Chapter 2: The Nature and Sources of UK Constitutional Law

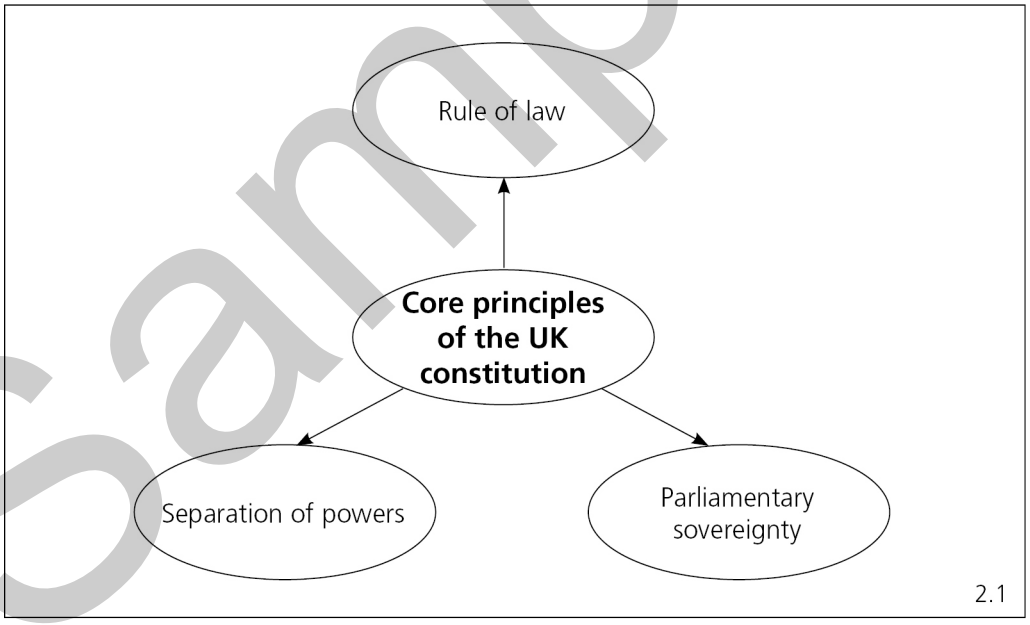
Outline

Aims of this Chapter

This chapter will enable you to achieve the following learning outcomes from the CILEx syllabus:

1 Understand the key features of UK public law
2 Understand the meaning of the "rule of law"
3 Understand the nature of the UK constitution

2.1 Introduction



Practical lawyers tend not to be very interested in underlying legal theories about law. They prefer to focus on what the law is rather than how it came to be as it is. When studying constitutional law, it is easy to concentrate on the detail of how the different institutions of the state interact in practice. Ignoring theory completely is, however, dangerous because it explains the reasoning and motivation of influential judges and politicians whose decisions have formed and adapted the constitutions of the United Kingdom and other countries.

Parliamentary sovereignty is an important legal principle in the United Kingdom's democratic constitution. Essentially, this means that an elected Parliament has the right to change the law as it thinks fit. In practice, of course, there are limits to what can be done when particularly objectionable legislation is proposed.

One of the most important theories is the "rule of law". This phrase can be used in different ways by politicians seeking to discredit others, but a key element means that the state should not exercise "arbitrary" power, that is, it should have to justify its actions by reference to a specific legal rule. All citizens should be treated equally by the courts and individual rights should be defined by reference to decisions of ordinary courts.

"Separation of powers" is a theory which distinguishes three sorts of power: legislative, executive and judicial. These powers are usually exercised by Parliaments, governments and judges, respectively. Under this theory, a good constitution is one where the persons exercising these powers are separate with as little overlap in functions as possible.

This chapter also reviews the different sources of constitutional law in the United Kingdom and considers the roles of statutes, case law, legal writers, and international treaties and legislation.

2.2 Parliamentary sovereignty

In an "unwritten" constitution such as that of the United Kingdom an elected government with a majority in Parliament has huge potential power to take away freedoms and individual liberties. Unlike in a well-drafted written constitution, protection of these freedoms and liberties is not "entrenched", that is, protected from removal or erosion by a later Parliament. Civil liberties campaigning groups, such as Liberty, have identified a significant erosion of individual freedoms in the United Kingdom in recent years following the London suicide attacks in July 2005. Most of the changes have been popular with a majority of the general public and elected Members of Parliament. A well-drafted written constitution does not, however, necessarily prevent controversial legislation which erodes or removes individual liberties. In the United States, the **Homeland Security Act 2002**, passed after the New York attacks in September 2001, has also eroded freedoms in the pursuit of increased security.

Note that even a written democratic constitution such as that of the United States will not cover every constitutional issue – the United States Supreme Court's power to overturn legislation which is "unconstitutional" is derived from a legal case (***Marbury v Madison [1803]***).

Since the 17th century, the UK system of government has been based on the notion of parliamentary sovereignty, suggesting that Parliament can do as it pleases. The reality is that this supremacy has been tempered by increasing democratisation and the ultimate threat of civil disobedience. In the modern era, governments derive their legitimacy from the ballot box and the mandate upon which they are elected. It is therefore assumed that a government will not enact legislation removing fundamental rights and freedoms without the moral authority of public support. A good example of strong public feeling causing a government to think again was the outcry over the introduction of the community charge ("poll tax") in the late 1980s.

In a constitution based on a written document, such as the **American Constitution**, the highest court (i.e. the Supreme Court) will have wide powers to review the workings of the government and a formal statement of law against which to judge its actions. By contrast, in the United Kingdom, the

highest court (the Supreme Court) must, in theory, accept the legality of Acts of Parliament and cannot question the workings of the legislature. In reality, the courts in the United Kingdom have had to adapt to a changed political climate, including the introduction into UK law of the **European Convention on Human Rights** (**ECHR**). Although still loyal to Parliament at Westminster, UK courts now declare when domestic law is in breach of **ECHR**. It should be remembered that the courts can do these things only because Parliament at Westminster has told them that they may: by the **Human Rights Act 1998** (**HRA 1998**).

2.3 Rule of law

Underpinning the discussion of parliamentary sovereignty is an acceptance of the doctrine of the **rule of law**. In *Introduction to the Study of the Law of the Constitution* (1885), the legal academic writer, Dicey, popularised the idea as a central element of the constitution. He believed that it restrained the government from acting arbitrarily and protected individual liberty, although few would accept his notions today without some qualifications.

Dicey defined the rule of law as "the establishment of order and the maintenance of peace through the settlement of disputes in accordance with the law". The system of government should be based on law, not force. Everyone, including, and especially, the government, should obey the law.

Dicey stated that the doctrine of the rule of law could be summarised in three main statements.

(1) There should be an **absence of arbitrary power** in the state.

(2) There should be **equal subjection of all citizens before the ordinary law** and the ordinary courts.

(3) The basic principles of the **rights of individuals** can be derived from the decisions of the ordinary courts, there being no requirement for a special system of constitutional law.

2.3.1 Absence of arbitrary power

Dicey's view was that Englishmen were ruled by the law and the law alone. Consequently, a public body's actions would be legitimate only if based on a legal rule. The rule could derive either from statute or from case law, each capable of meeting the requirements of certainty, stability and clarity. Even governments needed legal authorisation. Dicey's view is not absolute. Consider the following points.

(1) Discretionary powers may be given to authorities by statute. Some of these may be in times of emergency (see ***Liversidge v Anderson [1942]*** at **2.4.3**) but, in modern times, many forms of delegated power have become common. For example, the **Deregulation and Contracting Out Act 1994** gave government ministers the power to repeal certain Acts of Parliament; the **Legislative and Regulatory Reform Act 2006** (see **12.4.4**) is an example of considerable law-making power being delegated to government ministers.

Governments sometimes annul inconvenient court decisions by legislation (e.g. the **War Damage Act 1965** reversed the court decision in ***Burmah Oil Co Ltd v Lord Advocate [1965]***, in which the government was ordered to pay compensation for destroying property in wartime). ***IRC, ex parte Woolwich Building Society [1990]*** held that building societies had been taxed illegally and that the Inland Revenue had to return £250 m. This was reversed by **s53 Finance Act 1991**. Governments can grant legal immunities to themselves (e.g. parts of the **Crown Proceedings Act 1947** (see **Chapter 23**)). Some government powers, such as conventions (see **Chapter 3**), do not seem to have any specific legal authorisation. Similarly, there is considerable uncertainty about the exact extent of government powers derived from the common law (e.g. the royal prerogative – see **Chapter 10**).

(2) Dicey wrote in the 19th century and, as a Liberal, wished to make the point that the powers exercised by politicians and officials must have a legitimate foundation which is conferred by law. He was contrasting constitutional government with arbitrary government (in countries where the government obeyed no rules). In today's more complicated state, we must accept that some discretionary power is needed because it is impossible for legislators to foresee everything that might happen.

(3) Many limits on the arbitrary use of power are, in fact, political and not legal. Accountability is achieved through the ballot box. Dicey would probably have accepted this, as he always acknowledged the ultimate supremacy of voters.

2.3.2 Equality before the law

Lord Denning, the former Master of the Rolls, was fond of repeating this statement by Lord Coke, Lord Chancellor under James I: "Be ye ever so high, the law is above you."

To some extent, Dicey's views have become qualified. Dicey argued that there should not be special constitutional courts and that public officials should have no special legal immunities.

(1) Dicey's view incorporates an implicit criticism of the system in France at the time (and of the *Conseil d'Etat*). He seemed to think that this was biased in favour of the government, although, arguably, the administrative courts in France have provided an extremely useful check on the actions of public officials, which our own law of judicial review increasingly emulates.

(2) In the United Kingdom, the ordinary law courts no longer deal with all legal disputes. Many are dealt with by administrative tribunals such as Employment Tribunals.

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