–036**

[71] See Sir Nicolas Brown-Wilkinson, "The Independence of the Judiciary in the 1980s", [1988] P.L. 44.

[72] The relevant rules were referred to as the Kilmuir Rules, although in one form or another restrictions on judicial utterances ante-dated that Lord Chancellor. See also [1986] P.L. 383. They were relaxed by Lord Mackay in 1987, who reminded judges that they should not say anything that might damage their authority or prejudice the performance of their judicial work.

[73] Sir Francis Purchas, "Lord Mackay and the judiciary", (1994) 144 N.L.J. 527, "What is happening to judicial independence?", (1994) 144 N.L.J. 1306; Lord Ackner, "The erosion of judicial independence" (1996) 146 N.L.J. 1789, "More power to the Executive?" (1998) 148 N.L.J. 1512.

[74] s. 110 Courts and Legal Services Act 1990.

[75] See Ashworth, *Sentencing and Criminal Justice* (3rd ed., 2000), Chap. 2.

[76] See *R. v. Offen* [2001] Cr.App.R. 24.

[77] *McGonnell v. United Kingdom* (2000) 30 E.H.R.R. 241.

[78] e.g. both Houses of Parliament have *sub judice* rules, see P. M. Leopold "The Changing Boundary between the Courts and Parliament," in *Legal Structures* (Buckley ed., 1998).

Exclusion from the House of Commons

20–037 The exclusion by law of the holders of judicial office (other than lay magistrates) from sitting in the House of Commons[79] is now based on the doctrine that judges should not take part in political controversy. Formerly, the exclusion of judges from the House of Commons was based on different principles. When the Commons asserted their right to exclude James I's judges they did so on the ground of parliamentary privilege, because the judges of the common law courts were advisers of the House of Lords. For the same reason the Law Officers of the Crown should have been disqualified, but in this case the disqualification was eventually waived.[80]

Natural justice

20–038 The principles of natural justice which are discussed in Chapter 32 in relation to the judicial control of public authorities, apply *a fortiori* to the conduct of the courts. The right of each side to a dispute to be heard (*audi alteram partem*) and the requirement that a judge should not be a party to a case and should be free from personal interest or bias in the case before him (*nemo iudex in re sua*)[81] help to insure the impartial discharge of judicial duties. Where a judge has a pecuniary interest or has a direct personal interest in the outcome of a case, he is automatically disqualified from hearing the action, and any judgment he gives will be automatically set aside. The case of *R. v. Bow Street Magistrates, ex p. Pinochet (No. 2)*[82] established that the automatic disqualification rule goes further, and covers the situation where a judge does not have an interest in the outcome of the case, but where some affiliation or personal interest of the judge gives rise to a suspicion that he might not be impartial. This case arose out of the decision of the House of Lords, by a majority of three to two, that Senator Pinochet, a former Head of State, did not have immunity from the criminal process for international crimes which he allegedly committed when he was in office. The House of Lords before reaching this decision, had given a variety of human rights bodies, including Amnesty International, leave to intervene in the appeal process. It became known after the decision that Lord Hoffmann, one of the majority, was Chairperson of a trust set up by Amnesty to research into human rights issues. In *ex p. Pinochet (No. 2)* the House of Lords held that since the trust in question was owned and controlled by Amnesty, the two bodies were effectively one, and although the link was not sufficiently close to say that Lord Hoffmann was a party to the appeal, it was sufficiently close to establish that he had an interest in the proceedings. Their Lordships held that Lord Hoffmann should have been automatically disqualified from hearing the case and in consequence the earlier decision of the House should be set aside. This decision left the law in some confusion as it expanded the notion of automatic disqualification and, in remarks by members of the House of Lords, cast doubts on *R. v. Gough*.[83] *Gough* had established that where there was evidence of bias, and it was not a case of

[79] House of Commons Disqualification Act 1975.

[80] *Report and Minutes of Evidence on the Select Committee on Offices or Places of Profit under the Crown* (1941; H.C. 120, 147).

[81] *Dimes v. Grand Junction Canal* (1852) H.L.C. 759. In the light of the requirements of the E.C.H.R. the convention that the Lord Chancellor and ex-Lord Chancellors do not participate in appeals involving controversial political issues with which they have been concerned, *e.g. Heaton's Transport (St. Helens) v. T.G.W.U.* [1973] A.C. 15, is of even greater importance.

[82] [2000] 1 A.C. 119; see Timothy H. Jones, "Judicial bias and disqualification in the *Pinochet* case," [1999] P.L. 391.

[83] [1993] A.C. 646.

automatic disqualification, the test to be applied in determining whether a decision should be set aside was whether there was a "real danger" of bias. However, in *Locabail (UK) Ltd v. Bayfield Properties Ltd*[84] the Court of Appeal, in a single judgment of the court, applied *Gough* and dismissed four of the five appeals[85] before them on the ground that although there was evidence of apparent bias, there was no real danger of bias. The Court of Appeal refused to attempt to define the factors which could give rise to a real danger of bias, stating that it would depend on the facts and the nature of the issue to be decided in the case. However it went on to suggest that objection could not be based on the religious, ethnic or national origin, age, class, education, means or sexual orientation of a judge. It also suggested that objection could not ordinarily be based on a variety of other interests or experiences including a judge's membership of social, sporting or charitable bodies; masonic associations; previous judicial decisions; extra-curricular utterances in lectures, books, etc.[86]

A judge who has a possible conflict of interest in a case may continue to hear the case if he discloses this interest and the parties do not object. It may be questioned if this satisfies the requirement that justice should be seen to be done. It is clear that judges must take care to disclose to the parties anything which could give rise to a suspicion of a conflict of interest. The relaxation of the convention whereby judges should not take part in political controversy[87] can give rise to concerns as to judicial impartiality. In *Hoekstra and others v. H.M. Advocate*[88] it was held that extra judicial comments by Lord McClusky, in which he indicated misgivings with respect to the enactment of the Human Rights Act 1998, cast doubt on his impartiality in any case where arguments were based on the Act or the E.C.H.R. **20–039**

Publicity of proceedings[89]

One of the chief safeguards of the impartial administration of justice lies in the common law right of the public, including the press, to be present and to publish accurate reports and fair comments on the proceedings. This is embodied, too, in the maxim that it is not sufficient that justice be done, but it must be seen to be done: *Scott v. Scott*.[90] "Proceedings in open court ensure that justice is done and is seen to be done and that the public may be able to ponder whether justice has been done": *Home Office v. Harman*.[91] It is also a requirement of Article 6(1) E.C.H.R. and a pre-condition of the right to freedom of expression (Article 10). **20–040**

The courts have a discretion, which must be carefully exercised, to hear proceedings *in camera* on grounds of public policy, *e.g.* where secret information that might endanger the safety of the state is to be divulged, or to clear the court for the suppression of disorder.[92] In *R. v. Chief Registrar of Friendly Societies, ex*

[84] [2000] 2 W.L.R. 870, CA.
[85] It allowed the appeal in a personal injury case where the trial judge had previously written articles critical of insurance companies in such cases.
[86] At p. 888.
[87] *ante*, para. 20–034, and note 71 on p. 437
[88] [2001] 1 A.C. 216, 2001 S.L.T. 28
[89] Miller, *Contempt of Court* (3rd ed. 2000), Chap. 10.
[90] [1913] A.C. 417.
[91] [1981] Q.B. 534, *per* Templeman L.J.; see *Storer v. British Gas plc*, *The Times*, March 1, 2000, where the Court of Appeal held that an industrial tribunal had no jurisdiction to sit in private.
[92] See *R. v. Denbigh J.J., ex p. Williams* [1974] Q.B. 759.

p. New Cross Buildings Society,[93] the Court of Appeal pointed out that in exceptional circumstances the paramount object of the courts—to do justice in accordance with the law—could only be achieved by proceedings *in camera*. Here a public hearing—irrespective of the decision—would have caused financial loss. Statutory limitations on grounds of public morality are imposed in certain cases on the details that may be published, *e.g.* under the Judicial Proceedings (Regulation of Reports) Act 1926 and various statutes relating to children and young persons, divorce, nullity, and domestic proceedings.[94]

Fair reports of contemporary judicial proceedings are privileged.[95] Restrictions on reporting may be imposed to prevent the risk of prejudicing proceedings under the Contempt of Court Act 1981.[96]

Judicial immunity[97]

20–041 Immunity from suit is a derogation from a person's fundamental right of access to the court, and both common law and the E.C.H.R. require such derogations to be justified.[98] The law of defamation accords absolute privilege to judges[99] taking part in judicial proceedings. With regard to torts other than defamation the law is not altogether clear. The distinction usually taken is that between superior courts and inferior courts.

Judges are exempt from civil or criminal liability for things done or said while acting within their jurisdiction, even if done maliciously and without reasonable or probably cause.[1] Judges of *superior* courts are apparently not liable for judicial acts done outside their jurisdiction,[2] (*Anderson v. Gorries, ante*), and the acts of a superior court are presumed to be within their jurisdiction[3]). Anyway, there is no tribunal to enforce such liability.

Judges of *inferior* courts, including county courts,[4] courts—martial[5] and consular courts,[6] had been traditionally regarded as liable for judicial acts done without, or in excess of, their jurisdiction (*Peacock v. Bell, ante*). The judge of an inferior court will not be deemed to have acted without jurisdiction if he was induced to act by some false allegation of fact which, if true, would have given

[93] [1984] 2 Q.B. 227.
[94] *e.g.* Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968; *Barrett v. Att.-Gen.* [1971] 1 W.L.R. 1713; Magistrates' Courts Act 1980, s.71; Youth Justice and Criminal Evidence Act 1999, s.44.
[95] *Kimber v. The Press Association* (1893) 62 L.J.Q.B. 152, and see s.14 Defamation Act 1996.
[96] *post*, para. 25–012.
[97] Winfield, *The Present Law of Abuse of Legal Procedure* (1921), Chap. 7; *cf.* D. Thompson, "Judicial Immunity and the Protection of Justices", (1958) 21 M.L.R. 517; L.A. Sheridan, "The Protection of Justices" (1951) 14 M.L.R. 267; Abimbola Olowofoyeku, "State Liability for the Exercise of Judicial Power", [1998] P.L. 444.
[98] See *Fayed v. United Kingdom* (1994) 18 E.H.R.R. 393 at para. 65; *Tinnelly and Sons Ltd v. United Kingdom* (1998) 27 E.H.R.R. 249 at para. 74.
[99] Including magistrates: *Law v. Llewellyn* [1906] 1 K.B. 487.
[1] *Anderson v. Gorrie* [1895] 1 Q.B. 668 (colonial court); see also *Scott v. Stansfield* (1868) L.R. 3 Ex. 220 (county court).
[2] *Hammond v. Howell* (1677) 2 Mod. 219, *cf.* ministerial acts: *Ferguson v. Earl of Kinnoull* (1842) 9 Cl. & F. 251, 311 (HL).
[3] *Peacock v. Bell* (1666) 1 Wms.Saund. 74. See also *Taffe v. Downes* (1813) 3 Moo. P.C.
[4] *Houlden v. Smith* (1850) 14 Q.B. 841.
[5] *Dawkins v. Lord E. Paulet* (1869) 5 Q.B. 94; *Dawkins v. Lord Rokeby* (1873) L.R. 8 Q.B. 255; *Heddon v. Evans* (1919) 35 T.L.R. 642.
[6] *Haggard v. Pelicier Freres* [1892] A.C. 61.

him jurisdiction.[7] The distinction between superior and inferior courts began to develop in the seventeenth century, and was the product of two principles: first, the jurisdiction of inferior courts is limited by subject-matter, persons or place, while superior courts are not so limited; and, secondly, inferior courts are answerable to the superior courts if they exceed their jurisdiction, while superior courts are answerable only to God and the King.[8]

In *Sirros v. Moore*,[9] the Court of Appeal, in refusing to hold a judge of the Crown Court liable for a wrongful order of imprisonment, expressed the view that the immunity of judges of inferior courts should be assimilated to that of judges of superior courts. Magistrates have statutory protection from acts within their jurisdiction, but did not have immunity for acts beyond jurisdiction until 1991.[10] 20–042

In order to protect the administration of justice, immunity from suit also attaches to words spoken in the course of judicial proceedings by the parties,[11] witnesses[12] and counsel[13] and to the verdicts of juries.[14] However, in 2000, in *Arthur J.S. Hall and Co (a firm) v. Simmons*[15] the House of Lords, in a change of policy which was based on the changes in society and law in the previous thirty years,[16] held that the immunity of advocates from suits for negligence no longer applied. All of their Lordships held this to be the case in respect of the conduct of civil cases, and a majority of the House held it to apply to criminal proceedings also. Although the decision was not based on the requirements of the E.C.H.R., it is likely that had it been maintained a challenge could have been made on the basis that the restriction that the immunity imposed on the rights of individuals was disproportionate to its public policy aim.

Immunity for words spoken is absolute in the case of the courts in the strict sense and tribunals which have similar attributes to a court. The extent of absolute immunity was considered by the House of Lords in *Trapp v. Mackie*.[17] Lord Diplock emphasised that the first requirement was that the tribunal had been established by law, although not necessarily by statute[18] so that absolute immunity does not extend to domestic tribunals. A tribunal may be entitled to absolute immunity even although its decision may be subject to confirmation by another body as in the case of a military court of inquiry; *Dawkins v. Lord Rokeby*.[19] It

[7] *Houlden v. Smith*, *ante*.; *Calder v. Halket* (1839) Moo. P.C. 28.
[8] Holdsworth, *op. cit.* Vol. VI. pp. 234–240.
[9] [1975] Q.B. 118.
[10] For the situation prior to 1991, see *R. v. Manchester City Justices, ex p. Davies* [1989] Q.B. 631, CA and *Re McC.* [1985] A.C. 528, HL, a case from Northern Ireland. See now Justice of the Peace Act 1997, ss.51, 52.
[11] *Astley v. Younge* (1759) 2 Burr. 807. See also *Re Hunt* [1959] 2 Q.B. 69, CA.
[12] *Seaman v. Netherclift* (1876) 2 C.P.D. 53. See *Taylor v. Director of Serious Fraud Office* [1999] 2 A.C. 177, where it was explained that the immunity was limited to cases where "the alleged statements constitute the cause of the action." *per* Lord Hoffmann.
[13] *Munster v. Lamb* (1883) 11 Q.B.D. 588.
[14] *Bushell's Case* (1670) 6 St.Tr. 999; (1677) Vaughan 135. The practice of punishing jurors for finding against the evidence of direction of the judge was finally stopped by this case.
[15] [2000] 3 All E.R. 673.
[16] When in *Rondel v. Worsley* [1969] 1 A.C. 191, it was held on the grounds of public policy that barristers had immunity from actions in negligence.
[17] [1979] 1 W.L.R. 177. (A Scottish appeal, the House declaring that on this point English and Scottish law are the same.)
[18] *e.g. Lincoln v. Daniels* [1962] 1 Q.B. 237, CA: (disciplinary proceedings in Inns of Court); *Marrinan v. Vibart* [1963] 1 Q.B. 528.
[19] (1873) L.R. 8 Q.B. 255; (1875) L.R. 7 H.L. 744.

is important, although not an essential requirement,[20] that the tribunal's proceedings are held in public. Other characteristics listed by Lord Diplock included the right to legal representation, the calling of witnesses by each party; the compellability of the witnesses and the right to cross-examine witnesses.

IV. Contempt of Court[21]

20–043 Courts, if they are to serve their purpose of administering justice, must have the power to secure obedience to their judgments, to prevent interference with their proceedings and to ensure a fair trial to parties who resort to them to vindicate their rights. It is the public interest in seeing these ends achieved that is served by the law relating to contempt of court.[22] The latter phrase has been described as "inaccurate and misleading",[23] particularly because it suggests that the purpose of the law is to protect the dignity of the court. "It is justice itself that is flouted by contempt of court, not the individual court or judge who is attempting to administer it."[24] Lord Scarman has expressed the view that "It is high time . . . that we re-arranged our law so that the ancient but misleading term 'contempt of court' disappeared from the law's vocabulary."[25] However an acceptable alternative has not yet been suggested.

The law relating to contempt covers a variety of very different situations, from the disgruntled litigant who throws a tomato at a judge to the publication of an article on a matter of public interest by a newspaper before litigation on some aspect of that matter has even begun. Thus, in varying degrees the law of contempt will be in conflict with the right of free speech. In all cases judges will be judging in matters in which they may be thought to have a personal interest.[26] It is not, then, surprising that the law of contempt is an area of controversy. It is an area of law that has to be considered in the light of the E.C.H.R. and in particular Articles 6 and 10: even before the enactment of the Human Rights Act, the E.C.H.R. caused aspects of the law on contempt to be changed.[27] The Contempt of Court Act 1981 was enacted because of the decision of the European Court of Human Rights in *Sunday Times v. UK*[28] The 1981 Act reforms but does not entirely replace the common law of contempt.[29] Although the law of contempt in Scotland differs from the common law, the Act applies to both jurisdictions.[30]

[20] *Addis v. Crocker* [1961] 1 Q.B. 11 (CA) (Disciplinary Committee constituted under Solicitors Act 1957).

[21] Miller, *Contempt of Court* (3rd ed., 2000), Arlidge, Eady and Smith, *Contempt of Court* (2nd ed., 1999).

[22] The difficulty of determining what constitutes a court is discussed *ante*, para. 20–007.

[23] *Att.-Gen. v. Times Newspapers Ltd* [1992] 1 A.C. 191.

[24] *Att.-Gen. v. Leveller Magazine* [1979] A.C. 440, 449, *per* Lord Diplock.

[25] *Att.-Gen. v. BBC* [1981] A.C. 303, 362.

[26] See Willes J.'s answer to such a charge in *ex p. Fernandez* (1862) 19 C.B. (N.S.) 3, 56.

[27] See *Saunders v. United Kingdom* (1997) 23 E.H.R.R. 313. The Companies Act 1985 allowed information obtained by inspectors from a company official to be used in evidence against that person, failure to answer such questions could be punished as contempt of court. This was held to be in breach of Art. 6 E.C.H.R. Other legislation had similar provisions; s.59 and Sch. 3 of the Youth Justice and Criminal Evidence Act altered the law to conform with the E.C.H.R.

[28] [1979] 2 E.H.R.R. 245. The Phillimore Report (Cmnd. 5794 (1974)), had recommended reform.

[29] See para. 25–014.

[30] Rosalin McInnes and Douglas Fairley, *Contempt of Court in Scotland* (2001).

20–044 The common law distinguishes between civil and criminal contempt. Scots law draws no such distinction but recognises all forms of contempt as *sui generis*. That is more logical because, on the one hand civil contempt at common law is, like a criminal offence, punishable with imprisonment and the standard of proof required is the standard in criminal law, proof beyond reasonable doubt.[31] On the other hand criminal contempt is usually tried summarily,[32] that is without a jury, a form of procedure otherwise confined to minor offences dealt with by magistrates. The importance of the distinction in English law formerly lay in the fact that no appeal was possible in the case of criminal contempt,[33] however the Administration of Justice Act 1960, s.13 provided a right of appeal in all cases of contempt. Legal aid is available in the case of some criminal contempts only.[34] Magistrates' courts, the county court and all superior courts have a discretion to grant emergency legal aid for criminal contempts committed in the face of the court or in its immediate vicinity.[35] One remaining difference is that in cases of criminal contempt enforcement of the law is a matter for the Attorney-General[36] or the court itself; in civil contempt the choice of whether to pursue the matter of disobedience to the order of the court is usually a matter for the private litigant in whose favour the order has been made.[37]

In many instances conduct which is punishable as a contempt may equally constitute a distinct common law or statutory crime. In addition to a variety of specific (and, in some instances, largely obsolescent) offences,[38] there exists the extremely wide offences of perverting (or attempting or conspiring to pervert) the course of justice.[39] The Criminal Justice and Public Order Act 1994, s.51 provides several offences in connection with the intimidation of witnesses, jurors, etc.

Civil contempt

20–045 Civil contempt of court consists of disobedience to an order of the court made in civil proceedings. In *M. v. Home Office*[40] it was established that although a finding of contempt could not be made against the Crown, it could be made against a Minister of the Crown acting in his official capacity and against

[31] *Dean v. Dean*, (1987) 17 Fam. Law 200, CA.

[32] Trial on indictment, where the facts permit, was recommended by the Court of Appeal in *Balogh v. Crown Court of St Albans* [1975] Q.B. 73. Stephenson L.J. said that the jurisdiction to deal summarily with a case in which the judge himself was interested should "never be invoked unless the ends of justice really require such drastic means: it appears to be rough justice, it is contrary to natural justice, and it can only be justified if nothing else will do." (*ibid.*, p. 90). See also *D.P.P. v. Channel Four Television Co Ltd* [1993] 2 All E.R. 517, *per* Woolfe L.J., but *cf. R. v. Griffin* (1989) 88 Cr. App. Rep. 63.

[33] *Scott v. Scott* [1913] A.C. 417.

[34] Which may not be sufficient for Art. 6.3(c) of the ECHR.

[35] s.29, Legal Aid Act 1988; the provision for legal aid in these circumstances is now included within the scope of the Criminal Defence Service created by the Access to Justice Act 1999.

[36] s.7, Contempt of Court Act 1981. The Law Commission's view is it is justifiable to give the Attorney-General an exclusive role to protect freedom of expression: Consultation Paper 149 (1997) and Report, No. 255, H.C. 1085, (1998–99).

[37] *Home Office v. Harman* [1983] 1 A.C. 280, 310 *per* Lord Scarman; but in exceptional circumstances the court itself may act: *Re M. and others (minors) (breach of contract order: committal)* [1999] 2 All E.R. 56, CA.

[38] See *Offences Relating to Interference With the Course of Justice* (Law Comm. Report No. 96, 1979).

[39] *R. v. Machin* [1980] 1 W.L.R. 763, CA; *R. v. Selvage* [1982] Q.B. 372, CA.

[40] [1994] 1 A.C. 377; see H.W.R. Wade, "Injunctive Relief Against the Crown and Ministers", (1991) 107 L.Q.R. 4; T.R.S.Allan, "Courts, Crown, Contempt and Coercion", [1994] C.L.J. 1.

government department. Here the Home Secretary, on legal advice, had ignored an order of a High Court judge requiring him to procure the return of M to this country to enable a further hearing on M's application for judicial review of the Home Secretary's decision not to grant him asylum. Lord Templeman referred to the dangers of exempting Ministers of the Crown from the coercive jurisdiction of the courts, and said of the argument that there was no power to enforce the law by injunction or contempt proceedings against a Minister in his official capacity that it would, if upheld: "establish the proposition that the executive obey the law as a matter of grace and not as a matter of necessity, a proposition that would reverse the result of the Civil War."[41]

Formerly a contemnor was liable to punishment for an indefinite period until he was prepared to "purge" his contempt by apologising and complying with the order of the court. Section 14 of the Contempt of Court Act 1981 provides a maximum sentence "on any occasion" of two years for any contempt in the case of a superior court and one month in the case of an inferior court.[42] In *Lee v. Walker*[43] the Court of Appeal held that the High Court retained an inherent jurisdiction to impose consecutive sentences of imprisonment where there are a number of separate acts of contempt. Where it is possible to ensure obedience to a court order in some way other than imprisonment, such as a warrant for possession, that is preferable.

Because of the gravity of the consequences of breach of an order made in contempt proceedings the Court of Appeal has emphasised in several decisions the need for certainty and clarity in the order with which the alleged contemnor must comply if he is to avoid imprisonment[44], and "meticulous adherence to the required formalities".[45] Although there is authority for the view that a person in contempt cannot subsequently bring proceedings in the same cause until he has purged his contempt. "It is a strong thing for a court to refuse to hear a party . . . and it is only to be justified by grave considerations of public policy."[46] In all cases the court, probably, has a discretion whether or not to hear the party, and in so deciding it should take account of the requirements of the ECHR and the need for any restriction on the right of access to the courts to be in proportionate to the aim sought.[47]

20–046 The Official Solicitor has a responsibility to keep under review the cases of all persons imprisoned for contempt and to bring to the notice of the court any circumstances which might lead to a prisoner's release. He may act irrespective of the prisoner's own wishes.[48]

Disobedience to a court order may take many forms, from the obvious case of defiance of an injunction[49] to the breach of an undertaking given to a court. The

[41] At p. 395 Since the normal penalties for contempt were inappropriate, an order for cost was made against the Minister.

[42] For penalties in Scotland, see s.15. In the case of a corporate body there is a power to fine or to sequestrate assets, see *D.P.P. v. Channel Four Television Co Ltd* [1993] 2 All E.R. 517.

[43] [1985] 1 All E.R. 781. A similar power is possessed by the County Court by virtue of the Supreme Court Act 1981, s.14(4A), see the County Courts (Penalties for Contempt) Act 1983.

[44] *Chiltern D.C. v. Keane* [1981] 1 W.L.R. 619. See also *Lee v. Walker* [1985] Q.B. 1191.

[45] *Re C. (a Minor)*, [1986] 2 Fam. Law 187, C.A.

[46] *Hadkinson v. Hadkinson* [1952] p. 285, 298.

[47] See *X Ltd v. Morgan-Grampian Ltd* [1991] A.C. 1, where a flexible approach was favoured.

[48] See *Churchman v. Joint Shop Stewards' Committee* [1974] 1 W.L.R. 1094 (C.A). (Release of three dockers imprisoned for contempt by N.I.R.C.); *Midland Cold Storage Ltd v. Turner* [1972] I.C.R. 230; *Enfield L.B.C. v. Mahoney* [1983] 1 W.L.R. 749, C.A. (Refusal to deliver up the "Glastonbury Cross"); inherent power of Court to release before termination of fixed period of imprisonment).

[49] *e.g. Clarke v. Chadburn* [1985] 1 W.L.R. 78, (Contempt by N.U.M.).

place of contempt in the law on discovery (now disclosure) arose in *Home Office v. Harman*.[50] and resulted in a change in the Civil Procedure Rules.[51] The problem was the need to balance open justice and the need to have a mechanism for making available to the parties confidential or embarrassing documents.

Criminal contempt

Criminal contempt of court takes various forms. 20–04

(i) *Scandalising the court*[52]

This form of contempt, picturesquely also known in Scotland as "murmuring judges"[53] is intended to preserve public confidence in the administration of justice by punishing words and conduct which are scurrilously abusive or impugn the impartiality of the courts. O'Higgins C.J. in *The State (D.P.P.) v. Walsh*[54] said "Such contempt occurs where wild and baseless allegations of corruption or malpractice are made against a court." In *R. v. Gray*[55] it was held to be contempt to say, in a newspaper, of Darling J., that he was an "impudent little man in horsehair . . . a microcosm of conceit and empty headedness." The article went on to say, "No newspaper can exist except upon its merits, a condition from which the Bench, happily for Mr Justice Darling, is exempt." In *R. v. Editor of New Statesman, ex p. D.P.P.*[56] it was held to be contempt to say that it was impossible for certain people to hope for a fair trial from Avery J.. To commit this type of contempt, the words have to be directed at a judge in his judicial capacity: *Badry v. D.P.P.*[57]

The risk of judges confusing their own self esteem with the interests of justice is more serious here than in other areas of the law of contempt. It is necessary to bear in mind Lord Atkin's words, "Justice is not a cloistered virtue, she must be allowed to suffer the scrutiny and respectful, though outspoken comments of ordinary men."[58] In *R. v. Commissioner of Police of the Metropolis, ex p. Blackburn (No. 2)*,[59] for example, where Mr Quintin Hogg Q.C., M.P., as he then was, had published an article in *Punch* criticising the decisions of Court of Appeal on the Gaming Acts, the court held that criticisms of a court's decisions do not amount to contempt of court, even though they are in bad taste and contain inaccuracies of fact, provided they are in good faith and do not impute improper motives to those taking part in the administration of justice.

This type of contempt is virtually obsolete in English law; it would be difficult to justify it as a legitimate restriction to freedom of expression under the E.C.H.R.

[50] [1983] 1 A.C. 280; a friendly settlement was reached after the decision of the European Commission on Human Rights, *Harman v. United Kingdom* (1985) 7 E.H.R.R. 146.
[51] See Civil Procedure Rules 1998, r. 31.22.
[52] C. Walker, "Scandalising in the Eighties" (1985) 101 L.Q.R. 359.
[53] The Judges Act 1540 (no longer in force) provided that if "any maner of persoun murmuris any Juge temporale or spirituale als weill lordis of the sessioune as vtheris and previs nocht the samin sufficientlie ".
[54] [1981] I.R. 412, 421; see also *Attorney-General v. Connolly* [1947] I.R. 213.
[55] [1900] 2 Q.B. 36.
[56] (1928) 44 T.L.R. 301.
[57] [1983] 2 A.C. 297, PC.
[58] *Ambard v. Att.-Gen. for Trinidad and Tobago* [1936] A.C. 323, 335.
[59] [1968] 2 Q.B. 150, CA.

(ii) *Interference with justice as a continuing process*

20–048 Here again, the concern of the law is not to protect the conduct of particular proceedings but the administration of justice in general and public confidence in the courts. The Contempt of Court Act 1981, s.8 provides that it is a contempt of court to obtain, disclose[60] or solicit any information about the details of the deliberations of a jury in any legal proceedings. In *R. v. Young*[61] the Court of Appeal held that it could take account of what had happened in the hotel where the jury had spent the night, as that was part of their deliberations.[62] Proceedings under the section may only be instituted by or with the consent of the Attorney-General or on the motion of a court having jurisdiction to deal with the alleged contempt.[63] Section 8 is a restriction on freed expression, but in *Attorney-General v. Associated Newspapers Ltd*[64] the view was expressed that it did not breach the E.C.H.R.

The publication of the names of blackmail victims has been held to be a contempt because it interferes with the administration of justice by deterring future victims of such crimes from resorting to the courts: *R. v. Socialist Worker Printers and Publishers Ltd. ex p. Attorney-General*.[65] The House of Lords, however, in *Attorney-General v. Leveller Magazine Ltd*[66] emphasised that at common law there is no general right to anonymity on the part of witnesses and parties. Differing views were expressed on whether courts possessed a power specifically to order the press to refrain from revealing the identity of a witness and whether, if such a power existed, the magistrates had purported to make such a ruling. Section 11 of the Contempt of Court Act 1981 provides that where a court (having power to do so) allows a name or other matter to be withheld from the public in judicial proceedings the court may give such directions prohibiting the publication of that name or matter as appear to the court to be necessary for the purpose for which it was ordered to be withheld.[67] The section does little to clarify the common law position. It refers to courts which have the power to make directions without conferring those powers or making clear which courts possessed them under the common law. It does not make clear the effect of a breach of a direction and it does not deal with the publication of information in the absence of an express direction. Clearly the power provided by section 11 must be exercised with caution, as it creates an exception to the idea of open justice,[68] and must be interpreted in the light of Articles 6 and 8 of the E.C.H.R.[69]

20–049 "Victimising" witnesses after the conclusion of legal proceedings provides another example of conduct which generally undermines public willingness to participate in legal proceedings and confidence in the ability of courts to protect

[60] See *Attorney-General v. Associated Newspapers Ltd* [1994] 2 A.C. 238.

[61] [1995] Q.B. 344, CA.

[62] Four of the jurors has taken part in a seance where it was claimed the deceased told them to vote guilty; the appeal was allowed.

[63] The R.C.C.J. Cm. 2263 (1993) recommended that s.8 should be amended to allow for research into how juries reach their verdicts.

[64] [1994] 2 A.C. 238, HL.

[65] [1975] Q.B. 637.

[66] [1979] A.C. 440.

[67] A court which has not allowed a name to be withheld during proceedings cannot later attempt to prohibit publication of the name under s.11: *R. v. Arundel Justices ex p. Westminster Press Ltd* [1985] 1 W.L.R. 708.

[68] *R. v. Legal Aid Board, ex p. Kaim Todner* [1998] 3 All E.R. 541, CA.

[69] Specific statutory powers exist to shield, *e.g.* young people and vulnerable witnesses from publicity, see Youth Justice and Criminal Evidence Act 1999.

those who appear before them. "The administration of justice is, after all, a continuing thing. It is not bounded by the day's cases. It has a future as well as a present. And, if somebody pollutes the stream today so that tomorrow's litigant will find it poisoned, will he appeal to the court in vain?"[70]

In *Attorney-General v. Royal Society for the Prevention of Cruelty to Animals*[71] the society had brought disciplinary proceedings against one of its officers for giving evidence for the defence at the hearing of a private prosecution brought by the society. The Divisional Court described such conduct as, "a serious and unmitigated contempt", and imposed a heavy fine on the society.

(iii) *Contempt in the face of the court*

Conduct in a court designed to interrupt the administration of justice or expose the court to ridicule falls within this category. It covers assaults, threats, insults[72] or disturbing proceedings, for example by shouting slogans and singing songs: *Morris v. Crown Office*.[73] Witnesses who fail to attend court, produce documents or answer relevant questions, may be guilty of contempt.[74] The particular position of journalists, and others, who refuse to reveal the source of information is dealt with in section 10.[75] The alleged contempt does not have to be committed in the court room itself so long as it is closely connected with the case in progress, for example, threatening a witness outside the court room or putting a cylinder of laughing gas on the roof of the court building with the object of introducing gas into a particular court: *Balogh v. St Albans Crown Court*.[76] **20–050**

Whatever the position at common law the taking of photographs and the making of sketches in court is forbidden by the Criminal Justice Act 1925, s.41.[77] The use of tape recorders or other instruments for recording sound, without the consent of the court, is made contempt by section 9 of the Contempt of Court Act 1981.[78]

(iv) *Deliberate interference with particular proceedings*

Any act interfering with the outcome of particular proceedings, such as an attempt to bribe or intimidate judges, jurors or witnesses may constitute common law contempt which was preserved by section 6(c) of the 1981 Act.[79] **20–051**

(v) *Unintentional interference by prejudicial publications*

This type of contempt, which is concerned with publications which create a substantial risk of impeding or prejudicing the course of justice, is covered by the 1981 Act.[80] **20–052**

[70] *Re Att.-Gen.'s Reference, Att.-Gen. v. Butterworth* [1963] 1 Q.B. 696, 725, *per* Donovan L.J.
[71] *The Times*, June 22, 1985.
[72] See *R. v. Powell* (1994) 98 Cr.App.R. 224: wolf whistling at a juror was contempt, but a sentence of 14 days' imprisonment was inappropriate.
[73] [1970] 2 Q.B. 114, CA.
[74] *R. v. Montgomery* [1995] 2 All E.R. 28, CA.
[75] See *post*, para. 25–016 for a discussion of this section.
[76] [1975] Q.B. 73, CA.
[77] It is this section which prevents the televising of court proceedings in England and Wales.
[78] See the Practice Direction [1981] 3 All E.R. 848.
[79] See *post*, para. 25–014.
[80] See *post*, para. 25–013.

Jurisdiction to punish contempts

20–053 Although the law of contempt applies to protect proceedings in all courts, inferior courts have limited jurisdiction to enforce the law of criminal contempt. At common law an inferior court of record such as a coroner's court has jurisdiction to punish contempts in the face of the court: *R. v. West Yorkshire Coroner, ex p. Smith.*[81] Inferior courts, not of record, have no jurisdiction except where there is statutory authority; for example, magistrates' courts under the Contempt of Court Act, 1981, s.12[82] and county courts under the County Courts Act 1984, s.118.[83] In other cases provision is made for enforcement of the law by the Divisional Court.[84]

[81] [1985] 1 All E.R. 100.

[82] See *R. v. Newbury Justices, ex p. du Pont* (1983) 78 Cr.App.R. 255, DC. For the purposes of civil contempt county courts are superior courts: County Courts (Penalties for Contempt) Act 1983.

[83] *Bush v. Green* [1985] 1 W.L.R. 1143, CA.

[84] R.S.C., Ord. 52.

CHAPTER 21

THE POLICE[1]

Although the preservation of the peace, which is a royal prerogative,[2] is one of the primary functions of any state, the administration of the police has always been on a local basis in this country. That there is still no national police force today is partly a historical accident. In the sixteenth and seventeenth centuries constables were controlled both administratively and judicially by the justices of the peace, and they in their turn were controlled by the Council. The Long Parliament put an end to conciliar government by abolishing in 1642 the Star Chamber, through which this control was exercised. The Revolution Parliament had an equally strong fear of government by means of a standing army, as is witnessed by the famous declaration in the Bill of Rights 1688, and this traditional fear has since then been sufficient to prevent the formation of a national police force. **21–001**

History of the police[3]

In early English law the duty of seeing that the peace was preserved and of apprehending malefactors lay on the local communities of township and hundred. These duties—represented by such terms as frank-pledge, hue and cry and sheriff's tourn—were reinforced by the Assize of Arms 1181, an ordinance of 1252 which first mentions constables, and the Statute of Westminster 1285. Under this legislation a high constable was appointed for each hundred,[4] and one or more petty constables in each township. The office of constable was an annual duty and unpaid. The constables gradually came under the control of the justices of the peace, who were introduced in the fourteenth century. In the latter part of the seventeenth century the petty constables, appointed and dismissed by the local justices, came to be identified with the parish.[5] Towns had also an inefficient system of watch by night and ward by day. **21–002**

No one did more to rouse public opinion in the eighteenth century on the necessity for efficient organisation for the prevention of crime than Henry Fielding, both as author and magistrate. Sir Robert Peel, when Home Secretary, laid the foundation of a permanent professional police force for the metropolis. Nineteenth-century legislation made away with the ancient arrangements for trying to preserve the peace. Following on Peel's Metropolitan Police Act 1829,[6]

[1] T. Jefferson and R. Grimshaw, *Controlling the Constable* (1984); L. Lustgarten, *The Governance of Police* (1986), S. Uglow *Policing Liberal Society* (1988); Ian Oliver, *Police and Accountability* (2nd. ed., 1997); Neil Walker, *Policing in a Changing Constitutional Order* (2000); Robert Reiner, *The Politics of the Police* (3rd ed. 2000).

[2] Cited with approval in *R. v. Secretary of State for the Home Department, ex p. Northumbria Police Authority* [1989] Q.B. 26.

[3] L. Radzinowicz, *History of English Criminal Law and its Administration* (1956), Vol. III (1968), Vol. IV, Chap. 7; Sir Carleton Allen, *The Queen's Peace* (1953) Chap. 4; T. A. Critchley, *A History of the Police in England and Wales* (1967).

[4] High constables were abolished by the High Constables Act 1869.

[5] Parish constables were abolished by the Police Act 1964.

[6] See D. Ascoli, *The Queen's Peace: the Origins and Development of the Metropolitan Police 1829–1979* (1979). Modern statutory police forces may be traced back to the Dublin Police Act passed by the Irish Parliament in 1786, which established the Royal Irish Constabulary.

the Municipal Corporations Act 1835 required boroughs to maintain a paid police force. Every borough at one time maintained its own police force, but many of these were too small for efficiency and a series of statutes pursued a general policy of reducing their number. The borough police were administered by a Watch Committee of the Council, consisting of not more than one-third of the councillors. Meanwhile the City of London had obtained similar powers under a local Act, the City of London Police Act 1829. Optional powers were conferred on county Quarter Sessions by the Rural Police Act 1839. Not all counties availed themselves of these powers, and eventually the County and Borough Police Act 1856 extended the metropolitan scheme with modifications to all counties in England and Wales. When county councils were created by the Local Government Act 1888, the control of county police was transferred by way of compromise to a Joint Standing Committee of county councillors and justices.

21–003 As can be seen, the organisation of police administration and the legal status of the police officer grew up piecemeal. A Royal Commission was set up in 1960 to consider the constitutions and functions of local police authorities; the status and accountability of members of police forces, including chief officers of police; the relationship of the police with the public, and the means of ensuring that complaints by the public against the police are effectively dealt with. The Police Act 1964[7] accepted in general the majority of the recommendations of the Royal Commission.[8] In particular it established the tripartite structure of: police authorities, Chief constables and central government, which remains the basis of police governance in England and Wales,[9] but the powers of each part of this structure and their relationship to each other altered in 1994.

An important exception was London: the range of national functions and other tasks which arose from London's role as a capital city was seen as justification for a different control system for the Metropolitan Police, which since 1829 was under the direct control of the Home Secretary acting as its police authority.[10]

During the 1980s the government's general concern about efficiency, effectiveness and value for money in all aspects of public service included the police service.[11] The police service responded by undertaking a variety of internal reviews and initiatives aimed at addressing these demands, and unsuccessfully requested the establishment of Royal Commission on Policing. Instead the Sheehy Inquiry was established in 1992 to assess the modern needs of the police service. In 1993 a White Paper with new proposals for the structure of policing,[12] and the Sheehy Report were published. The Police and Magistrates' Court Act 1994 was broadly based on these two reports.[13] The Police Act 1996 consolidated the 1964 Act, aspects of the Police and Criminal Evidence Act 1984 and the 1994

[7] It also re-enacted certain previous statutes.

[8] Final Report (1962) Cmnd. 1728, *cf.* Dr A. L. Goodhart's Memorandum of Dissent, pp. 157, *et seq.*

[9] The position of the police in Scotland and Northern Ireland is not dealt with in this Chapter, but see Neil Walker, *op. cit.* Chaps 5 and 6; the Police (Northern Ireland) Act 2000 will make extensive alterations to policing in Northern Ireland.

[10] The other London police force is the City of London Police which had as its police authority the Common Council of the Corporation of London, which in 1985 delegated its functions to a Police Committee; the Home Secretary has particular powers in connection with this force.

[11] In the 1980s there were also conflicts between several Chief Constables and their respective police authorities; and see *R. v. Secretary of State for the Home Department, ex p. Northumbria Police Authority* [1989] 1 Q.B. 26.

[12] *Policing Reform: The Government's Proposals for the Police Service for England and Wales*, Cm. 2281.

[13] The Bill was extensively amended in the House of Lords.

Act, and provides the framework for police governance in England and Wales. The 1994 reforms sought to clarify accountability for policing and to strengthen the bonds between local communities and their police services; some commentators have suggested that they achieved the opposite.[14]

21–004 The 1962 Royal Commission had accepted that in policing the capital city the Metropolitan Police dealt with matters of national and international importance with responsibilities which transcended local and disparate interests; in consequence there remained good reasons why it should have a different constitutional arrangement from the rest of England and Wales. However there was some dissatisfaction with the lack of accountability of the Metropolitan Police to the people of London. In 1995 a non-statutory advisory body, the Metropolitan Police Committee, was established to assist the Home Secretary oversee the performance of the Metropolitan Police.[15] The election of a Labour government committed to reforming government in London[16] resulted in the enactment of the Greater London Authority Act 1999 which, in Part VI, makes extensive alterations to the constitutional position of the Metropolitan Police. In particular it provides for the establishment of a Metropolitan Police Authority as the police authority for the Metropolitan Police.[17]

Centralising and nationalising trends in policing

21–005 The 1964 Royal Commission report rejected the case for creating a national police system,[18] although many of the members thought a national police service would be more effective in fighting crime and handling road traffic, and the Commission did not think it would be constitutionally objectionable or politically dangerous. As a consequence of the report greater responsibilities were conferred on the Home Secretary, and provision was made for collaboration and mutual aid between forces. One of the recommendations of the Royal Commission was the further amalgamation of small police forces, and in consequence there are now 43 police forces compared to 122 in 1962.

There have been significant developments in policing since 1964 which, while not *de facto* creating a national police force, indicate a centralising trend. One of the main influences is the Home Office which, in addition to its policy-making and co-ordination role within the system of police governance,[19] provides specialised areas of support to the police forces such as the police national computer, the national automated fingerprint system and a D.N.A. database. The existence of a national Inspectorate of Police, the role of the Audit Commission and the powerful Association of Chief Officers of Police (ACPO) have contributed to this trend. Intelligence-led policing to tackle serious and organised crime on a national basis has been a further influence. The National Criminal Intelligence Service, whose role is to provide criminal intelligence to police forces, was established in 1992, but did not come under statutory authority until the Police

[14] Marshall and Loveday, "The Police: Independence and Accountability", in *The Changing Constitution*, (Jowell and Oliver eds., 3rd. ed., 1994). See *post*, para. 21–012 for a discussion of police accountability.

[15] For details of this Committee see Ian Oliver, *op. cit.* Chap. 7.

[16] Cm. 3727 (1997), Cm. 4014 (1998).

[17] The Police Act 1996 is amended to give the Metropolitan Police Authority similar powers to other police authorities and to give the Commissioner a similar role to Chief Constables.

[18] There are a variety of specialist national forces: the British Transport Police, the Ministry of Defence Police and the Atomic Energy Authority Constabulary, each regulated by statute.

[19] See *post*, para. 21–016 for further discussion of these and other the powers of the Home Secretary.

Act 1997. This Act also created the National Crime Squad, which developed from the existing six regional crime squads set up to deal with serious crime.[20] The remit of the Security Services[21] was extended in 1994 to include the prevention or detection of serious crime[22] and was further extended in 1996 to enable them to act in support of police forces in the prevention and detection of crime.[23] The changes in police accountability introduced in 1994 have been criticised as shifting the balance of power away from local government to central government.[24] In contrast, the relinquishment of the Home Secretary of his position as police authority for the Metropolitan Police is contrary to the centralising trends.

Main functions of the police

21–006 The Royal Commission on the Police (1962) outlined the main functions of the police as follows[25]:

(i) The duty to maintain law and order, and to protect persons and property.

(ii) The duty to prevent crime.[26]

(iii) Responsibility for the detection of criminals. Particularly in the case of terrorists and other politically motivated criminals this may involve infiltration by the police of suspect groups. The gathering of intelligence is the particular responsibility of Special Branch officers who are in close contact with the Security Services. They should not, however, procure the commission of crimes through agents provocateurs in order to secure the evidence required for conviction. Nonetheless, English law does not have a defence of "entrapment", although evidence obtained by entrapment may be excluded if its admission would have such an adverse effect on the fairness of the proceedings that the court should not admit it.[27]

(iv) Responsibility in England and Wales for making the initial decision whether to prosecute suspected criminals; the final decision is for the Crown Prosecution Service.

(v) The duty of controlling road traffic, and advising local authorities on traffic questions.[28]

[20] This Act established a Service Authority for each of these bodies and a framework for their control, direction and funding.

[21] *ante*, paras 19–047 to 19–050.

[22] Intelligence Services Act 1994, ss.1 and 3.

[23] Security Service Act 1996, s.1(1).

[24] See Leishman, Cope and Starie, "Reinventing and Restructuring: Towards a New Policing Order" Chap. 1 in *Core Issues in Policing* (1996).

[25] Cmnd. 1728, pp. 157, *et seq.*

[26] This duty extends to the suppression of crime in other parts of the world through cooperation with Europol and Interpol: *X. v. Metropolitan Police Commissioner* [1985] 1 W.L.R. 420.

[27] *R. v. Smurthwaite* [1994] 1 All E.R. 898, CA, applying s.78 of the Police and Criminal Evidence Act 1984. Allegations of police encouragement in the committing of a crime may result in proceedings being stayed: *R. v. Latif* [1996] 1 All E.R. 353, HL, or go to the question of sentence. See *Attorney-General's Reference No. 3 of 2000* [2001] Crim. L.R. 645, (relationship between English law and Art. 6 E.C.H.R.).

[28] The police have been assisted in this role since 1960 by traffic wardens.

Duty and discretion

Detailed consideration of what is implied in these duties and of the powers and privileges that the police also possess in connection with them will be found in later chapters.[29] Some general points may be made here. First, the police have no privilege in carrying out their work to break the law: *Morris v. Beardmore*.[30] Secondly, they may (and must), as will be seen later, possess powers not possessed by ordinary citizens, for example, to question, search, detain and arrest. Thirdly, although the police are described as being under a duty to maintain law and order and to prevent crime, in most cases that duty involves a large element of discretion and judgment. In some, unusual cases, the duty may allow of little or no discretion: the police constable who takes no action when an assault occurs before his eyes may be guilty of the common law offence of misconduct in a public office.[31] But usually even the ordinary constable is possessed of a wide discretion: should he arrest wrongdoers or merely warn them: arrest all or some of the participants in a brawl? Superior officers, too, must exercise a discretion whether to charge offenders and, if so, with what offence or offences. In the case of a Chief Constable the element of discretion extends to general questions of policy: should he concentrate his resources on suppressing illegal trafficking in drugs, on catching burglars or enforcing the laws against pornography. During a strike should he take steps to enable non-strikers to work if they wish, and, if so, what steps?[32] **21–007**

In exercising their discretionary powers the police, like other public authorities, are ultimately subject to judicial review. A constable's decision to arrest, for example, is open to challenge on the ground that it was unreasonable (in the sense given to that term in the law of judicial review[33]): *Mohammed-Holgate v. Duke*.[34] The exercise by a Chief Constable of his wider discretionary powers has been considered by the Court of Appeal, and the House of Lords. The earliest cases concerned the Metropolitan Police Force whose Commissioner is not in law a constable,[35] although the Court of Appeal equated his position with what they asserted to be that of a constable. A private citizen challenged the legality of directions issued by the Commissioner which, he alleged, meant in effect that the Metropolitan Police were not enforcing the laws against gaming[36] and pornography.[37] In all the cases the citizen failed in his applications; in the gaming case the Commissioner withdrew the offending instructions in the course of the litigation in the light of a decision of the House of Lords relating to the legality of certain forms of gambling. In the cases relating to pornography, however, he lost because the Court of Appeal emphasised that it could not tell the Commissioner how to exercise his discretion; it could only interfere if he did not exercise his discretion at all.

[29] *e.g.*, Chaps. 24 and 27.
[30] [1981] A.C. 446.
[31] *R. v. Dytham* [1979] Q.B. 722, CA.
[32] The discretion given to the police in connection with public assemblies and demonstrations has now to be exercised in such a way that it complies with the Human Rights Act 1998, see *post*, Chaps 22 and 27.
[33] *post*, para. 33–011.
[34] [1984] A.C. 437.
[35] Metropolitan Police Act 1829.
[36] *R. v. Commissioner of Police of the Metropolis, ex p. Blackburn* [1968] 2 Q.B. 118.
[37] *R. v. Commissioner of Police of the Metropolis (No. 3)* [1973] Q.B. 241; *R. v. Commissioner of Police of the Metropolis, The Times*, March 7, 1980, CA.

21–008 In *R. v. Chief Constable of Devon and Cornwall*[38] the Central Electricity Generating Board sought the assistance of the police to remove demonstrators who for some months had been occupying land in order to prevent the Board beginning the construction of a nuclear power station. The Court of Appeal held that the Board was entitled to the help of the police but refused to issue an order of mandamus. Templeman L.J. said that the police are not bound in all circumstances to act every time there is a breach of the law. On the other hand there came a time when they should act: but even then it was not for the court to tell the police how and when their powers should be exercised.[39] *R. v. Chief Constable of Sussex, ex p. International Trader's Ferry Ltd*[40] raised for the first time a European element to this discretion. Violent protests by those opposed to the export of veal calves required an extensive police presence to enable International Trader's Ferry Ltd (ITF) to carry on this trade. After several months the Chief Constable indicated that he was unable to continue the existing level of cover and provide an efficient and effective general police service. ITF sought judicial review on two grounds: first, unreasonable exercise of his discretion over the deployment of his resources, and secondly that his failure to guarantee safe transit of the livestock was a quantitative restriction on exports and in breach of Article 34 of the E.C. Treaty. The first argument was dismissed by all three courts, the House of Lords confirming that the police had a discretion as to how they allot the funds available to them, which would only be interfered with if it was *Wednesbury* unreasonable.[41] On the second ground, the House of Lords held that, on the assumption that the Chief Constable's decision was a "measure" for the purpose of Article 34, the decisions he took fell within the public policy exception in Article 36. The actions of the Chief Constable to maintain public order and adequate policing in his region were not disproportionate to the restrictions involved on ITF's trade.[42]

A final point to be made at this stage is that the execution by the police of their powers and the carrying out of their duties may interfere with the rights and powers of law abiding citizens. A citizen who obstructs a constable in the execution of his duty is guilty of an offence under the Police Act 1996, s.89. It may, however, be a matter of controversy whether a constable has a particular power or is acting within the scope of his duty. To what extent must the citizen in a particular instance accept the constable's view of his powers or his judgment on what is necessary in certain circumstances to prevent a breach of law? This problem will be discussed later.[43]

Legal status of police officers

21–009 The Queen's peace is part of the prerogative.[44] Police officers are not, however, Crown servants. A constable, including a Chief Constable, is an officer of

[38] [1982] 2 Q.B. 458, CA.

[39] See also *R. v. Oxford, ex p. Levey*, (1987) 151 L.G. Rev. 371; *Harris v. Sheffield United Football Club* [1988] 1 Q.B. 77.

[40] [1999] 1 All E.R. 129, HL; [1999] 2 A.C. 418, HL.

[41] For a discussion of the implications for accountability of where the funds come from see Barnard and Hare "The Right to Protest and the Right to Export: Police Discretion and Free Movement of Goods", (1997) 60 M.L.R. 394.

[42] Estell Baker, "Policing, Protest and Free Trade: Challenging Police Discretion under Community Law," [2000] Crim. L. Rev. 95.

[43] *post* paras 24–019 to 24–022.

[44] *Coomber v. Berks. Justices* (1883) 9 App.Cas. 61, 67, *et seq.*, *per* Lord Blackburn.

the peace, and as such has common law powers and duties.[45] These powers are exercised by a constable by virtue of his office, and not on the responsibility of anyone else, nor as a delegate or agent.[46] The legal position whereby a police officer exercises his authority by virtue of the common law as supplemented and amended by statute,[47] has to be seen in the context of his being a member of a disciplined body subject to the lawful orders of his superior officers.[48] The conflict between a police officer's individual responsibility for his actions and his duty to obey orders was referred to in *O'Hara v. Chief Constable of the Royal Ulster Constabulary*.[49] Lord Styne stated that where a statute vested an independent discretion to arrest on an individual constable, the fact that a superior officer had ordered that a particular arrest should be made, would not in itself be sufficient grounds to afford the constable reasonable grounds for the necessary suspicion. To decide otherwise would "be contrary to the principle . . . which makes a constable individually responsible for the arrest and accountable in law."[50]

21–010 The Police and Criminal Evidence Act 1984 (PACE Act) and the Public Order Act 1986 in conferring certain powers, distinguishes between different ranks of police officers. Under the PACE Act, section 55, for example, what are euphemistically described as "intimate searches" can only be authorised by an officer holding at least the rank of inspector.[51] The Public Order Act 1986 provides that "the senior police officer" may impose conditions on public processions (section 12) or public assemblies (section 14). In both sections this refers to the "most senior in rank of the police officers present at the scene".

A police officer who exceeds or abuses his powers to the injury of another may make himself personally liable in tort.[52] These cases seldom reach the courts; in the vast majority of cases the police negotiate a cash settlement. It is also possible to prosecute a police officer, but such action is rare.[53]

Vicarious liability

21–011 Since there is no master-servant relationship between a police constable and the police authority, vicarious liability for the wrongful actions can not apply.[54] This lacuna was rectified by statute, and section 88 of the 1996 Act[55] provides for

[45] *Lewis v. Cattle* [1938] 2 K.B. 454, DC. The office of constable is very ancient, older than that of justice of the peace.

[46] *Enever v. The King* (1906) 3 C.L.R. 969, *per* Griffiths C.J. at p. 977; approved in *Fisher v. Oldham Corporation* [1930] 2 K.B. 364, and *Att.-Gen for New South Wales v. Perpetual Trustee Co* [1955] A.C. 457, PC. *Sheilch v. Chief Constable of Greater Manchester Police* [1989] 2 W.L.R. 1102: a special constable also hold the office of constable.

[47] Today many of the powers of the police are found in the Police and Criminal Evidence Act 1984, see *post* Chap. 24.

[48] The 1962 Royal Commission acknowledged that it was not easy to reconcile these two positions, Cmnd. 1738 para. 66–67. See s.10 of the 1996 Act, which provides that the Chief Constable has "direction and control" of the force.

[49] [1997] 1 All E.R. 129, HL. The case was concerned with the meaning of reasonable suspicion in connection with a power to arrest; see *post* para. 24–009.

[50] At p. 135.

[51] As amended by the Criminal Justice and Police Act 2001 s.79. The substitution of inspector for superintendent was said by the Government to be necessary as part of the, "flexible reconstructing of the police."

[52] See Clayton and Tomlinson, *Civil Actions Against the Police* (1992); F. Belloni and J. Hodgson, Chap. 4 "Remedies for Police Misconduct" in *Criminal Injustice* (2000).

[53] See *post* para. 21–021 on police complaints.

[54] *Fisher v. Oldham Corporation* [1930] 2 K.B. 364.

[55] Re-enacting s.48 of the 1964 Act.

the vicarious liability of a Chief Constable for torts committed by constables under his direction and control in the performance or purported performance of their functions[56] in the same way as a master is liable for the torts of his servants. This is straightforward when the claimant has suffered an injury or damage as a result of the acts or omissions of a police officer.[57] it is more difficult and controversial when the damage has been caused by a third party.[58] The Race Relations (Amendment) Act 2000 makes Chief Constables vicariously liable for acts of racial discrimination by police officers.[59]

Police Accountability[60]

21–012 The following account is concerned with police forces in England and Wales: following amendments to the Police Act 1996 by the Greater London Authority
— Act 1999, much of it also applies to the Metropolitan Police.[61]

Police authorities

21–013 The establishment of a police authority[62] for every police area is provided for in section 3 of the 1996 Act. A police authority has the status of a body corporate (section 3(2) and section 5B), which reinforces its post 1994 independence from the local council. Prior to 1994 outside London, the police authority was a committee of the main council, with two thirds of its membership being drawn from the elected members of the council, and one third being drawn from the justices of the peace for the area. The 1994 Act reduced the size of the police authority (normally to be 17 members) and altered its composition. The membership now consists of nine members drawn from the relevant council, three magistrates and five independent members. The latter are appointed under a complex procedure, in which the Home Secretary plays a significant part (section 4 and Schedules 2 and 3 of the 1996 Act).[63]

In England and Wales every police authority is required to secure the maintenance of an efficient and effective police force for its area (Police Act 1996, s.6(1)).[64] The 1994 Act also introduced more concrete functions for the police authorities which have been repeated and expanded in the 1996 Act: to determine

[56] There will be no liability if the police officer was acting on "a frolic of his own": *Makanjuola v. Metropolitan Police Commissioner* [1990] 2 Admin. L.R. 214.

[57] See for example *Ripley v. Chief Constable of Northamptonshire* [1985] 1 W.L.R. 1242.

[58] See *Hill v. Chief Constable of West Yorkshire* [1989] 1 A.C. 53, and *Osman v. Ferguson* [1993] 4 All E.R. 344; *post* para. 31–024.

[59] This was proposed by the Commission for Racial Equality in its Third Review of the Race Relations Act, and by the Macpherson Inquiry into the death of Stephen Lawrence, Cm 4262, recommendation 11.

[60] Ian Oliver, "Police Accountability in 1996", [1996] Crim. L. Rev. 611.

[61] The City of London Police was exempted from the 1994 Act following an undertaking from the Common Council of the Corporation of London to limit the size of its police committee, and to have regard to Home Office guidance issued to other forces by virtue of the 1994 Act.

[62] Unless otherwise indicated, the Metropolitan Police Authority is included in the term police authority.

[63] The police authority for London consists of 23 members: 12 London Assembly members appointed by the Mayor, one of whom must be the Deputy Mayor; seven independent members, six of whom are appointed by the police authority in accordance with a similar complex procedure as for other police authorities, and one appointed by the Home Secretary; the reminder are magistrates (Sched. 2A).

[64] A number of public bodies have statutory powers to maintain bodies of constables not subject to the Police Act 1996; see note 18 *ante*.

local policing objectives (section 7 1996 Act), which may simply reflect the national objectives laid down by the Home Secretary, if they identify local priorities these must be consistent with the national objectives[65]; and to publish a local policing plan for the force area (section 8 1996 Act[66]). In discharging its functions the police authority has to have regard to all such objectives, performance indicators and plans (section 6). The 1994 Act gave the Home Secretary the power to instruct the inspectors of constabulary to inspect any force at any time. If the force is found to be not efficient or not effective, then he can instruct the police authority to take such measures as necessary (section 40 1996 Act) and the police authority must comply with those directions (section 6(4), 1996 Act).

The police authority, subject to the approval of the Home Secretary, appoints the Chief Constable (section 11); after consulting the Chief Constable and with the approval of the Home Secretary, it also appoints the Assistant Chief Constable (section 12).[67] It may also, with the approval of the Home Secretary, call on the Chief Constable, or Assistant Chief Constable to retire in the interests of "efficiency or effectiveness" (section 11 of the 1996 Act). Before seeking the approval of the Home Secretary, the police authority is required to give the Chief Constable or other officer an opportunity to make representations, and to consider any representations so made (section 11(3) of the 1996 Act).

By contrast the Commissioner of the Metropolitan Police is appointed by the sovereign under the sign manual and holds office during Her Majesty's pleasure. Before recommending an appointment to Her Majesty, the Home Secretary has to have regard to recommendations made to him by the Metropolitan Police Authority and representations made to him by the Mayor (section 9B 1996 Act).[68] The Metropolitan Police Authority has similar powers to other police authorities to remove the Commissioner or Deputy Commissioner (section 9E 1996 Act). **21–014**

The police authority has a statutory obligation to set a budget for the year. Its sources of income are: the central police grant (51 per cent of income), a revenue support grant (administered by the Department of the Environment), nationally pooled council tax. In addition both central and local government may make grants. The police authority may accept gifts of money and loans of other property "on such terms as appear to the authority to be appropriate", which may include commercial sponsorship (section 93(1)). Day to day financial management is in effect the responsibility of the Chief Constable who must "have regard to the local policing plan".

The police authority is required to make an annual report to the Home Secretary with respect to the policing of the area (section 9 of the 1996 Act); since 1994 the Home Secretary has also been able to require a police authority to submit a report to him on any matter connected with the discharge of the authority's functions (section 43 of the 1996 Act).

[65] s.37 1996 Act.

[66] s.24(1) of the Local Government Act 1999 inserted s.8(2)(d) which requires police authorities to prepare "Best Value" performance plans as part of the local policing plan. Best Value is concerned with securing continuous improvements to local services.

[67] These appointments have become "fixed term" appointments.

[68] There is a similar provision for the appointment of the Deputy Commissioner, the only difference is that the Home Secretary has to have regard to representations made to him by the Commissioner.

Functions of Chief Constables[69]

21–015 The Chief Constable has direction and control of his force (sections 9A and 10 of the 1996 Act). In exercising this operational control the Chief Constable is autonomous, subject only to the powers of the police authority and the Home Secretary. In discharging his functions he is required to "have regard to the local policing plan issued by the police authority" (sections 9A and 10(2)).[70] Appointments and promotions below the rank of Assistant Chief Constable are made by the Chief Constable, subject to regulations made by the Home Secretary (section 13 of the 1996 Act). These regulations give the Chief Constable the main role in monitoring conduct and exercising discipline within the force. Since 1994 Chief Officers have had similar powers to direct and control and to hire and fire civilian employees (section 15 1996 Act). Detailed powers of financial management in respect of manpower, buildings and other equipment were also transferred from police authorities to Chief Officers. The Chief Officer of Police must submit an annual report to the police authority, and the latter may require him to report on specific matters from time to time (section 22 of the 1996 Act).

Provision is made for collaboration and mutual aid between police forces, to be arranged by Chief Officers of Police with the approval of their police authorities (sections 23 and 24 of the 1996 Act). Collaboration enables two or more Chief Officers to agree to make joint use of premises, equipment or other facilities where they believe this would be advantageous. This enabled the foundation of the regional crime squads in 1965 and the National Criminal Intelligence Service in 1992.[71] Mutual aid[72] enables Chief Officers to ask one another for manpower or other assistance to enable them to meet special demands on their resources. The Mutual Aid Co-ordination Centre (formerly the National Reporting Centre) co-ordinates the requirements and needs of police forces during, for example, strikes such as the miners' in 1984–1985 and large scale disorders. The Home Secretary has power, in certain circumstances, to direct that mutual aid arrangements should be made (section 24(2)).

The Chief Officer may agree to provide special police services at any premises in his area, *e.g.* at demonstrations on private premises, sporting events; charges are payable to the police authority on such a scale as may be determined by that authority (section 25 of the 1996 Act).[73]

Functions of the Secretary of State

21–016 Although the tripartite system of police governance gives the Home Secretary the dominant role, on the ground that the basic function of government is to preserve law and order, he does not have a general responsibility for the efficiency of policing. He has specific powers under the Act which he is required to exercise "in such manner and to such extent as appears to him to be best

[69] Unless otherwise indicated this account also applies to the Commissioner of Police for the Metropolis. Where appropriate, the 1996 Act has been amended by the substitution of "chief officer" for "chief constable" to reflect the changes made by the Greater London Authority Act 1999; the 1996 Act already used that term when a provision applied to both Chief Constables and Commissioners.

[70] Although it is the police authority which takes the final decision on the local policing plan, it is the Chief Constable who takes the initiative in its drafting (section 8(3) 1996 Act).

[71] These bodies are now subject to the Police Act 1997.

[72] See Lustgarten, *Governance of the Police* (1986) Chap. 8.

[73] In *Harris v. Sheffield United Football Club* [1987] 2 All E.R. 838, it was held that police presence inside the ground went beyond the Chief Constable's duty to enforce the law, and should be paid for as a special service.

calculated to promote the efficiency and effectiveness of the police" (section 36 of the 1996 Act).[74] The Home Secretary is accountable to Parliament in a general way for the provision of an efficient and effective police service. His powers include: alteration of force areas; strategic policy-making; influence and oversight of the police authorities and chief officers of police; budgetary powers; powers to provide central services and power to make general regulations on discipline and conditions of service of police officers; powers in connection with the Inspectorate of Constabulary. The 1994 reforms gave the Home Secretary greater powers in respect of the broad strategy of policing, but less involvement in the details of force management. The Greater London Authority Act 1999 transferred responsibility for the Metropolitan Police Service from the Home Secretary to the newly established Metropolitan Police Authority.

The Home Secretary may by order make alterations in police areas, other than the City of London police area, if he considers it expedient in the interests of efficiency or effectiveness (section 32 of the 1996 Act). Police authorities may propose amalgamation, in which case the proposals must be submitted to the Home Secretary for his approval. This provision, which originated in the 1964 Act, is a means by which central government can reduce the number of police forces and thereby reduce the local connection with a police force. The Home Secretary must give notice of his intention to use this section, and consider any objections (section 33 of the 1996 Act); the relevant order has to be laid in draft before Parliament and approved by each House.

21–017 The Home Secretary gained new powers in 1994 over police authorities. Section 37 of the 1996 Act allows the Home Secretary, after consultation, to lay down national policy objectives.[75] Where an objective has been laid down then he may direct police authorities to establish performance targets aimed at achieving those objectives (section 38). This power enables the Home Secretary to determine national strategies for the police. He may also issues codes of practice to police authorities, for example on Financial Management and Race Relations.

The Home Secretary shares power with the police authorities in the appointment and dismissal of Chief Constables,[76] and may require a police authority to exercise its power to call on a Chief Constable to retire in the interests of efficiency or effectiveness, after hearing his representations and holding an inquiry (section 42 of the 1996 Act).

21–018 The powers of the Home Secretary over Chief Constables did not undergo such extensive reforms in 1994, and are based on the 1964 Act. In addition to his powers of appointment and dismissal, and general powers to make disciplinary regulations (section 50 of the 1996 Act), he has a variety of powers to require reports from the police authorities.[77] As well as receiving reports on forces from the Inspectors of Constabulary, he can cause a local inquiry to be held into any matter connected with the policing of any area (section 49).[78] He may require a Chief Officer to submit a report on specific matters concerned with the policing

[74] This formulation of the general duty of the Home Secretary is the basis for questioning him in Parliament about the police, but it does not enable questions on operational matters, which are the responsibility of the Chief Constable.

[75] S.I. 1999 No. 543, this is the third such plan to be issued.

[76] *ante* para. 21–013.

[77] *ante* para. 21–013.

[78] *e.g.*, the Scarman inquiry into the Brixton disturbances Cmnd. 8427 (1982), the Macpherson inquiry into the death of Stephen Lawrence Cm. 4262 (1999).

of an area and a copy of the Chief Officer's annual report to the police authority must be sent to him (section 44 of the 1996 Act). He may also require Chief Officers to provide him with a variety of criminal statistics (section 45 of the 1996 Act).

The Home Secretary may make grants to police authorities of such amounts as he may with the approval of the Treasury determine (section 46 of the 1996 Act). The 1994 Act introduced a new scheme of funding. Previously central government provided 51 per cent of whatever was spent by the police authority, under section 46 the amount of police grant is cash limited, and the figure is based on 51 per cent of assessed police costs. The procedure for calculating this figure has to be published. Grants for capital expenditure may be made to police authorities, either unconditionally or subject to conditions (section 47 of the 1996 Act), as can grants for expenditure on safeguarding national security (section 48 of the 1996 Act). The Home Secretary has fewer constraints on his funding decisions than the local authority; his ability to make grants to police authorities to enable a local police force to cope with a particular occurrance with little need to account for such decisions could be significant.[79]

21–019 The power of the Home Secretary to provide specific common services found in section 41 of the 1964 Act[80] was made more general in the 1994 Act, permitting him to provide such facilities and services "as he considers necessary or expedient for promoting the efficiency or effectiveness of the police" (section 57 of the 1996 Act). His statutory powers to encourage collaboration or mutual aid contribute to his powers to provide common services.

The Home Secretary determines the number of Inspectors of Constabulary who are appointed by the Crown, on the advise of the Home Secretary[81] (sections 54 and 55 of the 1996 Act). The *Inspectorate of Constabulary* is required to report to the Home Secretary on the efficiency and effectiveness of every police force in England and Wales, and to carry out other duties as directed by the Secretary of State. The latter requirement has enabled the reviews to become thematic, for example to consider the policing of ethnic minorities. New powers were given to the Inspectorate in 1999 to allow it to report on whether a police authority has improved the ways in which its functions are exercised.[82] Reports from the Inspectorate have to be published by the Home Secretary, and copies sent to the Chief Officers and the police authority, who must respond. The Chief Inspector of Constabulary must report annually to the Home Secretary, and his report is laid before Parliament. The work of the Inspectorate takes place in the context of a national policy framework laid down by the Home Secretary; it provides an important link between the centre and the police forces.

Public Accountability

21–020 Section 20 of the 1996 Act provides that every relevant council had to make arrangements to enable questions on the discharge of the police authority's functions to be asked, and answered, at council meetings. The 1999 Act provides for the first time for a similar provision in respect of the London Assembly (section 20A of the 1996 Act). Since 1984 each police authority, in consultation

[79] For examples to support the policing of an industrial dispute.

[80] This was interpreted widely in *R. v. Secretary of State for the Home Department, ex p. Northumbria Police Authority* [1989] 1 Q.B. 26.

[81] Formerly the Inspectors were all ex-chief officers, but increasingly serving chief officers have become Inspectors, and since 1991 part-time non-police officers have been appointed.

[82] "The Best Value framework" as established in the Local Government Act 1999 Part I.

with the Chief Constable,[83] has been required to obtain the views of the people of the area about matters concerning the policing of the area, and their co-operation with the police in crime prevention.[84] This has been implemented by non-elected consultative committees, which have been assessed as "talking shops" which have little influence on policing.[85] The requirement that police authorities establish a local policing plan, should provide a more effective forum for such groups.

The Home Secretary has a limited requirement to account to Parliament for policing since his responsibilities are to set national policing objectives and performance indicators; he cannot be questioned in Parliament about how a Chief Constable or an individual police officer has exercised his discretion, although these decisions may be influenced by objectives established by the Home Secretary. Since the 1999 reform, this is also the position with respect to the Metropolitan Police.

Complaints against police officers

21–021 An important aspect of genuine accountability of the police to the public, as opposed to the members of a police authority, is the existence of a satisfactory system to deal with complaints against the police. To say that the citizen has the right of recourse to the courts is unrealistic on various accounts. He may not be able to obtain the necessary evidence by his own efforts[86]; the conduct he complains of may not constitute a crime or tort but still fall below the standard properly expected of a public servant. The Police Act 1964, left the investigation and adjudication of complaints against the police to other police officers, a system reformed by the Police Act 1976 which established a Police Complaints Board, which looked at all reports of investigations into complaints except those involving possible criminal charges which went to the D.P.P. This system was criticised for its limited independent element and its failure to distinguish between minor and serious complaints. The Police and Criminal Evidence Act 1984 introduced a new scheme for dealing with complaints which was subject to further reform in 1994. The present law, based on the 1984 Act, is found in Part IV of the 1996 Act. There has also been dissatisfaction with this system,[87] and legislation to establish a new complaints system was promised in the 2001 Queen's Speech.

The 1984 Act established the Police Complaints Authority whose independence was emphasised by the provision that its chairman shall be appointed by the Queen. The other members, none of whom may be, or have been, police constables, are appointed by the Secretary of State (section 66 and Schedule 5 of the 1996 Act). Complaints may be made by a member of the public or by anyone on behalf of a member of the public—for example, the M.P. of a person aggrieved. The chief officer in whose area a complaint is made must take steps to obtain or preserve evidence relating to the complaint although he may subsequently refer the complaint to the Chief Officer of another force if it appears that

[83] Since the 1999 Act, s.96 applies in the same way to the Metropolitan Police.
[84] This was one of the proposals made in the Scarman Report, Cmnd. 8427 (1982).
[85] R. Morgan, "Talking about Policing", in *Unravelling Criminal Justice* (Downes, ed., 1992).
[86] Despite these problems the number of civil actions against the police, settled either in or out of court has risen in recent years, see H.C. 258 (1997–98) paras. 31–34.
[87] See Royal Commission on Criminal Justice, Cm. 2263 (1993), Chap. 3; the Home Affairs Select Committee First Report H.C. 258 (1997–98); Second Special Report H.C. 683 (1998–99); Macpherson inquiry, *op cit.*; Home Office Consultation Paper *Complaints Against the Police*, 2000.

it is appropriate to do so (section 67 of the 1996 Act). Complaints relating to officers above the rank of chief superintendent (senior officers) cannot be dealt with by a chief officer of a force but must be referred to the relevant police authority (section 68 of the 1996 Act). In the case of other ranks the procedure subsequent to the making of a complaint is the responsibility of a chief officer. Provision is made in section 69 of the 1996 Act for the informal resolution of complaints where that is appropriate. Chief Constables or police authorities must refer to the Police Complaints Authority any complaint alleging that conduct complained of resulted in death or serious injury (section 70 of the 1996 Act). Any matter *may* be referred to the Complaints Authority where it appears that a police officer has committed a criminal offence or an offence against discipline and the matter has not been made the subject of a complaint and it is the view of the police authority or the Chief Constable, as appropriate, that the matter ought to be referred by reason of its gravity or exceptional circumstances (section 71 of the 1996 Act). In the light of the discussion earlier of the accountability of chief officers it should be noted that it is expressly provided by section 67(4) of the 1996 Act that the complaints procedure does not apply to any complaint "in so far as it relates to the direction or control of a police force by the chief officer or the person performing the functions of the chief officer."

21–022 A feature of the procedure is that the investigation stage of complaints is to be subject to the supervision of the Complaints Authority in all cases involving death or serious injury and in other cases if it considers it desirable in the public interest (section 72 of the 1996 Act). Supervision may take the form of approving a particular officer to carry out the investigation and imposing specific requirements as to the carrying out of the investigation.

Once the investigation is complete the procedure depends on whether the complaint relates to senior officers or not. In the case of senior officers the report must be sent to the Director of Public Prosecutions unless the police authority (of the relevant force) is satisfied that no criminal offence has been committed (section 74 of the 1996 Act). In the case of other officers the chief officer of the force must decide whether the report indicates that a criminal offence has been committed: if he does so decide he must forward the report to the Director of Public Prosecutions.[88] He must, after the Director has dealt with the question of criminal proceedings, inform the Complaints Authority whether he intends to prefer disciplinary charges. If the chief officer decides that the officer ought not to be charged with a criminal offence he must inform the Complaints Authority and again indicate whether he intends to prefer disciplinary proceedings. Finally, if the chief officer concludes that the report does not indicate the commission of a criminal offence he must relay his conclusion to the Complaints Authority and indicate whether he intends to prefer disciplinary proceedings (section 75 of the 1996 Act): the Complaints Authority may recommend that disciplinary charges should be laid (section 76 of the 1996 Act). Charges laid under section 76, or in other cases where the Complaints Authority direct, are to be heard by a disciplinary tribunal, consisting of the chief officer and two members of the Authority.[89]

[88] Prosecutions are rare; in the light of several cases where the DPP had been asked to look again at decisions not to prosecute police officers, an independent inquiry was established: Butler Report, *Inquiry into C.P.S. Decision Making in Relation to Deaths in Custody and Related Matters* (1999). G. Smith, "Police Complaints and Criminal Prosecutions", (2001) 64 M.L.R. 372.

[89] s.78 provides for the application of the complaints procedure to constables maintained by bodies other than local government police authorities, *e.g.* British Transport Police.

Police authorities and Inspectors of Constabulary are required to keep themselves informed about the way in which complaints are dealt with (section 77 of the 1996 Act). The Complaints Authority is required to make an annual report to the Secretary of State and may make other reports on any matter coming to their notice in connection with their responsibility (section 79 of the 1996 Act). **21–023**

Discipline

Connected with police complaints is police discipline. In 1999 new regulations, which extensively reformed the previous scheme, were introduced.[90] In particular the double jeopardy rule, whereby an officer acquitted of a criminal offence could not be charged with an equivalent disciplinary, was abolished[91] and the standard of proof in disciplinary proceedings was changed to the civil standard of the balance of probabilities. **21–024**

[90] S.I. 1999 No. 730, made under ss.50 and 84 of the 1996 Act.

[91] This was provided for by s.37(f) of the 1994 Act, but only took effect in April 1999.

Part V

Rights and Duties of the Individual