

The Nature of the British Constitution

Emphasise British Constitution in itself is unwritten but that certain matters are written which comprise a constitution. Consider whether it is uncodified rather than unwritten.

Key principles first established as twin equal pillars of Constitution were Parliamentary Sovereignty and Rule of Law.

- No formal written constitution or bill of rights gives Parliament wide power to introduce far reaching legislation.
- Detailed discussion of the nature of the Constitution including different theories on its nature.
- Look at House of Lords and House of Commons. Consider the effect of the Parliament Acts 1911 and 1949 and relevant case law. If House of Lords rejects a Bill which has been passed by House of Commons on 2 occasions, House of Commons can send Bill to Monarch for royal assent without consent of House of Lords. Refer to recent legislation using this procedure e.g. Hunting Act 2004.

Highlight case law indicating challenge to the validity and enforceability of Parliament Act such as R (on application of Jackson Attorney General 2005)

Sources

Include statutes/ Acts of Parliament, EU law, case law, and conventions.

Case law consists of applying judicial precedent in the courts by judges interpreting statute and common law. Involves the system of judicial precedent where higher court in its judgment may bind lower courts. Differentiate between judgment and words said by the way, obiter dicta (persuasive rather than binding). Constitutional conventions are not set in law but nevertheless have binding force-for instance the permission sought by Prime Minister of the Monarch to dissolve Parliament.

Consider impact of UK membership of European Union on creation of law.

New source of law when UK joined the European Union. Sources of EU law include regulations, directives and decisions. Supremacy of Parliament been curtailed and limit of Parliament to create primary legislation which is under the province of the EU. EU Regulations take effect irrespective of wishes of domestic institutions within those Member States. Directives are addressed to member states so that they can bring their own legislation into harmony with the majority of member states. Directives must be implemented into domestic legislation within a set time frame laid down within the Directive itself. The UK would do this via Act of Parliament or delegated legislation.

- Concept expanded to recognise liberal values which demonstrate supreme value of human personality
- Refer to Lord Bingham's views on the modern day version of the rule of law."But it seems to me that the rule of law does depend on an unspoken but fundamental bargain between the individual and the state, the governed and the governor, by which both sacrifice a measure of the freedom and power which they would otherwise enjoy".
- Practical Impact of rule of law is that actions of government can be subject to judicial review thereby offering check and balance on power

Separation of Powers

Discuss three strands making up separation of powers; The Legislature (Parliament); The Executive (Government) and the Judiciary (Courts). In practice UK deemed to have weak separation of power with overlap between various branches. Doctrine says that overall power must not be in any one branch and checks and balance exist to prevent this especially to stop the executive wielding too much power. Judges should be free from political interference yet they are appointed by the executive.

Practical and legal operation of this doctrine recently clarified by law. [8] Aim of this Act was to get more distinct separation of functions and personnel between

legislature in form of House of Lords and judiciary. Supreme Court of UK removed Lord Chancellor from judicial process.

2 Parliamentary Sovereignty

The orthodox view is found in words of Professor AV Dicey. Examine 3 claims:

That Parliament can make or unmake any law on any subject matter. It is only body that can do this and its legislative supremacy cannot be questioned

Law can even be amended retrospectively.

Parliament cannot bind its successors nor can it be bound by its predecessors. Each successive Parliament must have the same unlimited powers as any predecessor. Doctrine of implied repeal; two conflicting Acts then the later Act will take precedence over earlier inconsistent Act.

Nobody can set aside or override its laws; an enacted Act of Parliament to be taken at face value and is final. It cannot be questioned even by the judiciary who have acknowledged that they cannot interfere. If an Act of Parliament conflicts with an international law, the former will prevail. This orthodox view portrays Parliament as the highest prevailing legislative body in the UK and the courts must enforce whatever law it chooses to make. This view must be examined in the modern wider sphere of the European Union.

Examine the relevant EU legislation starting with the EU Treaty and also reflect on the aims of the European Union which is to harmonise and create a single body of law which will be uniformly applied throughout Member states.

Discuss the impact of the Human Rights Act 1998. Gives effect in UK law to many of provisions of European Convention of Human Rights 1950 (ECHR).

Explain that although when the government is setting out its proposals for legislation in the area of human rights, it reiterates its continuing attachment to traditional doctrine of parliamentary sovereignty. However this is a rather nostalgic and detracts from wider political environment in which it subsists. The

HRA has radically affected notion of parliamentary sovereignty. This section states that Parliament must whenever possible take into account the human rights act when it is drafting legislation so that the proposed legislation is read consistently with relevant provisions of ECHR . See case of [Ghaidan v Godin-Mendoza](#).

Mention that in theory the UK could revoke the European Communities Act 1972 and withdraw from the EU but from political/trade viewpoint this is unlikely. Illustrate examples of cases which show supremacy of EU law over conflicting UK statutes.

3 Parliamentary Privilege.

History. Enshrined in the 1689 Bill of Rights as means of preventing a monarch from interfering with the proceedings of Parliament.

Old definition or understanding of meaning; legal immunity with no criminal or civil proceedings being brought against members of Parliament for actions undertaken or statements made in their duty as legislators (freedom of speech and freedom from arrest). Lately this has been clarified so that legal immunity (civil and criminal) for anything said in course of proceedings of Parliament is endorsed. In a modern case involving the arrest of Damian Green MP at his home on suspicion of aiding and abetting misconduct in public office following the search by police of his office without a search warrant but on the written consent of the Serjeant at Arms (serious concern raised about protection of MPs under the law).

Privileges include

Right of the House to regulate its own composition;

Right of the House to regulate its own internal proceedings (both as to matters and procedures)

Right to punish members and strangers for breach of privilege and contempt.

Committee on Standards and Privileges has power to suspend or expel members

for breach of rules. Serious breach includes giving false evidence to committee and members taking bribes.

Right of freedom from interference (although members are no longer immune from all civil actions)

Parliamentary Papers. Common law privilege for papers circulated among MPs on order of the House. Extended to papers published on orders of the House and to accurate copies.

Modern events. Discuss three Labour MPs and a Tory Peer were charged with false accounting over their expenses claims. Denying the offences they have invoked Article 9 1689 Bill of Rights to implement parliamentary privilege which prevents MPs and peers from being sued for slander.

Be aware that there have been recent calls for a Parliamentary Privileges Act to be introduced see Parliamentary Privilege First Report, 1999.

4 Human Rights Act 1998

Section 3 requires that current and future law is interpreted as far as possible so as to be compatible with ECHR and provides courts with new and extended powers of interpretation.

This can create tensions between protecting fundamental rights and Parliament remaining sovereign; 3 (b) and (c) do not give power to strike down or disapply legislation found to be incompatible.

Meaning of “possible”? Led to several opinions on interpretation of this word (Loveland 2003) decided that question raised by S 3 was not whether it obligated courts to make a break from historical interpretive principles, but rather to what extent it required them to do so.

Effects. The interpretative obligation can have far-reaching effects, as exemplified in *Litster v Forth Dry Dock and Engineering Co. Ltd* [1990] 1 AC 546, while the cases of *R v A* [2001] 2 WLR 1546 and *Ghaidan v Godin-Mendoza* [2004] 2 WLR 478 demonstrate the extent to which the courts feel free to use Section 3.

Section 4 . Permits a higher court such as House of Lords, Court of Appeal, Privy Council grant a declaration of incompatibility if satisfied that a provision within a statute is incompatible with ECHR. Courts only issued certificates sparingly.

Very important case in which the House of Lords held that Part 4 of Anti-Terrorism Crime and Security Act 2001 was incompatible with Human Rights Act. (led to Part 4 of the Act being replaced with Prevention of Terrorism Act 2005.

Courts have power to strike down or not apply secondary legislation (Regulations) which is incompatible with ECHR.

Section 6 (1) requires public authorities to act in conformity with the ECHR .

However courts are not considered a public body (S 6 (2))—states that a public body in breach of a Convention right does not act unlawfully if it takes this course because of legislation.

Problems arise because public body not defined. Some like police, local authorities and government are easily identified as being public bodies. Some other cases such as whether a housing association is a public body have been examined. This case identified factors which would determine if function was public and public authority to be given generous interpretation. Consider other noteworthy cases which look at whether the function was public. Also a case held that a private hospital was a public body when it carried out functions of making arrangements for care for mentally ill.

S6 (3) Parliament is omitted from definition of public body so it can legislate incompatibly. Courts are considered a public body.

Where a person claims to be victim of s 6 they may claim for damages, a declaration or seek a judicial review.

S 10. Introduces fast track process for altering incompatible legislation by which a remedial order can be made. Important to note that this leaves the power to amend the law and remove the incompatibility in the hands of the Government

and Parliament; not the courts. If this does not happen, an aggrieved person can take their complaint to the European Court of Human Rights in Strasbourg.

S 19 –Statement of compatibility.

Minister in charge of Bill would be required to make a statement of compatibility prior to the Bill's second reading.

Such statement should indicate if legislation is compatible with ECHR rights. This scrutiny is a way of exerting restraint upon Parliament to legislate in accordance with Convention rights.

Effect of S19. The requirement for ministers to state whether a proposed Bill conform to the HRA will discourage the executive from introducing legislation which conflicts with the ECHR. S19 statements do not bind courts to conclude that legislation is compatible. Statements have no persuasive authority either. However Parliament can still introduce the offending legislation which asserts its sovereignty.

Judges do not have the power to strike down legislation which is incompatible with ECHR so ability for Parliament to introduce such legislation is not fettered.

S 19 reaffirms Parliamentary sovereignty because Parliament may choose to legislate incompatibly and does so with informed consent (Lord Irvine of Lairg QC, 2003).