The Lord Slynn of Hadley
European Law Foundation

The English System of Justice

This collection of papers was prepared by Sir Henry Brooke (President of the Slynn Foundation) for seminars for the judges of the Supreme Court of Ukraine which were held on 9th and 11th February 2011. They cover a number of topics on which the judges had asked for information about different features of the English system of justice. Sir Henry and Sir Brian Neill (Chairman of the Foundation's Trustees) introduced the different topics at the seminars, assisted by Mr Steve Jacobs (Agencia Consulting Ltd).

At the end of the seminars the judges of the Supreme Court expressed a wish that the collection might be brought together in a more permanent form, for wider distribution within Ukraine.

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1. The Rule of Law and the status of the judiciary

1.1 The overall UK approach to the Rule of Law

In England and Wales[1] the importance of the independence of the judiciary was firmly established by law just over 300 years ago. The later Stuart kings, Charles II (1660-1685) and his brother James II (1685-1688), attempted to rule without Parliament, and claimed to be entitled to suspend laws and to dispense with laws with which they did not agree. When a judge ruled against them, they would dismiss that judge, and appoint a substitute on whom they could rely. There were only 12 senior judges in those days. Charles II dismissed 11 judges in the last eleven years of his reign. James II dismissed 12 judges in three years.

In 1688 Parliamentarians decided to get rid of James II and invited Prince William of Orange and his wife Mary to succeed as king and queen. One of their demands was that the monarch, who represented executive power, should never be allowed to dismiss a judge. Only Parliament could do so, and only after each House of Parliament had passed an express motion to that effect. This law was enacted in the Act of Settlement in 1701, and it is reproduced in modern legislation.

It was the eighteenth century philosophers Locke, Montesquieu and Blackstone from whom modern thinking about the separation of powers was developed. In each state there was to be an executive power, a legislative power and a judicial power, and each should respect the territory controlled by the others. Articles 1, 2 and 3 of the American Constitution (1787) sets out these principles very clearly.

I described this history in a long essay I wrote 15 years ago (which I could make available for translation into Ukrainian, in whole or in part). I started that essay by saying:

> "Today both Russia and Poland boast an impressive array of constitutional provisions designed to underpin the independence of the judiciary, but in each place I counselled that clauses in a constitution were not enough. For the rule of law to be really secure, there had to be a widespread understanding among the people of a country of the reasons why it is so important that the judges should be truly independent of the state. And this is what this essay is all about.
>
> Although we have exported written constitutions all over the world, in England we do not have one of our own. In default of a codified set of rules, there are four main ways in which our independence as judges is underpinned. First, we are independent of the executive and the legislature, and vice versa, and we do not get involved in political debate. Next, subject to modern rules relating to our age and our health, we cannot be removed except on an address passed by both Houses of Parliament. Thirdly, we are almost entirely immune from the risk of being sued or

[1] Scotland and Northern Ireland each have their own independent judicial systems. The governing principles are, however the same.

> prosecuted for what we do [as judges sitting in court]. And, finally, we are paid large enough salaries to render us free from the sort of financial worries which might in theory fuel the risk of judicial corruption."

Today these principles are underpinned by statute – the Constitutional Reform Act 2005 – and by international treaty (the European Convention on Human Rights). Article 6 of the Convention speaks of everyone's entitlement to a "fair and public hearing" by an "independent and impartial tribunal established by law". Section 3 (1) of the 2005 Act provides that the Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary. That section continues;

> "(4) The following particular duties are imposed for the purpose of upholding that independence.
>
> (5) The Lord Chancellor and other Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary.
>
> (6) The Lord Chancellor must have regard to—
>
> > (a) the need to defend that independence;
> > (b) the need for the judiciary to have the support necessary to enable them to exercise their functions;
> > (c) the need for the public interest in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly represented in decisions affecting those matters."

By section 17 of that Act a new Lord Chancellor is required to swear an oath "that in the office of Lord High Chancellor of Great Britain I will respect the rule of law, defend the independence of the judiciary and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible."

This is important, because when this Act came into force, the Lord Chancellor was no longer to be a judge and head of the judiciary. He was in future to be the member of the Government with direct responsibility, in an executive capacity, for respecting the rule of law and defending the independence of the judiciary.

1.2 <u>The relationship between the Executive and the Judiciary</u>

The judiciary respects the role of the executive which is to govern the country in accordance with the law. In turn, the executive respects the role of the judiciary, which is to interpret and uphold the law in the cases which are brought to the courts for decision. If the Government dislikes a decision, it is open to it to seek permission to appeal. If it does not like a decision of the Court of Appeal, it is open to it to seek permission to appeal to the Supreme Court. It has to abide by the decisions of the Supreme Court, however much it may dislike them. Its remedy, when appropriate, is to seek to persuade Parliament to alter

the law in relevant respects. By convention, it should not use its power and influence to criticise individual judgments of the courts: its remedy is to appeal.

The court's public law powers are exercised either through the exercise of statutory rights of appeal or through the courts' powers of judicial review. Broadly speaking, a court will only set aside a decision of the executive if there has been an error of law. That error may lie in an incorrect interpretation of the law; or in improper procedures used in making a decision; or because the decision is irrational; or because in the exercise of discretionary powers, the way in which power was exercised was disproportionate to the aim sought to be achieved. The court will remember that the executive, not the court, is the decision-maker. It will not set aside a decision merely because it disagrees with it,

How irrational – or unreasonable - must a decision be before a court will interfere with it? In a leading case, decided over 60 years ago, the President of the Court of Appeal said:

> "...A person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. [Another member of the court] gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all those things largely fall under one head."

The enactment of the Human Rights Act 1998 has created new tensions between the executive and the courts, particularly when the courts are implementing those articles of the European Convention of Human Rights which are perceived to give greater rights to suspected terrorists than the executive would wish them to have. However, it is the duty of the judges to interpret the laws enacted by Parliament "without fear or favour, affection or ill-will", as the words of the judicial oath make clear.

1.3 <u>The relationship between the Legislature and the Judiciary</u>

I wrote in my essay:

> "Judges are shielded to some extent from criticism in Parliament in connection with their day to day conduct of judicial business by the rule that charges against a judge can be made only on a substantive motion on which a vote will be taken. This principle was illuminated by a ruling of the Speaker of the House of Commons in December 1973 to the effect that reflections on a judge's character or motives, or charges of a personal nature, or any suggestion that a judge should be dismissed,

can be made only on such a motion. In July 1977, however, the Speaker qualified this ruling by making it clear that the rule was not as restrictive as many MPs might think. It was not necessary to have a substantive motion before the House to allow MPs to argue that a judge had made a mistake or that he was wrong, and 'the reasons for these contentions can be given within certain limits, provided that moderate language is used'. The law and custom of Parliament also includes a *sub judice* rule which prohibits parliamentary consideration of matters currently before the courts.

In turn, the courts may not question what takes place in Parliament. Article 9 of the Bill of Rights 1689 provides that "the *freedome* of speech and debates or proceedings in *Parlyament* ought not to be impeached or questioned in any court or place out of *Parlyament*", a provision of which [a senior judge] has recently said in a judicial capacity that "it is well established that the article prevents a court from entertaining any action against a member of the legislature which seeks to make him legally liable, whether in criminal or civil law, for acts done or things said by him in Parliament.

One modern commentator on constitutional law, Professor Turpin, has written in this context that the independence of the judiciary rests on a foundation of legal rules, conventions and the law and custom of Parliament.

It is for this reason that I believe that there always needs to be a widespread public understanding of the reasons why it is so important that the judges should be truly independent of the executive functions of the state, because if these reasons are not understood, legal rules, conventions, and the law and custom of Parliament can all be changed, and we will be back in the constitutional morass from which, in England, we were rescued in 1688."

Very recently the Supreme Court has ruled that the criminal courts have jurisdiction to hear charges that Members of Parliament committed dishonest and fraudulent acts when they claimed parliamentary expenses for items to which they knew they were not entitled. These actions had nothing to do with "the freedome of speech and debates or proceedings in Parlyament" which the Bill of Rights was enacted to protect. Those charges are now proceeding through the courts: if they are contested they will be heard by a judge and jury.

1.4 <u>The relationship between the Judiciary and the media</u>

A hundred years ago judges were much more willing to punish newspapers for contempt of court. The governing principle was expressed in these terms:

"The reason why the publication of articles like those with which we have to deal is treated as a contempt of Court is because their tendency and sometimes their object is to deprive the Court of the power of doing that which is the end for which it exists-namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it."

Today English judges are much readier to acknowledge the media's right to freedom of expression, and this is now buttressed by Article 10 of the European Convention on Human Rights.

After the Strasbourg court made a ruling against the UK government 30 years ago when the English courts had banned the Sunday Times's reports of the thalidomide controversy, which was still before the courts, Parliament enacted the Contempt of Court Act 1981. This Act gives the media much clearer guidance as to what may, and what may not, be published when a case is pending before the courts.

Subject to that limitation, the media are now much more willing to criticise judges, sometimes in very outspoken terms, and it is not easy for the judges to answer back. Both the Supreme Court and the Senior Courts (the High Court and the Court of Appeal) now have communications officers whose job it is to advise the judiciary about their dealings with the media. Every Supreme Court judgment is now accompanied by a short Press Summary, and the Court of Appeal sometimes follows this example in high profile cases.

In 2007 Lord Phillips, who was then Lord Chief Justice, said:

> "We have the benefit of an outstandingly able Communications Office that provides much useful information to the media, and is able to correct, sometimes in advance, erroneous press coverage or to explain some of the restrictions to which judges are subject. If there is one misconception that is more prevalent than any other it is that it is open to judges to decide cases, or impose sentences, according to their personal inclinations.
>
> We are, however, giving careful consideration as to whether we should identify judges who, with the benefit of media training, can be available to give the viewpoint of the judiciary in circumstances where it seems desirable to communicate this."

That idea has now been implemented.

1.5 <u>How judges are protected in civil society. The security of judges, and the security of the judicial system in general</u>

It would be a very serious contempt of court if anyone even tried to bribe a judge, or to make threats to a judge (or his/her family) in connection with a pending case. The common law offence of perverting the course of public justice is committed where a person or person

(a) acts or embarks upon a course of conduct,
(b) which has a tendency to, and
(c) is intended to pervert
(d) the course of public justice.

In the textbooks on criminal law examples are given of bribes or threats to witnesses or jurors, but not of attempts to bribe or threaten judges because no such case has arisen in modern times.

Fortunately, we have no tradition in the UK of physical attacks on judges, except in Northern Ireland in the days of terrorism by the IRA. In those days the house of one High Court judge in Northern Ireland was blown up, and a Court of Appeal judge and his wife were killed by terrorists when they were returning home from the Republic of Ireland. Judges were required to have security guards to protect them and their families.

In the last 60 years I think that only one English judge has been killed because of acts done by him as a judge. In 1981 an ex-offender, on his release from custody, hid in the garage of one of the judges who had sentenced him, and stabbed the judge 12 times as he went to the garage to drive his car to work. Occasionally, during the trial of terrorists or other dangerous offenders, the trial judge is given security protection until the end of the trial, and when there is a general terrorist threat judges are given advice about measures they can take to protect themselves (such as looking under their cars for concealed bombs, if they are parked in the open), but there is currently not perceived to be a need for any greater investment in judicial protection.

Similarly, courts now receive less police protection than they did in the past, although judges can always request the assistance of the police towards the end of a high profile trial, or if there is hostility between different elements of the public watching the proceedings. Sometimes disappointed defendants or litigants throw things at the judges or magistrates on the Bench, but these are not of an explosive nature. Elaborate security arrangements are installed at the public entrance to most major courts.

2. The functions of the Supreme Court of the United Kingdom

2.1 The creation of the Court and its jurisdiction

Until September 2009 the Appellate Committee of the House of Lords performed the functions of a Supreme Court. Its origin lay in a tradition by which dissatisfied litigants could petition the King/Queen if they had lost a case in the ordinary courts. Before 1876 members of the House of Lords who had held high judicial office would decide whether to grant a petition to appeal, and if it was granted, would sit as a committee to decide the case. In 1876 Parliament created a team of salaried law lords, who would be members of the House of Lords for the rest of their lives (since about 1958 they had to retire as judges when they reached the age of 75). Eventually there were 12 salaried law lords, of whom nine were English, two were Scottish, and the last came from

Northern Ireland. The law lords would only hear significant cases which raised issues of law of general public importance. The court appealed from had the power to grant leave to appeal to the House of Lords, but usually it would leave it to the House of Lords to decide which cases it should hear. The House of Lords had no power to hear appeals in criminal cases from Scotland, but apart from this limitation it had jurisdiction to hear appeals from every part of the United Kingdom.

When Parliament decided to create a new Supreme Court[2] it passed to that court all the powers and jurisdiction previously exercised by the Appellate Committee of the House of Lords. It also gave it power to hear what are called "devolution appeals" which arise if the scope of the powers exercised by the devolved governments of Scotland, Wales or Northern Ireland comes under challenge.

2.2 Does the UK Supreme Court have the power to request a review of particular cases?

Strictly the UK Supreme Court is a final court of appeal. It cannot hear appeals from criminal courts in Scotland. Nor can it hear an appeal against a decision of a lower appellate court which refused permission to appeal at that level without going on to hear the substantive appeal. Subject to these limitations, it has power to hear appeals from the Court of Appeal of England and Wales, the Inner House of the Court of Session in Scotland and the Court of Appeal of Northern Ireland[3]. It is, however, limited by the number of appeals it will agree to hear each year because there are only 12 Supreme Court justices and because they wish to be able to dispose of their appeals within a reasonable period of time: at present the target is nine months. The court also charges quite high fees, which serve to discourage some litigants who would otherwise wish to go on appealing, however unmeritorious their case. Publicly funded legal aid may be available to some litigants with meritorious cases who would not otherwise be able to afford the court fees (or their lawyers' costs).

When the court receives an application for permission to appeal, its office staff check that all the papers are in order, and one of the three files deposited with the court will then be sent to one of the Court's eight judicial assistants, who are usually very able young lawyers who serve the Court for ten-month fixed terms of appointment. He/she will then prepare a briefing note on the case, summarising the facts and the judgments of the lower court, setting out the grounds of appeal and drawing the judges' attention to any other matters they need to know.

The papers are then sent to a panel of three justices. These will always include at least one justice with expertise in the relevant branch of law. Both Scottish justices are likely

[2] By the Constitutional Reform Act 2005, whose relevant provisions came into force in 2009 when a court building in Parliament Square had been refurbished for the purpose.

[3] There is also a power o "leap-frog the first level appeal court if that court has already made a binding ruling on the point of law in issue which only the Supreme Court can overrule.

to consider Scottish applications for leave to appeal, and the justice from Northern Ireland will consider cases from that province. This panel is usually allowed two weeks for considering the papers, and it will then meet in the senior justice's room and decide which applications to admit and which to refuse. Between October 2009 and March 2010 44 applications were granted and 50 refused. If an application is granted, it will join the appeals for which permission to appeal has already been granted by the lower court, and a date for hearing the appeal will be allocated in the court's schedules.

2.3 What happens to cases when the Supreme Court decides an appeal?

If it is an appeal in a private law matter the Supreme Court will generally decide the case itself, and it will have all the powers afforded to the lower appeal court for that purpose. If the error(s) of law are such that justice demands that it should send the case back to a court of first instance for a retrial, it will follow that course. In a public law matter, the Supreme Court will not usurp the function of the original decision-maker. It will detect the error(s) of law (including any significant errors of procedure) and, quash the original decision (when appropriate), so that a new decision can be made in accordance with what is now declared to be the law to be applied.

If the case raises an issue of European Union law which is not "acte clair"[4], the Supreme Court, as the country's final court of appeal, is bound to refer the issue to the European Court of Justice for its opinion on the relevant point of law. It will then stay the appeal until the opinion of the Luxembourg court becomes available, which usually involves a two-year delay. It will then continue to hear the appeal with the benefit of the ruling of that court on the disputed issue.

If the court finds that a law of the UK Parliament violates a litigant's rights under the European Convention of Human Rights, it will not strike that law down. Instead it will make a "declaration of incompatibility" which in essence is a message from the court to Parliament to the effect that the court is of the opinion that our statute law does not comply with the requirements of the Convention. A fast track Parliamentary procedure is then available to enable Parliament to correct the error if it wishes to do so (which it usually does). If Parliament does not do so, it will be open to the UK Government to argue before the European Court of Justice at Strasbourg that it does not agree with its Supreme Court and to leave it to the Strasbourg court to decide whether there has indeed been a violation.

2.4 The role of the UK's Supreme Court in establishing case law

Broadly speaking, the law in a common law country like the UK is derived from two different sources: Acts of Parliament and subordinate legislation on the one hand, and the common law, developed by the judges on a case by case basis, on the other. The

[4] "Acte clair" is a French legal expression which means that a legal question is clear and there can be no doubt about it

authority of international treaties is incorporated into UK law by Acts of Parliament: the European Communities Act 1972 and the Human Rights Act 1998, for example.

Whether the judges are developing the common law, or whether they are interpreting statute-based law, decisions on issues of legal principle that have been decided by a higher court are binding on itself and on lower courts. The nature of binding precedent has been described in these terms:

> "Judicial precedent is the process whereby judges follow previously decided cases where the facts or point of law are sufficiently similar. It involves the following principles:
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> First, *stare decisis*, which means to stand by the decided, whereby lower courts are bound to apply the legal principles set down by superior courts in earlier cases and appellate courts follow their own previous decisions. For example:
>
> > The High Court must follow decisions of the Court of Appeal, which must follow decisions of the [Supreme Court]. The Court of Appeal must also follow its own previous decisions.
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> Secondly, the binding part of a previous decision is the *ratio decidendi* (reason for the decision) and it must be followed by judges in later cases. Anything said *obiter dicta* (by the way) in the original case is merely persuasive because it was not strictly relevant to the matter in issue and does not have to be followed."

The only exception is that the Supreme Court does have a power to overrule one of its previous decisions, but it is a power that it very seldom uses.

Today, most of our law is derived from statute-based sources, but Parliament very frequently gives the courts a fairly wide discretion to develop the law within the restrictions imposed by the governing statute. On the other hand, in important parts of our law, such as the law of negligence, the common law is still being developed. One example is a decision of the House of Lords that a statutory authority owed a legal duty of care towards a child to take reasonable care to diagnose that he/she was suffering from dyslexia: subject to the effect of Statutes of Limitation, when the child was grown up he/she could sue the statutory authority for loss he/she suffered if it had been negligent in failing to make the diagnosis. More recently, sufferers from a particular form of asbestos-related cancer have been held entitled to sue former employers for negligently exposing them to risk when it was quite impossible to determine at what moment of their life the cancer was in fact initiated.

2.5 What discretion do the judges of the UK Supreme Court have over their internal arrangements (e.g. can they determine whether to sit as panels of 1 or 3 or 5 or 7 etc – or do they have to sit in plenary)?

Parliament has left it to the justices to make the procedural rules of the Court, requiring only that these rules should be simple and simply expressed. The original rules were prepared following a public consultation, and the Court has a User Group which is likely to meet two or three times a year and will consider any possible changes to the Rules.

A single Justice, and also the Registrar of the court, has power to make procedural decisions on paper without a hearing. An affected party may then ask three justices to review that decision.

A panel of three Justices will deal with applications for permission to appeal. Most of these applications will be determined on paper without a hearing, but the panels have power to direct a hearing if they consider it appropriate. If granting permission to appeal the panel will direct whether in its opinion the appeal should be heard by five, seven or nine justices. The court will never sit as a plenary of 12 justices. Nine is the maximum for any appeal.

Between 1 October and 21 December 2009 the court was composed of seven justices four times and of nine justices three times. In the next legal term (up to Easter 2010) the court sat with seven justices once and nine justices twice. All other appeals were heard by five justices. With the benefit of the advice given by the panel which has granted permission to appeal, it will be for the President of the Court, in consultation with the Vice-President, who will ultimately decide the number of justices who will hear each appeal. There will normally be at least two justices with experience in the area of law which is the subject of the appeal.

In its first six months of operation the Supreme Court heard 43 appeals. Usually appeals will be heard within nine months of permission to appeal being granted. In cases of urgency an appeal will be expedited. In one recent case, involving an important point of law affecting the rights of a child which needed an urgent decision, the appeal was heard within two weeks of the papers being lodged at the court. Sometimes the justices will announce their decision at the end of a hearing, and give their reasoned judgments at a later date.

The justice who has prepared the leading judgment will deliver it first. Supporting judgments (if any) are then usually given in order of seniority, followed by any dissenting judgments. Sometimes the court gives a single judgment. The judgments are always prepared in writing, with embargoed copies being made available to the parties a short time in advance. A press summary will be prepared in every case, and an embargoed copy of that press summary will be sent to the main press agencies and broadcast media organisations in advance of the judgment being given. The judgment will not be read out in open court. Instead the justices will say how they have decided the case, and refer to their written judgment (when they have prepared one).

The UK Supreme Court has prepared its own Guide to Judicial Ethics and its own disciplinary procedures. Because it is a UK Court, the Office of Judicial Complaints for England & Wales (and its equivalents in Scotland and Northern Ireland) has no jurisdiction over Supreme Court justices.

2.6 The UK Supreme Court's Mission Statement and its Strategic Objectives

The Court has prepared and published a Mission Statement:

> "to ensure that the President, Deputy President and Justices of the Court can deliver just and effective determination of appeals heard by the Court, in ways which also best develop the Rule of Law and the administration of justice."

It has also prepared and published Strategic Objectives for its administration, which are in these terms:

1 The Court will create an environment, which effectively maintains the independence of the Justices, in which they can carry out their work protected from external pressures and which empowers them to develop the Rule of Law.

2 The Court will maintain and increase confidence in the administration of justice throughout the United Kingdom. It will promote transparency in, accessibility to and knowledge of the ways in which justice should be rightly administered. It will thereby promote knowledge of the importance of the Rule of Law, not least as a guarantee of democratic freedom.

3 The Court will run an efficient and effective administration, which enables the Court to secure the effective determination of justice, while demonstrating the best possible value for the resources with which it is provided. In particular it will operate a case management system, which provides appropriate measurable monitoring of the throughput of applications and cases, thereby enabling the most effective support of the Justices in their work.

4 The Court will promote good relations with all the individual jurisdictions, legislatures and governments in the different parts of the United Kingdom.

5 The Court will similarly develop appropriate relationships with courts in Europe, throughout the Commonwealth and in other countries, especially those which share its common law heritage.

6 The Court will demonstrate appropriate corporate social responsibility. In particular it will promote diversity amongst its staff, ensuring they are also representative of all the jurisdictions of the United Kingdom. It will also both source its supplies and consume its resources in ways which contribute as much as possible to sustainable development and the conservation of the world's natural resources.

7 The Court, as the statutory custodian of its own records, will provide the most appropriate environment it can for the organisation, preservation and future inspection of those records.

8 The Court, as occupant of the former Middlesex Guildhall, will promote knowledge of, and interest in, this historic building, the works of art it houses, especially the Middlesex Art Collection, and more generally the history of the County of Middlesex.

2.7 Other features of the new UK Supreme Court

The court building is open to the public on weekdays from 10 am to 4.30 pm. Leaflets are made available in seven languages, describing the work of the Court and the history of the building.

The Court has received 20,000 visitors in the first six months of its existence, and arranged tours for nearly 100 groups. About ten times more people attend hearings in the courtrooms of the Supreme Court than ever did in the House of Lords.

The Court is also an educational facility in its own right, with a purpose-built exhibition space. More than 100 schools or school groups have visited the court. The court arranges organised tours of the building, talks by justices, senior officials and Judicial Assistants, and also facilitates the observation of cases being heard in court.

In a dedicated exhibition area there are displays which describe the story of the Court's establishment and refer to important constitutional and political events, as well as significant judgments.

Other displays allow visitors to follow previous high profile judgments. There is a series of very simplified case studies where, through a touch screen, people will be taken through the issues and the law and invited to say what their decision would have been.,

In its first Annual Report the Court stated:

> "The Court's new facilities are far improved over those previously in the House of Lords for Justices, lawyers, other court users and the public. As a result of the move from the House of Lords, the UK's highest court is more accessible and transparent in its workings than was ever possible for the Appellate Committee of the House. Key benefits of the new accommodation for the Supreme Court and the Judicial Committee of the Privy Council (JCPC) include:
>
> - An additional courtroom to the Supreme Court and the JCPC. The largest courtroom allows for nine Justices to sit in one court, when required, whereas the space available in the House of Lords did not easily permit this;
> - an enlarged and "easier to use" Law Library for Justices and staff;
> - double the office space for Judicial Assistants ;
> - significantly increased number of dedicated meeting rooms available for advocates and parties in cases;
> - a comfortable lawyers' suite with WiFi access for legal teams;
> - improved ease of access for the public to come to the Court and see justice being done at the highest level. The home of the Supreme Court has been refurbished and designed with this in mind. The Court is easily located and visitors can see it

at work without notice. Access is also now fully compliant with the requirements of the Disability Discrimination Act."

3. The Governance of the Judiciary

3.1 How are judges appointed to administrative positions?

Since April 2006 an independent Judicial Appointments Commission (JAC) has been responsible for recommending appointments and promotions for candidates for judicial office in courts below the most senior level. Special arrangements are made, in which the JAC plays a part, for the appointment of the President and Vice-President of the Supreme Court and the five "Heads of Division"[5]. There is a judge in charge of every court centre of any size, and these appointments also fall within the JAC's area of responsibility, as do a number of specialist senior circuit judges who are responsible for the judicial administration of specialist cases[6] in their court centres. Unless an appointment is expressly time-limited, these judges will hold their appointment until the mandatory retirement age (unless they retire or are promoted before that date).

When three Supreme Court justices from Albania visited London recently, they met Baroness Usha Prashar, who had recently retired from being the first Chairman of this new Commission. She told them about the way in which the 15 members of her independent Commission were appointed, the fact that the Commission is entirely independent of politics, and the way in which it recommends only one candidate for each post, with very little ministerial discretion to refuse to accept its recommendation.

She explained how the Commission has the statutory duty to widen the pool of candidates from whom judges are selected, with a view to creating a more diverse judiciary. Each selection, however, must be made on merit.

The Commission devised its own criteria for the selection of judges which are posted on its website. For judges holding management or leadership posts, the following criteria are particularly relevant:

"QUALITIES AND ABILITIES - LEADERSHIP AND MANAGEMENT

1. Intellectual Capacity

- High level of expertise in your chosen area or profession
- Ability quickly to absorb and analyse information

[5] The Lord Chief Justice (President of the Criminal Division of the Court of Appeal), the Master of the Rolls (President of the Civil Division of the Court of Appeal), the Presidents of the Queen's Bench and Family Divisions of the High Court, and the Chancellor of the High Court (President of the Chancery Division).

[6] Chancery, Mercantile and Technology & Construction cases are assigned to the relevant senior circuit judges, who are specialists in those fields of law. They sometimes arrange combined lists, so that a specialist judge is not left with nothing to do when cases in his/her list are settled by agreement just before trial.

- Appropriate knowledge of the law and its underlying principles, or the ability to acquire this knowledge where necessary.

2. Personal Qualities

- Integrity and independence of mind
- Sound judgement
- Decisiveness
- Objectivity
- Ability and willingness to learn and develop professionally
- Ability to work constructively with others.

3. An ability to understand and deal fairly

- Ability to treat everyone with respect and sensitivity whatever their background
- Willingness to listen with patience and courtesy.

4. Authority and Communication Skills

- Ability to explain the procedure and any decisions reached clearly and succinctly to all those involved
- Ability to inspire respect and confidence
- Ability to maintain authority when challenged.

5. Efficiency

- Ability to work at speed and under pressure
- Ability to organise time effectively and produce clear reasoned judgments expeditiously.

6. Leadership and Management Skills

- Ability to form strategic objectives and to provide leadership to implement them effectively
- Ability to motivate, support and encourage the professional development for whom you are responsible
- Ability to engage constructively with judicial colleagues and the administration, and to manage change effectively
- Ability to organise own and others time and manage available resources.

The precise qualities and abilities for each post will be published in the information pack for each exercise"

3.2 The issue of judicial governance at all levels – what role does the Supreme Court of the UK play within this system?

There are three different judicial systems within the United Kingdom: the judiciary of England and Wales (now headed by the Lord Chief Justice), the judiciary of Scotland (headed by the Lord President of the Court of Session) and Northern Ireland (headed by the Lord Chief Justice of Northern Ireland).

In April 2006 the governance of the judiciary was transferred from a Government Department headed by an executive minister (the Lord Chancellor) who was nominally head of the judiciary (even though he very seldom sat in court) to the judiciaries of the three constituent parts of the UK. A large number of civil servants were transferred to new Judicial Offices, where their primary responsibility is to the judges whom they now serve.

The Lord Chief Justice of England and Wales is senior in status to the President of the UK Supreme Court who has no judicial responsibilities other than the task of leading that court, which is the only court of the entire United Kingdom. Our arrangements are different from the United States and Canada, where there are federal judges sitting in federal courts in every state or province. The Chief Justice of the Supreme Court is the head of the entire judiciary of those countries.

In England and Wales the Lord Chief Justice heads a small Executive Committee which includes the five Heads of Division and the Senior Presiding Judge. England and Wales is divided into six areas, and two High Court judges are appointed as Presiding Judges of those areas by the Lord Chief Justice for four-year terms of office as the senior judges responsible for judicial administration in those areas[7]. The Senior Presiding Judge is a Court of Appeal judge who acts as chief of staff for the Lord Chief Justice for a three year term of office. At present these appointments do not fall within the remit of the JAC. In their administrative role the presiding judges work closely with senior court managers appointed by Her Majesty's Courts Service (HMCS).

HMCS is now an independent agency, with its own ring-fenced budget allotted to it each year by the Ministry of Justice, with an independent Chairman and an equal number of judges and senior civil servants acting as non-executive members of its Board.

Since April 2006 the Ministry of Justice has also been responsible for most of the administrative tribunals in England and Wales, and arrangements are now being made for the administration of all these tribunals to be brought under the control of a single combined agency. A policy decision has also been made that the Lord Chief Justice will

[7] High Court Judges are also appointed for fixed term appointments by the Heads of the Chancery Division and the Family Division to be responsible for the judicial administration of cases falling within these specialist fields of law.

also be the leader of all the tribunal judges, too, a responsibility at present held by a judge of the Court of Appeal who acts as Senior President of Tribunals.

Because the justices of the UK Supreme Court play no part in these governance arrangements, it is unnecessary to give any further details of them in this Note, although we will be happy to provide further details, if requested, at the Workshop (or otherwise).

3.3 Handling complaints against judges

Complaints about the performance of judges in England and Wales are now handled by a new Office of Judicial Complaints (OJC).

The head of the OJC, Ms Sheridan Greenland, told the Albanian Supreme Court justices how her Office had functioned since it started work in April 2006. Its Annual Report contains statistical information about the number of complaints the Office receives, the categories of complaints, and the details of the disciplinary action taken against judges at different levels of the system.

The OJC is accountable both to the Lord Chief Justice and to the Lord Chancellor. In practice the Lord Chief Justice takes most of the decisions, with which the Lord Chancellor concurs. Her staff rejects many cases because they do not fall within the Regulations, mainly because they relate to judicial decisions as opposed to judicial conduct. A member of her staff (or an independent judge, in heavier cases) inquires into the facts of the complaints that are accepted for examination, and a decision is then made by the Lord Chief Justice and the Lord Chancellor in the light of their report. If a judge requests a review, a 4-person review panel is set up, with two judges and two lay persons (picked by rota from a panel of about 20 who are chosen after an open competition). The Lord Chief Justice and the Lord Chancellor cannot then impose a harsher penalty than the penalty recommended by the Review Panel.

If a senior judge is to be dismissed, then the Lord Chancellor will propose his dismissal to both Houses of Parliament. In the case of more junior judges the Lord Chancellor dismisses them. The Lord Chief Justice deals with all warnings and reprimands.

Apart from the Lord Chancellor, no politician takes any part in the process. There is an independent Judicial Conduct Ombudsman who deals with complaints that errors have been made in the way that a complaint has been processed.

4. Civil Procedure

4.1 The reforms to civil procedure in England and Wales

Until April 1999 the High Court and the County Courts operated separately, with two different sets of procedural rules for the hearing of civil claims. These arrangements dated back to 1846 when Parliament established over 400 county courts, which were designed as "poor man's courts", with local judges sitting in a court in or near most centres of population throughout England and Wales. The jurisdiction of these courts was limited to quite small sums of money. The High Court, on the other hand, was based in London, and its judges travelled out "on circuit" to try all the higher value civil cases in the largest towns in each area.

The jurisdiction of the county courts steadily increased, to such an extent that after 1991 most higher value civil claims could be started in either the High Court or the county court, depending on their complexity. It also became easier to transfer cases from the High Court to the county court, and vice versa. With the growth of its specialist jurisdictions – particular for commercial and administrative law business – and the greater length and complexity of both civil and criminal trials, High Court judges increasingly ceased to try more straightforward civil claims, and particularly many of the personal injury claims which used to dominate their lists. The conduct and pace of litigation was left to the parties' lawyers in those days, and some cases took a very long time to come to trial or were struck out by the court for "want of prosecution".

Three levels of judge are concerned with civil claims below appellate level: High Court judges, circuit judges and district judges. In London High Court Masters perform the role of district judges. In practice district judges (and Masters) deal with most of the elements of civil justice business today (including trials of claims of smaller value), while circuit judges and High Court judges are concerned with heavier civil business, particularly contested trials. All this judicial business (below the level of the Court of Appeal) is conducted by a single judge. In theory a jury may be empanelled to hear cases involving the claimant's reputation or liberty, but apart from claims against the police, juries are very seldom seen today.

Nearly 20 years ago the Court Service established a computer centre to which all the thousands of claims made by major suppliers (such as the water, gas and electricity companies) for small unpaid debts were directed. If no response was received within 14 days after a claim form was served, the computer would initiate a default judgment, which could then be served and later executed by court bailiffs without any involvement by judges or court management staff.

Lord Woolf, a very senior judge who later became Lord Chief Justice of England and Wales, was invited in 1994 to conduct a two-year review of our civil procedure arrangements. He concluded that the purpose of a civil justice system was to encourage disputing parties to resolve their disputes as early and as economically as possible, and that contested trials should only occur as a last resort if reasonable attempts at pre-trial settlement had failed. He introduced the concept of the "pre-action protocol" which

required parties to set out full particulars of their claim or their grounds of defence by correspondence, so that they could make a well-informed assessment of the merits and the size of the claim and the merits of the defence with a view to settling their dispute before litigation was even started. If a party failed to comply with the protocol and proceedings were issued, then a judge might order it to pay the other side's costs to the extent that they had been incurred unnecessarily. The protocols were agreed by groups representing the main parties in the different fields of legal practice (personal injuries, clinical negligence, and defamation, for instance) who identified the main things they each needed to know when assessing the merits and value of a claim.

When a claim had been issued and served, the claimant could proceed to enter a default judgment if the defendant did not serve a defence (or an acknowledgment of service indicating an intention to defend) within 14 days. Once it was clear that the claim was being defended, in whole or in part, the papers would be placed before a district judge, together with "allocation questionnaires" completed by the parties in which they identified the number of witnesses they would call and gave other information to help the judge identify the suitable "track" for the case and the timetable leading up to the trial. They would also say whether they had attempted any alternative form of dispute resolution (particularly mediation), or whether they wished to go to mediation now. The district judge would then give appropriate directions, either on the basis of what the parties had told him or after a hearing, usually conducted by telephone.

Civil claims are now directed to three "tracks": the "small claims track" for most claims of a value up to £5,000; the "fast track" for claims between £5,000 and £15,000, and the "multi-track" for claims above that value. Most claims come within the small claims track and will be heard informally by a district judge at a two-hour hearing in his room, ideally within 13 weeks of the claim form being served. If a party instructs a lawyer, the other side will not usually be ordered to pay any legal costs if it loses the case.[8] Many of these cases are assigned by a district judge to the court's small claims mediator, who will attempt, about five weeks after the claim has been served, to encourage the parties to settle their dispute at an agreed sum. These mediations are usually conducted by telephone, and about 70% of them result in a settlement.

For a fast track claim the district judge fixes a "window" for a date for trial about nine months away and gives directions for the procedural timetable leading up to trial. The trial is fixed to last for only one day, and restrictions are placed on the number of witnesses a party may call in person. In many small injuries cases there will be a "joint medical report" on which the parties will have had the chance of putting questions on paper to the expert before the trial. Advocates' fees for fast track trials have always

[8] A successful claimant can expect to recover the issue fee, the allocation fee (if applicable), his/her travelling expenses to court and those of any witnesses together with some witness expenses for going to court (up to £50 per day at present). If a claimant loses, he/she will probably be ordered to pay similar travel and witness expenses to the defendant.

been fixed, and today efforts are being made to fix the recoverable legal costs over a much wider area of pre-trial fast track work by solicitors (who handle the litigation and take statements from the witnesses: they may also do the advocacy at the trial if a barrister is not instructed).

A multi-track trial will be conducted in much the same way as all civil trials were conducted prior to the civil procedure reforms. Because the timetable is now under the control of the judges of the court, there will not be the same long delays as characterised the old arrangements (although the trial, at any rate of the value, of serious personal injury claims may have to be delayed pending the stabilisation of the claimant's injuries when a clearer prognosis of the future can be made). In the multi-track there may be more pre-trial disputes, for instance about disclosure of documents, and more use may be made of the summary judgment procedure by which either a claimant or a defendant may apply for a summary judgment if they consider that their evidence will show that there is no real prospect of the other side succeeding in their defence or their claim, as the case may be. Applications may also be made for an interim injunction (freezing the position until trial) or for some of the other types of interim order that may be available.

Before the trial the parties will have exchanged witness statements (including the evidence of their expert witnesses), and a district judge will conduct a pre-trial review, giving appropriate directions for trial now that the evidence is complete. To an increasing degree the parties will have attempted to settle the dispute before this stage, either at a joint settlement meeting or less often, with the assistance of a mediator, but at a pre-trial review the district judge or Master may still encourage them to get involved in mediation, if that has not been attempted before. In specialist jurisdictions (for instance, the Commercial Court and the Technology and Construction Court) pre-trial hearings will be conducted by a High Court judge (or a specialist senior circuit judge outside London).

The trial will be conducted in open court within the timeframe contained in the pre-trial directions (unless something unexpected happens). The judge will have read the witness statements, and while a party may wish to ask some supplementary questions, time at the trial is mainly taken up with oral cross-examination of witnesses and their subsequent re-examination by the party calling them. In most cases the judge will deliver judgment orally, immediately after the parties' final submissions, but it is always open to a judge, particularly in complex cases, to reserve judgment and deliver a written judgment later on. At a civil trial a judge will wear robes, but not a wig. The advocates will wear robes, and barristers (and, now, solicitors, too, if they choose) will wear wigs.

The civil appeals system was reformed ten years ago, following an inquiry by a seven-person team headed by Sir Jeffery Bowman[9]. Very few cases have ever proceeded to a second appeal in the House of Lords (now the Supreme Court) but before the reforms either party could appeal as of right following a trial against any judgment for a sum over £5,000: appeals involving smaller sums required the permission of the Court of Appeal. A party could appeal as of right against a pre-trial ruling by a district judge (or Master) and the circuit judge (or High Court judge) hearing the appeal would not merely be reviewing the judgment of the court below: they would be deciding the appeal as if the case had been brought to them without a prior hearing.

The main purpose of the reforms was to drive appeals down to an appropriate level, to limit the parties to one appeal in most cases, to change the nature of all appeals into being merely a review of the lower court's decision, and to require either the lower court or the appeal court to grant permission to appeal in nearly all cases before an appeal could proceed. As a general rule, appeals from district judges would be heard by a circuit judge; appeals from circuit judges (except after a multi-track trial) would be heard by High Court judges; and appeals from High Court judges or circuit judges following a multi-track trial) by the Court of Appeal. A second appeal would only be permitted if the Court of Appeal considered that the appeal raised an important point of principle or practice or there was some other compelling reason why a second appeal should be heard. In the six years before the reforms the size of the Court of Appeal had been increased from 29 to 36 judges during a time when delays in that court were growing longer and longer. The reforms have meant that those judges can concentrate on matters that really require the attention of the second most senior court in the country, and the number of judges has increased only very slightly in the last 14 years, usually for some special reason.

Appeals lie on both law and fact, but appeal judges will be very slow to differ from the opinion formed by the trial judge of the credibility of a witness. At the workshop we will be happy to answer any questions about the principles appeal judges apply when deciding an appeal.

In the Court of Appeal applications for permission to appeal will be dealt with a single judge on paper, or, if reconsideration is sought, by one or sometimes two (and very rarely three) judges in court. Substantive appeals are usually heard by three judges (of whom at lest one must be a specialist in the relevant field of law). The Court of Appeal has power to sit as a panel of five judges, but this has happened less than five times in the last fifty years.

4.2 The procedural rules for cases in the English courts – with particular emphasis on ensuring the equality of all parties to the case.

[9] Sir Jeffery had recently retired as managing partner of Price Waterhouse, the leading firm of chartered accountants, and his review was concerned with examining ways of making the appeal system more businesslike and efficient.

Securing greater access to justice has been one of the ambitions of civil justice reformers over the last 20 years. In devising his reforms Lord Woolf set out to achieve this aim by making the procedural rules simpler and easier to understand, and by increasing the chance that a dispute could be settled early on, ideally before a claim form was issued, in order to save the parties the costs of contested litigation. However, he had to face the problems that lawyers' fees continued to rise, that Government refused to invest in the computerisation which was considered essential if judges were to fulfil their new case-management responsibilities effectively, and that Government also wanted to reduce its expenditure on publicly funded legal aid for civil litigation. Another problem was that the Treasury insisted that civil litigation should pay for itself[10], with no Government subsidy except for fees remissions or exemptions for the very poor. He also wished to ban the use of Latin, in an effort to make court proceedings easier to understand.

For claims for sums less than £5,000 the reforms have been quite successful. It is quite easy for a claimant to complete the claim form in a simple case: indeed, a software program called "Money Claims On-Line" (MCOL) will enable him to issue a claim (and pay the court fee) from his personal computer at home. He merely has to set out information in the appropriate boxes, as if he was booking a seat at the theatre or a train ticket online.

If he is served with a claim form as a defendant, he will also be sent a set of instructions and guidance in simple language explaining what he has to do if he wishes to resist the claim in whole or in part. If MCOL has been used for the service of the claim form, he can respond by submitting a defence online.

When the defence is received at the computer centre, the claim form and the defence will be sent to a court centre –usually the court closest to the defendant's home – from which he will be sent an "Allocation Questionnaire" to complete, and again the assistance of a lawyer will not be needed in relation to simple claims.

We have already explained how a small claims mediator will approach the parties by telephone in many cases, and in 70% of them the case will be settled, usually over the telephone, without the litigants having to go to the court building at all. Customer satisfaction surveys have shown that 98% of those who have used the court's mediation service have rated it as "good" or "very good", and most of them said they would use it again even if on the present occasion they were unable to agree a settlement.

And if a mediated settlement is not achieved, or even attempted, the trial of the claim will take place in the informal setting of the district judge's room at court, with a maximum of two hours allowed for the hearing, and nobody wearing any form of court dress. Although lawyers are not prohibited, the district judge will conduct the hearing in

[10] Including the cost of the judges and the courtrooms.

an inquisitorial manner. Unless he has behaved unreasonably so that the other side has had to incur costs unnecessarily, the unrepresented loser will not usually have to pay any costs apart from the court fee and other expenses (for which see note 1 above).

These small claims represent most of the defended business of the courts. Efforts are now being made to see what can be done to reduce the costs involved in higher value claims as well. At present all claims between £5,000 and £15,000, and personal injury claims and landlord-tenant claims for repairs to the rented property between £2,000 and £15,000 are assigned to the fast track, and the Government is about to explore what more could be done to reduce the cost of bringing or defending fast track claims.

It is said that a Government consultation paper concerned with "the transformation of civil justice" will be issued in March 2011, with a view to a Government Bill being presented to Parliament in the 2011-2012 session of Parliament, and new legislation, if enacted, coming into force in 2014. The outlines of the likely proposals are beginning to emerge.

One of the main thrusts of the proposals will be to encourage disputing parties to settle their disputes without any necessity for court proceedings. If they cannot agree between themselves, much more information will be given about alternative forms of dispute resolution, including mediation, and ways will be sought of making these forms of dispute resolution easier to access and more economic than they are now: this will not be easy to achieve, particularly as no Government subsidy is likely to be available.

Because of the success of the small claims mediation scheme, thought may be given to making the scheme mandatory (unless there are very clear indications that the mediation is very unlikely to succeed). Parties may be compelled to mediate, but they cannot be compelled to reach an agreement, so that the requirements of Article 6 of the European Convention on Human Rights will continue to be fulfilled.

Efforts will also be made to reduce the costs of defended fast-track business and make them more predictable. In 2000, when the Government withdrew the availability of publicly funded legal aid from most types of civil litigation (including personal injury claims) it introduced new statutory regimes in relation to "conditional fee agreements" (CFAs) and "after the event insurance" (ATE insurance). By the former, otherwise known as "no win, no fee" agreements, solicitors, and sometimes barristers, would act for a client under a CFA, on terms that if the client won, they would recover from the defendant an agreed success fee of up to 100% of their costs.[11] Under the latter, if grounds for a claim arose, a party could take out ATE insurance to protect it from paying the other side's costs if it lost the case. If it won, it could recover the cost of the ATE premium from he losing party in addition to its other legal costs.

[11] The court had power to reduce the success fee if it considered it represented an unreasonable pre-assessment of the risks of the litigation.

These arrangements were very unpopular with liability insurers and other types of defendant (including the media) because they greatly increased the level of costs they would be likely to have to pay if their defence was unsuccessful. In 2009 an appeal court judge, Sir Rupert Jackson, conducted a year-long review of these and other aspects of the present costs regime, and the Government is already consulting on certain aspects of his proposals. Some of his suggestions involved a ban on the recovery of ATE insurance premiums (in return for a new regime of "one-way costs shifting", whereby an unsuccessful claimant would not have to pay the defendant's costs) and the recoverability of the success fee (within capped limits) not from the defendant, but out of the damages the claimant recovers in the action (accompanied by a general 10% uplift on the tariff for damages)

New arrangements for "fixed costs" have recently been introduced in relation to all the legal costs of litigating road traffic accident claims worth less than £10,000, and the Government is likely to want to widen the scope of this regime. One of its advisers, Lord Young, recently recommended, too, that the upper limit of the fast-track regime should be increased to £25,000.

At the same time the Government is likely to seek to do more to encourage parties to resolve their disputes at an earlier stage of litigation (when this is practicable) by recourse to alternative forms of dispute resolution, particularly mediation. This is likely to be accompanied by a sharp increase in the court fees charged for the trial (and any subsequent appeals) in higher value claims, as a further incentive to parties to resolve their differences by agreement, and not at the expense of the state.

Needless to say, aspects of these proposals will be very controversial, although it is likely that a Labour Government would have sought to legislate along roughly the same lines if it had been returned to office. They will be accompanied by a general "freeing up" of the way in which legal services can lawfully be delivered. This is sometimes known as "Tesco's law" because it is envisaged that people shopping in a supermarket will be able to purchase simple forms of legal advice (on how to make a will, for example) at the same time as they are doing their shopping for the weekend.

On my last visit to Ukraine, I visited the offices of a Non-Governmental Organisation which was exploring ways of increasing the use of mediation as a way of resolving disputes, particularly in rural areas. This is just another example of the way in which many countries are now seeking new ways of delivering civil justice in a manner that is simpler and does not cost so much.

5. Criminal Procedure

5,1 "One question is the establishment and development of judicial control – for example, under the new criminal procedures the arrest of persons is under the control of the court."

In England and Wales the police are still the primary agency which has the power of arresting people on suspicion of crime. The provisions of Article 5 of the European Convention on Human Rights largely reproduce the relevant principles of the English common law. A police officer may arrest someone without a warrant if he has a reasonable suspicion that he/she has committed an arrestable offence, so long as the arrested person is told in simple terms why he/she is being arrested[12]. The Police and Criminal Evidence Act 1984 then dictates the length of time the police may detain a suspected person in custody without charging him/her with an offence.

Broadly speaking, continued detention beyond 24 hours requires the authority of a more senior police officer[13], and for continued detention (without charge) for longer than 36 hours the authority of a court is required. A court may authorise detention without charge for up to four days from the original arrest. For persons suspected of terrorist crimes, a court may now authorise continued detention for up to 28 days.[14]

Once a person has been charged with an offence he/she must be brought before a court without unreasonable delay, and the courts will thereafter be responsible for deciding whether to release the detained person on bail pending trial, or to remand him/her in custody. If remanded in custody, the defendant will be committed to prison and come within the responsibility of the prison authorities. No further questioning by the police is permitted after a defendant has been charged.

5.2 "Jury trials – these are prescribed by the law and the Constitution, but we have no experience of their operation, so we would be keen to learn the UK experience."

Most trials of criminal offences in England and Wales are conducted in a summary way in magistrates' courts either by a panel of three lay magistrates (assisted by a legally qualified clerk) or by a single legally qualified district judge (magistrates' courts)[15].

[12] If a court has granted an arrest warrant, the warrant must be shown to the person being arrested.

[13] Of the rank of superintendent or above. This is only permitted in the case of "serious arrestable offences".

[14] Originally this power was vested in the executive, and it represented the only occasion when the United Kingdom has exercised its right to derogate from the requirements of the European Convention of Human Rights, following an adverse decision of the Court at Strasbourg in Brogan and others v UK (1989) 11 EHRR 117. The power to extend detention in these cases for up to 28 days is now vested in a court.

[15] These used to be called stipendiary magistrates. There are about 150 of them in England and Wales. They serve in a full-time capacity as professional judges, as compared with about 30,000 lay magistrates who volunteer to sit in court for up to 26 half-days each year. Most minor traffic offences and minor offences of an administrative nature are conducted by lay magistrates who also exercise wide jurisdiction in simpler family cases involving domestic violence, for instance.

The trial of serious offences is conducted on indictment in a Crown Court by a judge sitting with a jury. With certain exceptions, everyone between the ages of 18 and 70 is liable to be summoned, on a random basis, to undertake jury service. Advice on HM Courts Service's website sets out the nature of the obligations involved:

> "You may be one of many people who have been chosen for jury service. A jury consists of 12 members of the public selected at random. Jurors usually try the more serious criminal cases such as murder, rape, assault, burglary or fraud. These trials take place in the Crown Court.
>
> Receiving a jury summons means you are legally required to attend court. Please do not be worried about this, most people overcome their initial concern and find jury service interesting and rewarding.
>
> Jury service is one of the most important civic duties that anyone can be asked to perform. As a juror, you have a chance to play a vital part in the justice system. You do not need any knowledge of the legal system. Each individual juror will be asked to consider the evidence presented and then decide whether the defendant is guilty or not guilty.
>
> As a juror you would normally be asked to serve for a period of ten working days and during that time you could sit on more than one case. If a trial takes longer, the jury is expected to sit for the whole of the trial, however you will be told about the length of the trial at the start. If there are any exceptional circumstances which prevent you from serving for a longer period of time you will need to tell the court before sitting on the jury panel."

Jurors will be paid travelling expenses, a modest subsistence allowance, and expenses for financial loss (including loss of earnings) according to a fixed tariff.

A juror will report for duty at a Crown Court, and will then be liable to be included in a panel of 15 from whom a jury of 12 will be picked by lot. There is no longer any provision for jurors to be challenged by one or other of the parties without the need to give any reasons. Reasons (on which the judge will give a ruling) must be given for any challenge to a prospective juror, and in practice very few challenges are now made. At the start of what is known to be a long trial, a much larger panel of prospective jurors will be addressed by the judge, who will excuse a juror from serving in that trial if there is a good reason, based on hardship, why it would be unreasonable for the juror to serve for such a long time. In such cases, which may have attracted pre-trial press publicity, jurors may be asked questions about their attitudes to relevant features in the case, but in general British courts do not go through the very long processes of jury selection that occur in United States courts.

Once 12 jurors have been selected and sworn the juryman's oath, they will listen to the evidence, the advocates' speeches, and the judge's summing up. They may submit written questions, through the judge, during the course of the trial. At the end of the

trial the judge will sum up the evidence they have heard and give them directions on the relevant principles of law they must apply. They will then retire and consider whether they find the defendant(s) guilty or not guilty of the offence(s) of which they have been charged. At first they will be told they must reach a unanimous verdict. At an appropriate time after two hours have elapsed, depending on the length and complexity of the trial, the judge may direct them that he/she is now willing to receive a majority verdict, on which not less than ten of them have agreed. If the jury find the defendant guilty, it will then be the duty of the trial judge to pass sentence.

The jury does not give reasons for their verdict. A defendant wishing to appeal will challenge the judge's summing up (particularly the directions of law) or any procedural rulings the judge may have made to the disadvantage of the defendant during the course of the trial. The prosecution cannot appeal against an acquittal by the jury. However, they may ask the Attorney-General to consider an appeal to the Court of Appeal if they are dissatisfied by a ruling by the judge on an important point of law. The Court will then hear the appeal and give its ruling, but this will not affect the acquittal. Under recent reforms, the prosecution may now appeal against other rulings by the judge – for instance if he/she stops the trial on the basis that the prosecution evidence has disclosed no case on which any reasonable jury could convict.

In other common law countries there are also juries of 12. In Scotland a jury of 15 is empanelled. In the cour d'assises in France in cases where the sentence for the offence may exceed ten years the judge retires with the jury (of 9 or 12 lay people), and has an equal vote in deciding both guilt and sentence. In murder cases in Poland two professional judges sit with three lay jurors. In the Channel Islands (Jersey and Guernsey, or example) the judge sits with two jurats (who are similar to lay magistrates). In other countries one or more lay assessors sit with the judge. Japan has recently introduced arrangements by which six lay people sit with three professional judges as judges in a criminal trial one of the professional judges must occur if a verdict of guilty is to be valid.

In an article in The Economist in February 2009 the author wrote:

> Russia's bid to do away with most jury trials has little to do with efficiency. Russia reintroduced jury trials in 1993 for several charges including terrorism, hostage-taking and armed insurrection to show its commitment to the rule of law. The commitment did not last. Research showing that Russian juries are nine times more likely to acquit defendants than judges sitting alone led to a decision to revert to non-jury trials for all cases save murder.
>
> Meanwhile, three Asian countries are going the other way. Under a law that came into force in 2005, some 50,000 "people's assessors" have been appointed in China to serve in trials for all but the most minor criminal offences. Selected on merit and appointed for five years, Chinese assessors resemble English lay magistrates, likewise appointed for several years, rather than common-law

> jurors, who are usually chosen at random and serve for just one trial. Still, like jurors in civil-law countries, the assessors, sitting alongside judges, are required to reach decisions on law and fact, and sometimes help with sentencing, too.
>
> In Japan, jury trials were once available in theory but little used in practice. Starting in May, though, six lay jurors, chosen at random from among voters, will sit alongside three judges in contested cases punishable by death or life imprisonment.
>
> South Korea has been more tentative. In a bid to modernise an opaque legal system, it introduced juries in 2008, restricted to trials for the most serious crimes. At the moment, they are advisory. Under the constitution, all defendants must be tried by a judge, so giving juries decision-making powers would require a constitutional amendment. As elsewhere, the system has led to more acquittals. It is due to be reviewed by the Supreme Court in 2012."

The English experience has been that the jury system has done a great deal to strengthen people's opinion of the fairness of the courts. The defendant is judged by his/her fellow-citizens, not by a professional judge, and the jurors can see the efforts that are made by English judges and lawyers to ensure that the defendant has a fair trial. A great English judge, Lord Devlin, has said[16]:

> "For more than seven out of the eight centuries during which the judges of the common law have administered justice in this country, trial by jury ensured that Englishmen get the sort of justice they liked and not the sort of justice that the government or the lawyers or any body of experts thought was good for them.
>
> The second and by far the greater purpose that is served by trial by jury is that it gives protection against laws which the ordinary man may regard as harsh and oppressive."

[16] Trial by Jury, Sir Patrick Devlin (1956), pp159-160.