

## CONSTITUTIONAL LAW

### Tutor

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### Overview

This course is an introduction to the British constitution. Most days, you could look at any decent newspaper and read about the kinds of issues and topics that might be discussed in this course: Brexit, Scottish independence, the deployment of the armed forces, mass surveillance, monarchs and ministers, secret trials for suspected terrorists, and much more. If you have any interest in politics or government or human rights – and as a law student, you almost surely do – then you'll find this course interesting. The course isn't all about law, despite its title. The constitution includes more than just legal rules. And even to understand the legal rules, you'll need to understand something about their political context. So, we'll cover a lot of ground in this course, and that'll help keep things interesting, too.

Why are you studying constitutional law now, at the beginning of your degree? A constitution provides a framework for the rest of the legal system (a point we'll pick up on in week 1). By studying the constitution, you'll get a sense of what some of the big pieces of the legal system are, and how they fit together. Some of these 'big pieces' are the institutions that create and apply the law, including Parliament and the executive (week 2). Some of the other big pieces are the principles that weave through the legal system and help it hang together as a whole: the rule of law, parliamentary sovereignty, and the separation of powers (weeks 3, 4, and 6). Constitutional law also tells us about how England, Northern Ireland, Scotland, and Wales figure in the United Kingdom as a whole, and about how the UK relates to the EU (week 5).

Had you taken a course in constitutional law 25 years ago, it would have looked very different. Devolution hadn't happened yet, for one thing. The UK didn't have its Human Rights Act, which is what weeks 7 and 8 are mainly about. The UK was part of the EU. Further reforms are possible. Scotland and Northern Ireland might leave the union. The Human Rights Act might be repealed or changed. Constitutional law is the fastest moving and most exciting area of law at the moment. It's a great time to be learning the subject.

In addition to teaching you about the constitution, this course has two aims. One is to help you to think analytically about the law. You'll be expected to piece together facts, to evaluate what others have said, to support your views with logic and evidence, and to argue for your views in tutorials and in the exam. You'll be presenting your views mainly in written form, and the other aim of the course is helping you learn how to write a clear, concise, and convincing essay.

## Schedule in brief

- Week 1: Nature and Sources of the Constitution
- Week 2: Parliament and the Executive
- Week 3: The Rule of Law
- Week 4: The Separation of Powers
- Week 5: Multi-Layered Government
- Week 6: Parliamentary Sovereignty
- Week 7: Human Rights I
- Week 8: Human Rights II

## Tutorials

There will be tutorials every week. Each tutorial will be an hour long, and they'll be held in my room in Brasenose College. There will be two students per tutorial. The aim of the tutorials is to explore the reading and your thinking about it in depth.

We will arrange times and groups during week 0. If you have a conflict with a suitably important appointment, you can swap tutorial places, if those concerned (ie, the swappers and their partners) agree and I'm told by email at least 24 hours in advance. If you're ill, please ask the college nurse to email me confirming you're unable to attend.

There is a set of Tutorial Questions below each week's reading. You should write a paragraph or two on each Tutorial Question. Doing so will help you figure out where to put your time. If you get to the end of the reading, and you find you can't answer a Tutorial Question, take that as a sign you need to read, or reflect on, parts of the material again.

## Essay

There are essays due in weeks 2–7. Before the tutorial, read your tutorial partner's essay. Come to the tutorial prepared to describe and assess his or her essay.

### Essay Format

Your essay should be no more than 1400 words. This is a strict limit, meant to teach you concision and prioritisation. Your essay should have your full name on the first page. The file name should include your surname and the week number (eg, 'Smith – Week 1 – Nature and Sources'). Otherwise the format is up to you, though I don't recommend using Comic Sans.

### Submission

Essays must be uploaded to Dropbox by 9pm the day before the tutorial. I will send you a link to a shared folder. Please bring a printed copy of your essay and the essays by your tutorial partner. If you run into any trouble with Dropbox when you try to upload your essay, email the essay to me and your tutorial partner instead. But please don't treat email as a substitute for Dropbox. And please don't edit or delete essays (yours or other students') after they've been uploaded.

### Feedback

As long as you submit your essay on time, I'll give you feedback on it. I won't mark or give feedback on late essays, unless there's a very good reason for the late submission (eg, serious illness). If no one in a tutorial group submits an essay, we won't hold the tutorial. I'll try to return your essay on the day of the tutorial. That may not always be possible, but if it isn't, I'll try to return the essay soon after.

What does ‘feedback’ mean? For every essay I’ll give you brief written comments – notes on what you did well or poorly; what to keep the same, what to change for next time; what you should read, what you should think about; and so on. For the essays submitted in weeks 5–7 I’ll also give you a mark. I won’t give you a mark in the first few weeks because I want you to focus on the comments instead, and because at that early stage a mark doesn’t mean very much. In addition to written comments and a mark, you’ll get feedback as part of our discussion during the tutorial.

### What’s a good essay?

70 or above is a “first class” or “distinction-level” mark. 60–69 is an “upper second class” or “2:1” mark. 50–59 is a “lower second class” or “2:2” mark. 40–49 is a “third class” mark. Below 40 is a failing mark.

The Law Mods Examination Conventions says that a distinction-level answer shows several of the following:

- close attention to the question asked;
- extensive knowledge and understanding of the topic addressed;
- impressive comprehensiveness and accuracy, with few substantial errors or omissions;
- notable clarity and appropriateness of structure, argument, integration of information and ideas, and expression;
- identification of more than one possible line of argument;
- good appreciation of theoretical arguments concerning the topic and substantial critical analysis.

Simplifying, you should show that you know the law; that you’ve thought carefully and insightfully about the law; and that you can present your thoughts clearly and persuasively, in an answer to the question posed. The better you do these things, the better your mark will be.

How do you learn how to write a good essay? Practice, reflection, and more practice. That’s what you’ll have an opportunity to do this term. Here are a few tips to get you started:

- *Start early.* Look at the essay question before you start your reading. Keep it in mind as you do your reading and note down points that will be helpful. Write a plan before you write the essay. Give yourself enough time to write two drafts.
- *Introduce, conclude.* You should have a *short* introduction, where you tell the reader how you interpreted the question and how you propose to go about answering it. You should also have a conclusion, where you make it clear to the reader that you did what you said you would do.
- *One step after the next.* Each step in the essay – each point in each paragraph – should follow from the previous step, lead to the step after, and support your conclusion. Always ask yourself: would a reader still be convinced of my conclusion, if I removed this paragraph, point, example, etc? If the answer is Yes, then you should probably cut it.
- *An essay is an argument.* You’re trying to convince the reader of your answer to the question. So don’t just summarize what you’ve read or try to show how many facts you’ve learned. Take a position. And don’t just take a position; give reasons for that position, cite relevant authority (cases, articles, reports, etc.), and anticipate possible objections. Be persuasive.
- *Clarity above all.* English students and historians try to write beautifully. Lawyers aim for clarity because you can only persuade someone if they understand what you’re saying. In general:
  - Don’t use a lot of jargon. Avoid latin and ‘legalese’.

- Use the active voice.
- Omit needless words.
- Don't use a long word if a short word will do.
- Use everyday language if you can (eg, 'so' not 'therefore', 'let' not 'permit', 'show' not 'demonstrate', 'first' not 'firstly', 'thus' not 'thusly').
- Write short sentences. Aim for an average of about 20 words per sentence.
- If you read your essay out loud, does it sound like something an articulate person might say in conversation? If not, try again.

Read some writing guides. I like *Style: Lessons in Clarity and Grace* by Williams and Bizup (there are copies in the BNC library), but there are others.

- *Experiment.* You'll need to use trial and error to figure out what works. Try writing an essay one way. I'll tell you what was effective and what wasn't. Next week, try writing the essay a different way, keeping as much of what worked as you can. And so on, for each week. Take risks, without being reckless.
- *Use models.* Sometimes it helps to have an example of good writing to use as a model. Unfortunately, a lot of legal writing is awful. This is true of judgments and of academic work. So, you'll need to pick your models carefully. Lady Hale, Lord Reed, and Lord Sumption are good writers. Of the authors you'll be reading in this course, Adam Tomkins, Vernon Bogdanor, and Timothy Endicott are some of the better writers. These judges and authors all have different styles. That goes to show that there's more than one way to write well in law.

## Reading and Resources

### The Reading List

Our reading list is based on the core reading list for Constitutional Law produced by the Faculty. Our list has everything that's on the core list, plus some extras. When you write the exam, you'll be deemed to know all of the reading on the core list. You can find the core list on the WebLearn course page. I strongly recommend you look at it.

Some of the reading has a star (\*) next to it, and some doesn't. Start with the starred reading, then do the non-starred reading. Please understand: the difference between starred and non-starred reading is *not* the difference between essential and non-essential reading, but the difference between reading to do first and reading to do later. All the reading is essential.

The reading list is long. How should you tackle it? You might develop your own approach, which is fine. Here are some suggestions:

- *Budget your time.* Think about how much time you have to do the reading. How long will it take to write the essay? Do you have another tutorial the same week? How long did it take you to do the reading last week? Then divide up the reading so that you can finish it in the time available. Be realistic with yourself about how much reading you can do per hour (it's probably less than you think). Make a schedule and try to stick with it.
- *Start with a textbook.* A textbook will give you an overview of a topic, and you can use that as a framework for the rest of the reading. In this course we mainly use two books:
  - Elliott and Thomas, *Public Law* (4<sup>th</sup> edn, 2020)
  - Bradley, Ewing, and Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, 2015)

Bradley, Ewing, and Knight has a lot of detail. It's also dry and a bit hard going. Elliott and Thomas is more readable. They make a good pairing, and I recommend looking at them both.

- *Go topic by topic, starting with the starred reading.* The non-textbook reading tends to be a mix of case law, statutes, reports (such as by government bodies), and academic articles and book chapters. Especially with the articles and chapters, it's often helpful to skim the piece first, then go back over it more carefully. Some articles provide an overview of a large topic, and it's helpful to read those first. If it's obvious from skimming it that an article or chapter is about a case or statute on the reading list, it will usually make sense to read that case or statute first.
- Use the Tutorial Questions (see above) and past exam questions (see below) to focus your reading.
- *Make notes.* You can't remember everything, and there isn't time to read everything again just before Mods. You'll need to rely on your notes. Try to draw out key points – the bits that you would mention, were you to explain the topic to someone else. Pay special attention to the cases. Don't try to make them comprehensive; that would defeat the point. (If you find you're consistently taking 40+ pages of notes per topic, come and see me.)
- *Draw connections between weeks.* Constitutional Law is a course where almost everything touches on something else in the course. If you find yourself shuffling back and forth between a week's reading and your notes from previous weeks – well, that's a good sign. It's also a good sign to find yourself adding things to the notes you took previously, based on the reading for a later topic. Your odds of doing well on the exam go up a lot if you can explain the connections between the topics.
- *After the tutorial.* You'll hopefully have a new take on some of the reading. You'll probably also realize there are some gaps in your knowledge. While all this is fresh in your mind, take some time to go back over the reading and supplement your notes.

The reading list uses these abbreviations:

CA	Court of Appeal	PL	Public Law
CLJ	Cambridge Law Journal	MLR	Modern Law Review
HL	House of Lords	LQR	Law Quarterly Review
ECJ	European Court of Justice	All ER	All England Law Reports
EHRR	European Human Rights Reports	WLR	Weekly Law Reports
		DLR	Dominion Law Reports

### Online

There's great constitutional commentary online. The good newspapers (eg, the Guardian, the Times) are a useful resource. There are also websites that take up constitutional issues. Some of the sites I recommend are:

- The UK Constitutional Law Association Blog: <http://ukconstitutionallaw.org/blog/>
- The UK Supreme Court Blog: <http://ukscblog.com/>
- Public Law for Everyone (a blog by Mark Elliott of Cambridge): <http://publiclawforeveryone.com/>
- The UK Human Rights Blog: <http://ukhumanrightsblog.com/>
- The blog of the Constitution Unit (a research unit at UCL): <http://constitution-unit.com/>

There are lots of constitutional commentators worth following on Twitter. You might start with Mark Elliott, Joshua Rozenberg, Dinah Rose QC, then work your way out from there.

Joshua Rozenberg also hosts an excellent BBC radio program called 'Law in Action', which you can [download as a podcast](#).

### Lectures

I *strongly* recommend attending the lectures in constitutional law. You can find the times and locations on the Faculty's lecture list here:

<https://www.law.ox.ac.uk/current-students/lecture-list>.

### Exams

This is a Mods course, so the exam is at the end of Hilary Term. Take a look at some past exam papers sooner rather than later. The papers are available here:

[https://weblearn.ox.ac.uk/portal/hierarchy/oxam/page/search\\_by\\_cours](https://weblearn.ox.ac.uk/portal/hierarchy/oxam/page/search_by_cours). Think about the kinds of questions that are asked, and use them to guide your reading and revision. It's also a good idea to look at the Examiners' Reports on past exams papers.

### **Checklist**

Putting all this information together, here are some questions you should ask yourself before each tutorial:

- *Two days before:* Have I done all the starred reading? Have I thought about the feedback from the previous weeks? Have I looked at past exam papers and noted common types of questions? Have I answered the Tutorial Questions?
- *9pm the day of the tutorial:* Have I uploaded my essay to Dropbox?
- *2 hours before:* Have I read and reflected on my tutorial partner's essay? Am I prepared to describe and assess their arguments? Have I noted down the questions I had while doing the reading?
- *Just before:* Have I printed off copies of the essays, and my answers to the Tutorial Questions?

### **Questions?**

If you have any questions while doing the reading or writing your essay, the tutorial or class is the time to raise them. But if something comes up after, or you have a question about your feedback, or about anything else relating to the course, you're always welcome to contact me. Try email first. If I can answer your question quickly, I'll do so by email. If it's anything more involved, I'll probably ask you to come and see me. Just don't be afraid to ask. It's perfectly alright to feel confused. I've never thought a question was stupid.

## WEEK 1: NATURE AND SOURCES OF THE CONSTITUTION

This topic has two parts. The first is about what constitutions are, and what some of the distinctive features of the UK constitution are. The second part is about the sources of the constitution, or in other words, the types of material that make up the constitution. One type of material is conventions. Two others are principles and statutes. The British constitution is unusual partly because it's 'unwritten' or 'uncodified', a feature the merits of which are hotly debated.

### 1. Overview: The British Constitution

- •Elliott and Thomas, chapter 1

### 2. The Political and the Legal Constitution

- •Griffith, 'The Political Constitution' (1979) 42 MLR 1
- Oliver 'Law Politics and Public Accountability' (1994) PL 238
- •Gee and Webber, 'What is a political constitution?' (2010) 30 OJLS 273

### 3. Constitutional Conventions

- •*A-G v Jonathan Cape* (1976) QB 752
- •*Re Amendment of the Constitution of Canada* (1981) 125 DLR (3d) 1 at 21-29, 81-87, 90-106, 110-126
- Marshall, *Constitutional Conventions*, at 16-17, and Brazier & Robilliard [1982] PL 28
- *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645
- •*Evans v Information Commissioner* [2012] UKUT 313, [64]-[112]
- •*R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [136]-[151]
- *FDA v Prime Minister* [2021] EWHC 3279 (Admin)
  
- Ministerial Code 2015
- Cabinet Manual 2011
- Government of Wales Act 2006, s 107(6)
  
- Dicey Ch 14, 15
- •Ahmed, Albert, and Perry, 'Judging Constitutional Conventions' (2019) 17 International Journal of Constitutional Law 787
- •Barber, *The United Kingdom Constitution* (OUP 2021), ch 6
- •Jaconelli 'Do Constitutional Conventions Bind?' (2005) 64 CLJ 149

### 4. Constitutional Principles; Constitutional Statutes?

#### A. Principles

- •Elliott and Thomas, chapter 2
- Endicott, *Administrative Law*, 3<sup>rd</sup> edn, pp 11-37
  
- •*R (Simms) v Secretary of State for the Home Department* [2002] 2 AC 115, 130E-F and 131E-G
- •*R (Unison) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409, [65]-[102]

- *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605

## B. Constitutional Statutes

- *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [60]–[67]
- *R(HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3
- *R (Unison) v Lord Chancellor* [2017] UKSC 51, [65]–[102]
- Barber, 74–82
- Perry & Ahmed, ‘Constitutional Statutes’ (2017) 37 OJLS 461

## 5. The Codification of the Constitution?

- Barber, ‘Against a Written Constitution’ [2008] PL 11
- J. King, ‘The Democratic Case for a Written Constitution’ in Jowell and O’Cinneide, *The Changing Constitution* (9<sup>th</sup> ed. Oxford University Press)

## 6. Tutorial Questions

- What is a statute? What is a principle? How do they differ from rules of the common law?
- What are constitutional conventions? How do they differ from laws?
- Could a political actor make a mistake as to what a convention demands?
- To what extent is it true to say that the British Constitution is ‘unwritten’ and ‘political’?
- Is codification of the British Constitution possible? Is it desirable?
- Is there a distinction between ‘constitutional’ and ‘ordinary’ statutes in UK law? Should there be?
- Should unelected judges supervise and limit a government that is chosen by and accountable to an elected legislature?

## 7. Assignment

### Instructions and Question

In later weeks, the assignment will always be an essay. For this first week, the assignment is to prepare an essay plan. It should be a plan of the essay you would write in answer to the following question:

‘The central part played by conventions in the constitutional arrangements of the UK indicates a preference for self regulation by governments and politicians over a system of legal checks and balances enforceable by the courts, which is much more characteristic of modern codified liberal constitutions.’ (BARENDT) Critically assess this statement.

In your plan, set out the main points your essay would include (in the order they would appear), the evidence you would use to support each point, likely objections and possible responses, and your conclusion. The plan should be one page of A4. Bring the plan with you to the tutorial.

### Essay Tip

For quotation questions, the quotation itself may provide a structure for your essay. Start by telling the reader what things the author puts forward as true. For as many of those things as possible, tell the reader whether each is true and why. Finally, in light of those conclusions, tell the reader what to make of the quotation as a whole.

## WEEK 2: PARLIAMENT AND THE EXECUTIVE

One of the jobs of a constitution is to create and regulate the major institutions of the state (or government). In the UK these institutions are Parliament, the executive, and the courts. We'll start with Parliament – its functions, its relationship with the people, and its future. We'll then turn to the functions and powers of the executive. Finally, we'll discuss how Parliament checks (and fails to check) the executive. The political limits on the executive are complemented by legal limits, which are the focus of next week's reading. Note that while Parliament's law-making powers form the backdrop of this week's reading, it isn't until week 6 that we'll squarely confront the source and extent of those powers.

### 1. Functions

#### A. Parliament

- •Elliott and Thomas, pp 166–228
- •Norton, 'Parliament: A New Assertiveness' in Jowell, Oliver, O'Conneide *The Changing Constitution*
- •Kelly, 'Select Committees: Powers and Functions' and Kelly & M Hamlyn, 'The Law and Conduct of Members of Parliament' both in Horne, Drewry & Oliver (eds) *Parliament and the Law* (2013)

#### B. Executive

- •Elliott and Thomas, ch 4

### 2. Delegated Legislation

- HJ Hooper, 'Delegated Legislation in an Unprincipled Constitution' (forthcoming, 2023): [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4227000](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4227000)
- •*R (Public Law Project) v Lord Chancellor* [2016] UKSC 39
- •*AXA General Insurance v Lord Advocate*, Lord Hope [47]–[50], Lord Reed [135]–[147]
- •Delegated Powers and Regulatory Reform Committee, *Democracy Denied? The Urgent need to rebalance power between Parliament and the Executive* (2021–2022, HL Paper 106).

### 3. Representation

- N Johnston, 'Voting Systems in the UK' (House of Commons Research Briefing No. 04458, 2017)
- •Philip Norton, *Parliament in British Politics* (2<sup>nd</sup> edition, 2013) ch. 10.
- *R (HS2 Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3 [61]–[66] (On Party Whips)
- •E Burke, 'Speech to the Electors at Bristol (1774)': <http://press-pubs.uchicago.edu/founders/documents/v1ch13s7.html>

- •JS Mill, 'Considerations on Representative Government' in *On Liberty and other essays* (Oxford, OUP: Oxford World's Classics, 2008)

#### 4. Referendums & Recall

- *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 at [116–125]
- L Trueblood, 'Legislating for Referendums in the United Kingdom' [2020] *Public Law* 49
- House of Commons Public Administration and Constitutional Affairs Committee, *Lessons Learned from the EU Referendum* (2017), ch 2: <https://publications.parliament.uk/pa/cm201617/cmselect/cmpubadm/496/496.pdf>
- UCL Constitution Unit, 'Report of the Independent Commission on Referendums' (2018), chs 2,3, and 4: [https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/182\\_-\\_independent\\_commission\\_on\\_referendums.pdf](https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/182_-_independent_commission_on_referendums.pdf)
- M Canovan 'We the Sovereign People' in M Canovan, *The People* (Polity: Key Concepts, 2005)
- The Recall of MPs Act 2015
- N Johnston and R Kelly, 'Recall Elections' Commons Library Research Briefing No. 5089, 2019

#### 5. House of Lords Reform

- •Russell, 'Rethinking Bicameral Strength: A Three-Dimensional Approach' (2013) 19(3) *The Journal of Legislative Studies* 370
- JS Caird and D Oliver, 'Parliament's Constitutional Standards' in A Horne and A Le Sueur (eds), *Parliament: Legislation and Accountability* (Hart, Oxford 2016)
- House of Lords Reform Bill 2012, available at: <http://www.cabinetoffice.gov.uk/sites/default/files/resources/house-of-lords-reform-draft-bill.pdf>
- •Bogdanor, *The New British Constitution* (Hart, 2009), Chapter 6
- Waldron, 'Bicameralism and the Separation of Powers' (2012) 65 *Current Legal Problems* 31

#### 6. Parliamentary Controls on the Executive

- *The material from week 1 on constitutional conventions is relevant here.*
- •Elliott and Thomas, ch 10, 11
- •Scott "Ministerial Accountability" [1996] PL 410
- •Woodhouse, 'Ministerial Responsibility' in Bogdanor, *The British Constitution in the Twentieth Century* (2004)
- • O Gay, 'Individual Ministerial Accountability to Parliament' (2012, Commons Library Research Briefing)
- •L Andrews, 'Brexit, Cabinet Norms and the Ministerial Code: Are we Living in a post-Nolan Era?' 91(1) (2020) 125

- Constitutional Reform and Governance Act 2010, s 3(6)

## 7. Tutorial Questions

- Does Parliament *really* legislate?
- Is Parliament democratic? Would Parliament be better at its job if it were (more) democratic? Does it matter which job we're talking about?
- What role do political parties play in the UK's constitution?
- Should an MP vote for a manifesto commitment, even if they personally disagree with it?
- When is it appropriate for an issue to be decided by referendum?
- What is the constitutional status of a referendum in the UK?
- Is a second chamber necessary? If so, what should it do?
- What is the executive? What is the Crown? What is the monarch?
- What is the most important source of the executive's powers?
- Is there a convention of individual ministerial responsibility? Should there be?
- How are prerogative powers created?

## 8. Essay

### Question

What roles does Parliament play in the British constitution? Which role is most important?

### Essay Tip

A good essay is a distinctive essay. Try not to adopt the view of anyone (judge, academic, etc.) wholesale. It's better to be original, even a bit. But remember that your opinions carry no weight in themselves. What matters is the reasons and arguments you put forward in their favour.

## WEEK 3: THE RULE OF LAW

The executive's sweeping powers create the potential for abuse. Last week we considered the political controls on the executive, their strengths, and their many weaknesses. This week we turn to the legal controls on the executive, controls that are typically justified in terms of the rule of law. Some important themes are the relative effectiveness of political versus legal limits on the executive, the content of the rule of law (what it requires or forbids), and the appropriateness of judicial supervision over political matters.

### 1. Legal Controls on the Executive

#### A. General

- •*Entick v Carrington* (1765) 19 St Tr 1030
- •*M v Home Office* [1994] 1 AC 377
- •*R (Gillan) v Commissioner of Police for the Metropolis* [2006] UKHL 12
- •*R (Cornerhouse) v Director of Serious Fraud Office* [2008] UKHL 60

#### B. The Crown and the Royal Prerogative

- •Munro, *Studies in Constitutional Law* (1999) ch 8
- •*A-G v De Keyser's Royal Hotel* [1920] AC 508
- •*Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 esp pp 955 - 7, 938 - 43, 944 - 5, 946 - 8, 950, 960
- •*R v Home Secretary ex p Northumbria Police Authority* [1988] 1 All ER 556 (noted: Bradley [1988] PL 298)
- •*R v Home Secretary, ex p Fire Brigades Union* [1995] 2 AC 513
- •*R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61
  - S Faran 'Prerogative Rights, Human Rights and Island People: the Pitcairn and Chagos Island Cases' [2007] PL 414
- •*(R (Gentle) v Prime Minister (and others))* [2006] EWCA Civ 1689
- •*R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5
- •*Cherry (and Others) v Advocate-General For Scotland* [2019] UKSC 41

### 2. Rule of Law

- •Bradley, Ewing, and Knight, ch 4
- •Dicey, ch 4
- •Fuller, *The Morality of Law* (1969), 46-91
- •Raz (1977) 93 LQR 195
- •Allan [1985] CLJ 111
- •Craig [1997] PL 467
- •Lord Bingham 'The Rule of Law' [2007] 66 CLJ 67
- •Barber, *Principles of Constitutionalism* (2018), ch 4
- Endicott, 'Adjudication and the Law' [2007] 27 OJLS 311
- •*R (Purdy) v DPP* [2009] UKHL 45

- *Woolwich Equitable BS v Inland Revenue Commissioners* [1993] 1 AC 70 (headnote only)
- *R (Corner House Research) v Director of the Serious Fraud Office* [2008] EWHC 714 [2009] 1 AC 756 (House of Lords)
- *Walumba Lumba v Secretary of State for the Home Department* [2011] UKSC 12
- *Evans v Attorney-General* [2015] UKSC 21
- *R (Reilly) v Secretary of State for Work and Pensions* [2016] EWCA Civ 413 (CA)
- *R (Unison) v Lord Chancellor* [2017] UKSC 51
  
- Constitutional Reform Act 2005, s 1, s 2

## 5. Tutorial Questions

- Do courts define the scope of prerogative powers? Do courts limit their use? What's the difference?
- Should all prerogative powers be abolished? Should some?
- What is the distinction between “formal” and “substantive” accounts of the rule of law? Is it a helpful distinction?
- Does the rule of law ever need to be compromised? Does it ever produce conflicting demands?
- If the rule of law requires rule *by* law, then it is incompatible with the rule of law to regulate important matters by constitutional convention. Do you agree?

## 6. Essay

### Question

‘A prerogative power is ... limited by statute and the common law, including ... the constitutional principles with which it would otherwise conflict’. (*Cherry (and Others) v Advocate for Scotland* (2019)). Discuss.

OR

When did the rule of law become a principle of the United Kingdom constitution?

### Essay Tip

Almost any essay will require you to do two things: to show you know what is the case (the “positive” story), and to show you know what ought to be the case (the “normative” story). On its face a question might only be about the positive or the normative. Take that as your cue about where the focus of your essay should be. But don't entirely neglect either the positive or the normative.

## WEEK 4: THE SEPARATION OF POWERS

Dicey said that the British constitution had just two major ‘principles’ or ‘doctrines’: the parliamentary sovereignty and the rule of law. We considered the rule of law last week. Week 6 is about parliamentary sovereignty. This week we pause to consider what many since Dicey have claimed is an equally important principle – the separation of powers. One issue is what exactly the separation of powers requires or forbids. Another issue is whether the separation of powers really is a principle of the British constitution, and if so, why.

### 1. The Separation of Powers

- •Barnett, *Constitutional and Administrative Law* (10<sup>th</sup> edn), ch 4
- •Tomkins, *Public Law*, ch 2
- •Barendt [1995] PL 599
- Barber [2001] CLJ 54
- •Marshall, *Constitutional Theory*, ch 5
- Cane, *Controlling Administrative Power*, ch 2
- P Joseph, ‘Parliament’s Attenuated Privilege of Freedom of Speech’ (2010) 126 LQR 568
- *Case of Proclamations* (1611) 12 Co Rep 74 (Lord Coke)
- *Prohibitions del Roy* (1607) 77 ER 1342, 12 Co Rep 64 (Lord Coke)
- •*Pepper v Hart* [1993] AC 593
  - Kavanagh ‘Pepper v Hart and Matters of Constitutional Principle’ 121 LQR 98
- Fixed Term Parliaments Act 2011
- •Dissolution and Calling of Parliament Act 2022

### 2. Judicial Independence

- •Bradley, Ewing, Knight 322–332
- •Magna Carta 1215, cl 39 and 40
- •Human Rights Act 1998, incorporating ECHR Article 6
- •Constitutional Reform Act 2005, s, 2–3, 23–27, 32–33, 137
- •*McGonnell v United Kingdom* (2000) 30 EHRR 209 (noted: Cones [2000] PL 166)
- *R v Anderson* [2002] 4 All ER 1089

### 3. Parliamentary Privilege

- •Bradley, Ewing, and Knight, ch 9
- Bill of Rights 1689, art 9
- O Gay & H Tomlinson ‘Privilege and Freedom of Speech’ in Horne, Drewry & Oliver (eds) *Parliament and the Law* (Oxford, Hart Publishing, 2013)
- The *Strauss* case (1958) 21 MLR 465 (and Denning’s dissent: [1985] PL 80)
- *A v United Kingdom* (2003) 36 EHRR 51

- • *R v Chaytor* [2010] UKSC 52 (noted (2011) 70 CLJ 282)
- J Saunders 'Parliamentary Privilege and the Criminal Law' [2017] Crim Law Rev 521

#### 4. Questions to Consider

- True or false: the principle of the separation of powers is too vague to be of any real use in the British constitution?
- Which conforms more closely to the principle of the separation of powers: the law or the constitution?
- Should judges be accountable – if so, to whom?
- What is 'parliamentary privilege'? Why is it important?
- How have courts used proceedings in Parliament? Have they been right to do so?
- Should judges care what Parliament intended when it legislated? If so, how should they deduce this intention?

#### 5. Essay

##### Questions

'It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts each have their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed.' (LORD MUSTILL, *R v Secretary of State for the Home Department, ex p Fire Brigades Union* (1995)). Discuss.

OR

'Although the UK has no written constitution, it is a constitutional convention of the highest importance that the legislature and the judicature are separate of one another, subject to certain ultimate rights of Parliament over the judicature which are immaterial for present purposes. It therefore behoves the courts to be ever sensitive to the paramount need to refrain from trespassing on the province of Parliament.' (SIR JOHN DONALDSON MR, *R v HM Treasury, ex p Smedley* (1985)). Discuss.

##### Essay Tip

Constitutional principles are based in custom or practice. They belong to the constitution because people like ministers and judges and parliamentarians act in accordance with them, and treat them as guides to action. So when we ask whether a principle is part of the constitution, or ask how a principle operates, we need to cast our net widely, to take into account as much constitutional practice as possible. That means reminding yourself not to answer questions about, for example, the rule of law, but also the separation of powers and parliamentary sovereignty, by drawing on only a single week's reading.

## WEEK 5: MULTI-LAYERED GOVERNMENT

The principle of the separation of powers tells us something about how power ought to be allocated amongst the institutions of one government. But there are other governments, in addition to the government of the UK as a whole. How are powers allocated amongst them? How ought they to be allocated? We start by looking at the history of the UK's multi-layered constitution. After considering the courts' emerging 'devolution jurisprudence', we turn to Northern Ireland, Scotland, and Wales, where devolution has taken strikingly different paths; and to England, which has no legislature of its own.

### 1. General

- •Elliott and Thomas, ch 7
- •Dickson, 'Devolution' in Jowell, Oliver, O'Cinneide *The Changing Constitution* (OUP, 2015)
- C Bell, 'Constitutional Transitions: the peculiarities of the British Constitution and the politics of Comparison' [2014] PL 446

### 2. Union, Empire and Devolution

- The Treaty of Union 1707
- The Government of Ireland Act 1920
- MacCormick N, 'Does the United Kingdom have a Constitution' 29 NILQ 1
- Smith TB, 'The Treaty of Union of 1707 as Fundamental Law' PL 99
- Ford JD, 'The Legal Provisions of the Act of Union' 66 CLJ 106
- *MacCormick v The Lord Advocate* 1953 SLT 255 (Court of Session, Inner House)
- *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262, para 106 (House of Lords)
- *Moohan, Petitioner* 2015 SLT 2 (Supreme Court)

### 3. The Multilayered Constitution

#### A. The Concept of Subsidiarity

- R Schutze, 'Subsidiarity After Lisbon: Reinforcing the Safeguards of Federalism' (2009) 68 Cambridge Law Journal 525
- European Union (Withdrawal) Act 2018 s 10, 12 (section 12 modifies the devolution statutes)

#### B. Westminster and Whitehall

- Hazell, 'Westminster as a three-in-one legislature for the United Kingdom and its devolved territories'(2007) 13 Journal of Legislative Studies 254
- Memorandum of Understanding and supplementary agreements between the United Kingdom Government, Scottish Ministers and the Cabinet of the National Assembly for Wales, Cm 4444 (Oct 1999)
- Torrance D. Intergovernmental Relations in the United Kingdom (House of Commons Library 2018)

- House of Lords Constitution Committee, Inter-governmental Relations in the United Kingdom (HL Paper 146 of 27 March 2015)
- House of Commons Public Administration and Constitutional Affairs Committee, The Future of the Union: Inter-institutional relations in the UK (HC 839 8 December 2016).

#### 4. The role of the courts

- Scotland Act 1998, 2012, 2016
- Northern Ireland Act 1998
- Government of Wales Act 1998, 2006, 2017
- *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32
- *Martin v HM Advocate of Scotland (Most)* [2010] UKSC 10
- *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46, [2012] 1 AC 868, [42]–[52] (Lord Hope); [135]–[156] (Lord Reed)
- *Attorney General v National Assembly for Wales Commission* [2012] UKSC 53, [2013] 1 AC 792
- *Agricultural Sector (Wales) Bill – Reference by the Attorney-General for England and Wales* [2014] UKSC 43 (see Ann Sherlock, ‘Supreme Court ruling on Welsh legislation’ UK Const L Blog (30th July 2014) (available at: <http://ukconstitutionallaw.org/>)
- *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [136]–[151]
- *In the Matter of an Application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)* [2018] UKSC 27
- *Re: UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64
- *Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] UKSC 42

#### 5. Country-specific issues

##### a) Northern Ireland – consociationalism

- B. Dickson ‘Devolution in Northern Ireland in Jowell & O’Cinneide (eds) *The Changing Constitution* (9<sup>th</sup> edition)
- Lipjhart, *Democracy in Plural Societies* (Yale University Press, 1977), chapter 2

##### b) Scotland – economic devolution, independence

- Referendums (Scotland) Bill 2019.
- E. Smith and A. Young, “That’s how it worked in 2014, and how it would have to work again” U.K. Const. L. Blog (15th Mar 2017) (available at <https://ukconstitutionallaw.org/>)

- •A McHarg, 'Devolution in Scotland' in Jowell & O'Connell (eds) *The Changing Constitution* (9<sup>th</sup> edition)

c) Wales – an emerging jurisdiction?

- •R. Rawlings, 'The Welsh Way/Y Ffordd Gymreig' in Jowell & O'Connell (eds) *The Changing Constitution* (9<sup>th</sup> edition)
- Jones, 'Wales, Devolution and Sovereignty' (2012) 33 *Statute Law Review* 151

**Questions to Consider:**

1. What is the difference between federalism and devolution?
2. Which territories in the UK enjoy the right to secession – what form do these rights take, and how can they be exercised?
3. Do the constitutional origins of the UK continue to possess constitutional significance?
4. Has the 'West Lothian Question' been answered?
5. Do the same values underlie devolution and the separation of powers?
6. 'It is wrong that Scottish MPs get to rule on bills concerning, say, only English hospitals. But banning them from participating in such votes would create the risk of two separate governments; one English, one British ... So [the House of Commons' 2015 Standing Order] rightly gives English MPs a veto, but also requires all bills to pass the House of Commons as a whole. As compromises go, it could be worse' (THE ECONOMIST (2015)). Discuss.

**6. Essay**

Question

'The devolution settlement is perhaps the most important constitutional development since 1997. Its importance lies partly in the fact that it has been, almost without exception, a failure.' Discuss.

OR

Devolution in the UK is not symmetrical. Are there good reasons for this?

Essay Tip

In addition to being accurate, focused, and clear, first-class answers tend to be much more detailed than 2:1 answers. They use more material – more cases, articles, statutes, reports, etc. – and canvass more arguments and objections. Pack as much in your essays as you possibly can (while, of course, remembering not to include anything irrelevant). When you've almost finished writing your essay, look over the reading list again, and ask yourself: is there anything I haven't cited which I can now? If so, go back and add it in.

## WEEK 6: PARLIAMENTARY SOVEREIGNTY

In this week's tutorial, we at last come to what Dicey thought was the 'cornerstone' of the British constitution: parliamentary sovereignty. Broadly, the doctrine of parliamentary sovereignty is about Parliament's legal powers and the limits, if any, on those powers. We'll start with some of the big questions: if Parliament is sovereign, what does that tell us about which powers Parliament has and the extent of those powers? If Parliament is sovereign, why is it sovereign? Is Parliament in fact sovereign? We'll see that parliamentary sovereignty is often thought to mean, in part, that no other institution (eg, no court) can limit what Parliament can do. That leaves perhaps the most difficult question: can Parliament limit its own powers?

### 1. General Reading

- •Bradley, Ewing, and Knight, ch 3
- Craig and de Burca, *EU Law: Text, Cases, and Materials* (5th edn, 2011), ch 9
- •Wade, 'The Basis of Legal Sovereignty' [1955] CLJ 172
- •Elliott, 'The Principle of Parliamentary Sovereignty in Legal, Constitutional, and Political Perspective' in Jowell, Oliver, O'Conneide, *The Changing Constitution*
- •Barber, 'The Afterlife of Parliamentary Sovereignty' (2011) 9 *International Journal of Constitutional Law* 144
- •Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (2010) ch 7, 10
- • R Ekins, 'Legislative Freedom in the United Kingdom' [2017] 133 *Law Quarterly Review* 582
- • *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46, [42]–[52] per Lord Hope
- • *R (Evans) v Attorney General* [2015] UKSC 21, especially [52]–[59], [154]–[160], [163]–[177]
- • *R(HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, especially [78]–[79], [200]–[208]
  - M Elliott, 'Reflections on the HS2 case: a hierarchy of domestic constitutional norms and the qualified primacy of EU law' UK Const L Blog (23rd January 2014) (available at <http://ukconstitutionallaw.org>.)
- • *Benkharbouche & Anor v Embassy of the Republic of Sudan (Rev 1)* [2015] EWCA Civ 33, para. 69–86
- • *R(Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, esp. para 98–144
- • *R(Elan-Cane) v Secretary of the State for the Home Department* [2021] UKSC 57, [90]–[92]
- • *Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] UKSC 42, [40], [50]

### 2. Can Parliament Bind its Successors?

#### A. The Position in English Law

- Heuston, *Essays on Constitutional Law*, ch 1
- •Gordon, *Parliamentary Sovereignty in the UK Constitution* (2015), ch 2
- •Wade [1996] LQR 568
- Allan [1997] LQR 443
  
- •Parliament Acts 1911 and 1949
- •European Communities Act 1972, ss 2(1), 2(4) and 3
  
- •*Ellen Street Estates v Minister of Health* [1934] 1 KB 591
- •*R v Secretary of State for Transport ex p Factortame* [1990] 2 AC 85
- •*R v Secretary of State for Transport ex p Factortame (No.2)* [1991] AC 603, at 658 onwards
- •*Equal Opportunities Commission v Secretary of State for Employment* [1994] 1 WLR 409, esp. Lord Keith at 418–9
- •*Thoburn Sunderland District Council* [2002] EWHC 195, [2002] 3 WLR 247, especially [60]–[67]
- •*Jackson v HM Attorney-General* [2005] UKHL 56
  - R. Ekins, ‘Acts of Parliament and the Parliament Acts’ [2007] 123 Law Quarterly Review 91
- *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39, [20]

#### B. The Position of the European Court of Justice

- •Craig and de Burca, ch 10

#### 3. Can Judges Review the Validity of Acts of Parliament?

- •*Pickin v British Railways Board* [1974] AC 745
- •*R (SC, CB, and 8 Children) v SoS for Work and Pensions* [2021] UKSC 26 [163]–[210]
- See also the *Factortame* cases, *AXA*, *HS2*, and *Jackson* above
- Young, *Parliamentary Sovereignty and the Human Rights Act*, ch 1
- Kavanagh, *Constitutional Review under the UK Human Rights Act* (2009) ch 11
- • HJ Hooper, ‘Legality, Legitimacy, and Legislation: The Role of Exceptional Circumstances in Common Law Judicial Review’ (2021) 41 *Oxford Journal of Legal Studies* 142

#### 4. Tutorial Questions

- “There is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply...” (Lord Bridge in *Factortame (No. 2)*). Is Lord Bridge correct?
- Is it possible to express the principle of parliamentary sovereignty as a rule addressed to the courts?
- What is the doctrine of implied repeal? Are there any exceptions to it?
- If Parliament is sovereign, does that mean no statute can be ‘unconstitutional’?
- Thinking ahead to Week 6, how do you think devolution affects parliamentary sovereignty?
- If Parliamentary sovereignty exists, should we now think of it as a constitutional archaism and no longer as a defining feature of the British constitution?

#### 5. Essay

### Question

When did Parliament lose its sovereignty? In what sense did it lose it?

OR

‘Parliament can itself qualify its own sovereignty, as it did when it conferred on the courts the power to make declaration of incompatibility with rights guaranteed by the ECHR, under section 4 of the Human Rights Act. The Scottish Parliament, on the other hand, cannot qualify the sovereignty of Parliament ...’ (LORD REED, *Reference re United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* (2021)). Discuss.

### Essay Tip

Many essay questions are deliberately broad. They challenge you to identify, not just what’s relevant, but what’s most important. So you need to learn the art of prioritization. Some things to keep in mind. (1) You don’t need to discuss everything in equal detail. You can focus on certain topics, issues, cases, etc., and deal more briefly with others. (2) If you’re going to prioritize some issues etc., explain to the reader why you’re doing so. What’s your reason for choosing *this* issue rather than *that* one to develop in detail? (3) A few excellent reasons for choosing an issue etc. to discuss in detail are *topicality* (the issue matters right now), *wider significance* (the resolution of the issue bears on the operation of other bits of the constitution or our understanding of them), and *controversy* (judges or academics argue about the issue).

## WEEK 7: HUMAN RIGHTS I

One job of the constitution is to regulate the state's relationship with its citizens, and a big part of that job is about human rights. What are our human rights? Where do they come from? How are they protected? In Britain human rights were traditionally protected through the common law and a patchwork of statutes. Since 1950 Britain has been a party to the European Convention on Human Rights. The ECHR is an international treaty that sets out various rights (eg, a right to freedom of religion, a right against torture), obligates the contracting parties to uphold them, and creates the European Court of Human Rights to help ensure their protection. The ECHR is given effect by British courts through an Act of Parliament: the Human Rights Act 1998. The HRA tells British courts to 'take into account' what the ECtHR has said when making decisions relating to ECHR rights. The HRA also empowers courts to protect human rights: by interpreting legislation in a way that conforms to the Convention rights; by declaring that a statute is incompatible with a Convention right; and by invalidating acts by 'public authorities' that are incompatible with Convention rights. These powers are expansive, and many people think that they go too far, or that they have been misused.

### 1. General

- •Bradley, Ewing, Knight, ch 14

### 2. Common law fundamental rights

- •*R (Daly) v Home Secretary* [2001] UKHL 26; [2001] 2 AC 532 (HL(E))
- •*R (Osborn) v Parole Board* [2013] UKSC 61; [2014] AC 1115 (SC(E & NI)), 1145-1148 [54]-[63] (Lord Reed JSC)
- •*R(Jollah) v Secretary of State for the Home Department* [2020] UKSC 4
- •*Elgizouli v Secretary of State for the Home Department* [2020] UKSC 10
  
- Clayton, 'The Empire Strikes Back: Common Law Rights and the Human Rights Act' [2015] PL 3

### 3. European Convention on Human Rights

- •*Convention for the Protection of Human Rights and Fundamental Freedoms* (1950) ETS No 5 (entered into force: generally and for the United Kingdom 03.09.1953), arts 1-18
- • C. O'Conneide "Human Rights and the UK Constitution" in JL Jowell, D Oliver, and C. O'Conneide (eds), *The Changing Constitution* (8th edn, OUP 2015) 70
- L Hoffmann, 'The Universality of Human Rights' (2009) 125 LQR 416
- Lord Sumption, 'The Limits of Law', 20 November 2013: <https://www.supremecourt.uk/docs/speech-131120.pdf>

### 4. Section 2

- Human Rights Act 1998 (UK), ss 1-11, sch 1
  
- •*R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323 (HL(E))
- •*R (Animal Defenders) v Culture Secretary* [2008] UKHL 15; [2008] 1 AC 1312 (HL(E)), 1351-1352 [44]-[45] (Lord Scott of Foscote), 1354-1355 [53] (Baroness Hale of Richmond)

- *In re G (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 AC 173 (HL(NI)), 188 [33] (Lord Hoffmann), 193 [50] (Lord Hope of Craighead), 214–216 [116]–[124] (Baroness Hale of Richmond)
- *R v Horncastle* [2009] UKSC 14; [2010] 2 AC 373 (SC(E)), 380–382 [9]–[14], 407–408 [107]–[108] (Lord Phillips of Worth Matravers PSC)
- *Rabone v Pennine Care NHS Trust* [2012] UKSC 2; [2012] 2 AC 72 (SC(E)), 110–112 [110]–[114] (Lord Brown of Eaton-under-Heywood JSC)
- *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38; [2014] 3 WLR 200 (SC(E)), 315–328 [67]–[118] (Lord Neuberger of Abbotsbury PSC), 368–370 [230]–[234] (Lord Sumption JSC), 402–403 [339]–[345] (Lord Kerr of Tonaghmore JSC)
- Irvine, ‘A British Interpretation of Convention Rights’ [2012] PL 37
- Sales, ‘Strasbourg Jurisprudence and the Human Rights Act: A Response to Lord Irvine’ [2012] PL 253
- Finnis, ‘A British “Convention right” to Assistance in Suicide?’ (2015) 131 LQR 1
- Kavanah, *Constitutional Review Under the UK Human Rights Act 1998* (2009), ch 6
- Hale, ‘Argentoratium Locutum: Is Strasbourg or the Supreme Court Supreme?’ (2012) 12 HRL Rev 65

#### 5. Proportionality and Strasbourg Jurisprudence

- *R (Daly) v Home Secretary* [2001] UKHL 26; [2001] 2 AC 532 (HL(E)), 546–548 [26]–[27] (Lord Steyn)
- *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 38; [2014] AC 700 (SC(E)), 788–791 [68]–[76] (Lord Reed JSC)
- *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38; [2014] 3 WLR 200 (SC(E)), 341–344 [166]–[170] (Lord Mance JSC)
- *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57

#### 6. Tutorial Questions

- Are human rights universal? Should legal protection of human rights be universal?
- What role is left to the European Court of Human Rights after the Human Rights Act 1998 (UK)?
- Is it better to protect human rights and fundamental freedoms at common law, by statute or by international convention?
- How is the notion of proportionality relevant to understanding Convention rights under the Human Rights Act 1998?
- Should the courts accord weight to the views of decision-makers whose public powers may impact Convention rights under the Human Rights Act 1998 in determining the scope of those rights?

#### 7. Essay

‘Contracting states can of course create rights going beyond those protected by the [European Convention on Human Rights], but that power exists independently of the Convention and the Human Rights Act, is not dependent on the margin of appreciation doctrine, and is exercisable in accordance with long-established constitutional principles, under which law-making is generally the function of the legislature.’ (LORD REED, *R (Elan-Cane) v Secretary of State for the Home Department* (2021)). Should it be for Parliament

alone to create rights going beyond those protected by the European Convention on Human Rights?

OR

‘[I]t was not the purpose of the Human Rights Act that the common law should become an ossuary’ (LORD TOULSON, *Kennedy v. The Charity Commission* (2014)). Discuss.

## WEEK 8: HUMAN RIGHTS II

### 1. Section 3 of the HRA – interpretation of legislation

- \*Human Rights Act 1998 (UK), s 3
- \**R v A* [2002] 1 AC 45; [2001] UKHL 25
- \**Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557 (HL(E))
- \**R (Wilkinson) v IRC* [2005] UKHL 30; [2005] 1 WLR 1718 (HL(E)), 1720–1724 [2]–[19] (Lord Hoffmann)
- \*Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP 2009), §§3-4
- \*Young, ‘Deference, Dialogue, and the Search for Legitimacy’ (2010) OJLS 815
- Sales and Ekins, ‘Rights-consistent Interpretation and the Human Rights Act 1998’ (2011) 127 LQR 217

### 2. Sections 4 and 10 of the HRA – declarations of incompatibility

- \*Human Rights Act 1998 (UK), ss 4, 5, 10, sch 2
- \**R (Anderson) v Home Secretary* [2002] UKHL 46; [2003] 1 AC 837 (HL(E)), 880–883 [20]–[31] (Lord Bingham of Cornhill), 893–895 [58]–[60] (Lord Steyn), 900–901 [78]–[83] (Lord Hutton)
- *Bellinger v Bellinger* [2003] UKHL 21; [2003] 2 AC 467 (HL(E))
- Hickman, ‘Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998’ [2005] PL 306
- \*King, ‘Parliament’s Role Following Declarations of Incompatibility under the Human Rights Act’ in M Hunt, H Hooper and P Yowell (eds), *Parliaments and Human Rights* (Hart 2015) 165

### 3. Section 6 of the HRA – judicial review of administrative action

- \*Human Rights Act 1998 (UK), ss 6–8
- *In re G (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 AC 173 (HL(NI)), 179 [3], 188 [33] (Lord Hoffmann), 214 [116] (Baroness Hale of Richmond)
- *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38; [2014] 3 WLR 200 (SC(E)), 313 [60] (Lord Neuberger of Abbotsbury PSC)

### 4. Section 19 of the HRA – scrutiny of proposed legislation

- Human Rights Act 1998 (UK), s 19
- *R (Animal Defenders) v Culture Secretary* [2008] UKHL 15; [2008] 1 AC 1312 (HL(E)), 1340–1342 [13]–[32] (Lord Bingham of Cornhill)

- M Hunt, 'The Impact of the Human Rights Act on the Legislature' (2010) 6 EHRLR 601
- J Hiebert and J Kelly *Parliamentary Bills of Rights* (CUP 2015), chapter 7

#### 5. Reading Questions

- Is section 4 of the HRA compatible with parliamentary sovereignty? Is section 3?
- Does the HRA provide effective protection for human rights? Could any statute provide such protection while respecting parliamentary sovereignty?
- What considerations should guide a judge's choice between a remedy under section 3 and a remedy under section 4 of the HRA when both might be reasonably available?
- How far has the HRA supported the principle of the separation of powers?
- What impact has the HRA had on the characterisation of the United Kingdom constitution as 'legal' or 'political'?

#### 6. Assignment

Instead of writing an essay, you will debate the students from St John's College. Details to be circulated closer to the time.

## VACATION READING

### 1. Prisoner Voting

- *Hirst v United Kingdom (No. 2)* – 74025/01 [2005] ECHR 681 (6 October 2005)
- *R (Chester) v Secretary of State for Justice* [2012] UKSC 63 [25]–[35]; [120]–[124]
- *Moohan v Lord Advocate* [2014] UKSC 67, [103]–[106]
  
- E Bates, ‘Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg’ 14(3) (2014) *Human Rights Law Review* 504
  
- For analysis of the parliamentary responses, see A Horne and I White, Prisoners’ Voting Rights (House of Commons Note) available at: [www.parliament.uk/briefing-papers/sn01764.pdf](http://www.parliament.uk/briefing-papers/sn01764.pdf)

### 2. Reform

- Commission on a Bill of Rights, ‘A UK Bill of Rights? The Choice Before us’ (2012) (available online at <http://www.justice.gov.uk/about/cbr>), 8–39
- M Amos, ‘Problems with the Human Rights Act 1998 and How to Remedy Them: Is a Bill of Rights the Answer?’ (2009) 72 *MLR* 883
- A Horne and L Maer, ‘From the Human Rights Act to a Bill of Rights?’ in A Horne, G Drewry and D Oliver (eds), *Parliament and the Law* (Hart 2013) 251