

# CONSTITUTIONAL & ADMINISTRATIVE LAW

## Reading Materials: Weekend One



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## What is Constitutional and Administrative Law?

Constitutional and administrative law is concerned with the distribution and the exercise of power within the state. It includes not merely the power to make legal rules, but also the accountability of those charged with enacting, applying and enforcing the law.

Constitutional and administrative law regulates the relationships between the state and the individual, so it can be distinguished from private law subjects (such as contract or property law) which regulate legal relationships between private individuals.

Distinguishing between 'constitutional' law and 'administrative' law however is not always so easy. The two cannot always be clearly separated from one another, but one possible distinction is to see constitutional law as the law relating to the constitution of a state. All states have a constitution of some form which will incorporate the body of rules by which the state is governed. Administrative law, on the other hand, is concerned with rules which control the exercise of governmental power, particularly controls exercised by the courts.

In the United Kingdom, Parliament is the supreme law-making authority. Parliament exercises this power through the enactment of legislation (i.e. statutes). Such Acts of Parliament are therefore a primary source of **constitutional law**. But where a minister, as the representative of the government of the day, appears to act unreasonably or illegally, the legality of such action may be tested in the courts. This is the **administrative law** procedure of judicial review.

### *Studying Constitutional and Administrative Law*

Constitutional and administrative law is unlike other subjects you will study on the GDL where the law is fairly clearly expressed in statutes and case law. The sources of constitutional law are more diverse than this and are not always formally written down. In addition, much of this subject is based on constitutional principles, embedded in history, which sometimes seem to be political rather than legal. When studying constitutional law you will have to discuss and analyse such principles.

To get the most out of constitutional law you will need to study it in the context of what is happening around you. Since the election of a Conservative government in the General Election in May 2015 we have seen a number of constitutional issues taking centre stage in British politics, ranging from the proposed repeal of the Human Rights Act 1998, the constitutional issue of the UK's membership of the European Union and BREXIT, to the June 2017 General election with a hung Parliament. Therefore, it will enhance your studies considerably, and make the subject even more interesting, if you make a conscious effort to take an interest in contemporary issues of constitutional importance.

## **Reading materials**

On the first weekend you will be given a copy of the two textbooks that we will be using in the Constitutional and Administrative law module.

Once you have received these textbooks you should read the relevant chapters linking to the topics that we have covered at the first teaching weekend.

## Constitutions

To be read in conjunction with  
Unlocking Constitutional and Administrative Law Pages 1-36.

### WHAT IS A CONSTITUTION?

Academics have sought to define the term constitution in slightly different ways:

Bradley and Ewing have placed an emphasis on the existence of a formal document stating a constitution is:

*[A document or documents] 'Having a special legal status which sets out the framework and the principal functions of the organs of government within the state and declares the principles or rules by which those organs must operate.'* Bradley & Ewing *Constitutional & Administrative Law* (15<sup>th</sup> ed. 2011)

Whereas, Bolingbroke, an 18th century English politician, in *A Dissertation upon Parties* (1733) placed an emphasis on a constitution as a system of governance:

*'That assemblage of laws, institutions, and customs ... that compose the general system, according to which the community has agreed to be governed'*.

This was furthered in Tom Paine's *The Rights of Man* (1794),

*'A constitution is a thing antecedent to a government, and a government is only the creature of a constitution. The constitution of a country is not the act of its government, but of the people constituting its government. It is the body of elements, to which you can refer, and quote article by article; and which contains the principles on which the government shall be established, the manner in which it shall be organised, the powers it shall have, the mode of elections, the duration of Parliaments, or by what other name such bodies may be called; the powers which the executive part of the government shall have; and in fine, everything that relates to the complete organisation of a civil government, and the principles on which it shall act, and by which it shall be bound. A constitution, therefore, is to a government what the laws made afterwards by that government are to a court of judicature. The court of judicature does not make the laws, neither can it alter them; it only acts in conformity to the laws made: and the government is in like manner governed by the constitution.'*

Essentially, a constitution consists of the laws, rules and other practices which identify and explain:

- The institutions of government;
- The distribution of powers within those institutions;
- How those powers are exercised and controlled;
- The relationship between the institutions of government and the citizens.

Typically this constitution is **codified** - it takes the form of a single document or a clearly defined group of documents, it is produced by a special procedure - a constitutional convention or other similar agency - and it is regulated by special arrangements for its amendment. That is to say that it is '**entrenched**', although the extent of this entrenchment varies widely, so some constitutions are very rigid, meaning that they are very difficult to amend, while others can be amended relatively easily.

### 1. WHAT DO WE MEAN BY A CONSTITUTION BEING 'WRITTEN' OR 'UNWRITTEN'

A **written** or **codified** constitution is one which can be found contained in a single document or a series of documents intended to be read as a whole. Typically, this document has been produced by a special procedure, and takes priority over other laws.

An **unwritten or uncodified** one is not found in one place. Some of its provisions can be found in statute law, but others are to be found in case law, and perhaps in principles derived from constitutional history and 'custom and practice' (sometimes called 'constitutional conventions' in the UK). Any attempt at producing a coherent overall statement is the task of the text-book writer.

### 2. WHAT DO WE MEAN BY A CONSTITUTION BEING 'ENTRENCHED'?

This word indicates that the provisions of the constitution cannot be readily amended or changed. This is a reflection of the fact that the constitution is produced by a special procedure, regarded as having special significance and status - a constitutional assembly, perhaps, or the use of a referendum, to make it explicitly the 'will of the people'.

The level of entrenchment and the scope of entrenchment vary very considerably.

- There are provisions of the German constitution, the [Grundgesetz](#) (Basic Law), which may not be changed at all, while changes to the other provisions require a two thirds majority of each of the two legislative chambers.
- In the [United States](#) amendment generally requires a two thirds majority in each house of Congress and ratification by three quarters of the states. Equal representation of states in the Senate can only be removed with the consent of the state affected.
- In [Denmark](#) the amendment must be passed by two successive Parliaments and in a referendum where 40% of the entire electorate support the amendment.

While the means adopted vary, the objective is the same - to ensure that the constitution is not changed ill-advisedly or without full consideration and widespread approval.

### 3. HOW DO CONSTITUTIONS DEVELOP?

Typically, a constitution is drafted at some turning point in the evolution of the state; after independence has been achieved, whether militarily, as in the case of the USA, or by negotiation, as in the case of Australia, India and many other former colonies; following an internal revolution, as in the case of France in 1789, Russia in 1917 or South Africa after the collapse of apartheid; following military defeat, as in the case of Germany in 1919 and 1945;

or following some other major social and political upheaval, as in the case of Russia after the break-up of the Soviet Union. However, some states have merely decided that it was time for a restatement of the political and constitutional position, as in the case of Denmark in 1954.

#### **4. DOES THE UNITED KINGDOM HAVE A CONSTITUTION?**

The major upheavals in our constitutional arrangements took place in the 17th century and did not result in the creation of a codified constitution. Rather, the development of our constitution has been piecemeal, sometimes marked by statutes documenting the change (e.g. the Parliament Act 1911) but often merely observable in practice and not officially documented (e.g. the move from executive government actively presided over by the monarch, to a Cabinet of ministers under a Prime Minister).

We therefore have an unwritten (or more precisely *uncodified*) constitution, made up of several sources, common law rules, statutes, Royal Prerogative powers and so-called constitutional conventions. In this we are highly unusual. New Zealand has adopted a similar approach, (although no other former colony or dominion has), in that it does not have a supreme constitution, prescriptive of the rights of the Parliament, and adopts the sovereignty of parliament.

As there is no codified constitution, some academics such as F.F. Ridley argue we do not have a constitution at all. However, when we look back at the Bolingbroke definition of a constitution, which states that a constitution is '*that assemblage of laws, institutions, and customs ... that compose the general system, according to which the community has agreed to be governed*', it can be argued that the United Kingdom satisfies all of these elements of a constitution- it is simply not codified in a single document.

#### **5. WHAT ARE THE ADVANTAGES AND DISADVANTAGES OF WRITTEN AND UNWRITTEN CONSTITUTIONS?**

At a simple (and at worst simplistic) level, the debate centres on the merits of certainty on the one hand as against flexibility on the other.

But there is more to it than that. There is often an assumption that a written codified constitution is inherently 'better'. But what about the following?

- A prescriptive constitution is no actual guarantee of the rights it purports to confer, or even that the constitutional division of powers will operate as stated;
- A constitution can confer legitimacy on the political classes (or put another way, constitutions may be used by an otherwise dubious regime to confer legitimacy upon it);
- A constitution is often the focus for an emerging state, or a state trying to make sense of a new political reality. As such, constitutions are children of their time and may become outmoded, or perversely interpreted; and
- The special procedures needed to amend a constitution can face stale mates and necessary modernisation cannot take place.

Are our institutions and rights better protected by a lack of a 'written, codified' document?

+ / -	Unwritten	Written
<p><b>Advantage</b></p>	<p>Flexible - allows rapid adjustment to changed political etc. circumstances. Combines the best principles from different stages of the development of the state in question.</p> <p>Is it really necessary to codify the British constitution- has worked relatively successfully.</p>	<p>Clear statement of principle - easily understood and acted on.</p> <p>Defines fundamental rights and provides a mechanism for their enforcement.</p> <p>Defines the scope and extent of the powers of the government and a judicial mechanism for resolving disputes as to alleged infringements.</p> <p>Ensures that important principles are respected and not overridden ill-advisedly.</p> <p>Provides a sense of national identity: see USA pride in the constitution.</p> <p>Ensure public have a better understand of the constitution.</p>
<p><b>Disadvantages</b></p>	<p>Lacks clarity - need to consult a textbook to identify the key features.</p> <p>Fails to provide a clear focus for national identity.</p> <p>No entrenched human rights.</p> <p>No legal constraint or framework for the</p>	<p>Rigid - so may become outdated and inappropriate. Such as USA right to bear arms.</p>

	government - political constraint only.	
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All of these are *contextual*. It is often argued that the inability of the US to pass gun control laws because of the 2nd amendment right to bear arms, which related well to the need for a citizen militia in the 18th century, but is considered by some to be inappropriate today, is a telling example of improper rigidity. However, the US constitution has been amended 27 times. In reality, if there were the political will, gun control could be introduced by way of amendment just as prohibition of alcohol was.

Equally, the flexibility of the UK constitution does not always produce a speedy response. House of Lords reform has been on the constitutional agenda since the 19th century, and was formally initiated by the [Parliament Act 1911](#), but although there have been further incremental moves, such as the introduction of life peers and the removal of most of the hereditary peers, there is still no clear agreement on the final constitution and powers of the second chamber. This is partly because the issue has had a low priority, but it is also due to the fact that there is no clear political consensus.

In reality, for most purposes, if sensibly formulated and intelligently administered, either form of constitution can achieve most of the desired objectives of the population. It is true that the [Human Rights Act 1998](#) did incorporate the substantive convention rights under the [ECHR](#) in English law. It took 50 or so years, in part due to lack of political will, in part because of concerns about the relationship between the Convention and Parliament. However, all the other states of the [Council of Europe](#) incorporated the Convention much earlier, despite the need in many cases to revise their prescriptive constitutions, so we have no particular cause for self-congratulation.

It is certainly true that many notorious dictatorships and abusive regimes, such as the [Soviet Union](#), [North Korea](#) and [Zimbabwe](#), have boasted of prescriptive constitutions which are, on paper, excellent examples, but which have simply not been respected. The lesson from this is that the document is not enough; it must be backed up with political, civic and judicial adherence to proper constitutional principles and the Rule of Law.

However, it would be wrong to conclude from this that a constitution is of no significance. Where there is both ingrained respect for the Rule of Law and an effective constitution, citizens are more transparently and conspicuously protected.

## Sources of the British Constitution

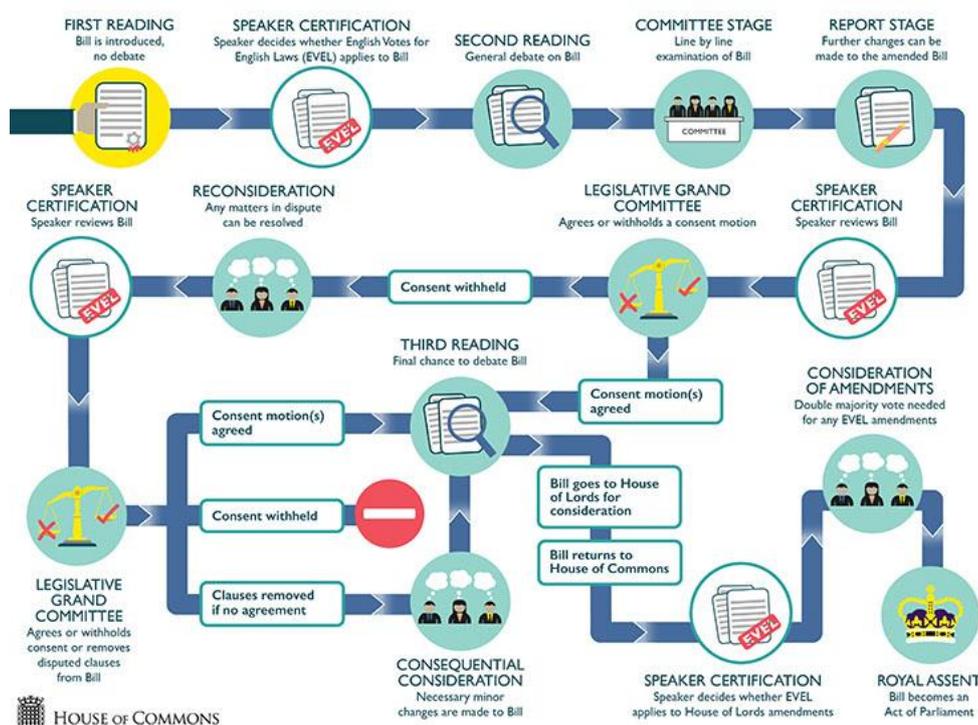
To be read on conjunction with  
Unlocking Constitutional and Administrative Law chapter 4.

The distinctive feature of a common law, or uncodified, constitution is that it is necessary to locate its component parts. There may be debate over whether a particular document 'counts', but it does not really matter, because there is no person or organisation entitled to give a definitive opinion on this. Strictly speaking Parliament could pass a statute which purported to give a definitive list, but there is no realistic prospect of this happening. There is no modern work which claims to list all sources, although any Constitutional Law textbook will claim to at least refer to, if not reproduce, all principal and generally accepted sources.

The major sources fall into three groups - **statutes**, important decisions of the courts, or **case law**, and **conventions**; these are understandings which operate in political and government circles, but are not strictly speaking legal rules enforceable in the court. It is also important to note that commentary by **eminent experts and academics** are very influential. This is particularly true of classic authors such as Locke, Hume and Blackstone in the 18<sup>th</sup> century, and Dicey in the 19<sup>th</sup> century.

### 1. Statutes or Act of Parliament

To say that there is no written British Constitution is misleading- large propositions of the constitutional arrangements are found written in statute. Before considering some of the key statutes which are a source of the British constitution it is necessary to understand how a statute of act or parliament is created, as the highest form of law in England and Wales. The Diagram below summarises the process of how a Statute or Act of Parliament is made.



As has already been mentioned, constitutional law is concerned with the organisation and allocation of power to the institutions of government. Key statutes which are concerned with this include the legislation on the devolution of power to Scotland, Wales and Northern Ireland.

Another aspect of constitutional law is concerned with the regulation of the relationship between the individual and the state. The formal expression of an individual's right can be found in a wide array of statutes including the Magna Carta 1215, the Bill of Rights 1689 and the Human Rights Act 1998.

Chapter 2 in the text book provides a more exhaustive list of the constitutionally significant statutes which form a source of the constitution.

## **2. Common law (case law)**

The decisions by the courts in interpreting the law created by parliament acts as an important source of the constitution in two main ways.

1. The courts must interpret legislation which may be unclear or unspecific and so capable of being interpreted in a number of different ways. This is often achieved through statutory interpretation which you will cover in the ELM module.
2. Central to a common law system is the lawmaking role of the courts which extends beyond the interpretation of legislation to judge made law. A prime example of this was the House of Lords decision in the case of *R v R* (1991) to make marital rape a criminal offence.

## **3. Constitutional Conventions**

### **What are constitutional conventions?**

Constitutional conventions are the so-called 'rules' or, more accurately, the principles and understandings which supplement and flesh out the formal legal rules. Because these conventions are not formally introduced and approved, and they are not justiciable, it can be very difficult to establish what they are. It can be difficult to disentangle what 'ought to happen' from what just 'happens'.

Attempts at definition include:

*"The unwritten maxims of the constitution" (J S Mill)*

*"Provide the flesh which clothe the dry bones of the law". (Jennings)*

*"Constitutional conventions form the most significant class of non-legal constitutional rules. A clear understanding of their nature, scope and manner of application is essential to the study of the United Kingdom's constitution. Conventions supplement the legal rules of the constitution and define the practices of the constitution". (Barnett).*

“[c]ertain rules of constitutional behaviour which are considered to be binding by and upon those who operate the Constitution, but which are not enforced by the law courts (although the courts may recognise their existence), nor by the presiding officers in the Houses of Parliament.” Marshall & Moodie (1971)

“[r]ules of political practice which are regarded as binding by those to whom they apply, but which are not laws as they are not enforced by the courts or by the Houses of Parliament.” Hood-Phillips (1952)

“[r]ules for determining the mode in which the discretionary powers of the Crown (or of the Ministers as servants of the Crown) ought to be exercised.” A V Dicey (1885 Law of the Constitution)

Conventions are

- Concerned with constitutional matters
- Operate supplementary to law.
- People at whom conventions are directed feel bound
- Must be some sort of track record or precedent
- Some sort of basis in constitutional morality.

### **The Purpose(s) of Conventions:**

1. to change and develop the constitution;
2. to regulate both internal and external relations; and
3. To provide a control mechanism.

### **Common Characteristics of Conventions**

- conventions are not formulated in writing
- the development of conventions is an evolutionary process
- conventions regulate the conduct of those holding public office
- sanctions for a breach of convention are political
- conventions are capable of being enacted into statute
- conventions are not exclusive to states with unwritten constitution

### **Determining the Existence of Convention**

How do we know if a particular political practice is a convention? It is often difficult to identify and ascertain whether a particular rule or practice has in fact become a convention.

Professor (Sir Ivor) Jennings says that the existence of a convention can be determined by asking 3 questions:

1. Is it possible to point to precedents?
2. Did the actors in the precedents believe that they were bound by a rule?
3. Is there a reason for the rule?

## Why are conventions obeyed?

As Conventions are non-legally binding rules, there are questions raised as to why those to whom they apply (those in political power) obey them.

Jennings suggests that "conventions are observed because of the political difficulties which arise if they are not".

"Politics is the final arbiter under an unwritten constitution" (Clarke, 1985. The Edwardians and the Constitution.).

It must be noted that Conventions are not always respected and can be breached without significant legal consequence. There may however be a practical or political consequence which results from a breach, such as a Minister being forced to resign. There also exists the possibility conventions may be turned into law to ensure compliance.

There is no clear authority supporting that conventions are straightforwardly enforceable but case law suggests conventions not wholly irrelevant.

- Evans v Information Commissioner (2012)
  - Challenge of the government's refusal to disclose advocacy letters to ministers in which Prince C sought to advance his own charities or promote his views.
  - Analysis of the Convention played a major part in deciding if the relevant legal test (public interest) was satisfied.
- AG v. Jonathan Cape Ltd [1976]
  - Publishing memoirs, cabinet discussions
  - Breach of confidence
  - Received in situation of confidence, as per convention
  - Can influence the circumstance

## Examples of Conventions

The best way to understand what constitutional conventions are is to look at some of the conventions operating in the UK constitution today.

### **Conventions relating to the Royal Prerogative**

The Monarch still retains some prerogative powers, but almost all of these powers are now governed by conventions.

- Prerogative power of granting of royal assent to bills passed by parliament - by convention never refused.
- Treaties, although ratified using Royal Prerogative, will not be ratified until the passing of a suitable statute law by Parliament. This is necessary if the treaty requires an amendment to domestic law, affects the rights of private individuals,

requires public expenditure, grants the Crown additional powers, or cedes territory. Examples include extradition treaties, double taxation treaties, and reciprocal social-security treaties.

- Prerogative power of appointment of Prime Minister (PM) (which position is itself only a conventional one) - by convention always appoints the MP who controls a majority in Commons
- The monarch will accept and act on the advice of their ministers, who are responsible to Parliament for that advice; the monarch does not ignore that advice, except when exercising Reserve powers.
- Prerogative power of appointment of Cabinet ministers - by convention picks those chosen by the Prime Minister
- Prerogative power of to summon, dissolve and prorogue Parliament - controlled by convention (and statute – e.g. under the Parliament Act 1911 the duration of Parliament must not exceed 5 years).

### **Conventions relating to the operation of the Cabinet system**

Collective responsibility:

Members of the Cabinet are governed by a convention requiring them not to dissent from the official cabinet line in public. This is known as the convention of collective responsibility. Now reflected in the Ministerial Code and in the Cabinet Manual 2011.

There are three strands to this convention:

- (i) *The confidence principle*: a government can only remain in office for so long as it retains the confidence of the House of Commons, a confidence which can be assumed unless and until proven otherwise by a confidence vote.
- (ii) *the unanimity principle*:
- (iii) *the confidentiality principle*: this recognises that unanimity, as a universally applicable situation, is a constitutional fiction, but one which must be maintained, and is said to allow frank ministerial discussion within Cabinet and Government

### **Conventions regulating the relationship between Ministers and Parliament**

Individual Ministerial Responsibility

This refers to the convention that a minister should take responsibility for:

- (i) conduct in his public role as a minister, and for the actions of his departmental officials; and
- (ii) Conduct in his private life.

It is clear that a Minister is accountable to Parliament in the sense that s/he must report to the House on matters relating to the conduct of their department and any executive agencies attached to it. Beyond this there is only confusion. Some commentators, relying

largely on Sir Thomas Dugdale's resignation over the Crichton Down affair and Sir John Nott's resignation over the invasion of the Falkland Islands by Argentina, argue that a minister must resign if there has been a significant failure within the department, even if the minister is not personally at fault. However, these are exceptions, and it is noteworthy that although the Scott report on arms to Iraq directly criticised several ministers for failing to advise Parliament that there had been a change in policy over export of machine tools to Iraq, and indeed giving the impression that there had been no change, none of the ministers concerned resigned.

It appears to be the case that a minister must resign if their personal or political behaviour is such that the Prime Minister adjudges that they have become a liability in political terms. Later, published papers suggested that this was the case for Dugdale, who merely put a positive gloss on a resignation engineered by the Prime Minister. All sources agree that the minister must account for what has gone on, but there is nothing to indicate that where there are errors, except those which are sufficiently serious, and which are the personal fault of the minister in any event, there is any expectation that resignation must follow. Professor Griffith, following a review of the whole record in 1987 concluded that, while the precise reasons for the resignation were unclear, it was not in pursuance of any principle of liability for the acts of officials, but was more likely because of the lack of support from the Cabinet as a whole in the face of back bench

### **Conventions regulating Proceedings in Parliament**

- In the event of a dispute between the House of Lords and the Commons, the Lords should normally give way to the Commons.
- **The Salisbury Convention:** The House of Lords will not oppose the 2<sup>nd</sup> or 3<sup>rd</sup> reading of any Government legislation which complies with commitments which were made in the governing party's election manifesto.
- **The Sewell Convention:** The UK Parliament will not legislate for matters devolved to the devolved governments of Scotland, Wales and Northern Ireland without the consent of the devolved legislature affected.
- Proposals on the expenditure of public money may only be introduced by a Government Minister in the House of Commons.
- Parliament should meet at least once a year.

### **Conventions Regulating the Relations between the United Kingdom and Other Members of the Commonwealth**

The United Kingdom Parliament may not legislate for a former dependent territory which is not an independent member of the Commonwealth except at its request and with its consent (re-stated in the preamble to the Statute of Westminster 1931 and enacted in Section 4).

### **What are the arguments both for and against the codification of conventions?**

Codification has different meanings and the fact that a set of rules is codified does not in itself determine the nature of the rules. There are two positions that have been adopted with regards to the codification of conventions.

1. Conventions should be given legal force.
2. Conventions might be codified within an authoritative text but remain as on-legal political practices.

In favour of codification of conventions

- Greater transparency of government.
- Could be enforced by Courts
- Freedoms of individuals better protected
- More checks on government
- Safeguard the neutrality to those who apply them.
- Likely to generate public confidence in the integrity of government
  - I.e. Constitutional Reform Act 2005.

Against codification of convention

- The current system retains flexibility: it is undesirable for them to become fossilised and so impede further constitutional change.
- Definitional problems of codification
- Danger of judges becoming politically tarnished
- Is codification even possible in practice?
- Impossible to identify all usages that are currently conventional and after a code was established further conventions might develop.

## Separation of Powers

To be read in conjunction with  
Unlocking constitutional and administrative law chapter 5

### **1. A brief history into the development of the concept of separation of powers**

Viscount Henry St John Bolingbroke (1658-1751) first introduced the separation of powers, proposing that the protection of liberty and security within the State depended upon achieving and maintaining equilibrium between the Crown, Parliament and the people:

*“Since this division of power and these different privileges constitute and maintain our government, it follows that the confusion of them tends to destroy it... in a constitution like ours, the safety of the whole depends on the balance of the parts.”*

This was developed in the 18<sup>th</sup> century by Baron Montesquieu, who stressed the importance of the separation of powers in order to protect individual liberty and democracy:

*“Political liberty is to be found only when there is no abuse of power. But constant experience shows us that every man invested with power is liable to abuse it, and to carry his authority as far as it will go .....To prevent this abuse, it is necessary from the nature of things that one power should be a check on another ....when the legislative and executive powers are united in the same person, or in the same body... there can be no liberty..... Again, there is no liberty if the power of judging is not separated from the legislative and executive..... There would be an end to everything if the same man, or the same body... were to exercise those three powers, that of enacting laws, that of executing public affairs and that of trying crimes or individual causes.”*

Montesquieu believed the system of checks and balances of one institution against the other was the secret of the political and economic success of the British at the time, although he over-stated the degree of separation between legislature and executive. He argued for such a system of separation of powers as a solution for France in L'Esprit des Lois.

In England, power was held by the ministry (cabinet), acting in the name of a crown which was already distanced from actual government because Queen Anne and King George I had displayed little ability and interest respectively. Although drawn from Parliament, the ministers did not control it, as there were no disciplined parties in the modern sense. Parliament controlled finances, and approval for policies had to be sought individually. The judges were generally robustly independent and would rule government action unlawful in appropriate cases, especially in matters concerning the liberty of the subject and improper financial demands.

The doctrine has since developed and interpretations of its meaning now range from the strict (complete separation between all three organs of state) to the less strict (separation to a great extent, i.e. some overlaps may exist, but with effective checks and balances to

prevent the abuse of state power). The doctrine of separation of powers has been adopted by states to create two different constitutional frameworks of states.

The first constitutional framework adopted by states is a **Presidential system**; here the full separation principle is maintained, and the population selects its legislators in one set of elections and its executive or administration in another. In some systems the separation is virtually complete. For example, in the USA the only overlap is that the Vice-President presides over the Senate (although he has no vote). No other dual mandate between Congress (the legislature) and the executive under the President is permitted. Whereas, in France, ministers are generally selected from the National Assembly (legislature), but they stand down from this mandate temporarily, being replaced by a substitute until they leave ministerial office. In these states the Head of State and Head of Government are usually the same person.

The second constitutional framework adopted by states is a **Parliamentary system**; here the population votes for a legislature in the knowledge that the result of this election determines the composition of the executive, because this will be formed from the party or coalition of parties which has won a majority in the parliamentary elections. In some cases, including the UK, members of the government remain full members of the legislature and can therefore answer to it on a routine basis. In these states the Head of State is usually a symbolic one, a constitutional monarch or a president with restricted and generally largely symbolic or representative powers.

## 2. A Modern-Day Understanding of the Doctrine of Separation of Powers

The doctrine is concerned with limiting and controlling state power. According to Professor Wade separation of powers should mean that:

1. The same person should not be a member of more than one of the three organs of state;
2. One organ of state should not interfere with the work of another;
3. One organ of state should not exercise the functions of another.

The three organs of the state are the executive, the legislature and the judiciary.

The **executive** is the organ exercising authority in and holding responsibility for the governance of a state. The executive executes and enforces law through the everyday running of the state.

A **legislature** is a deliberative assembly with the authority to make laws for a political entity such as a state.

The **judiciary** is the system of courts that interprets and applies the law in the name of the state. The judiciary also provides a mechanism for the resolution of disputes. Under a strict separation of powers, the judiciary generally does not make law (which is the responsibility of the legislature) or enforce law (which is the responsibility of the executive), but rather interprets law and applies it to the facts of each case.

### 3. To What Extent Does It Apply to The UK Constitution?

In the UK, the three organs of state aren't completely separate from one another. However, some senior members of our judiciary have submitted that there are areas where our system does adhere to the doctrine:

Lord Diplock: "... the British constitution, though largely unwritten, is firmly based upon the separation of powers; Parliament makes the laws, the judiciary interpret them." (Duport Steels v Sirs [1980] 1 WLR 142 HL);

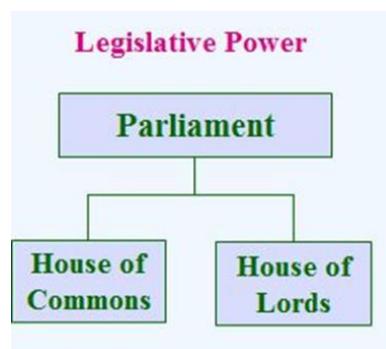
Lord Steyn: "The separation of powers between the judiciary and the legislature and executive branches of government is a strong principle of our system of government. The House of Lords and the Privy Council have so stated..." (R v Secretary of State for Home Department ex parte Anderson [2002]).

But many argue that in its purest or strictest sense, separation of powers isn't part of our constitution.

A more acceptable view may be that our unwritten constitution, which has evolved over time, has a partial separation of powers with some degree of overlap but with certain checks and balances in place to limit the potential for abuse of power.

How the organs exist in the UK

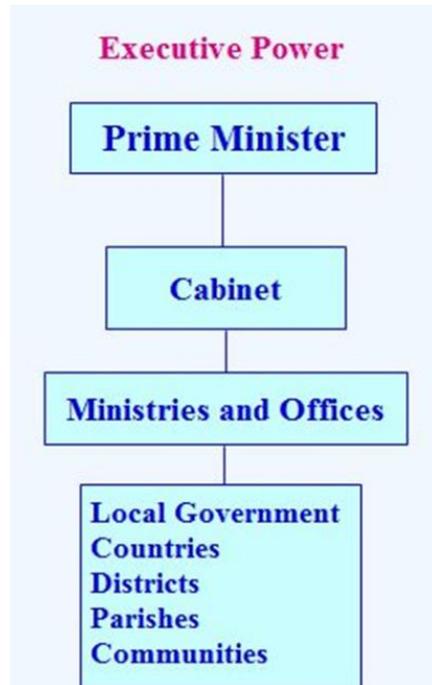
#### Legislature:



- Parliament has unlimited law-making power. The Queen in Parliament makes primary law in the form of Acts of Parliament. The Queen cannot make law without being proposed by Parliament.
- Comprises of the House of Lords and House of Commons
  - The legislature has three primary functions
- Primary legislature.
- Provides the government with money.
- As a matter of convention the executive is politically accountable to Parliament.
  - Parliament must meet at least every 3 years; by convention must meet annually.
  - The elected HoC superior to the HoL.

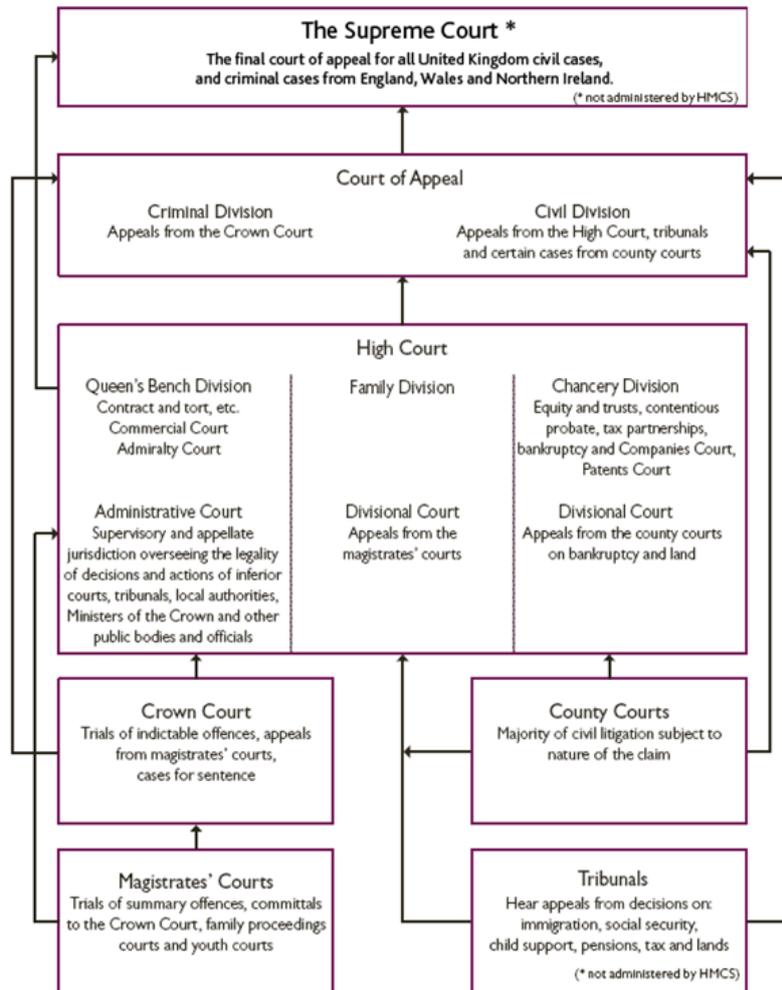
- The House of Lords cannot veto a public bill that originates in the House of Commons but can delay it for no more than one year (one month if a money bill).  
Exception: bill to extend Parliament beyond 5 years.

**Executive:**



- Core of the executive is the Crown; Queen, ministers, civil servants and the armed forces.
- The executive is responsible for the day to day running of the country.
- Queen must appoint the person who commands the majority of the House of Commons as Prime Minister to lead the executive.
- All ministers must be MPs.
- Committee of about 25 senior ministers chaired by the PM are responsible for government policy, coordination of government work and major decisions.
- Government powers are mainly conferred by statute to individual ministers.
- No constitutional principles requiring any particular structure of government departments.

## Judiciary



- All courts must be created by statute and their powers are determined by statute.
- Uphold the rule of law by applying the law created by the legislature (Parliament).

### 4. What overlaps are there between the executive, the legislature and the judiciary in the UK and what checks and balances exist between them?

#### A. Executive and Legislature

##### i) Personnel:

- The personnel of the Government (the Executive) come from the legislature:
  - Ministers of the Crown must be members of either House of Parliament.

- The Prime Minister and the Chancellor of the Exchequer must be members of the House of Commons.

Lord Hailsham (Lord Chancellor 1979-1987) recognised the scope for abuse of power in our system, calling it 'an elective dictatorship'. He argued that our electoral process, which often gives a Government a large majority in Parliament, can result in a situation where the Executive controls the legislature. How that control can be exercised depends on the mechanisms in place for Parliament to check the Executive.

ii) *Functions:*

- Secondary/delegated legislation: laws and regulations made by Government departments, local authorities and other public bodies under the authority of an Act of Parliament.
- Example: Henry VIII clauses: a clause in an Act of Parliament allowing the Government to repeal or amend it by secondary legislation without further parliamentary scrutiny.

iii) *Controls:*

Parliamentary procedures for scrutiny of the Government:

- A vote of no confidence

There is the opportunity for the House of Commons to call for a vote of no confidence in the Government. The loss of a vote of no confidence on a matter of policy central to the Government's programme will result in the resignation of the Prime Minister and can cause dissolution of Parliament. But where the Government has a large majority, as Labour did back in 1997, it is unlikely that a Government would lose a vote of no confidence – one aspect of living in an elective dictatorship?

The last successful vote of no confidence was back in 1979 when James Callaghan resigned as Prime Minister after a vote of no confidence.

- Her Majesty's Opposition
- Question Time, Debates and Select Committees
- The House of Lords

B) Executive and Judiciary

i) *PERSONNEL:*

- Attorney General

ii) *FUNCTIONS:*

- Judges as chairmen of tribunals of inquiry.

The Leveson Inquiry (2011/12)

Judges are equipped by their training and experience to review evidence with objectivity and in an impartial and rigorous manner but many of these inquiries involve sensitive

political issues. This means that the Chairman who delivers the report may be subjected to criticism. In particular, there may be accusations from some quarters that the judges are afraid to criticise the Government and, at the very least, the public perception of their impartiality may be damaged.

*iii) CONTROLS:*

- Judicial Review of Executive Action
  - Council of Civil Service Unions v Minister of State for the Civil Service [1985] AC 374 (the “GCHQ” case)
  - This case commonly referred to as the GCHQ case, sets out the test formulated by the court as to which areas of power of the executive are justiciable (i.e. where the courts can effectively control executive action) and where they will hold back. You will look at this case in more detail in your LGS on prerogative powers.

C) Legislature and Judiciary

*i) PERSONNEL:*

- The ‘historical’ role of the House of Lords as the highest domestic court in the land and the role of the new Supreme Court of the UK in remedying this overlap of personnel and function.

*ii) FUNCTIONS:*

- Parliamentary privilege: Parliament has the power to regulate its own internal composition and structure.
- Judges as lawmakers  
Do the judiciary violate the doctrine of separation of powers by interpreting statute with too much freedom? Do they in fact make law? This should be the job of the legislature under the separation of powers doctrine.
- R v R [1992] AC 599
  - Facts: D and his wife were living apart. D forced his way into the house where his wife was staying and forced her to have sex with him. He pleaded not guilty to rape (relying on an exemption for married couples).
  - House of Lords: Upheld D’s conviction (“...the supposed marital exception in rape forms no part of the law of England today”).
- The Human Rights Act 1998 (“HRA”)
  - S.3 HRA contains a duty on our courts to interpret legislation compatibly with the upholding of Convention rights (as far as possible) and, where this is not possible, s.4 HRA gives the higher courts the opportunity to make a declaration of incompatibility. The courts have been using these powers and

feeling their way through the cases – we will study some of these cases later on in the course.

- In the words of Lord Steyn in *R v A*: “...s.3 [HRA] requires the court to subordinate the niceties of language [of the statute] to broader considerations of relevance judged by logical and common sense criteria of time and circumstances”. Yet, throughout, the courts have been conscious of their role – which is not to make law.
- They have also made frequent reference to the doctrine of Parliamentary Sovereignty, specifically preserved by s.4 HRA. The UK courts cannot overturn legislation made by Parliament.

*iii)*     **CONTROLS:**

- Senior Court judges can be removed from office by an address of both Houses of Parliament to the Crown.
- The sub judice resolution.  
MPs should not discuss matters awaiting adjudication in a court of law

**D)**     Judiciary, Executive and Legislature

- The Sovereign:

Head of the executive, the legislature and the judiciary. Is the involvement of the Sovereign in all three branches a good thing, a bad thing or an irrelevance?

**5. WHAT IMPACT HAVE RECENT CONSTITUTIONAL REFORMS HAD ON THE KEY FEATURES OF OUR CONSTITUTION?**

One example of the way our constitutional system historically disregarded the separation of powers was in the traditional role of the Lord Chancellor. Until 2005, the role of the Lord Chancellor was living proof of the absence of separation of powers.

**1. Head of the Judiciary**

The Lord Chancellor was head of the judiciary and able to sit as a judge. The Lord Chancellor was also President of the Supreme Court of England and Wales.

**2. Cabinet Minister (Executive)**

The Lord Chancellor was (and still is) a Cabinet minister responsible for the administration of justice.

**3. Speaker of the House of Lords.**

The Lord Chancellor was also Speaker in the House of Lords.

**The Constitutional Reform Act 2005 (the “Act”)**

The Act received Royal Assent on 24 March 2005 although much of it came into force on 3 April 2006. It addresses four important areas:

- Reform of the Office of the Lord Chancellor:

The Act reformed the post of Lord Chancellor. The Lord Chief Justice (“LCJ”) became the head of the judiciary and took over many of the judicial functions formerly undertaken by the Lord Chancellor.

The Lord Chancellor continues to be the Government minister responsible for “justice” (including the judiciary and courts system) – the Secretary of State for Justice.

Section 15 and Schedule 4 provide for judiciary-related functions currently vested in the Lord Chancellor to be transferred to another office holder or otherwise disposed of, and for the modification of certain other functions of the Lord Chancellor. Some of the judiciary-related functions are transferred to the Lord Chief Justice or to another member of the senior judiciary. In many instances, as appropriate to the nature of a particular function, the Lord Chancellor will be required to consult, or obtain the concurrence of, the Lord Chief Justice (or vice versa) before exercising the function. In others, functions may be exercised by the Lord Chancellor or the Lord Chief Justice acting alone.

Section 19 of the Act also makes provision for the transfer, modification and abolition of other functions of the Lord Chancellor.

- Supreme Court:

Part 3 of the Act creates a Supreme Court of the United Kingdom (which is generally to be known as ‘The Supreme Court’ in the Act and other legislation) and makes provision for the transfer to the Supreme Court of the appellate jurisdiction of the House of Lords and the devolution jurisdiction of the Judicial Committee of the Privy Council. The new Supreme Court will be separate from Parliament. It is located in a building separate from the House of Lords with its own independent appointments system, its own staff and its own budget.

- Judicial independence:

For the first time, the Act provides for a legal duty on Government ministers to uphold the independence of the judiciary. They will not be allowed to influence judicial decisions through any special access to judges. Section 3 places a duty on Ministers of the Crown (including the Lord Chancellor), and all others with responsibility for matters relating to the judiciary or otherwise to the administration of justice to uphold the continued independence of the judiciary

- Judicial Appointments Commission:

As we have already seen, the Act has created an **independent** Commission to recommend judicial appointments to the Secretary of State for Justice.

### **What factors might affect the independence of the judiciary?**

i) Removal from Office

The Act of Settlement 1701 (now contained in s11 (3) of the Supreme Court Act 1981) secures the independence of the judiciary by establishing the principle that senior judges (i.e. High Court judges and above) cannot be dismissed by the Executive.

Cannot be dismissed for political reasons. They can be removed by compulsory retirement if they are incapacitated or unable to resign through incapacity. In any case the power of Parliament to remove judges is used sparingly.

As well as security of tenure, judges enjoy security of remuneration.

ii) Judicial Immunity

Judicial proceedings are privileged. The judge of a superior court is not liable for anything done or said in the exercise of judicial functions (*Sirros v Moore* [1975] 1QB 118).

iii) Political Ties

Judges are expected to remain politically impartial. All political ties must be severed on appointment to the bench.

iv) Freedom from Bias

*R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet (No 2)*

Spanish authorities wanted to obtain the extradition of Senator Pinochet from the UK to Spain to stand trial for crimes against humanity. The House of Lords considered whether undisclosed links between Lord Hoffman and Amnesty International caused a real danger of bias, although no actual bias was suggested.

Held: his interest meant that he was automatically disqualified from sitting on the appeal. The House of Lords did not even need to apply the test for bias. The decision made at appeal had therefore been improperly made and was overturned.

**6. SUMMARY: TO WHAT EXTENT DO WE HAVE A FORMAL SEPARATION OF POWERS?**

In the latter part of the 20th century the lawmaking role of the judges has dramatically expanded. Judicial law making is no longer always confined to small, incremental changes. This is not only as a result of the HRA. Therefore, it is equally essential that the judiciary recognise the boundaries of their powers being an unelected and unrepresentative body.

The relatively recent reforms to the role of the Lord Chancellor, the House of Lords and the system of judicial appointments have, however, addressed some of the concerns expressed as to the UK's most obvious violations of the separation of powers. This led Professor Wade to conclude that "In many constitutions, separation of powers has meant an unhampered executive. In England, it means little more than an independent judiciary."

## Activities

### Activity one: UK Constitution and Separation of Powers

Match up the key elements of the UK's democratic structures with their correct definition.

Term	Definition
Constitution	A set of important rules that describe how a country is run.
United Kingdom Parliament	The most powerful body in Parliament. It is where MPs discuss and debate policies and vote on legislation before it goes to the House of Lords.
House of Commons	The devolved governments of Scotland, Wales and Northern Ireland, formed from parties elected in the devolved Parliaments or Assemblies. They are led by First Ministers. In Northern Ireland there is also a deputy First Minister.
Devolved administrations	Made up of the House of Commons, the House of Lords and the Monarch (sometimes referred to as the Crown).
House of Lords	Responsible for a range of vital services for people and businesses in a defined area including social care, schools, housing and planning and waste collection.
Local government	Made up of about 800 'peers'. Its main job is to 'double check' new laws and make sure they are fair and will work. Some legislation starts here and is then voted on by the Commons.
Ward	The party or parties (as with a coalition) that can command an overall majority in the House of Commons, i.e. more than half the members in the House of Commons after a general election.
Local councillor	People who represent their local community, so they must either live or work in the area. They can be from any political party and can also be completely independent of any political party.
The Monarch (sometimes referred to as 'the Crown')	Sits within the House of Lords and is usually appointed due to their knowledge and expertise. Responsible for checking laws and holding the government to account.
Member of Parliament	An area in your local authority. Local authorities are divided up into these. Each of these usually has two or three local councillors who are elected in local government elections.
Government	A geographical area of voters: each area elects one MP. There are currently 650 of these in the UK. The people in each area are called constituents.
Peer	The process in the UK which created a national Parliament in Scotland, a National Assembly in Wales and a National Assembly in Northern Ireland. This process gave the UK nations powers to make various decisions that had previously been made by the UK Parliament. The powers given to these nations has developed over time.
Constituency	The democratically elected national Parliament or Assembly that represents the interests of the people of Scotland, Wales or Northern Ireland. They are empowered to make laws on devolved matters such as education and health. The elected Members are different to the Members of the UK Parliament.
Devolved Parliaments or Assemblies	Rarely attends Parliament but has significant duties to carry out including delivering a speech at the start of each Parliament and giving final sign off to bills (proposed new laws).
Devolution	Responsible for the day to day running of local services.
Elected mayor	Represents the interests and concerns of the people in their constituency and is involved in considering and proposing new laws to govern the country, and holding the government to account.

### **Activity Two: Sources of the Constitution**

Create a table and try to identify two sources of the British Constitution in each of the three following categories: Statutes (Act of Parliament), Cases, Conventions. You may need to rely on general knowledge as well as what you have read so far.

### **Activity Three: The Constitution in Everyday life**

Having gained a clearer understanding on what is considered to be a constitutional issue, take time out in your course preparation to read a reputable newspaper and identify the number of articles which discuss constitutionally significant matters.



### **Activity Four: Online Quiz**

This will require you to do some wider reading on the topics covered in this introductory reading material.

<https://global.oup.com/uk/orc/law/public/lesueur3e/student/mcqs/ch04/>