

University of Trier
International Legal Studies
Class notes, 9 January 2014

Chapter 7 (continued)

Initiating Proceedings

1. parties are the *claimant* and the *defendant*
2. claimant must prepare a *claim form*, and submit it to the appropriate court (includes the cause of action, remedy/damages sought)
3. Claim form must be served on defendant (in person, via first-class post or electronic transmission)
4. Claimant must either attach or separately serve a document known as *particulars of claim* (includes allegations, type of damages sought, list of witnesses, relevant documents such as a contract, applicable law)
5. Defendant may respond as follows:
 - a. File an *admission* (“I did it, and I’ll pay you”)
 - b. File a *defense* (“I didn’t do it, and here are the reasons why”) with or without a *counterclaim* (“I didn’t do it—**you** did, and I’m suing you!”)
 - c. File an *acknowledgement of service* (“I didn’t do it, but I need more time and more information before I can file a defense”)
6. Claimant may, at his discretion, file a *reply* in response to defendant’s counterclaim, but he is not obligated to deny defendant’s allegations.
7. Each of the above documents must be accompanied by a *statement of truth* (“I do so solemnly swear all of the statements included herein are the truth”). If the party wrongfully signs, this is known as *contempt of court* (punishable by fines/imprisonment)
8. Thereafter, parties must disclose to each other the nature/existence of any documents they will use to prove their case—or which might damage their case. This is known as *disclosure*
9. The court itself may order *specific disclosure*
10. Physically sharing these documents is known as *inspection*
11. The court regulates which evidence is *admissible* or *inadmissible* at trial
12. The court will also request the parties to submit *witness statements*, summarizing witness’ likely testimony at trial

Judgment Without Trial

1. Default Judgment—where defendant fails to respond to the claim. May be *set aside*
2. Summary Judgment—one or both parties approach judge, insisting they should automatically win without going to trial (to justify, they submit an *application notice* and supporting evidence). The party making the application is the *applicant*; the other is the *respondent*

Legal Aid

Government financial assistance is available to needy parties through the *Legal Services Commission*; subject, however, to a strenuous *means test*

Terminology

--contempt of court

--costs

--directions

--document

--setting aside

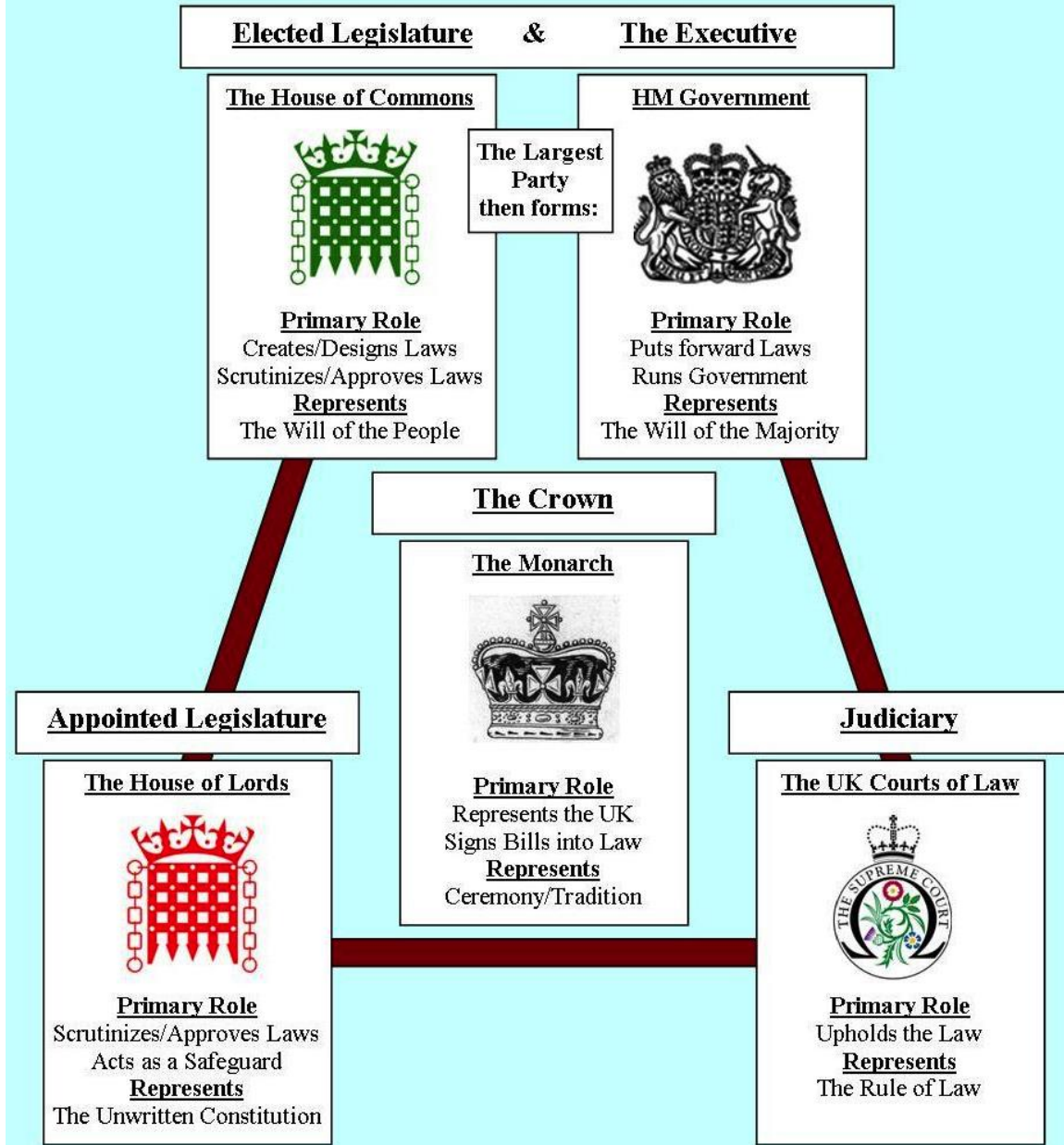
--settlement

--conditional fees vs. contingency fees

--pre-action protocols

--Part 36 payment (payment into court to effectuate a settlement)

UK Fusion/Separation of Powers



Chapter 8

I. **British Constitution**

a. **Unwritten—but it exists**

The British Constitution is derived from a number of sources. Statutes are laws passed by Parliament and are generally the highest form of law. Constitutional Conventions are unwritten practices which have developed over time and regulate the business of governing. Common law is law developed by the courts and judges through cases. The UK's accession to the European

Communities Act 1972 has meant that European law is increasingly impacting on the British Constitution. The UK is also subject to international law. Finally, because the British Constitution cannot be found in any single document, politicians and lawyers have relied on constitutional authorities to locate and understand the constitution.

b. The Rule of Law

The Rule of Law is an aspect of the *British Constitution* that can be considered an important part of *British Politics*. It involves:

1. The rights of individuals are determined by legal rules and not the arbitrary behaviour of authorities.
2. There can be no punishment unless a court decides there has been a breach of law.
3. Everyone, regardless of your position in society, is subject to the law.

The critical feature to the Rule of Law is that individual liberties depend on it. Its success depends on the role of trial by jury and the impartiality of judges. It also depends on Prerogative Orders.

There are three Prerogative Orders:

1. Certiorari calls a case up from an inferior court to a superior one to ensure justice is done.
2. Prohibition prevents an inferior court from hearing a case it does not have the power to listen to.
3. Mandamus orders an inferior court to carry out its duties.

c. Parliamentary Sovereignty

Parliamentary sovereignty is a principle of the UK constitution. It makes Parliament the supreme legal authority in the UK, which can create or end any law. Generally, the courts cannot overrule its legislation and no Parliament can pass laws that future Parliaments cannot change. Parliamentary sovereignty is the most important part of the UK constitution.

Over the years, Parliament has passed laws that limit the application of parliamentary sovereignty. These laws reflect political developments both within and outside the UK.

They include:

The devolution of power to bodies like the Scottish Parliament and Welsh Assembly.

The Human Rights Act 1998.

The UK's entry to the European Union in 1972.

The decision to establish a UK Supreme Court in 2009, which ends the House of Lords function as the UK's final court of appeal.

These developments do not fundamentally undermine the principle of parliamentary sovereignty, since, in theory at least, Parliament could repeal any of the laws implementing these changes.

d. The Doctrine of Separation of Powers

In Britain this doctrine is not so clear. The legislative aspect is Parliament where laws are passed; the executive (which plans prospective laws and formulates policy) is the cabinet of the government and the judiciary is the Law Lords and the Judicial Committee of the Privy Council who have a final say on legal issues

The Prime Minister is an active member of the legislative (and can vote in Parliament), yet he is also the leading member of the executive.

The Lord Chancellor is a member of the cabinet and therefore of the executive as well as being head of the judiciary.

The House of Lords also has a right to vote on bills so they are part of the legislative but the Lords also contains the Law Lords who are an important part of the judiciary.

As with the PM, the members of the Cabinet are also members of the legislative who have the right, as a Member of Parliament, to vote on issues.

Therefore, there is a merging of roles in the British model. Some have argued that this is needed for flexibility in a modern society. Supporters of the American model claim that a written constitution gives a government the rights it has so that it cannot trespass onto power held by other parts of the political system or have its powers trespassed on by others. The Executive (President's office), the Legislative (Congress) and the Supreme Court (Judiciary) have very clear powers stated in the American Constitution that restricts each section's powers and avoids crossover between the three sectors of politics.

II. Parliament

a. The House of Commons

The House of Commons is the publicly elected chamber of Parliament. Members of the Commons debate the big political issues of the day and proposals for new laws.

Parliament is an essential part of UK politics. Its main roles are examining and challenging the work of the government, debating and passing all laws and enabling the Government to raise taxes

Law making is one of Parliament's essential roles. Find out how new laws are made and learn how a Bill passes through Parliament and becomes an Act

Much of the work of the House of Commons takes place in committees, made up of around 10 to 50 MPs. These committees examine issues in detail, from government policy and proposed new laws, to wider topics like the economy

b. The House of Lords

The House of Lords is the second chamber of the UK Parliament. It works with the House of Commons to:

*make laws
check and challenge the actions of the government, and
provide a forum of independent expertise*

The House of Lords Chamber spends about 60% of its time on legislation; the other 40% is spent on scrutiny – questioning Government and debating issues and policy. Committee work takes place outside the Chamber.

c. Government

The political party which wins the most seats/places in a general election forms the Government.

The Government runs the country and is formed from the political party that wins most seats in the House of Commons in a general election. The Government formulates policy and introduces legislation in Parliament.

Most senior members of the Government are members of the House of Commons but there are ministers, along with two Cabinet members, in the House of Lords.

The House of Lords also contains many Members of Parliament who were in previous governments.

d. The Legislative Process

See:

<https://www.gov.uk/legislative-process-taking-a-bill-through-parliament>

e. Devolution

Devolved powers are decisions that Parliament formerly used to control, but are now taken up by the separate bodies. These could include matters like health or education. UK devolution created a national Parliament in Scotland, one in Wales and another in Northern Ireland. This process transferred some levels of power from the UK Parliament to these nations - but retained authority over the devolved institutions in the UK Parliament.

Devolution is the giving way of powers from the central government of a sovereign state to government at a sub national level while parliament is legislature. Thus devolved parliament is a legislature that has given away powers to government at sub national level.

A devolved English Parliament is one that gives separate decision-making powers to county representatives. The UK central government is known to delegate certain powers to devolved governments so that they can make decisions for their own areas.

Mock Trial material

Overview of the trial process

1. The trial process requires the prosecution to bring evidence to prove beyond reasonable doubt that a defendant committed the alleged offence. It is not for the defendant to prove that s/he did not commit the offence as a defendant is presumed innocent until proved guilty.
2. Different offences have varying elements which must be proved, and the evidence required will vary accordingly. It is always essential to look closely at the wording of the offence to identify what the prosecution is required to prove.
3. It is also important to consider the 'burden of proof' and the 'standard of proof'.
4. The burden of proof is normally on the prosecution to prove that the defendant is guilty. However, in some offences, the burden may switch to the defence to prove (or disprove) at least some facts that are part of the offence or defence (a 'reverse burden').
5. The prosecution must prove the guilt of a defendant 'beyond reasonable doubt'. However, a different standard of proof applies where the burden is on the defence. In that situation, the defence must discharge the burden 'on the balance of probabilities', which is the civil law standard and easier to satisfy.

6. The trial is the forum where the evidence is examined and the court considers whether it is sufficient to discharge (or satisfy) the burden of proof.

What is evidence?

1. Evidence is information that may be presented to persuade the court of the probability of the truth of some fact asserted in the case, i.e. information by which facts tend to be proved or disproved.

Fact-finding in the trial

2. Facts at issue in criminal cases are those that the prosecution must prove if it is to succeed, together with any facts that the defendant may wish to raise in his/her defence. The prosecution must prove all the elements of the offence. Examples of facts that may need to be proved are:

the identity of the defendant;
that the defendant is an employer;
that an employee was 'at work' at the time s/he was injured.

3. The elements of an offence will appear as items on the evidence matrix that is submitted to the Approval Officer as part of the prosecution report.

4. A trial is a fact-finding exercise and, with its verdict, the court makes a decision as to whether all elements of the offence have been proved. Fact-finding might appear to be straightforward: the two parties put before the court their evidence to support a particular version of the facts in dispute, and the court decides which version it prefers. However, there are rules that govern how this process is to be conducted – rules of evidence, such as the hearsay rule, and rules of procedure. These rules are necessary to ensure that a defendant receives a fair trial and is not unfairly convicted.

The burden of proof

5. The burden of proving the guilt of the defendant lies on the prosecution, who must prove the particulars of the offence beyond reasonable doubt; the jury or magistrates should only convict if they are sure of the defendant's guilt.

6. A key question for consideration is which party has the obligation ('the burden') to prove particular facts in issue. A court will look primarily at the wording of the statutory provision when making this decision.

7. The words 'shall' or 'shall not', used in statutory provisions, impose an absolute obligation to do, or not to do, the act in question. It is not possible for a defendant to argue that it is impracticable, difficult or even impossible to do it, or not to do it. For example, section 7 HSWA states: "It shall be the duty of every employee while at work–

a. to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions at work; and

b. as regards any duty or requirement imposed on his employer or any other person by or under any of the relevant statutory provisions, to co-operate with him so far as is necessary to enable that duty or requirement to be performed or complied with."

8. By the use of the word "shall", this section imposes absolute duties on the employee. Once the prosecution has proved that an employee did not take reasonable care as required, the offence is proved, whether or not the defendant realised that what s/he was doing fell below an acceptable standard of conduct.

Legal and evidential burdens

15. There are two principal burdens (or 'obligations to prove') in legal proceedings: the legal burden and the evidential burden.

16. The **legal burden** is the obligation on a party to prove a fact in issue. In criminal proceedings, the prosecution normally has the legal burden of proving, beyond reasonable doubt, all elements of the offence. Whether this burden has been discharged is decided by the magistrates or jury at the end of the trial, when all the evidence has been presented. If the prosecution has not discharged this burden, the case will fail.

17. The **evidential burden** is the obligation to adduce sufficient evidence on a fact in issue to justify, as a possibility, a favourable finding on that issue by the magistrates or jury. Whether the evidential burden has been discharged is decided, during the course of the trial, by the judge (for example, following a defence submission of 'no case to answer'). The prosecution must adduce sufficient evidence to prevent the judge withdrawing that issue from the jury. Even where the evidential burden is discharged on a particular issue, the evidence may not be sufficient to discharge the legal burden on that issue.

18. A party bearing the legal burden on a particular issue usually also bears the evidential burden of proving that issue. Two exceptions are:

certain criminal defences; and
'presumptions'.

19. In certain criminal defences, the burden on the defence may be 'evidential only': the defence merely has to raise sufficient evidence for the matter to be considered by the court. The burden then passes to the prosecution to prove the matter beyond reasonable doubt. However, this is not the case with the reverse burden under section 40 HSWA (see below); this exception does not therefore apply to health and safety offences.

20. A **presumption** is where a court treats a fact as having been proved, notwithstanding that no (or insufficient) evidence has been presented to establish it. A presumption can help the prosecution to prove a particular fact by requiring the defence to disprove it. For example, it will be presumed as a matter of law that:

a properly addressed and posted letter, not returned, has reached its destination; and

a person acting in an office was properly appointed.

21. These facts will be 'presumed' by the court unless the defence presents sufficient evidence to the contrary to rebut the presumption.

Reverse burdens

22. When the burden of proof is on the defendant to establish a particular issue, it is often referred to as a 'reverse burden', because it reverses the normal situation in which the prosecution must prove the facts beyond reasonable doubt.