1 Introducing public law

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Introduction

Welcome to the **Public law** module guide. Public law is a fascinating and challenging subject area which will give you the chance to engage with fundamental issues affecting how law works in the context of democratic government in the United Kingdom. In this chapter we will consider how public law differs from other law subjects as well as looking briefly at the structure and content of the chapters of the module guide.

Finally, we will briefly review study skills for public law and the structure of the examination.

ESSENTIAL READING

- **Le Sueur, Sunkin and Murkens, Part 1: Constitutional fundamentals (see Section 1.3 'Textbooks', below).**

1.1 How public law differs from other law subjects

In the course of studying law modules students will normally approach their studies on the basis of dealing with one topic at a time. After achieving some understanding of a topic, they will move on to the next one, only returning to it at the revision stage.

When studying public law, however, it is very important to develop as soon as possible a sense of how the different elements fit together. Topics such as the rule of law and parliamentary supremacy will be relevant in a variety of different contexts as a wide range of public law topics are studied.

The political dimension of public law will often be a challenge for students. International students may feel that they lack an understanding of British politics and political institutions but this can be remedied by making use of newspaper websites such as the *Guardian*, *The Times* and the *Daily Telegraph*, as well as the BBC website. Inevitably, students will find that their studies of public law make them more sceptical of journalists' interpretations of the legal implications of politicians' actions.

1.2 Content of individual chapters of the module guide

Each chapter will contain an introduction setting the scene. Brief descriptions of the law will follow, accompanied by a variety of activities. The activities will usually require you to follow links to a variety of different websites, including:

- www.parliament.uk
- www.legislation.gov.uk
- www.judiciary.gov.uk
- www.gov.uk/government/organisations/cabinet-office.

In addition, reading case reports and other material on LexisLibrary or Westlaw will be important.

In response to the material on the internet, a variety of questions will be given. Some of them will be straightforward factual questions to which there is only one correct answer. Other questions will ask you to consider your own **personal** responses to the material and the wider issues discussed. At the end of the module guide answers are provided to the activities. In response to some questions, the answer will state 'Students will form their own views'. The author may also include his own personal views, but the intention is to challenge you to respond 'But I think…because…'.

Audio presentations are also referred to within the chapters and can be listened to on the Virtual Learning Environment (VLE), or the scripts can be read instead.

The weblinks provided are subject to change. If a link is no longer working please use the title or other information given to search for its new address.

1.3 Textbooks

Core textbook

- **Le Sueur, A., M. Sunkin and J.E.K. Murkens *Public law: text, cases and materials*. (Oxford: Oxford University Press, 2016) third edition [ISBN 9780198735380].**

Statute book

- ***Core statutes public law & civil liberties 2017-18* (Palgrave Macmillan).**

Further reading

- **Bogdanor, V. *The new British constitution*. (Oxford: Hart Publishing, 2009) [ISBN 9781841136714].**

- **Brazier, R. *Constitutional reform: reshaping the British political system*. (Oxford: Oxford University Press, 2008) third edition [ISBN 9780199233045].**
- **Jowell, J., D. Oliver and C. O'Cinneide (eds) *The changing constitution*. (Oxford: Oxford University Press, 2015) eighth edition [ISBN 9780198709824]. This book contains up-to-date essays on many of the topics covered on this module.**
- **King, A. *The British constitution*. (Oxford: Oxford University Press, 2009) [ISBN 9780199576982].**
- **Leyland, P. *The constitution of the United Kingdom: a contextual analysis*. (Oxford: Hart Publishing, 2016) third edition [ISBN 9781849469074].**
- **Syrett, K. *The foundations of public law*. (Basingstoke: Palgrave Macmillan, 2014) second edition [ISBN 9781137362674].**

There are several introductory books, shorter than textbooks, which seek to give an overview of constitutional law. These include:

- **Loughlin, M. *The British constitution: a very short introduction*. (Oxford: Oxford University Press, 2013) [ISBN 9780199697694].**
- **Tomkins, A. *Public law*. (Oxford: Clarendon Press, 2003) [ISBN 9780199260775].**
- **Barendt, E. *An introduction to constitutional law*. (Oxford: Oxford University Press, 1998) [ISBN 9780198762546]. This provides a clear and succinct account of some of the principles underlying the UK constitution. It does, however, precede the substantial constitutional changes that have taken place over the last 12 years or so.**

For an introduction to the history of the UK constitution, try one of these:

- **Lyon, A. *Constitutional history of the United Kingdom*. (Abingdon: Routledge, 2016) second edition [ISBN 9781138910676].**
- **Wicks, E. *The evolution of a constitution: eight key moments in British constitutional history*. (Oxford: Hart Publishing, 2006) [ISBN 9781841134185].**

There are also some references to texts not listed here in the Further reading.

Detailed reading references in this module guide refer to the editions of the textbooks listed above. New editions of one or more of these textbooks may have been published by the time you study this module. You can use a more recent edition of any of the books; follow the detailed chapter and section headings and the index to identify relevant readings. Also check the VLE regularly for updated guidance on readings.

1.4 Journals

You will often be referred to articles in journals. These are generally available online. The main UK journal in the field is *Public Law*, published four times a year since 1956. This is available electronically via Westlaw. The general UK academic law journals, such as the *Cambridge Law Journal*, *Law Quarterly Review*, *Modern Law Review* and the *Oxford Journal of Legal Studies*, also often have articles of interest. The journal *Parliamentary Affairs* is also a useful source for some topics — though not written primarily by or for lawyers (please note this journal is not available in the Online Library). There is also a recently launched journal, the *International Journal of Constitutional Law*, devoted to international and comparative constitutional law. Here you will find articles and comments on developments pertaining to many different constitutional systems including that of the European Union as well as its Member States (which of course includes the UK). The leading specialist journals pertaining to EU law are the *Common Market Law Review*, the *European Law Review* (not currently available in the Online Library) and the *European Law Journal*.

Please note that as long as you read the Essential reading you are then free to read around the subject area in any text, paper or online resource. You will need to support your learning by reading as widely as possible and by thinking about how these principles apply in the real world. To help you read extensively you have the VLE, Online Library and other legal resources.

1.5 Online study resources

In addition to the module guide and the Essential reading, it is crucial that you take advantage of the study resources that are available online for this module, including the VLE and the Online Library.

1.6 Assessment

Important: the information and advice given here are based on the examination structure for the session 2017/18. We strongly advise you to always check both the current Regulations for relevant information about the examination, and the VLE. You should also carefully check the rubric/instructions on the paper you actually sit and follow those instructions.

The examination usually contains eight questions. Many of these are essay questions, which require you to show knowledge of the law and a critical approach to the law.

Others are problem questions, which require you to apply the law to a given factual situation.

To cope with problem questions successfully, you must be able to see what issues arise on the facts and advise on them accurately and succinctly, referring always to the sources of law upon which you rely for your conclusions. The law may well be uncertain. If so, you must explain why, and then choose what you believe to be the decision most likely to be made by the court, giving reasons for your choice. In general you must be aware of major proposals for reform of the law. You must also show a capacity for independent thought. It follows that during your studies you should:

- think for yourself about the persuasiveness of the arguments put forward in what you read
- 'read around' the topic
- discuss problems with your tutor or lecturer
- discuss problems with fellow students.

Notes

2 The UK constitution and its core institutions

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Introduction

'What is the constitution?' A US citizen might answer 'It's a document in Washington DC guaranteeing our liberties.' The importance of this physical document to the history and current sense of identity of the USA is set out on the following website: www.archives.gov/exhibits/charters/constitution_transcript.html

Most other nations also have a document labelled 'the constitution' which has some kind of a special status over and above the respect owed to ordinary laws.

A British citizen, on the other hand, will not find it so easy to reply. Although the Magna Carta of 1215 might be pointed to as **one** source of British liberties, there is no single document labelled the 'British Constitution'.

This does not mean, of course, that functions of a written 'constitution' do not need to have equivalents in a modern Western democracy such as the United Kingdom. In fact these functions are described in a variety of sources, including 'constitutional' Acts of Parliament and constitutional 'conventions'.

In this chapter we will first look at some classifications of different types of constitution. When reading around this area, it is important to bear in mind that some of these classifications relate to the form that a constitution takes rather than to its content.

We will then start to examine features of the UK constitution, commonly referred to as 'the Westminster model' and the key participants.

Essential reading

- **Le Sueur, Sunkin and Murkens, Chapter 1: The constitutional rulebook.**

Further reading

- **Bogdanor, V. *The new British constitution*, Chapter 1: A peculiar constitution.**
- **King, A. *The British constitution*, Chapter 1: What is a constitution?**
- **Leyland, P. *The constitution of the United Kingdom*, Chapter 1: UK constitution.**
- **Loughlin, M. *The British constitution*, Chapter 1: What constitution?**
- **Syrett, K. *The foundations of public law*, Chapter 1: An introduction to the study of public law.**
- **Tomkins, A. *Public law*, Chapter 1: On constitutions.**

2.1 Classifications

As we examine the traditional ways in which constitutions have been distinguished, it is very important to remember that there is always a risk of over-simplification if we do not recognise the complexity of the historically constructed and often untidy institutions which they describe.

You might find it of interest to browse through a few different constitutions to gain an overall impression of the similarities and differences. The following weblink to the 'Constitute project' provides an easy means to do so: www.constituteproject.org/

2.1.1 Written and unwritten

A written constitution represents an attempt by politicians and statesmen to **codify** all the important laws and rules relating to the way in which the state will be governed. The aspiration is usually to include everything which is important in a single document. Although historically the writers of constitutions have derived ideas from other constitutions, the French and US constitutions being particularly influential internationally, there is no universal blueprint for what should be included. Inevitably, differing decisions will be made by different statesmen as to what is sufficiently 'constitutional' to be included.

The lack of a single overarching constitutional document for the United Kingdom perhaps reflects its unique history in which there was no single moment of national political consensus when a serious attempt was made to set out **all** the constitutional arrangements in a coherent framework. The nearest attempt was made in the 17th century after the civil wars between the Royalists and Parliament. During the Protectorate when there was no king, Oliver Cromwell drafted his 'Instrument of Government' which set out how England, Wales, Scotland and Ireland were to be ruled. However, this document was abandoned and not replaced when Charles II was 'restored' to the throne after Cromwell's death.

2.1.2 Rigid and flexible

The importance of the subject matter of a constitution means that most people will see the value in its stability. Countries where there is constant conflict between elected politicians and judges amid uncertainty about the rules governing their relationships are not usually happy ones. Nonetheless, from time to time, political and social changes may mean that the existing constitutional arrangements have to change and adapt.

The process of changing the constitution may be very difficult in a **rigid** constitution, such as the USA, or relatively straightforward in a **flexible** constitution, such as the United Kingdom. Consider the method by which the United Kingdom shared its political sovereignty with other European states when it entered the European Community (now the European Union) in 1973. A simple Act of Parliament was passed (i.e. the European Communities Act 1972) and, although a referendum was subsequently held to endorse the decision, there was no constitutional **requirement** to hold one. By way of comparison, when the Irish government wished to change the (written) Irish constitution to permit divorce in 1995, it was **obliged** to hold a referendum. Remember, though, both constitutional changes were politically very difficult for the Irish and British governments.

2.1.3 Republican and monarchical

The United Kingdom is often described as a constitutional monarchy. Its head of state is an unelected king or queen who 'reigns' over his or her 'subjects'. Although the presence of the current monarch, Elizabeth II, is still pervasive on coins, stamps and letterboxes, the constitutional significance of her status is much diminished. Lord Bingham has stated:

> The political power of the monarch has diminished to vanishing point, since the personal directions which remain are very limited, must be exercised according to clearly-understood principles and cannot be regarded as an exercise of independent power in any ordinary sense.

The formal powers of the monarch, referred to as **prerogative powers,** are now largely exercised by the head of the government, the Prime Minister. We will discuss the significance of the Crown, representing the government, and the prerogative powers in more detail in Chapter 7.

There are a variety of republican constitutional models. One clear distinction is between those states that give the elected head of state (usually known as the president) significant political power, such as France and the USA, and those whose presidents are meant to represent the nation as a whole and be above the political fray, for example Germany.

2.1.4 Unitary and federal

The political and governmental arrangements of a nation reflect many factors including, of course, its history. The geography of the state is also often significant. States which have a very large land mass with diffuse centres of population have been compelled by reasons of practicality to adopt systems of government where many aspects of decision making are divided among the legislatures of provincial or state assemblies or parliaments. Governmental functions that are seen as truly national, including foreign affairs, are exercised by a national legislature. Such systems of government are known as **federal**, with Canada and the USA being obvious examples. Political and constitutional conflict between federal legislatures and provincial or state governments are very common in many federal countries.

In many (though not all) smaller countries, government from the centre is accepted more readily, with much weaker local government. Such political systems are referred to as **unitary**. Ireland is an example.

The United Kingdom has operated for centuries as a state with many features of a unitary constitution. The UK Parliament in Westminster, London, has legislated for the whole of the United Kingdom, although it has always recognised the distinctiveness of Scotland, in particular, through various conventions. Following the introduction of **devolution**, granting political power to elected assemblies in Wales and Northern Ireland and an elected Scottish Parliament, the unitary aspects of the UK constitutional model have been diminished. It is now more appropriate to describe it as a 'multilayered' form of government.

On 18 September 2014 a referendum was held in Scotland on the question of whether Scotland should become an independent country. In this referendum the majority voted against independence. However, had this resulted in a majority vote in favour of independence, the structure of the UK would have been subject to fundamental constitutional and structural change.

We will discuss devolution in more detail in Chapter 13.

Further reading on UK constitutional reform:

- **Bogdanor, V., T. Khaitan and S. Vogenauer 'Should Britain have a written constitution?' (2007) 78 *The Political Quarterly* 499–517.**
- **Gordon, R. *Repairing British politics: a blueprint for constitutional change*. (Oxford: Hart Publishing, 2010) [ISBN 9781849460491].**

2.2 Key participants in the UK constitution

Consider the following diagram:

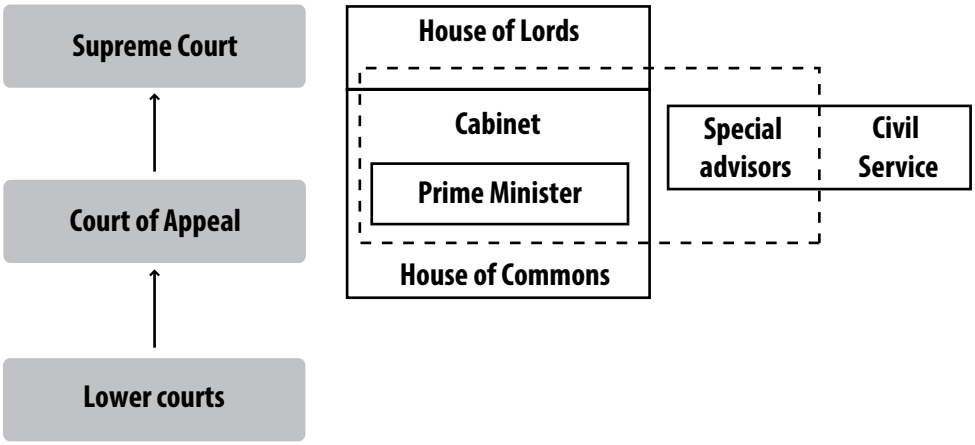

Figure 2.1

The structure of the court system is fairly orthodox when compared to legal systems in other jurisdictions. The Supreme Court is at the apex of the appeal system and the progression of a case from the lower courts to the Supreme Court via the Court of Appeal seems logical and coherent.

When we examine Parliament, however, we have some curious features. The head of government, the Prime Minister, must (by constitutional convention) be a member of the 'lower' House, the House of Commons. The cabinet is drawn from both the House of Commons and the House of Lords (i.e. the upper House) and the Prime Minister's personal powers are derived largely from the historical prerogative powers given to the monarch.

Alongside the cabinet and government in the diagram we can see the civil service. An important aspect of government is that the ministers who form the government need help to achieve their objectives. Unlike in some countries, such as the USA, where there is a convention that senior civil servants are replaced when a new government is formed, the traditional approach in the United Kingdom has been for senior civil servants to remain in post. The neutrality of the civil service has been questioned in recent years in the light of the growing importance of politically partisan 'special advisers', whose roles have sometimes brought them into conflict with professional civil servants.

2.3 The 'Westminster model'

There are a number of key features that have been identified in the system of government of the United Kingdom.

- The government is largely drawn from the 'lower' House of Parliament, the House of Commons.
- Parliament is the apex of the system of government and has supreme law-making power, unchecked by a constitutional court.
- The ministers in the government are effectively held in check by systems of 'accountability' which apply not only during elections but in between them as well.

This simple description has, inevitably, been challenged on the grounds that it describes an ideal that has never existed rather than the more fluid and untidy reality of government in 21st-century Britain. We will now consider some aspects of how the constitution works in practice and compare them to the ideal.

2.3.1 Relationship between government and Parliament

In theory the government is held in check by Parliament, in particular the House of Commons. There are various aspects by which the degree of control of government by Parliament and of Parliament by government can be measured. One aspect is the extent to which Acts of Parliament can be passed without the support of the government. Parliamentary procedures provide limited opportunities for 'backbench' (i.e. non-ministers) MPs and members of the House of Lords to introduce Private Members' Bills on topics of their own choosing. In theory this should be a great opportunity for law making to be carried out in less fashionable areas of law with greater consensus between politicians of all parties. Nonetheless, the hard reality is that very few Private Members' Bills actually become statutes. In relation to public bills in the 2013–14 parliamentary session, for example, a mere five Private Members' Bills completed the parliamentary legislative process, compared to a total of 30 Acts of Parliament. In the 2014–15 parliamentary session, 10 Private Members' Bills received Royal Assent out of a total of 36 public bills which became statutes.

ACTIVITY 2.1

Watch the podcast about Private Members' Bills at:

www.parliament.uk/about/podcasts/theworkofparliament/privatemembersbills/ and answer the following questions.

a. **What day of the week are Private Members' Bills considered by Parliament?**
b. **How many days are allocated in a parliamentary session to Private Members' Bills?**
c. **How many Private Members' Bills are selected in the ballot?**
d. **What was the subject matter of Cheryl Gillan's Bill?**
e. **How can an opponent of a Private Member's Bill 'kill' it?**
f. **Is there any method of preventing a Private Member's Bill being 'killed'?**
g. **How did David Mundell make his decision on what he should include in his Private Member's Bill?**
h. **Which government departments did he consult and what was their response?**
i. **Statistically, what proportion of Private Members' Bills become law?**
j. **Do you think that the system of Private Members' Bills should be improved and, if so, how?**

ACTIVITY 2.2

Find the ballot results for Private Members' Bills for the 2015–16 Parliamentary session via the Parliament website and answer the following questions:

a. **What is the name of the MP who was drawn first in the ballot?**
b. **Find at least one of the Private Members' Ballot Bills which became law in the previous (i.e. 2014–15) parliamentary session.**

ACTIVITY 2.3

Find the ballot results for Private Members' Bills for the 2016–17 Parliamentary session via the Parliament website and answer the following questions:

a. **What is the name of the MP who was drawn first in the ballot?**
b. **What was the subject matter of the Private Members' Bill introduced by this MP?**

Another method by which government departments and ministers can be held in check by Parliament is the use of departmental select committees. Select committees are made up of backbench MPs and are headed by a chair who is elected by a secret ballot of the House of Commons. The importance of the secret ballot lies in the fact that it prevents the government from using government whips to influence more MPs to choose chairs who are more malleable.

Activity 2.4

Watch the film 'Select committees in the House of Commons. Asking the questions you want answered', on the Parliament website: www.parliament.uk/about/podcasts/theworkofparliament/select-committees-in-the-house-of-commons/

Compare this description to the blogpost 'The House of Commons' Select Committees are now more independent of government. But are they any better informed?' (Dunleavy, P. and C. Gilson, 15 July 2010): http://blogs.lse.ac.uk/politicsandpolicy/the-house-of-commons%E2%80%99-select-committees-are-now-more-independent-of-government-but-are-they-any-better-informed/ and answer the following questions:

a. **What are the factors that influence the topics which select committees investigate?**

b. **What reforms have been introduced to deal with the problem of MPs not attending their select committees?**

c. **How valid do you think Dunleavy and Gilson's criticisms of the methods of information gathering by select committees are?**

2.3.2 Lack of constraint by a constitutional court

Although the United Kingdom now has a Supreme Court, it is inaccurate to assume that it has a similar function to the US Supreme Court, which has an overt role as a guardian of the US constitution. Nonetheless, the Supreme Court (and its predecessor, the House of Lords) has made a number of important decisions that have caused considerable frustration to government ministers and, arguably, imposed constraints on the will of Parliament. The Court of Justice of the European Union has enforced EU law in the United Kingdom and the European Court of Human Rights (ECtHR) has made a number of very controversial decisions concerning the civil liberties of suspected terrorists. The decision in *Hirst* v *United Kingdom* (2005) by the ECtHR that s.3 of the Representation of the People Act 1973, which imposes a complete ban on voting by prisoners, breached the European Convention on Human Rights (ECHR) has caused particular controversy among MPs and government ministers.

2.3.3 Delegated legislation

Delegated legislation, usually in the form of rules, regulations and orders (collectively described as 'statutory instruments'), makes up an increasingly large proportion of UK law. The scale of this law making can be seen at: www.legislation.gov.uk, where the 'UK Statutory Instruments' section indicates that 2,059 statutory instruments were created in 2015 and 3,486 in 2014. This compares with only 37 Public General Acts in 2015 and 30 in 2014.

Although a large proportion of statutory instruments concern temporary road traffic closures of minimal public interest to those not stuck in resulting traffic jams, a significant number deal with important detailed areas of law such as welfare benefits, environmental regulation, etc. Delegated legislation does not pass through the parliamentary stages undergone by Acts of Parliament. Instead most statutory instruments are created by ministers (and usually drafted by their civil servants) who have been given this law-making power by Acts of Parliament.

Parliamentary scrutiny of delegated legislation is, as a result, fairly minimal. Some statutory instruments must be approved by both Houses under the **affirmative procedure** and others may be annulled by a resolution of either House under the **negative procedure**, but two-thirds are not examined by MPs or Lords at all. We will examine UK delegated legislation in more detail in Chapter 9.

2.3.4 Prime ministerial government instead of cabinet government?

The focus of media discussion of politics in the United Kingdom tends to be on personalities. The greatest attention is often on the Prime Minister and his or her

decisions about how the nation should be governed. Recent Prime Ministers, such as Margaret Thatcher and Tony Blair, were such strong personalities that their personal political power tended to overshadow that of their cabinet colleagues. Nonetheless, both of them were constrained in important ways by the need to retain support from the ministers in their cabinets.

Although the Prime Minister, currently Theresa May, is now leading a (single-party) Conservative government, between 2010 and 2015 her predecessor, David Cameron, was Prime Minister of the Conservative/Liberal Democrat coalition government. He thus had to work with cabinet colleagues who had significantly different politics from him. This meant that a more consensual and collegiate approach was adopted, in which the Prime Minister worked closely with the Liberal Democrat Deputy Prime Minister, Nick Clegg. However, as the 2015 general election drew closer, it arguably became politically advantageous for David Cameron to emphasise the areas of policy in which he had different views from his Liberal Democrat cabinet colleagues.

2.3.5 Membership of the European Union

Since the United Kingdom joined the European Economic Community (the predecessor of the European Union) in 1973, there has been a series of treaties which have contained measures integrating decision making and legislation into European law. We will discuss EU law and its impact on UK constitutional law in Chapters 11 and 12, but it is worth noting at this stage that the introduction of majority voting by member states in some areas of policy, rather than a requirement of unanimity, is a particular challenge to the Westminster model.

2.4 Reforming the Westminster model

Despite the problems with the Westminster model, which we have outlined above, many MPs, ministers and Lords continue to be intellectually and even emotionally attached to it. A number of steps have been taken to improve the effectiveness of law making and debate in and around Parliament. Ministers are increasingly expected to be accountable for their decisions. Note the following innovations.

- Debates on topics selected by backbench MPs: Debates may now be heard in Westminster Hall, a building adjoining the Houses of Parliament, as well as in Parliament itself. The Backbench Business Committee, which was created in 2010, has the power to allocate a limited amount of parliamentary time for debates on topics selected by backbench MPs. Such debates are usually on topical issues and should attract a reasonable amount of interest from MPs.
- Draft Bills: In recent years judges and other commentators have criticised the quality of the drafting of controversial Acts of Parliament. In order to identify problems with legislation at an early stage, the government will now publish some draft Bills to allow more time for comments and improvements. The draft Bills will be examined by select committees from either the House of Commons or House of Lords. See www.parliament.uk/about/how/laws/draft/

2.5 Direct democracy

Underpinning the idea of direct democracy is the belief that law making will have greater acceptability to the voters if they have a direct say in what laws will be made and their content. This is clearly a significant challenge to the Westminster model which rests on the assumption that law is best made by **representatives** of the people rather than by the people themselves. There are clearly difficulties with this approach: is it realistic to expect most voters to engage with the complexity of many legislative issues? Will populist campaign groups distort the debate and drown out opposing arguments?

Several methods of direct democracy have been used in the United Kingdom.

2.5.1 Referendums

The ideal form of referendum is a straightforward question to which there are two possible answers – 'yes' or 'no'. Not all referendum questions are as succinct. Consider the following examples:

'Do you think the United Kingdom should stay in the European Community?'

- The answer in 1975 was 'yes'.

'I agree/do not agree that there should be a Scottish Parliament' and 'I agree/do not agree that the Scottish Parliament should have tax-varying powers'

- The answer from Scottish voters in 1997 was agreement to both propositions.

More recently, the response of voters to referendum questions has often been negative. Note the decisive rejection of the following question in 2011:

- 'At present, the UK uses the "first past the post" system to elect MPs to the House of Commons. Should the "alternative vote" system be used instead?'

In June 2016, the UK voted in a referendum on continued UK membership of the EU. The question was:

'Should the United Kingdom remain a member of the European Union or leave the European Union?'

The other recent use of a referendum in the UK was not UK-wide (unlike the AV and EU referendums) but confined to voters in Scotland – on the question of Scottish independence.

Activity 2.5

Read the House of Lords select committee 12th Report of session 2009–10 'Referendums in the United Kingdom' (HL paper 99) at: www.publications.parliament.uk/pa/ld200910/ldselect/ldconst/99/99.pdf and answer the following questions.

a. **Identify three suggested advantages of referendums. Which of your chosen three advantages do you think is the strongest argument in favour and why?**

b. **Identify three suggested disadvantages of referendums. Which of your chosen three disadvantages do you think is the strongest argument against and why?**

2.5.2 Other methods of direct democracy

A number of other methods of engaging more directly with voters outside elections have been used in the United Kingdom.

E-petitions

See www.parliament.uk/business/committees/committees-a-z/commons-select/backbench-business-committee/e-petitions-/ for a diagram showing how the House of Commons Backbench Business Committee deals with e-petitions. Note how there is a requirement that at least one MP is prepared to support a debate on the topic of an e-petition.

Activity 2.6

Go to the e-petitions website at: https://petition.parliament.uk/ and identify which e-petitions are currently trending. Do you think they are raising important and neglected issues for Parliament to consider?

Social media

Parliament has started to engage with social media such as Twitter, Facebook, etc. See: www.parliament.uk/get-involved/have-your-say/online-discussion-rules/

2.6 Summary

1. Constitutions can be classified in different ways, including federal or unitary, republican or monarchical. They may be rigid or flexible.
2. In contrast to most democratic countries, the United Kingdom is often described as having an unwritten constitution. There is no single document labelled the 'UK Constitution', but a better description is that it is uncodified, since most of the rules and conventions are written down in various Acts of Parliament and descriptions of conventions.
3. The 'Westminster model' of government is still considered by many parliamentarians (though not by many legal commentators) to represent the form of government of the United Kingdom. It features government drawn from the majority party or parties in the House of Commons and House of Lords. Parliament is the unchallenged apex of the system of government, without any limitations imposed by a constitutional court, and ministers are held accountable to Parliament.
4. The relationship between Parliament and the government can be viewed in various ways, including the extent to which individual MPs and Lords can create law through Private Members' Bills.
5. Select committees have acquired greater powers to question and challenge government ministers, but their effectiveness is still limited.
6. The relationship between the courts and government has been strained in recent years over various issues, including the effect of decisions of the Court of Justice of the European Union and the ECtHR. The UK Supreme Court does not, however, fulfil the functions of a constitutional court.
7. Control by Parliament over delegated legislation (statutory instruments) is very limited, although the affirmative and negative procedures are sometimes used.
8. The ability of the Prime Minister to impose his or her will on the government varies depending on the personalities involved, and,occasionally, as in 2010–15, in the light of the constraints of coalition government.
9. Incremental reforms to the Westminster model include providing a mechanism for backbench MPs to instigate debates. The use of draft Bills enables earlier scrutiny by MPs and other interested parties.
10. Direct democracy poses challenges to the Westminster model. Referendums, in particular, detract from the representative approach to law making and may lead to bad policy making when difficult decisions are considered in isolation.
11. Other methods of direct democracy include e-petitions and social media.

3 Parliamentary supremacy

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Introduction

In this chapter we consider a crucial, if controversial, feature of the UK constitution: parliamentary supremacy. We will examine the traditional approach, favoured by legal writers and politicians known as 'political constitutionalists', which treats the political process and Parliament as having supreme power and legitimacy. Ultimately, according to this view, the courts will follow the expressed will of Parliament regardless of the content of the statute.

We will then consider the legal writers, including some senior judges, who are described as 'legal constitutionalists'. Their approach is to argue that the judiciary should have and, indeed, does have residual powers to strike out Acts of Parliament which are contrary to fundamental rights or constitutional principles. Issues which are relevant to the arguments of the legal constitutionalists include the Parliament Acts 1911 and 1949, the Act of Union with Scotland and the status of EU law in the United Kingdom as well as the Human Rights Act 1998 (HRA).

Essential reading

- **Le Sueur, Sunkin and Murkens, Chapter 2: The legislative supremacy of the UK parliament.**

Further reading

- **Gordon, M. 'The conceptual foundations of parliamentary sovereignty: reconsidering Jennings and Wade' (2009) *Public Law* 519.**
- **Jowell, J. 'Parliamentary sovereignty under the new constitutional hypothesis' (2006) *Public Law* 562.**
- **Laws, J. 'Constitutional guarantees' (2008) 29 *Statute Law Review* 1.**
- **Loughlin, M. *The British constitution*, Chapter 2: Writing the constitution.**

3.1 The traditional view

The legal writer Dicey defined parliamentary supremacy as follows:

> Neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make and unmake any law whatsoever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.
> (Dicey, A.V. *Introduction to the study of the law of the constitution*. (Indianapolis, IN: Liberty Fund, 1982) 8th revised edition [ISBN 9780865970038])

Parliament, as understood by Dicey, meant the House of Commons, the House of Lords and the monarch collectively. His statement makes two propositions: first, all Acts of Parliament, whatever their purpose, will be obeyed by the courts; and secondly, no person or body can override an Act of Parliament.

The obvious question which follows from Dicey's assertion is: what is the legal basis of this power of parliamentary supremacy, given that (as explained in Chapter 2) there is no single document called 'The English Constitution'? Wade has argued:

> The rule is above and beyond the reach of statute...because it is itself the source of the authority of statute...The rule of judicial obedience is in one sense a rule of common law, but in another sense – which applies to no other rule of common law – it is the ultimate political fact upon which the whole system of legislation hangs. Legislation owes its authority to the rule: the rule does not owe its authority to legislation.
> (Wade, H.W.R. 'The basis of legal sovereignty' (1955) 13 *CLJ* 172)

There are numerous instances of judicial decisions where the courts have affirmed the supremacy of Acts of Parliament. In *Madzimbamuto* v *Lardner-Burke* (1969), where the Southern Rhodesia Act 1965 was considered following the unilateral declaration of independence of the white minority government of Southern Rhodesia (now Zimbabwe), the court held that the Act was still valid and Southern Rhodesia remained a British colony. Lord Reid stated:

> It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid.

3.2 The enrolled Bill rule

The courts' reluctance to challenge the validity and authority of an Act of Parliament is illustrated by their approach to arguments about defects or procedural irregularities in particular Acts. In *Edinburgh and Dalkeith Rly Co* v *Wauchope* (1842), the House of Lords rejected the argument that an Act was invalid because the claimant had not been given notice of it in accordance with parliamentary Standing Orders. Lord Campbell stated, *obiter*:

> All that a court of justice can look to is the parliamentary roll;* they see that an Act has passed both Houses of Parliament, and that it has received the Royal Assent, and no court of justice can inquire into the manner in which it was introduced into Parliament, what was done previously to it being introduced, or what passed in Parliament during the various stages of its progress through both Houses of Parliament.

This statement was affirmed by Lord Reid in *British Railways Board* v *Pickin* (1974).

* Each Act of Parliament is printed on a 'roll' of vellum (calfskin). An interesting debate has arisen recently with regards to the continued printing of Acts of Parliament on vellum. You might like to read about it here: www.parliament.uk/business/committees/committees-a-z/commons-select/administration-committee/news-parliament-2015/publication-of-first-report/

3.3 Doctrine of implied repeal

As we have seen, one of the key features of the traditional approach to parliamentary supremacy is the potential for **any** Act of Parliament to be amended or repealed by a

later Act. Parliamentary draftsmen take great pains to review the context of how a new Bill is to fit into the framework of existing Acts. Often the Schedules of a Bill will list a series of specific repeals and amendments of existing Acts.

Sometimes, however, an unanticipated inconsistency between two Acts of Parliament becomes apparent. The courts are faced with the dilemma of deciding between the two Acts. Under the doctrine of implied repeal, the later Act is deemed impliedly to repeal the earlier Act to the extent that the two Acts are incompatible.

Activity 3.1

Find *Ellen Street Estates Ltd* v *Minister of Health* (1934) in LexisLibrary or Westlaw and answer the following questions.

a. **Which two inconsistent Acts were considered in this case?**

b. **In what way were the two Acts in conflict?**

c. **State the wording of s.7(1) of the earlier Act.**

d. **What did Scrutton LJ consider the effect of s.7(1) on the conflicting provisions of the later Act?**

The doctrine of implied repeal was considered more widely in *Thoburn* v *Sunderland City Council* (2002), when it was held that the European Communities Act 1972 could not be impliedly repealed by the Weights and Measures Act 1985. Laws LJ identified a class of 'constitutional statutes' which define fundamental rights. In his opinion a constitutional statute:

> (a) conditions the legal relationship between citizen and state in some general, overarching manner, or
>
> (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights.

He listed examples of such Acts, including the Magna Carta, the Bill of Rights 1689, the Acts of Union, the Reform Acts, the European Communities Act 1972, the Scotland Act 1998, the Government of Wales Act 1998 and the HRA.

He argued that 'constitutional statutes' can only be repealed expressly and **not** impliedly:

> The court would apply this test: is it shown that the legislature's **actual** – not imputed, constructive or presumed – intention was to effect the repeal or abrogation?

Subsequently he explained the implications in relation to parliamentary supremacy:

> It would not mean the loss of sovereignty. It would merely specify the conditions in which Parliament could change the constitutional law. And the conditions would be just the same as those which presently apply if Parliament seeks to change constitutional principles established by the common law.

There are problems with Laws LJ's arguments, not least because they have not been explicitly approved by the Court of Appeal or Supreme Court. Although for recent discussion see the HS2 case – *R (HS2 Action Alliance Ltd)* v *Secretary of State for Transport* [2014] UKSC 3 – in which 'constitutional instruments' are referred to (at para.207) and the following blogpost: https://ukconstitutionallaw.org/2014/01/23/mark-elliot-reflections-on-the-hs2-case-a-hierarchy-of-domestic-constitutional-norms-and-the-qualified-primacy-of-eu-law/.

There is also the difficulty of identifying who decides whether a particular statute is a 'constitutional' statute – the courts or Parliament? For further discussion see Chapter 8.

Activity 3.2

Listen to the audio presentation on the VLE discussing the concept of entrenchment.

No feedback provided.

3.4 The 'manner and form' argument

One of the ways in which the traditional approach to parliamentary supremacy has been challenged has been the argument that, although Parliament has no limits on the subject matter on which it legislates, the manner and form in which it legislates **can** be limited. Under this argument special procedures for making legislation, such as requiring a referendum, can be imposed. If the set procedures are not followed, the courts could, it is argued, prevent the subsequent Act from being passed.

One of the cases which has been used to support this argument is *Minister of the Interior* v *Harris* (1952). This South African case concerned a provision in the UK Parliament's South Africa Act 1909 which created the Union of South Africa from the previous British colony. Under the South Africa Act 1909 an attempt was made to preserve the existing voting rights of a mixed-race community known as 'Cape Coloureds' by requiring a two-thirds majority of both Houses of the new Union of South Africa parliament before these rights could be removed. As part of the introduction of apartheid in 1948, the South African parliament removed the voting rights under an Act which was passed without the two-thirds majority. The Supreme Court of South Africa held that the requirements of the South Africa Act 1909 were entrenched and the 1948 Act was therefore invalid.

Minister of the Interior v *Harris* (1952) is, of course, a Commonwealth case and not binding in the United Kingdom. A more fundamental problem with relying on it in the UK context is that it reflects a relationship between a legislature and a 'higher' law, in this case imposed by the UK Parliament in 1909.

3.5 Parliament Acts 1911 and 1949

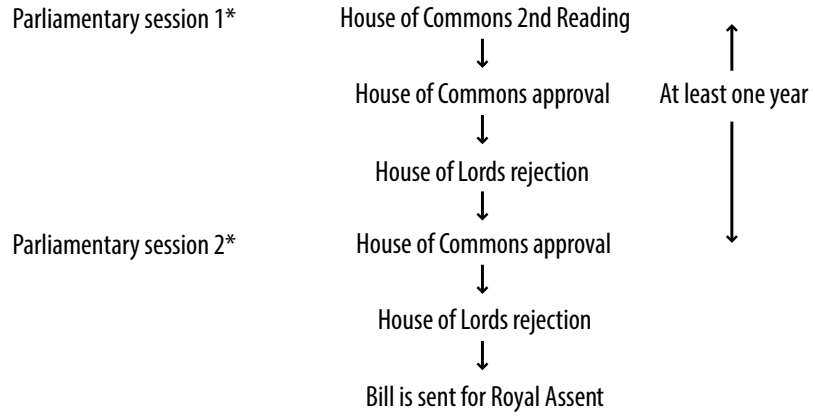
In the United Kingdom there is no written documentary constitution setting out the procedures for legislating. It is useful, nonetheless, to consider the Parliament Acts 1911 and 1949 under which special procedures can be applied, in specified circumstances, for passing Acts of Parliament **without** the consent of the House of Lords.

3.5.1 Historical background

The Parliament Act 1911 was passed following a constitutional struggle between the Liberal government, which controlled the House of Commons, and a Conservative-dominated House of Lords. When the Liberal government was not able to get its social welfare legislation approved by the House of Lords, the Prime Minister threatened to overturn the Conservative majority in the House of Lords by creating large numbers of Liberal peers. Eventually the House of Lords approved the Parliament Act 1911. The Parliament Act 1949 subsequently shortened the required period of delay before the procedures for obtaining the Royal Assent without the approval of the House of Lords could be used.

3.5.2 Key provisions

- Section 1: This provides that 'money Bills' (covering taxation and finance) approved by the House of Commons must, so long as there is at least one month remaining before the end of the parliamentary session, be approved without amendment within one month by the House of Lords.
- Section 2: A non-money Public Bill can be approved if the following timescale has been met:



* A parliamentary session usually lasts for one year, starting in the spring.

Figure 3.1

Activity 3.3

Find s.2 of the Parliament Act 1911 (as amended) in LexisLibrary or Westlaw and answer the following questions.

a. **Consider the following fictitious Bill:**

   The Drainage (Miscellaneous Operations) Bill had its second reading approved by the House of Commons on 1 July 2012 and was subsequently approved by the House of Commons and rejected by the House of Lords. The minister proposing the Bill is aware that there is implacable political hostility to the proposals in the Bill by the House of Lords and no scope for compromise. She wishes to reintroduce the unchanged Bill in the next parliamentary session using the Parliament Acts procedure. What time limit must she ensure is observed?

b. **Identify a type of Public Bill (in addition to a money Bill) for which the Parliament Acts procedures are not available.**

An unusual feature of Acts passed under the Parliament Acts procedures is the 'enacting formula' at the beginning of the Act which states:

> Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Commons, in this present Parliament assembled, in accordance with the provisions of the Parliament Acts 1911 and 1949, and by the authority of the same, as follows.

The significance of this formula was considered by R. Ekins in 'Acts of Parliament and the Parliament Acts' (2007) 123 *LQR* 91:

> Parliament intended the 1911 Act to serve as a decision-making procedure, enabling the Queen, Lords and Commons to legislate even when the Lords disagreed. If the Act bypassed the Lords altogether, it would be a delegation of authority...Thus the Lords do participate in legislative acts pursuant to the Parliament Acts. The authority they share is exercised to enact legislation and the Lords should understand the resulting Act to be in some sense their Act, in the same way that the minority in the House understands the vote of the majority to settle how the House acts.

Besides the Parliament Act 1949, only a few Acts have been passed under the Parliament Acts procedure. This reflects the normal deference of the House of Lords to the democratic will of the people as expressed in the voting of the House of Commons, as well as the willingness of both Houses to compromise. Acts which were passed under these procedures include the Government of Ireland Act 1914, the War Crimes Act 1991 and the Hunting Act 2004.

In *Jackson* v *A-G* (2005) the opponents of the Hunting Act 2004, which banned the hunting of wild animals with dogs, argued that the Parliament Act 1949 was invalid because, as delegated legislation, it was outside the powers of the Parliament Act 1911.

The House of Lords held that the Parliament Act 1949 was valid **primary** legislation (see Ekins above) and was valid along with the Hunting Act 2004. The fact that only two of the three constituent elements of Parliament had approved it did not make it delegated legislation.

Activity 3.4

Look at the UK Parliament website to find out how many Acts have been passed using the Parliament Acts procedure.

3.6 The Act of Union 1706

This Act provided for the union of Scotland and England 'for ever after'. It contained a number of provisions which were intended to be entrenched and bind the future United Kingdom Parliament. Although there have subsequently been changes in legislation affecting the Act of Union, some Scots lawyers have argued that restraints have been recognised and complied with in practice.

In *MacCormick* v *Lord Advocate* (1953) objections were raised as to the designation of the new Queen Elizabeth as 'Queen Elizabeth the Second' when Elizabeth I had only been queen of England and not Scotland (for a historical time line of the English and Scottish monarchs, see: www.britroyals.com/rulers.htm). The claim failed, but in *obiter* comments Lord Cooper stated:

> [t]he principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law.

The force of this statement has been undermined by the fact that no Scottish court has held an Act of Parliament to be invalid on the basis of inconsistency with the Act of Union.

3.7 Parliamentary supremacy and the European Union

We will examine the relationship between EU law and UK law in more detail in Chapter 12. At this stage it is important to note the provisions of s.2 of the European Communities Act 1972:

> (1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties...are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law...
>
> (4) any enactment passed or to be passed, other than one contained in this part of this Act, shall be construed and have effect subject to the foregoing provisions of this section...

Lord Hope in *Jackson* v *A-G* (2005) has argued that the net effect of these two subsections:

> [c]oncedes the last word in this matter to the courts. The doctrine of the supremacy of Community law restricts the absolute authority of Parliament to legislate as it wants in this area.

We should note, however, that Sir John Laws has interpreted s.2(4) more narrowly as simply providing a rule of construction for later statutes.

Section 18 of the European Union Act 2011 attempts to clarify the status of the European Communities Act 1972:

> Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.

3.8 The Human Rights Act 1998

The HRA was passed under the normal procedures of Parliament for Public General Acts. The broad effect of the Act was to enable UK courts to enforce rights created under the European Convention on Human Rights (ECHR) to which the United Kingdom was a party in 1951. Until the HRA came into force, the rights of UK citizens under the Convention could only be enforced by going to the European Court of Human Rights (ECtHR).

We will review the HRA in more detail in Chapters 18–20, but it is important, in the context of parliamentary supremacy, to be aware of the following key features.

1. A new interpretive duty is applied to all primary and secondary legislation.
2. So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way that is compatible with Convention rights: s.3(1).
3. Where it is not possible to read and give effect to **subordinate** legislation in a way that is compatible with Convention rights, such legislation may be quashed except where the parent Act prevents the removal of the incompatibility: s.3(2).
4. Where it is not possible to read and give effect to **primary** legislation (this includes Acts but is not limited to them) in a way that is compatible with Convention rights, the legislation remains in force, but the High Court or appeal courts may make a 'declaration of incompatibility'. The government can then use 'fast-track' measures in Parliament to remove the incompatibility: s.10.
5. All public authorities, including courts and tribunals, must, when exercising public functions, comply with Convention rights unless authorised otherwise by primary legislation: s.6(1).
6. All courts and tribunals must comply with case law from the ECtHR.
7. Ministers promoting Public Bills must issue a statement to Parliament stating either that the Bill is compatible with the Convention or that it is not **and** the government still wishes to proceed.

It is noticeable that the HRA does not distinguish between existing and former Acts.

The declaration of incompatibility is particularly significant in respect of parliamentary supremacy. Although the form of parliamentary supremacy is preserved, since the primary legislation remains valid, the ruling of the court has the practical effect that others affected by it, if it remains unchanged, will take their claims to the ECtHR in Strasbourg. Effectively the courts may not have the power to strike down an Act of Parliament, but they can deliver a fatal wound to it, even if Parliament and not the courts must switch off its life support.

3.9 Summary

1. The basic principle underlying the traditional view of parliamentary supremacy as set out by Dicey is that Parliament has 'the right to make and unmake any law whatsoever; and, further, that no person or body is recognised by the law of England as having the right to override or set aside the legislation of Parliament'.
2. The courts have been unwilling to challenge the validity of an Act of Parliament by reference to arguments over procedural irregularities. This is known as the 'enrolled Bill rule' and is illustrated by *Edinburgh and Dalkeith Rly Co* v *Wauchope* (1842) and *British Railways Board* v *Pickin* (1974).
3. The doctrine of implied repeal deals with the difficulties caused when a later Act conflicts with an earlier but does not expressly repeal it. Under the traditional approach, exemplified in *Ellen Street Estates Ltd* v *Minister of Health* (1934), the later Act is deemed impliedly to repeal the earlier Act in respect of the incompatibility.

In *Thoburn* v *Sunderland City Council* (2002) Laws LJ identified a new approach which was to be applied to 'constitutional statutes'. Under this approach constitutional statutes could only be repealed expressly.

4. Under the 'manner and form' argument, while Parliament has no limits on the subject matter on which it can legislate, the manner and form in which it legislates **can** be limited. Special procedures, such as a requirement to hold a referendum, can be laid down and enforced by the courts if they are not followed. Several Commonwealth cases such as *Minister of the Interior* v *Harris* (1952) have been used to justify this argument.
5. The Parliament Acts 1911 and 1949 set out procedures under which the House of Lords is unable to prevent the passage of 'money Bills' and Bills which have been approved by the House of Commons in two successive sessions. In *Jackson* v *A-G* (2005), the validity of the Parliament Act 1949 and subsequent Acts passed under the procedure as primary legislation was affirmed.
6. Some Scots lawyers have argued, following *MacCormick* v *Lord Advocate* (1953), that the principle of parliamentary supremacy does not apply in Scots constitutional law.
7. European Union Treaties and legislation under s.2 of the European Communities Act 1972 are recognised under UK law and all Acts are to be construed accordingly. In *Jackson* v *A-G* (2005) Lord Hope stated that the doctrine of the supremacy of Community law restricts Parliament's power to legislate.
8. The HRA enabled UK courts to enforce the ECHR. All primary and secondary legislation must be interpreted in accordance with Convention rights. Subordinate legislation may be quashed, if it is incompatible. Where an Act is held to be incompatible, the court will issue a 'declaration of incompatibility' whose practical, though not legal, effect will usually be for the government to amend the legislation as soon as practical.

Notes

4 The rule of law

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Introduction

Section 1 of the Constitutional Reform Act 2005 states:

> This Act does not adversely affect –
>
> (a) the existing constitutional principle of the rule of law, or
>
> (b) the Lord Chancellor's existing constitutional role in relation to that principle.

This short section, which was the subject of learned debate in Parliament, leaves the reader little the wiser as to the question – what is the rule of law? Clearly it is a principle which pre-dates the 2005 Act and was seen as sufficiently important for the Lord Chancellor's role in relation to it to be preserved. In fact, the absence of any attempt in the Act to define the rule of law reflects the uncertainty which exists around this rather nebulous concept.

In this chapter we will look first at Lord Bingham's eight sub-rules and then consider briefly the distinction between 'content free' and 'content rich' interpretations of the rule of law. Dicey's influential, if flawed, description of the rule of law will then be reviewed, together with criticisms of his approach.

Finally we will discuss the practical ways in which the rule of law is protected in the United Kingdom: through the courts, Parliament and the office of Lord Chancellor.

Essential reading

- **Le Sueur, Sunkin and Murkens, Chapter 3: The rule of law.**

Further reading

- **Bingham, T. '*The rule of law*' (2007) *CLJ* 67.**
- **Bingham, T. *The rule of law*. (London: Penguin, 2010) [ISBN 9780141034539].**
- **Craig, P. 'Formal and substantive conceptions of the rule of law: an analytical framework' (1997) *Public Law* 467–87.**
- **Dicey, A.V. *Introduction to the study of the law of the constitution*. (Indianapolis, IN: Liberty Fund, 1982) eighth revised edition [ISBN 9780865970038], Part II, Chapter IV.**
- **Jowell, J. 'The rule of law', in Jowell, J., D. Oliver and C. O'Cinneide (eds) *The changing constitution*.**

4.1 Bingham's eight 'sub-rules'

Lord Bingham grappled with the challenge of defining the rule of law by breaking it up into eight 'sub-rules'. His discussion of these sub-rules has been one of the most influential modern discussions of the rule of law. The sub-rules are as follows.

1. The law must be accessible and, so far as possible, intelligible, clear and predictable.
2. Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.
3. The laws of the land should apply equally to all, save to the extent that objective differences require differentiation.
4. Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.
5. The law must afford adequate protection of fundamental rights.
6. Means must be provided for resolving, without prohibitive cost or undue delay, bona fide civil disputes which the parties themselves are unable to resolve.
7. Adjudicative procedures provided by the state should be fair.
8. The rule of law requires compliance by the state with its obligations in international law as in national law.

Activity 4.1

On a preliminary reading of Bingham's eight sub-rules, which, if any, do you think might be viewed as somewhat controversial and why?

We will now consider a number of issues arising from these sub-rules in the light of the UK constitution.

4.1.1 Accessibility, clarity and predictability

Why are these requirements important? Bingham gives three reasons: first, so that we know what we might face a criminal penalty for; second, so we can claim our rights and understand our obligations; third, because successful conduct of trade and commerce depends on accessible rules.

In recent years considerable efforts have been made to enable British citizens to have access to the 'raw' law through government websites such as www.legislation.gov.uk as well as government department websites and the www.gov.uk portal. This represents a significant advance in the accessibility of the law for those members of the public with access to the internet. Groups with little access to the internet lose out by comparison.

Clarity is always a difficult challenge for parliamentary draftsmen of statutes and statutory instruments. Particular difficulties are generated when areas of law are very controversial politically and subject to frequent legislative change. Criminal justice has become more confusing in recent years, with Criminal Justice Acts every year and changes introduced before the innovations in the previous Act have been implemented. Other areas of law have benefited from considered 'consolidating' Acts†, often drafted or influenced by the Law Commission. In relation to the development of case law, Bingham has highlighted the difficulties of interpretation caused for lawyers and their clients in subsequent cases when the Court of Appeal judges or Supreme Court justices give separate individual judgments, rather than agreeing to a single 'leading' judgment. Lord Donaldson in *Merkur Island Shipping Corpn* v *Laughton* (1983) stated:

> Absence of clarity is destructive of the rule of law; it is unfair to those who wish to preserve the rule of law; it encourages those who wish to undermine it.
> ([1983] 1 All ER 334, p.351)

† A recent example of an attempt at consolidation can be found in a current Law Commission project. It commenced with a consultation in December 2014 which proposed reform based on the following principles:

- the laws governing elections should be rationalised into a single, consistent legislative framework governing all elections, and
- electoral laws should be consistent across all types of election.

See: www.lawcom.gov.uk/project/electoral-law/#electoral-law-consultation-related-documents

Predictability is a very important aspect of the rule of law. In dictatorships, citizens are often left uncertain as to whether or not a particular action will be subject to criminal punishment – the power of the state is enhanced by the unpredictability. Particular difficulties arise when laws are made to apply **retrospectively** (to actions which have already happened). This happened when the War Damage Act 1965 abolished the right to compensation for damage done during war 'before or after the passing of this Act'. Following Article 7 of the ECHR, the courts will interpret legislation under a presumption that it does not have retrospective effect.

4.1.2 Application of the law equally to all, subject to objective distinctions

In the criminal law children and those without mental capacity are treated differently in terms of procedures for investigation and trial as well as in sentencing. Children under 10 are treated as *doli incapax* – legally incapable of committing a crime.

4.1.3 Ministers and public officials should act in good faith, fairly, within their powers and not unreasonably

This is the core of administrative law, which is discussed in detail in Chapters 15–17. The remedy of judicial review is available to challenge the actions of ministers (including their role in creating secondary legislation) and other public bodies where they have acted outside the powers which were given to them (usually by an Act of Parliament), or acted unfairly or unreasonably. Decision making can be challenged if there is bias or individuals are not given the right to a fair hearing.

4.1.4 Protection of human rights

The incorporation of the ECHR into UK law by the HRA has had major implications for the protection of individual rights. We will examine this area in more detail in Chapters 18–20.

4.1.5 Access to civil justice without excessive cost or delay

Although alternative dispute resolution (ADR) is increasingly popular and encouraged by government, handling civil court cases is still a core function of the legal system. In *R* v *Lord Chancellor, ex p Witham* (1998) an applicant in receipt of state benefits successfully challenged, by way of judicial review, an order made by the Lord Chancellor increasing the costs of writs (claim forms). Laws J stated:

> Access to the courts is a constitutional right; it can only be denied by the government if it persuades Parliament to pass legislation which specifically – in effect by express provision – permits the executive to turn people away from the court door. That has not been done in this case.
> ([1998] QB 575, p.586)

The costs of civil litigation are always controversial and the labour-intensive nature of the adversarial court system has led to rapidly increasing civil legal aid costs. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 has introduced 'damages-based agreements', enabling claimants' lawyers to be paid on the basis of a percentage share of the damages and has weakened still further the availability of legal aid. The introduction of the Civil Procedure Rules (CPR) has not led to the savings in costs that were originally hoped for, although judicial case management under the CPR has reduced delays.

4.2 'Content-free' and 'content-rich' interpretations of the rule of law

The content-free interpretation of the rule of law focuses on the form of the law and the procedures by which law is made. The legal writer Raz identified eight basic principles which reflect this approach.

1. All law should be prospective, open and clear.
2. Laws should be relatively stable.
3. The making of laws should be guided by clear rules.
4. The judiciary should be independent.
5. The principles of natural justice should be observed (see the discussion of administrative law at Section 4.1.3).
6. The courts should be able to review the implementation of other principles.
7. The courts should be easily accessible.
8. The discretion of the police and crime fighting agencies should not pervert the law.

Clearly most people would value these principles and accept that their absence would damage confidence in the state. Are they enough for a good society? Supporters of the 'content-free' interpretation do not deny that the principles should be supplemented by other values such as rights, justice and democracy but argue that these values should not be attached to the concept of the rule of law:

> The message is therefore that if you wish to argue about the justness of society do so by all means. If you wish to defend a particular type of individual right then present your argument...It is however on this view not necessary or desirable to cloak the conclusion in the mantle of the rule of law, since this will merely reflect the conclusion which has already been arrived at through reliance on a particular theory of rights or the just society. (Craig, P. Sixth Report from the House of Commons Select Committee on the Constitution, HL 151 of 2006–07)

The 'content-rich' interpretation is a more complex and, perhaps, idealistic view of the rule of law. Ronald Dworkin summarised it as:

> I shall call the second conception of the rule of law the 'rights' conception...It assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights be recognised in positive law, so that they may be enforced upon the demand of individual citizens through the courts and other judicial institutions of the familiar types, so far as this is practicable. (*A matter of principle*. (Boston, MA: Harvard University Press, 1985) [ISBN 9780674554610])

Activity 4.2

Match, so far as you can, Raz's eight principles to Bingham's sub-rules in the table below:

Bingham	Raz
1	
2	
3	
4	
5	
6	
7	
8	

In the light of this comparison, do you think that Bingham's eight sub-rules are 'content-rich' or 'content-free' interpretations of the rule of law?

4.3 Dicey's description of the rule of law

Traditionally public law textbooks have started their chapters on the rule of law with Dicey's fairly succinct three-point description. The danger of this approach is that students may fail to appreciate how much Dicey's summary in *Introduction to the study of the law of the constitution* reflects the political and legal realities of the late 19th century, rather than those of the United Kingdom of the 21st century. Nonetheless the description continues to influence constitutional writers and it is important to understand the three elements as well as the criticisms of them. He described the rule of law as follows.

> No man is punishable or can be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land.

Effectively 'regular' law was to be applied and not the use of arbitrary or discretionary powers.

> No man is above the law...every man, whatever be his rank or condition, is subject to the ordinary law of the realm…every official, from the Prime Minister down…is under the same responsibility for every act done without legal justification as any other citizen…
>
> The general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are...the result of judicial decisions determining the rights of private persons.

In short, he was arguing that the constitution was 'judge-made'.

4.3.1 Criticisms of Dicey

Sir Ivor Jennings, in *The law and the constitution* (London: University of London Press, 1933), has criticised Dicey's assumption that the rule of law was inconsistent with the use of discretionary powers by the executive. We will see in Chapter 9 how the complexities of governing a technically sophisticated country, as well as other constraints such as limited parliamentary time, have led to a great increase in the use of delegated or secondary legislation, in the form of rules and regulations. The importance of this legal framework in setting the ground rules for business and industry, as well as fulfilling other social purposes, such as the protection of the environment, must be understood.

Jennings also argued strongly that Dicey's second point ignored the particular responsibilities public officials held by virtue of their roles. In addition, he ignored the special immunities certain categories of individuals have, for example children and foreign diplomats with diplomatic immunity.

Finally, Dicey's third point completely ignored the role of statute in the constitution. Even in respect of the examples he gives – personal liberty and the right of public meeting – there are many statutes giving vital protections and imposing significant constraints. These include, of course, the HRA.

4.4 Protection of the rule of law by the courts

Before we examine some individual examples of how the courts have dealt with arguments relating to the rule of law, it is worth recalling some of the basic constraints under which the system of judge-made law (i.e. the 'common law') operate. These constraints include the fact that the courts are unable to protect rights that have been recognised previously as important to the rule of law if they are expressly abolished by an Act of Parliament. An example is the Criminal Evidence (Witness Anonymity) Act 2008 which removed the common law right of a criminal defendant to know who was bearing witness against them by replacing it with a regime in which witness anonymity orders could be used in limited circumstances. The nature of case law is, in a sense, always erratic and focused on responding to claims by particular individuals for protection in their particular circumstances. Individual judges in different cases

may show undue deference to government or be unwilling to challenge political and public pressure. J.A.G. Griffith (*The politics of the judiciary*) has argued that judges, by virtue of their background, are:

> Necessarily conservative, not liberal and show tenderness towards private property and dislike of trade unions, strong adherence to the maintenance of order, distaste for minority opinions, demonstrations and protests and support for government secrecy.

Griffith was writing in 1977, in an era when conflict between trade unions, employers and the government was widespread in the streets and in the courts. It is arguable therefore that this sweeping criticism does not reflect the subsequent willingness of at least some judges, regardless of their personal backgrounds, to risk political and popular disapproval by protecting liberties in the name of the rule of law.

One of the earliest cases where the courts demonstrated a willingness to challenge the power of government in this area was *Entick* v *Carrington* (1765). A 'King's Messenger' (a government investigating officer) attempted to seize a suspect for seditious libel under a warrant which gave him sweeping powers to seize papers and books. Lord Camden highlighted the fact that these powers were not justified by any statute or common law power.

Dicey's second proposition, focusing on the personal responsibilities of public officials, was illustrated in *M* v *Home Office* (1994), where an asylum seeker was deported by the Home Secretary before his application for judicial review had been completed. Although the applicant was beyond the jurisdiction by this stage, the House of Lords held that the Home Secretary, in his official capacity, had been guilty of contempt of court for failing to comply with an order to return the applicant while he was still en route. Lord Woolf stated that:

> The object of the exercise is not so much to punish an individual as to vindicate the rule of law by a finding of contempt.

Since the terrorist attacks on 11 September 2001 on the USA, one of the main areas of conflict between the courts and government has been over a relentless tide of legislation aimed at increasing the powers of the police and state with a view to minimising the risks of terrorism. In *A* v *Secretary of State for the Home Department* (2005), the powers of the state to detain non-UK nationals without trial under the Anti-terrorism, Crime and Security Act 2001 were considered. This concerned individuals who were considered to be a security threat in the United Kingdom, but could not be deported to their home countries because of the risk that they would face torture there. The 2001 Act was challenged under the HRA on the grounds of discrimination under Article 14 of the ECHR, because it only applied to non-UK nationals. The House of Lords accepted (by 8:1 – Lord Hoffmann dissenting) the right of the government to conclude that the public emergency justified the detention, but ruled that it was applied in a discriminatory manner.

The government responded by introducing a 'control order' regime under the Prevention of Terrorism Act 2005 which applied to UK nationals as well as non-UK nationals. This regime has now been replaced by the Terrorism Prevention and Investigation Measures Act 2011 which has replaced control orders with 'terrorism prevention and investigation measures' (TPIMs; these are more limited in scope and, in particular, have a two-year time limit. Some further amendments were made to the operation of TPIMs in the Counter-Terrorism and Security Act 2015.

Activity 4.3

Find in Westlaw or LexisLibrary *R (on the application of Corner House Research)* v *Director of the Serious Fraud Office* (2008) and answer the following questions.

a. **What reason did the Director of the Serious Fraud Office (SFO) give in his press release for his decision to drop the investigation into alleged bribery?**

b. **Which two reasons did he state did not lead to the decision?**

c. **In Lord Bingham's summary of the decision of the Divisional Court, why was the alleged threat by Prince Bandar significant?**

d. **Why did Lord Bingham describe the Director as 'courageous' for not using the reason of 'evidential weakness' for his decision?**

e. **The Director of the SFO did not consider whether a decision to drop the prosecution would affect national security if other countries learned that the United Kingdom had given in to the threat. Why did Lord Bingham not consider this important?**

f. **Do you think that the decision of the House of Lords strengthened or undermined the rule of law?**

4.5 Protection of the rule of law by Parliament

It is important to view the role of Parliament in protecting the rule of law in the light of our discussion of parliamentary supremacy in Chapter 3. The doctrine of parliamentary sovereignty gives Parliament the ultimate decision over whether or not an Act of Parliament that conflicts with the rule of law should be passed. The courts have only limited powers of constraint. The consequences of a clash between these two principles were discussed *obiter* in *Jackson* v *A-G* (2005) by Lord Steyn:

> In exceptional circumstances involving an attempt to abolish judicial review or the authority of the courts, [the courts] may have to consider whether this is a constitutional fundamental which even a complaisant House of Commons cannot abolish.

Lord Hope, in the same case, stated:

> It is no longer right to say that [Parliament's] freedom to legislate admits of no qualification...the rule of law enforced by the courts is the controlling principle upon which our constitution is based.

The extreme circumstances suggested by Lord Steyn have not yet arisen and it is difficult to envisage a government that would be able to win support in the House of Commons and House of Lords for any attempt to abolish judicial review.

4.6 Protection of the rule of law by the Lord Chancellor

We saw in the Introdution to this chapter that s.1 of the Constitutional Reform Act 2005 explicitly preserved the **existing constitutional role** of the Lord Chancellor. Unhelpfully the Act failed to spell out what that role was, although this omission perhaps reflected the difficulty of defining it. During the debate on the Act, Lord Falconer commented:

> We all agreed that we do not want to change the Lord Chancellor's existing role in relation to the rule of law. That role goes further than simply respecting the rule of law in discharging his ministerial functions. It includes being obliged to speak up in Cabinet or as a Cabinet Minister against proposals that he believes offend the rule of law. That role does not require him proactively to police every act of government. The role is not one that is enforceable in the courts. (Hansard, HL, Vol 667, col 1538 (20 December 2004))

Lord Bingham has argued instead that the Lord Chancellor's role in protecting the rule of law would no doubt be susceptible, in principle, to judicial review.

Given that meetings of the cabinet are held in private, the exact role in decision making of individual Lord Chancellors has been hard to determine and, as a result, the courts have had no opportunity to consider it.

ACTIVITY 4.4

Find s.2 of the Constitutional Reform Act 2005 and list the factors that the Prime Minister may take into account when appointing a Lord Chancellor.

ACTIVITY 4.5

If it were up to you to decide, would you view a legal background as an advantage or disadvantage for a prospective Lord Chancellor/Secretary of State for Justice?

Explain your answer.

4.7 Summary

1. Lord Bingham described the rule of law by reference to eight 'sub-rules'.
    a. The law must be accessible, clear and predictable.
    b. Questions of legal right and liability should normally be dealt with under the law and not by discretion.
    c. The laws of the land should apply equally to all, unless there are objective differences.
    d. Ministers and public officers must act in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.
    e. The law must protect human rights.
    f. Genuine civil disputes must be resolved without undue cost or delay.
    g. Adjudicative procedures should be fair.
    h. International law must be complied with.
2. Accessibility is enhanced by greater public access to 'raw' law through websites such as www.legislation.gov.uk. Clarity of statute making is variable, with political influence sometimes leading to hasty legislation. Predictability is enhanced by the principle that legislation should not have a retrospective effect.
3. Objective distinctions, which justify the application of law being applied differently, include the test for criminal responsibility for children and the treatment of mentally disabled people under the law.
4. The remedy of judicial review is available where ministers fail to act in good faith, fairly, within their powers or reasonably.
5. The HRA is a key tool for protecting human rights.
6. The Civil Procedure Rules have limited the problem of delay in the civil justice system, but the withdrawal of civil legal aid is increasing the costs for ordinary litigants.
7. The 'content-free' interpretation of the rule of law, described by Raz, emphasises the importance of the form of law and its procedures. The 'content-rich' interpretation, favoured by Dworkin, attributes morals and values to the rule of law. Lord Bingham's eight sub-rules fit best into the 'content-rich' interpretation, although they illustrate the fact that there is overlap between both interpretations.
8. Dicey's three-part definition of the rule of law has been very influential, although it is now challenged on a number of grounds. It is as follows:
    a. No one is to be punished or suffer loss except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. Arbitrary or discretionary powers are to be excluded.
    b. No one is above the law. Everyone is subject to the ordinary law of the realm. Every official, from the Prime Minister down, is under the same responsibility for every act done without legal justification as for any other citizen.
    c. The general principles of the constitution are the result of judicial decisions determining the rights of private persons.
9. Critics of Dicey, such as Jennings, have pointed to the widespread use of discretionary powers in the modern UK constitution through which vital and complex secondary legislation is passed. In addition, the fact that public officials are subject to particular legal constraints due to their office has been highlighted. Finally, the importance of statute (e.g. the HRA) in protecting the rights of individuals is completely ignored in Dicey's summary.

10. Protection of the rule of law by the courts has been erratic since, by its nature, issues are only dealt with when an individual chooses to take them to court. The social background of the judges has been felt by some critics (e.g. Griffith) to encourage an excessively conservative and cautious approach. Cases such as *Entick* v *Carrington* (1765) and *M* v *Home Office* (1994) have demonstrated the courts' willingness, in some circumstances, to challenge the power of government in order to protect personal liberties. The clash between the protection of civil liberties and the determination of the government to impose greater restrictions in the name of preventing terrorism has led to many cases. In *A* v *Secretary of State for the Home Department* (2005) the House of Lords accepted the use of control orders, but required discrimination against non-UK nationals suspected of offences to be removed. Control orders have since been replaced by terrorism prevention and investigation measures with a more limited scope. In *R (on the application of Corner House Research)* v *Director of the Serious Fraud Office* (2008), the House of Lords refused to grant judicial review where the DPP dropped a prosecution of an arms company for corruption solely on the grounds that national security was threatened.

11. Protection of the rule of law by Parliament must be considered in the light of the doctrine of parliamentary supremacy. In *Jackson* v *A-G* (2005), Lords Steyn and Hope speculated *obiter* about potential (extreme) circumstances in which the rule of law would be seen by the courts as justified in striking down Acts of Parliament that removed fundamental rights.

12. The role of the Lord Chancellor in protecting the rule of law was explicitly preserved in s.1 of the Constitutional Reform Act 2005. Although not defined in the 2005 Act, the role has been described as to speak up in cabinet and Parliament against proposals that might damage the rule of law. The first non-lawyer Lord Chancellor in recent times, Chris Grayling, was appointed in 2012. This was followed by the appointment of the Rt Hon Michael Gove MP as the next Lord Chancellor followed this trend as and, most recently, in July 2016, did the appointment of the Rt Hon Elizabeth Truss MP as Lord Chancellor and Secretary of State for Justice – three consecutive non-lawyers have now held the position.