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Legal institutions and the legal process

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Few areas of healthcare practice are untouched by the law, and healthcare professionals will no doubt have some involvement with the legal process during their careers. This chapter seeks to provide an overview of the salient and relevant features of the legal system in England and Wales, in order to facilitate an understanding of the subject matter in the subsequent chapters.

Scotland and Northern Ireland enjoy their own legal traditions which, though distinct from that of England and Wales, share many similarities.

SOURCES OF LAW

Laws are rules that govern orderly behaviour in a collective society. The system which we call ‘the Law’, is an expression of the formal institutionalisation of the promulgation, adjudication, and enforcement of rules.

In England and Wales, the principal sources of these laws are Parliament and the decisions of judges in courts of law. Increasingly, however, rule-making powers are now the subject of delegation.

Parliamentary law

Parliament is the principal and pre-eminent organ of legislation in the UK. It is composed of the House of Commons, the House of Lords and the Monarch. In theory, the political and legal doctrine of ‘Parliamentary Sovereignty’, means that Parliament can pass any law it sees fit, and such laws cannot be altered by the courts.

In order to achieve the status of an Act of Parliament, the proposed Parliamentary legislation (known as a ‘Bill’) must successfully negotiate a series of ‘readings’ in both Houses, as well as a detailed scrutiny of its provisions by a ‘Standing Committee’.

Delegated legislation

Parliament has neither the time nor the flexibility to produce Statutes that might anticipate every individual detail of its subject matter.

Statutes, therefore, often contain broad permissive provisions delegating legislative powers to government ministers as well as a plethora of ‘public bodies’ associated with government departments.

The legislative product of such properly delegated power, (known variously as statutory instruments (SIs), ‘bye-laws’, rules and regulations), possess the same force of law as the parent or enabling Act of Parliament.

Government ministers and their departments are responsible for issuing some 3000 SIs annually, as well as the myriad of circulars, codes and ‘guidances’ emanating from the state, the resulting figure represents a significant legislative power when compared to the 50 or so statutes passed annually.

Ministers and government departments receive administrative assistance in the detailed execution of policy from over one thousand ‘independent’ public bodies known as Non Departmental Public Bodies (NDPBs). NDPBs cast a wide shadow into all areas of public activity and they themselves are often sub-delegated the responsibility to formulate rules and regulations. While this method of legislation has both the advantage of flexibility as well as utilising sources of specialist knowledge, it is both opaque and lacking in public accountability.

STRUCTURE OF THE NATIONAL HEALTH SERVICE

A statutory creation, the National Health Service (NHS), was introduced in 1948 to bring the provision of healthcare under direct government responsibility in order to ensure a free and comprehensive service. Overall responsibility for the NHS currently rests with the Secretary of State for Health who, assisted by a number of Ministers of Health, heads the Department of Health.

The NHS and its institutions are the subject of frequent structural changes, and at present the Department of Health exercises direct control over the Strategic Health Authorities and indirect control over NHS Trusts, Primary Care Trusts, and Care Trusts.

While in theory government ministers are *responsible* for their individual fiefdom, personal ministerial control of this vast organisation is not possible. The administration and implementation of government policy operates, therefore, by way of delegation of discretionary powers through to the various administrative tiers within the service.

Control of executive powers

The NHS is one of the principal organs of the UK's welfare system and as a state emanation has the potential to impinge on individual rights and freedoms, a position aggravated by delegation of the practical implementation of policy to unelected and unaccountable administrative bodies.

There are a variety of political and legal controls, of varying effectiveness, on these state sponsored powers.

Ministerial responsibility

Ministers may be required to answer open questions from the floor in Parliament on both their actions and those of their department. This may often represent a source of considerable political embarrassment, as well as unwelcome media and public attention, though in practice, matters are often disposed of by way of written replies.

Parliamentary review and Select Committees

Parliamentary Select Committees sit to examine expenditure, administration, and policy of government departments and associated public bodies. Members of Parliament from each political persuasion are represented, and individual membership is often a consequence of a special interest in a particular area.

The two Select Committees which are primarily concerned with health matters, the Select Committee on Health, and the Public Administration Select Committee, have wide powers to examine documents and summon persons before them.

Tribunals

Tribunals are 'public' bodies established to deal with conflicts that arise between the citizens and administrative bodies, to ensure that delegated discretionary powers are properly exercised.

There are now some 70 different administrative tribunals in England and Wales, dealing with around one million cases per annum.

Statutory tribunals, such as the Mental Health Review Tribunal¹, are creations of primary legislation, though there exist a number of 'domestic tribunals' established pursuant to agreement between private individuals (e.g. the Jockey Club).

Though primarily ‘administrative’ in nature, many tribunals operate in a quasi-judicial capacity.

The effectiveness of tribunals as independent checks on executive power is questionable, particularly when most depend on the sponsoring Department of State for administrative support, expenses, and appointment of members.²

Tribunals deal with a considerably greater volume of cases than the civil courts. They are reputed to benefit from being flexible, cheap, and to possess relevant specialist expertise, thereby enabling them to deal with cases more expeditiously. Tribunals may be subject to judicial scrutiny by way of judicial review (*infra*).

Public inquiries

Departments of State often establish *ad hoc* internal private inquiries to examine alleged wrongdoing within their sphere of influence. Where, however, the issues involved are likely to arouse national concern, the relevant Secretary of State can seek a resolution of both Houses of Parliament to establish a statutory public inquiry with formal terms of reference.

These inquiries though having powers to compel witnesses to attend and testify under oath, are not courts of law; they adopt an inquisitorial process and seek primarily to establish truth.

Public inquiries are lengthy and costly affairs and often by the time they report their findings, and make their recommendations, public feeling has moved on.

The Ombudsman

The Office of The Parliamentary Commissioner for Administration (PCA)³ was created in 1967. A Crown appointee and independent of the government, the PCA (or ombudsman) is charged with the investigation of maladministration on the part of government or government agencies.

The Health Service Ombudsman (HSO) specifically investigates complaints that hardship or injustice has been caused by the NHS’s failure to provide a service, or where there has been an administrative failure (maladministration).⁴ It is the decision-making *process* that forms the basis of any investigation and not the *merits* of the individual case (see also Chapter 7).

Aggrieved persons (or their family) can access the PCA via their MP, and between 2000 and 2001 the HSO considered 870 cases ranging from

waiting times to standards of diagnosis and care. The HSO produces an annual report with appropriate recommendations that is examined by a Select Committee and on which the government is encouraged to act. The HSO will only investigate complaints that have first passed through the local complaints procedures.

The Ombudsman has no powers to examine complaints that could be taken to court, matters relating to government policy, decision *properly* arrived at by NHS bodies, or issues of a ‘personal’ nature such as contracts of employment.

Judicial review

The High Court maintains an inherent supervisory jurisdiction over inferior courts, tribunals, and administrative bodies exercising delegated judicial and quasi-judicial powers in the public domain. Individuals aggrieved by the actions of these bodies may seek redress through the courts by way of an application for *judicial review*.

The High Court will exercise its ‘public law’ jurisdiction only where a public body has made an error of law, has acted ‘illegally’, ‘irrationally’, or where there has been ‘procedural impropriety’. These grounds have been held to include matters such as a body acting outside the powers (*ultra vires*) that have been delegated to it, acting unreasonably, acting with bad faith, or for improper purposes.

In policing the exercise of discretionary powers by public bodies, the High Courts are mindful of balancing the need to protect individual freedoms from undue and oppressive interference by the organs of government, while also ensuring an efficient executive. It is not the role of the courts to usurp the decision-making powers *rightly* delegated by Parliament to public bodies particularly where such delegation is predicated on the greater substantive expertise possessed by many of these bodies in their particular areas of operation.

An application for judicial review requires the leave of the High Court, and will only be granted in cases that raise ‘public law’ issues, and where the aggrieved party can demonstrate a ‘sufficient interest’ in the outcome of the case (known as *locus standi*). In this way, the courts can weed out vexatious claims.

The process of judicial review only allows the ‘supervising’ court to invalidate an illegal decision, and send it back to the original deciding body for reconsideration. Judicial review is concerned with procedural issues and not the substantive issues.⁵ The supervising court cannot substitute its own opinion on the substantive merits of the decision, and in this important aspect judicial review differs from appeal.

The limitations of judicial review exposes a lacuna in the legal protection of substantive individual rights; rendered all the more acute by an absence of a written constitution in the UK.

Human Rights Act 1998 (see also Chapter 2)

The Human Rights Act (HRA) has given UK courts greater power to protect certain fundamental rights by introducing the European Convention on Human Rights (and the related jurisprudence) into UK domestic law.

The European Convention seeks to protect certain fundamental rights of its citizens such as the right to life (Article 2), liberty (Article 5), privacy (Article 8), and a family life (Article 12). The HRA has introduced a rights-based ‘constitution’ into UK domestic law and all legislation must now be compatible with these rights.

In deference to Parliamentary Sovereignty, and the constitutional effects of a notional shift in power to the judiciary, s19 HRA expressly states that the courts cannot invalidate incompatible primary legislation. The courts can nevertheless make a declaration of incompatibility and allow the legislature to remedy it, *should it so desire*. Furthermore, as part of Parliamentary procedure, ministers sponsoring Bills must make a statement of compatibility with Convention rights (s19 HRA).

Subordinate legislation, in contrast, may be struck down by the courts if it cannot be construed as compatible with rights granted under the Convention.

In addition to these legislative checks, s6 HRA makes it illegal for ‘public authorities’ or persons exercising functions of a public nature to act in any way that is incompatible with Convention rights, unless, under the relevant statutory provisions, the authority could not have acted differently.

The term ‘public authority’ is not defined, but is intended to be interpreted widely and would certainly include the panoply of administrative bodies associated with the machinery of healthcare provision in the UK.

JUDICIAL LAW

The other principal source of law in the UK arises from the corpus of decisions made by judges in the courts. This form of law has evolved over time and is often referred to as ‘common law’ or ‘case law’. It was, until the 17th century, the pre-eminent source of law in the UK, and while Statute Law has since superseded it in terms of sheer bulk, case law still enjoys an important role.

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Consistency and fairness in judicial law is maintained to a certain extent by the ‘doctrine of precedent’ which ensures that the principles enunciated in one court will normally be binding on judges in inferior courts in subsequent cases. The House of Lords, by way of exception, is not so bound, and has jurisdiction to overrule its previous decisions.

Allied to the concept of Parliamentary Sovereignty is that of a judiciary that is independent of state control, though the provisions of statutory law will always bind the courts. The courts have always exercised a role in construing or interpreting statutory language, but with the introduction of the HRA the courts may now enjoy greater powers.

Branches of law

The law is divided into a number of specialist fields, each with its own language, procedures and substantive rules; the two principal categories being civil law and criminal law.

Civil law is concerned with the resolution of disputes between individuals. It is the aggrieved party who undertakes the legal action (a ‘suit’) and remedies are usually financial.

Criminal law is concerned with the relationship between individuals and the state. Where the nature of an act is of sufficient importance or gravity, the state will undertake the ‘prosecution’ of an individual, and the sentences are punitive in nature.

There is an overlap between these two jurisdictions and a criminal offence (e.g. assault) will often have an equivalent in the civil jurisdiction (e.g. trespass).

As a reflection of this division, the courts are similarly split into civil and criminal jurisdiction with each jurisdiction being arranged in a hierarchical manner reflecting precedent and expertise.

In both jurisdictions the conduct of the litigation is adversarial in nature.

The Civil Courts in England and Wales

The Magistrates’ Court is the lowest of the civil courts in England and Wales, and, outside family, and matrimonial issues, has a limited role in civil disputes. ‘Lay’ magistrates sit in the majority of Magistrate Courts and are advised by a legally qualified justices’ clerk. In metropolitan areas, however, a legally qualified District Judge (Magistrate Court) will sit alone.

Above the Magistrates’ Court is the County Court, where, in the presence of a circuit judge, 90% of all civil disputes are heard annually.

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The High Court has unlimited jurisdiction in civil cases, and hears cases which involve more complex legal issues and/or cases involving high monetary values.

The High Court itself comprises of three divisions: the Chancery Division, which specialises in matters such as company law and trusts; the Family Division, specialising in matrimonial issues and matters relating to minors; and the Queen's Bench Division, which deals with general civil matters. It is usual for judges in the High Court to sit in the absence of a jury.

The High Court sits in the Royal Courts of Justice in London, but has a number of provincial offices known as district registries.

The Divisional Court of the Queen's Bench is a distinct entity that exercises its jurisdiction in respect of certain appeals from Magistrates' Courts (on civil matters), tribunals, and judicial review.

The Civil Division of the Court of Appeal will hear appeals on matters of law (and are therefore not retrials) from the High Court and the County Courts, and is presided over by the Master of the Rolls and the Lords Justices of Appeal.

The ultimate appellate civil court for England and Wales, Scotland, and Northern Ireland is the House of Lords sitting in a judicial capacity.

The Judicial Committee of the Privy Council

This court is composed of 'Councillors' who have occupied senior judicial positions. It has a domestic appellate jurisdiction in respect of decisions of disciplinary committees of the General Medical Council and other statutory healthcare related bodies, as well as a civil and criminal appellate jurisdiction in respect of certain Commonwealth countries.

The Criminal Courts in England and Wales

The Magistrates' Courts play an important role in the criminal jurisdiction, hearing the vast majority of minor criminal cases.

The Crown Court is a single court that sits in a number of different 'tiered' centres throughout England and Wales. It is the court of first instance in respect of the more serious, or 'indictable', offences, but also hears appeals from Magistrates Courts on points of law or against conviction and/or sentence.

Appeals from the Crown Court are made to the Criminal division of the Court of Appeal, presided over by the Lord Chief Justice and the Vice President of the Criminal Division, and thence to the House of Lords on important points of law.

Individuals under the age of 18 will be tried at special Youth Courts.

Coroner Courts

These are ancient courts in English law and unique in respect of their inquisitorial approach. The coroners jurisdiction is over certain categories of death, and inquests are held to determine the ‘how, where and when’ of a death, and not to apportion blame or to opine on criminal or civil liability (see Chapter 9).

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Human rights and healthcare professionals

Michael Peel

HUMAN RIGHTS

The concept of human rights is that people have inherent rights simply because they are human. The ideas that developed during the Renaissance were that all men (but not generally at that stage, women or children) were equal. This was either for religious reasons, such as the Protestant view that as all men were created in God’s image they must be equal, or because it was a fundamental principle in their secular humanist philosophy. They should therefore, be treated equally by the law. They, or according to many political philosophers, those with some degree of social standing, have the right to try to influence political decisions that affect them. Their personal lives and possessions should not be interfered with arbitrarily. These formulations are equivalent to the biomedical ethics, principles of justice, autonomy and non-maleficence respectively (see also Chapter 3).

It is possible to find references to some of the concepts that later became those of human rights in such documents as the Code of Hammurabi (1780 BCE) and Aristotle’s Nichomachean Ethics (330 BCE). One of the first legal instruments in the UK covering human rights issues was the Magna Carta (1215), in articles such as:

(39). No freeman shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgement of his peers, or by the laws of the land.

Up to this point the King’s word was law (the Divine Right of Kings) so justice was, at best, arbitrary. Subsequently, men of property gained some rights against the absolute rule of the king. However, more than 400 years later the balance between human rights and the Divine Right of Kings was still being debated at the time of the English Civil Wars (1642–1651). The philosophical arguments were developed in books by