Once enacted, statutes, even if obsolete, do not cease to have the force of law, but common sense usually prevents most obsolete laws from being invoked. In addition, statutes which are no longer of practical utility are repealed from time to time by Statute Law Repeal Acts. Nevertheless, a statute stands as law until it is specifically repealed by Parliament. This may take place by implication as where an earlier Act is repealed by a later one which is inconsistent with it.

An Act of Parliament is, in general, binding on everyone within the sphere of its jurisdiction, though it may not be binding if it infringes the Treaty of Rome, as the *Factortame* case shows, but all Acts of Parliament can be repealed by the same or subsequent parliaments; and this is a further exception to the rule of the absolute sovereignty of Parliament – it cannot bind itself or its successors.

*Cheney* v *Conn*, 1968 – The court cannot in general declare a statute to be invalid (2)

*Prince of Hanover* v *Attorney-General*, 1957 – A statute remains law until repealed (3)

*Vauxhall Estates Ltd* v *Liverpool Corporation*, 1932 – Repeal by implication (4)

## Repeal of statutes and the European Communities Act 1972

As regards the power of Parliament to abolish or alter statute law by a later Act, an interesting situation arises in connection with our membership of the European Community.

Since this is the first time we have met the expression 'European Community' it would perhaps be desirable to consider whether the expression 'Community' or 'Union' should be used. The parts of the European co-operation arrangements include: the European Community (economic co-operation – the old EEC); the European Atomic Energy Community (EURATOM); the European Coal and Steel Community (ECSC); and the Maastricht areas (new areas of co-operation such as political, foreign affairs, defence and conventions (for instance, on drugs)).

When referring to all of them, the correct legal reference is to the European Union, and the same is true when referring only to the Maastricht area of co-operation. Otherwise, the correct references are to the European Community or EURATOM or ECSC as the context requires.

The European Court of Justice has no automatic jurisdiction in the Maastricht areas and so rightly continues to call itself the Court of Justice of the European Communities, though confusingly the Council calls itself the Council of the European Union even when passing EC legislation! The Treaty of Amsterdam, which was agreed at the European Council in Amsterdam in June 1997 and which was incorporated into UK law by the European Communities (Amendment) Act 1998, has relevance to the legal system in that it extends the powers of the ECJ in regard to action by the Union on asylum and immigration and co-operation on police and judicial matters.

Those in business tend to use the term 'Union' at all times and there is no harm in this. Practising lawyers would no doubt feel that they had to be precise.

The obligation of the British Parliament on entry to the European Community was to ensure that Community law was paramount. The view of the European Court is that Community law overrides English law where the latter is inconsistent with it. Section 3 of the European Communities Act 1972 binds our courts to accept this principle and talks of applying the principles of Community law with the idea that it prevails. Section 2(4) of the 1972 Act states that a UK statute should be construed so as to be consistent with Community law. However, many authorities on constitutional law see this obligation as a dilemma in the

sense that Community law cannot be paramount when like the rest of our law the 1972 Act is at the mercy of any future Act of Parliament which must, under the fundamental rule of our constitution, prevail over any pre-existing law whatsoever. In other words, Community law is paramount as the result of the European Communities Act 1972, which could be repealed by a future Act of Parliament. It would seem to be the duty of our courts to accept that repeal.

## Delegated legislation

Many modern statutes require much detailed work to implement and operate them, and such details are not normally contained in the statute itself, but are filled in from some other source. For example, much of our social security legislation gives only the general provisions of a complex scheme of social benefits, and an immense number of detailed regulations have had to be made by civil servants in the name of, and under the authority of, the appropriate Minister. This method of legislating is increasingly common in the field of business law, where companies, insolvency and consumer statutes give a large number of powers to government ministers to make rules and orders to flesh out the statute. These regulations, when made in the approved manner, are just as much law as the parent statute itself. This form of law is known as delegated or subordinate legislation.

The major difference between an Act of Parliament and delegated legislation is that the courts can declare the latter to be invalid and inapplicable because it was made beyond the powers given in the parent statute and/or the proper procedures were not followed in its enactment as where consultation required by the parent statute was not carried out (see further Chapter 6).

## Custom

In early times custom was taken by the judges and turned into the common law of England, and it is still possible, even today, to argue the existence of a local or trade custom before the courts. Local customs consist in the main of customary rights vested in the inhabitants of a particular place to use, for various purposes, land held in the private ownership of another: for example, to take water from a spring (*Race* v *Ward* (1855) 24 LJQB 153) and for fishermen to dry their nets on private land (*Mercer* v *Denne* [1905] 2 Ch 538). A local custom can also affect the terms of a contract as is illustrated by *Hutton* v *Warren*, 1836 (see Chapter 14). As a present-day source of law, however, custom is of little importance.

### The law merchant

Mercantile law, or *lex mercatoria*, is based upon mercantile customs and usages, and was developed separately from the common law. The Royal Courts did not have a monopoly of the administration of justice and certain local courts continued to hear cases long after the Royal Courts were established. One notable area was that involving mercantile and maritime disputes. Disputes between merchants, local and foreign, which arose at the fairs where most important commercial business was transacted in the fourteenth century, were tried in the courts of the fair or borough, and were known as 'courts of pie powder' (*pieds poudrés*) after the dusty feet of the traders who used them.

These courts were presided over by the mayor or his deputy or, if the fair was held as part of a private franchise, the steward appointed by the franchise holder. The rules applied were the rules of the European law merchant developed over the years from the customary practices of merchants and the jury was often made up of merchants. The fair or borough courts were supplemented for a time by 'Staple Courts' which sat in the staple towns. These towns, which were designated by Edward III (1327–77) as the exclusive centres of trade for such commodities as wine, wool, leather and tin, were required to hold courts to decide the trading disputes of merchants and again the customary practices of merchants were used.

Maritime disputes were heard by maritime courts sitting in major ports such as Bristol. These, too, applied a special European customary law developed from the customary practices of seamen.

The common law courts were slow to show an interest in dealing with commercial matters. In part this was due to the idea that their jurisdiction had a geographical limit and was restricted to matters which had arisen in England between English citizens. Foreign matters, and many of these commercial disputes did involve either a foreign merchant or a contract made or to be performed abroad, were left to some other body, especially if it could raise questions about the relations between the King and foreign sovereigns where the King's Council might be a more appropriate body. To some extent also it was due to the fact that the common law courts and the common law had come into existence at a time when land was the most important commodity and the procedures and concerns of the common law courts were adapted to problems arising from disputes about the possession and ownership of land. They were formal, slow and ill-adapted to the needs of merchants who required a speedier justice administered according to rules with which they were familiar.

When the Court of Admiralty developed, it took over much of the work of the merchants' courts, but from the seventeenth century onwards the common law courts began to acquire the commercial work, and many rules of the law merchant were incorporated into the common law. This was achieved partly by fiction. For example, to get over the fact that technically it still lacked jurisdiction over matters arising abroad the Court accepted allegations that something that had occurred abroad had in fact occurred in England within its jurisdiction, e.g. by using the fiction that Bordeaux was in Cheapside.

Lord Mansfield and Lord Holt played a great part in this development, in particular by recognising the main mercantile customs in the common law courts without requiring proof of them on every occasion. Perhaps the most important mercantile customs recognised were that a bill of exchange was negotiable and that mere agreements should be binding as contracts. In this way the custom of merchants relating to negotiable instruments and contracts including the sale of goods became part of the common law, and later, by codification, of statute law in the Bills of Exchange Act 1882, and the Sale of Goods Act 1979.

## International conventions

Where the UK has signed up to an international convention, the convention really represents the customary consensus of the states signing up to it in terms of rulings to be given on certain matters such as the carriage of persons and goods by sea and air. These conventions become part of UK law and the common law cannot override them. An example is provided by *Sidhu* v *British Airways plc* [1997] AC 430. The claimants sued the airline for damages at common law for breach of contract and negligence following delays in their flight when the plane they were on landed in Kuwait and the delays arose out of arrests made by the authorities of themselves and other passengers. The House of Lords, in the eventual appeal, rejected their claim. The matter was governed by the Warsaw Convention on International Carriage by Air 1929 which the UK had signed up to and under which only two years were allowed for a

claim against the six years allowed by the common law. The claimants were out of time under the Convention.

## Canon law

A brief mention should be made of the ecclesiastical or church courts since prior to 1857 they dealt not only with offences against church doctrine and morality but also with other matters such as matrimonial causes, legitimacy and the inheritance of property when a person died. Many of the rules laid down by these courts were derived from Roman law and were inherited by the civil courts to which these matters were eventually transferred. In 1970 the civil courts concerned were amalgamated into the Family Division of the High Court (see Chapter 2).

The present position is that the church courts remain to deal with certain matters, e.g. decoration, alteration and use of churches.

Since disciplinary hearings against clergy receive more publicity these days, it is worth noting that the church courts only heard disciplinary matters where the clergy involved were incumbents, i.e. those appointed to livings within the Church of England. Those who hold appointments as priest-in-charge were not covered by these procedures but are subject to a disciplinary hearing before a Bishop under what are called the Canons of the Church of England. There has been reform also even in regard to disciplinary matters affecting incumbents where the Consistory Courts (see below) are replaced by a system of clerical tribunals on the lines of those existing for doctors and lawyers, i.e. domestic tribunals (see p 78).

The court of first instance is that of the diocesan chancellor, called a Consistory Court. He must be a member of the Church of England and is usually a practising barrister. Appeal lies from him to the Court of Arches in the province of Canterbury, and to the Chancery Court of York in the northern province. On matters concerning conduct, there is a further appeal to the Judicial Committee of the Privy Council and on other matters, e.g. the suitability of a Henry Moore altar in a Wren church (*Re St Stephen Walbrook* [1987] 2 All ER 578), there may be an appeal to the Court of Ecclesiastical Cases Reserved. The church courts are not courts of common law and the prerogative orders (see Chapter 3) – which operate as a valuable check on the abuse of power by other courts and tribunals – do not apply to them.

## Legal treatises

One last source remains to be considered – namely, legal treatises. Throughout the centuries great English jurists have written books, some in the nature of legal textbooks, which have helped to shape the law and inform the legal profession.

We have already mentioned Bracton whose *Treatise on the Laws and Customs of England* was written in the thirteenth century and was probably based on the decisions of Martin de Pateshull, who was Archdeacon of Norfolk, Dean of St Paul's and an Itinerant Justice from 1217 to 1229, and on those of William de Raleigh who was the Rector of Bratton Fleming in Devon and an Itinerant Justice from 1228 to 1250.

Sir Edward Coke, who lived from 1552 to 1634, is a celebrated name. His *Institutes* covered many aspects of law. For example, his *First Institute*, published in 1628, was concerned with land law. His *Second Institute*, published in 1642, was concerned with the principal statutes. The *Third Institute*, published in 1644, dealt with criminal law, while the *Fourth Institute*, also

published in 1644, was concerned with the jurisdiction and history of the courts, this work containing bitter attacks on the Court of Chancery. Although at first sight 'Institute' may seem an odd word to use to describe a legal text, it is derived from the Latin *Institutio* which means 'instruct, arrange, make order of'.

During his lifetime Coke occupied the offices of Recorder of London, Solicitor-General, Speaker of the House of Commons, Attorney-General and finally Chief Justice of Common Pleas.

Sir William Blackstone, who lived from 1723 to 1780, published his *Commentaries on the Laws of England* in 1765. These are concerned with various aspects of law and are based on his lectures at Oxford. He was a Judge of the Common Pleas and was also the first Professor of English Law to be appointed in any English university.

In addition to older treatises such as those mentioned above, the works of modern writers, sufficiently eminent in the profession, are sometimes quoted when novel points of law are being argued in the courts.

***Boys* v *Blenkinsop***, 1968 – Textbooks as a source of law (**5**)

2

# THE COURTS OF LAW

The Royal Courts of Westminster developed out of the *Curia Regis* (or the King's Council). The Court of Exchequer was the first court to emerge from the *Curia Regis* and dealt initially with disputes connected with royal revenues. The Court of Common Pleas was set up in the time of Henry II to hear disputes between the King's subjects. The Court of King's Bench was last to emerge and initially was closely associated with the King himself, hearing disputes between subjects and the King.

As the system developed the Court of Chancery was added and there was also a Court of Admiralty. The Court of Probate and the Divorce Court developed from the old ecclesiastical courts which formerly dealt with these matters. Each of these courts had its own jurisdiction, sometimes overlapping and sometimes conflicting. This was particularly true with regard to the common law courts and the Court of Chancery. For example, in *Knight* v *Marquis of Waterford* (1844) 11 Cl & Fin 653 the appellant was told by the House of Lords, after 14 years of litigation in equity, that he had a good case but must begin his action again in a common law court. It is useful to refer at this point to *Wood* v *Scarth* (1858) (see Chapter 12). This case is a further illustration of the delays which resulted from the administration of law and equity in separate courts. Anyway, this was how the English legal system entered the nineteenth century and it was this inheritance that the Victorians set out to rationalise into the form with which we are familiar.

## The Supreme Court of Judicature

In order to rationalise the system, the Supreme Court of Judicature was established. Under the Judicature Acts 1873–75 the High Court was divided into five divisions: Queen's Bench, Common Pleas, Exchequer, Chancery, and Probate, Divorce and Admiralty, the number being reduced to three by an Order in Council in 1881 when the Common Pleas and Exchequer Divisions were merged into the Queen's Bench Division. The Court of Appeal was given jurisdiction over appeals.

### The House of Lords

The House of Lords was not included in the Supreme Court of Judicature by the Judicature Acts because of Parliament's opposition to its then hereditary character. Its jurisdiction as a final court of appeal was established by the Appellate Jurisdiction Act 1876 which also provided the House with trained judges, i.e. Life Peers with legal training. The Judicature Acts 1873–75 were consolidated in the Supreme Court of Judicature (Consolidation) Act 1925.

This Act is now repealed by the Supreme Court Act of 1981, s 1, reaffirming the previous position by providing that the Supreme Court of England and Wales shall consist of the Court of Appeal, the High Court of Justice and the Crown Court, and that the Lord Chancellor shall be the President of the Supreme Court. The Employment Appeal Tribunal is not included, even though it is staffed in part by High Court judges and appeals lie to the Court of Appeal.

The above material will be significantly altered when the relevant sections and Schedules of the Constitutional Reform Act 2005 are brought into force. The reason is that the House of Lords is renamed by that Act as the Supreme Court so that the present sets of courts currently forming the Supreme Court cannot continue under this nomenclature. They will remain as now but be retitled the Senior Courts of England and Wales. These moves cannot be made until 2009 because the new Supreme Court has no place in which to conduct its hearings. The Middlesex Guildhall in Parliament Square has been chosen but needs refurbishment, which is scheduled to be completed by 2009.

It is also worth noting that, as the CRA 2005 comes into force, the Supreme Court Act 1981 will be renamed as the Senior Courts Act 1981.

## The courts today

In recent times far-reaching changes have been made in the structure and jurisdiction of the civil and criminal courts by various reforming statutes. The present system of courts exercising both civil and criminal jurisdiction is set out in Figures 2.1 and 2.2 respectively and the main routes of appeal indicated.

### Administration of the courts

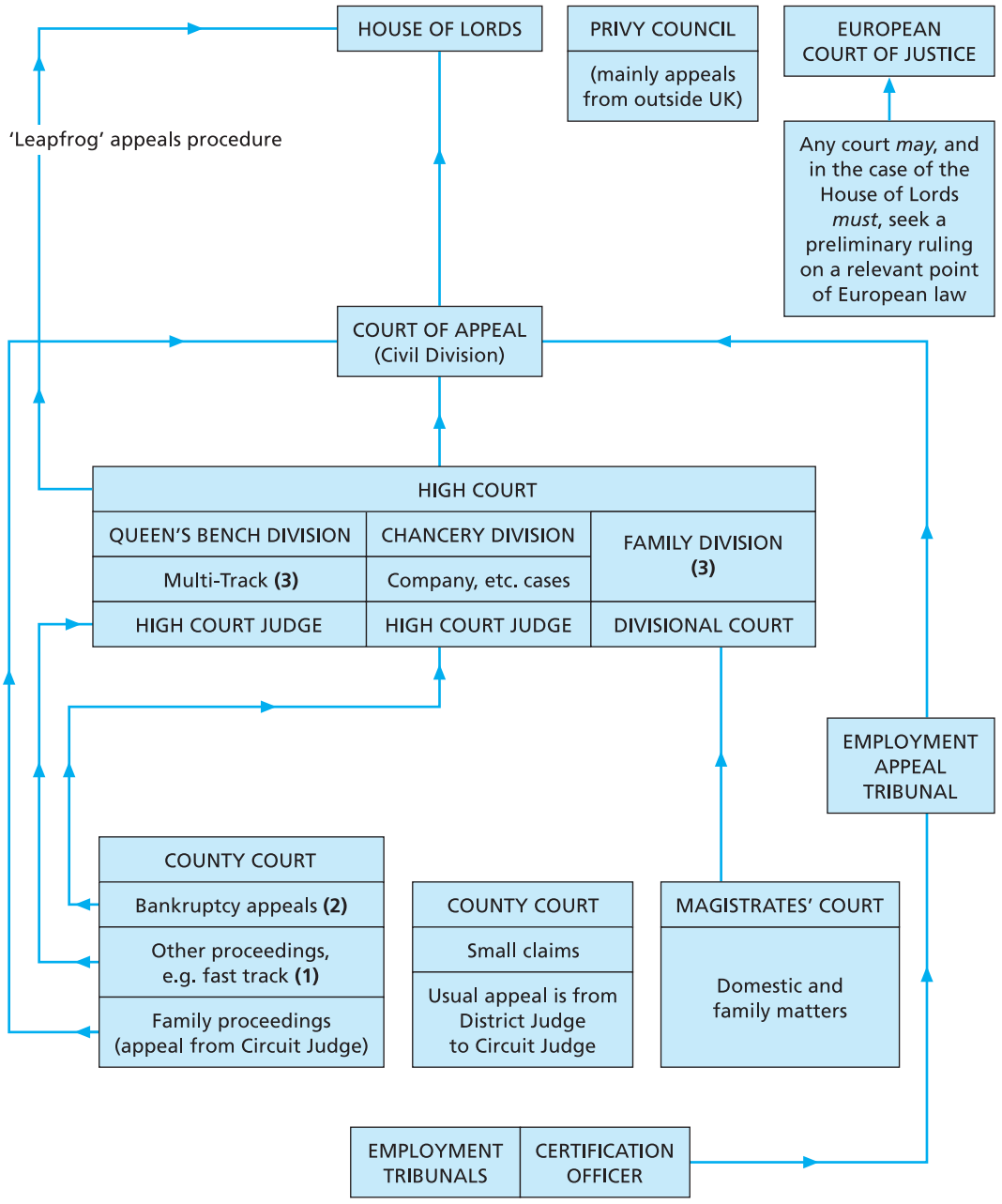
Under s 1 of the Courts Act 2003, the Lord Chancellor is under a statutory duty to secure an efficient and effective administration system and other services such as enforcement services to support the current Supreme Court of England and Wales (i.e. the Court of Appeal, the three Divisions of the High Court and the Crown Court) and also the county courts and magistrates' courts business. The Lord Chancellor chose an executive agency called Her Majesty's Courts Service, which began operating in April 2005. The new system brings all the courts in the current Supreme Court and the county courts and magistrates' courts under one administrative roof.

It is worth noting again that s 59 of the Constitutional Reform Act 2005 (CRA 2005) will, as it comes into force, rename the current Supreme Court of England and Wales as the Senior Courts of England and Wales, the House of Lords being then replaced by the Supreme Court of England and Wales, with the current Law Lords constituting its judiciary (but as new appointments are made this link will not continue).

Section 1 of the Courts Act 2003 continues in force but the statutory duty referred to will, as the CRA 2005 comes into force, rest upon the Secretary of State for Constitutional Affairs in consultation with the Lord Chief Justice, who becomes the head of the judiciary.

## Magistrates' courts

Although, as we shall see, the Crown Court tries the most serious criminal cases (all those in fact which are tried on indictment with a jury), the great bulk of the criminal work of the country is performed in the magistrates' courts.




*Notes*

**1** If heard by a circuit judge.

**2** If heard by a district or circuit judge.

**3** If heard by a High Court judge.

**Figure 2.1 System of courts currently exercising civil jurisdiction**

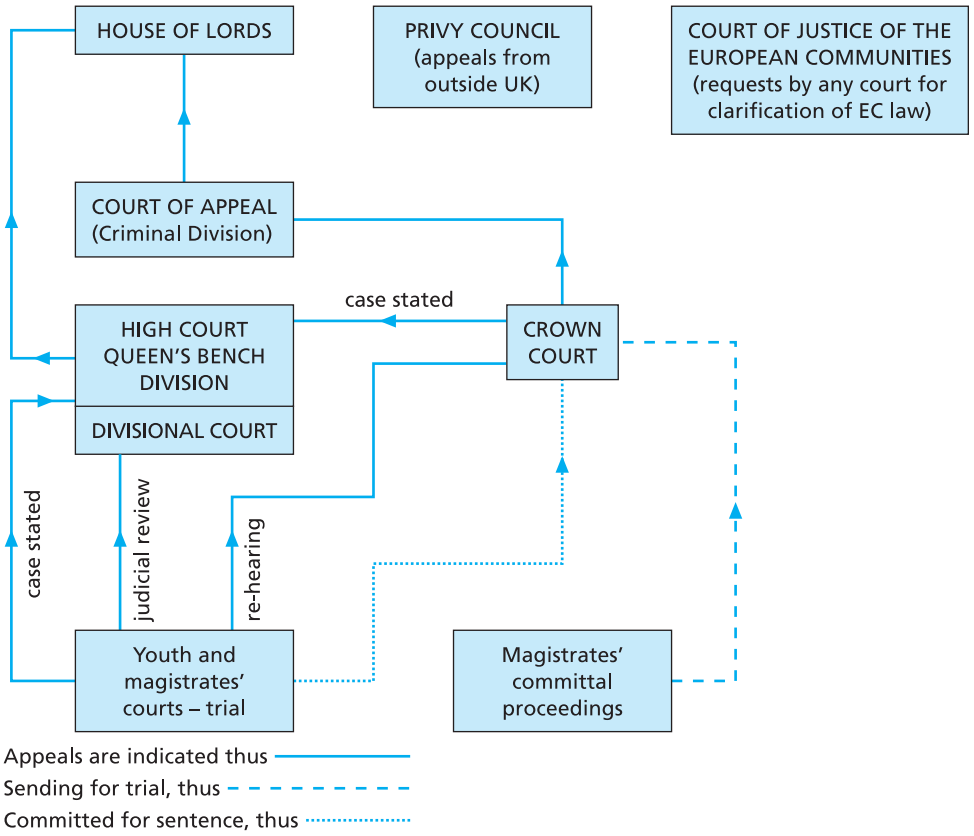



**Figure 2.2 System of courts currently exercising criminal jurisdiction**

## Types of magistrates

Magistrates may be of several kinds as follows:

**(a) Lay magistrates**. These are appointed by the Lord Chancellor on behalf of, and in the name of, the Queen under s 10 of the Courts Act 2003. The Lord Chancellor is required to assign each lay justice to one or more local areas. The Lord Chancellor is currently empowered to make rules regarding the training of magistrates.

Under the CRA 2005, as it comes into force, s 10 of the Courts Act 2003 will continue but the assignment of lay justices becomes a matter for the Lord Chief Justice after consultation with the Lord Chancellor. It is important here to note that s 19 of the CRA 2005 allows the Lord Chancellor by Order to divest himself of functions to another person. Therefore, as the CRA 2005 comes into force, the functions of the Lord Chancellor will be transferred. There are the following options according to Orders made: to transfer mainly to the Lord Chief Justice with the right of consultation with the Lord Chancellor retained; to transfer to the Lord Chief Justice with consultation rights in the Secretary of State; or abolition in favour of the Lord Chief Justice.

**(b) District judges (magistrates' courts) and deputy district judges (magistrates' courts)**. These are full-time magistrates who sit in various areas of the country. They were formerly called stipendiary magistrates. The area to which an appointment is made is entirely a matter for the Lord Chief Justice. From 6 April 2006 they are appointed by the Queen on the recommendation of the Lord Chief Justice and must have a seven-year general advocacy

qualification within the meaning of s 71 of the Courts and Legal Services Act 1990. Appointments have been made, e.g. in the West Midlands, Greater Manchester, Merseyside and in London – in courts such as Bow Street and Tower Bridge. There was a limit on these appointments but this was removed by the Access to Justice Act 1999 with, perhaps, the object of making more appointments in order to reduce the number of courts staffed by lay magistrates.

The Justices of the Peace Act 1997 established a national bench of district judges (magistrates' courts). The authority for appointment is now s 22 of the Courts Act 2003. The national bench is lead by the Senior District Judge (or Chief Magistrate). A district judge is assigned to a local justice area but may be directed by the Department for Constitutional Affairs through the senior district judge to sit in any court in England and Wales as required. A main difference between a district judge (magistrates' court) and a lay justice is that the district judge sits alone in criminal cases. District judges (magistrates' courts) can exercise the jurisdiction of the Crown Court (s 65 Courts Act 2003).

The Judicial Studies Board undertakes the training of district judges and gives initial and continuing training. Some district judges (magistrates' courts) may be designated by the senior district judge to deal with certain kinds of specialist work, such as youth court cases, extradition and applications for further detention under terrorism legislation. The judges are addressed as 'Sir' or 'Madam'.

## Justices' clerks and legal advisers

Section 27 of the Courts Act 2003 (as amended by Sch 4 to the CRA 2005) provides for a justices' clerk and assistant justices' clerks in magistrates' courts. These individuals must have had a right of audience in relation to all proceedings in a magistrates' court for five years, or be a barrister or solicitor who has served for not less than five years as an assistant to a justices' clerk or has previously been a justices' clerk.

The justices' clerk manages a team of advisers who may be engaged by contract under s 2(4) of the Courts Act 2003. Powers are delegated to the legal advisers to give legal advice to magistrates: assistant clerks may also be engaged by contract under s 2(4). Most of the advisers are barristers or solicitors. Magistrates are not bound to accept the advice given. However, it is accepted practice that they should do so, otherwise the proceedings may be appealed.

Legal advice should be given in open court. Advice given in the justices' retiring room which has not been discussed in open court is given on a provisional basis only. The advice should be repeated in open court so that the parties may make representations.

There has in the past been much case law relating to situations where clerks have given legal advice in the retiring room and not in open court and on appeal the court has said that, in the absence of any indication or suspicion that the clerk had taken part in making the decision, the conviction must stand. However, it is doubtful whether such convictions would now be allowed to stand. The Human Rights Act 1998 has impacted on this area and transparency of communications between magistrates and their clerks and advisers is stressed in current Practice Directions, which are rules governing particular aspects of court procedure. Certainly, consultations out of court must be limited so that Art 6 of the European Convention on Human Rights (the right to a fair trial) is observed.

Justices' clerks can perform duties that are authorised to be done before one magistrate. These include issue of summons, allowing adjournment of trials where the parties agree, and granting criminal defence representation orders. A justices' clerk may delegate these functions to a legal adviser. This means that the clerk or adviser can consider the above matters while the magistrates deal with other matters.

## Administration of magistrates' courts

The Courts Act 2003 unifies the Supreme Court *as it is currently constituted*, the county courts and the magistrates' courts into one system called Her Majesty's Court Service. The same Act makes provision for the practice and procedure in those courts and for accommodation for the court house and offices and staff. An important provision of the 2003 Act is to set up Courts Boards to be concerned with Crown Courts, county courts and magistrates' courts based on police authority areas. The members of these Boards are:

- a judge, e.g. a district or circuit judge;
- two lay justices from the area of the Board;
- at least two members being persons who have knowledge and experience of the work of courts in the area of the Board;
- at least two members who are representative of people living in the area of the Board.

The Board will keep under review the suitability or otherwise of the provision being made for local justice and consider, for example, the reallocation of court houses.

Section 6 of the Courts Act 2003 abolishes the former magistrates' courts, committees which used to carry out administrative functions.

## Classification of criminal offences

Before discussing the powers of magistrates in regard to criminal prosecutions, it is necessary to classify criminal offences for procedural purposes. Proceedings are regulated by the Magistrates' Courts Act 1980 in the main. Criminal jurisdiction falls into three classes of offence listed in the Criminal Law Act 1977 (as amended) as:

(*a*) offences triable only on indictment before a judge and jury;
(*b*) offences triable only summarily by the magistrates;
(*c*) offences triable either way.

### *Some examples*

Examples of crimes which fall into the relevant categories appear below.

***Offences triable only summarily***

- driving without insurance;
- careless or inconsiderate driving;
- speeding;
- being drunk and disorderly in a public place.

***Offences triable either way***

- theft;
- burglary without violence or threat to a person;
- aggravated vehicle taking (this occurs, e.g. where after the taking a person is injured by the driving);
- assault occasioning actual bodily harm;
- dangerous driving.

***Offences triable only on indictment***

- murder and manslaughter;
- robbery, which involves a taking by force;
- rape.