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# Principles of Common Law Public Law – The British Constitution & Guiding Principles

Principles of Common Law

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## Public Law

### Constitutional Law

- Structure of the state
- Organs of the state
- Fundamental law of the land
- General principles regarding powers of the state and its relations with its citizens
- International relations
- → *State set-up (skeleton)*

### Administrative Law

- Sub-category of Constitutional Law
- Specifically organs of the State in motion
- Functions of the State
- Judicial Review (≠US)
- No International Law – exclusively powers and functions of administrative authorities
- → *State in motion (muscles/flesh)*



## The UK Constitution

### Unwritten vs. uncodified

- *‘If a constitution means a written document, then obviously Great Britain has no constitution. In countries where such a document exists, the word has that meaning. But the document itself merely sets out rules determining the creation and operation of governmental institutions, and obviously Great Britain has such institutions and such rules. The phrase “British constitution” is used to describe those rules.’ (\*)*

Sir Ivor Jennings, 1959

- *“The British Constitution, contrary to popular description, is not ‘unwritten’ – a good part of it is written – but it is uncodified.”*

House of Lords Select Committee on the Constitution, 2002



## Sources of the UK Constitution

- A substantial part of the UK Constitution is “written” albeit not codified in any one document
- Variety of sources of the UK Constitution:
  - Historical charters: Magna Carta 1215, Bill of Rights 1689
  - Statutory Law – Certain Acts of Parliament (\*): Act of Settlement 1701 (Crown succession), Acts of Union 1707 (England and Scotland) and 1800 (Great Britain and Ireland), Parliament Acts 1911 and 1949, British Nationality Act 1981, House of Lords Act 1999, Constitutional Reform Act 2005, Wales Act 2017, etc.
  - Common Law - Seminal judicial decisions: *Entick v Carrington* (1765), *Jackson v AG* (2005)
  - Constitutional Principles: rule of law, parliamentary sovereignty, separation of powers
  - Constitutional Conventions: Salisbury Convention, PM is leader of party with majority in HoC, Queen follows PM’s advice, Royal Assent for Bills to become law
    - NB: do not confuse with “customs”: red briefcase, PM questions on Wednesday (very British)
  - Constitutional writers: Dicey, Bagehot, Blackstone, Mill, Hart, Raz
  - EU Law + European Communities Act 1972 (repealed by “Brexit Act”)
  - European Convention on Human Rights + Human Rights Act 1998



## Monism and dualism

- Describes the relationship between national and international law, specifically how international treaties and conventions are incorporated into the internal national legal system
- Monism – international and national systems form a unitary body of law. Once the country has signed and ratified a treaty or convention, it has direct effect in their national legal system = citizens may base any claim against the state directly on the treaty (eg. The Netherlands)
- Dualism – international law must be translated into the national legal system, usually by legislation. Citizens must then base their claim on the national rule which incorporates the international one.
- In the UK, all international treaties and conventions must be “brought home” by act of the UK Parliament.
  - EU Law → European Communities Act 1972. UK Withdrawal Act 2020
  - European Convention on Human Rights → Human Rights Act 1998
  - Usually the Act of Parliament either refers to the treaty or copies it verbatim
  - BUT this system allows the UK to cherry pick which Articles of the conventions they will incorporate and which ones they will ignore



## Separation of Powers

### Legislative

- UK Parliament
  - House of Commons: elected, majority rules
  - House of Lords: appointed by the Queen on the advice of the Prime Minister excluding 92 hereditary members

### Executive

- The Monarch
- Government
  - Prime Minister: leader of the party with majority of seats in House of Commons
  - PM's Cabinet
- Scottish Government, Welsh Assembly Government, Northern Ireland Executive

### Judiciary

- Supreme Court
- Court of Appeal
- High Court: Queen's Bench Division, Chancery Division, Family Division
- Lower Courts: Crown, Magistrates, County, Family

- Checks and balances between all of them to hold them accountable
- Progressive move towards separation of powers: House of Lords used to be highest court in the UK
- The Lord Chancellor used to be the speaker and member of the House of Lords, head of the judiciary in the country and often judge in the House of Lords acting as highest court, and sat in the PM's Cabinet.



## Sovereignty of Parliament

- Dicey: “Parliament has the right to make and unmake and law whatever.”
- Developed over time to gradually limit the powers of the King (no revolution).
- No person can override or set aside the legislation of Parliament.
- No Parliament can bind future Parliaments.

### Challenges

- Shared or limited sovereignty with international law and EU Law
- No Parliament can bind future Parliaments – so the sovereignty of Parliament is not absolute - paradox
- If each generation can make new laws, it limits the power of any generation to entrench their laws.
- Problem with *lex posteriori* in dualistic system.
- Example: in theory, Parliament could make a law that says that “*all babies born on a Tuesday must be put to death.*” But constitutional principles and international human rights obligations prevent that.
- Will come back to this on Brexit – see later lecture.



## The Royal Prerogative

- Royal Prerogative = body of authorities, privileges and immunities exclusive to the Crown alone as head of the State and of the executive. In theory, in the UK – subject to no restriction.
- By convention, most of these rights are executed by her government, the Prime Minister and his Cabinet, in her stead (eg. Prime Minister goes to international conferences for «heads of state»)
- Current functions that have stayed with the head of state:
  - Constitutional:
    - appointment of the Prime Minister (by convention: leader of the party with the majority in the House of Commons)
    - signing and dissolving Statutes (by convention, always signs a Bill and acts on the advice of her Prime Minister regarding dissolving).
  - Public engagement and ceremonial to the national community
  - Symbolic and representative of their country to the international community





## Judicial review

- The rule of law requires that all government action be legally authorised. *Ultra vs intra vires*
- Suspicious of wide discretionary power → judicial safeguards against abuse
- Issues: review of actions by *public authorities* only, standing to sue
- Separation of powers: review *not* appeal, judiciary may defer matters to political decision-making (new law)
- Grounds for judicial review (*GCHQ* case 1985):
  - Illegality of the action – the law regulates decision-making, even discretion must be *intra vires*
  - Irrationality of the action / unreasonableness – outrageous defiance of logic or accepted moral standards. Judges should be able to tell, otherwise there is something wrong with the system
  - Procedural impropriety – failure to observe basic rules of natural justice, procedural fairness not followed, denial of justice, bias in the decision (ECHR: independent and impartial tribunal)
  - New: s. 6 HRA 1998 – if the action of the public authority violated the ECHR
    - Must engage Convention right, must be interference, interference must be unlawful and disproportionate
- Dealt with in standard courts, no division for administrative courts (French system)
- Judicial Review Procedure in the Civil Procedure Rules (made under Act of Parliament)



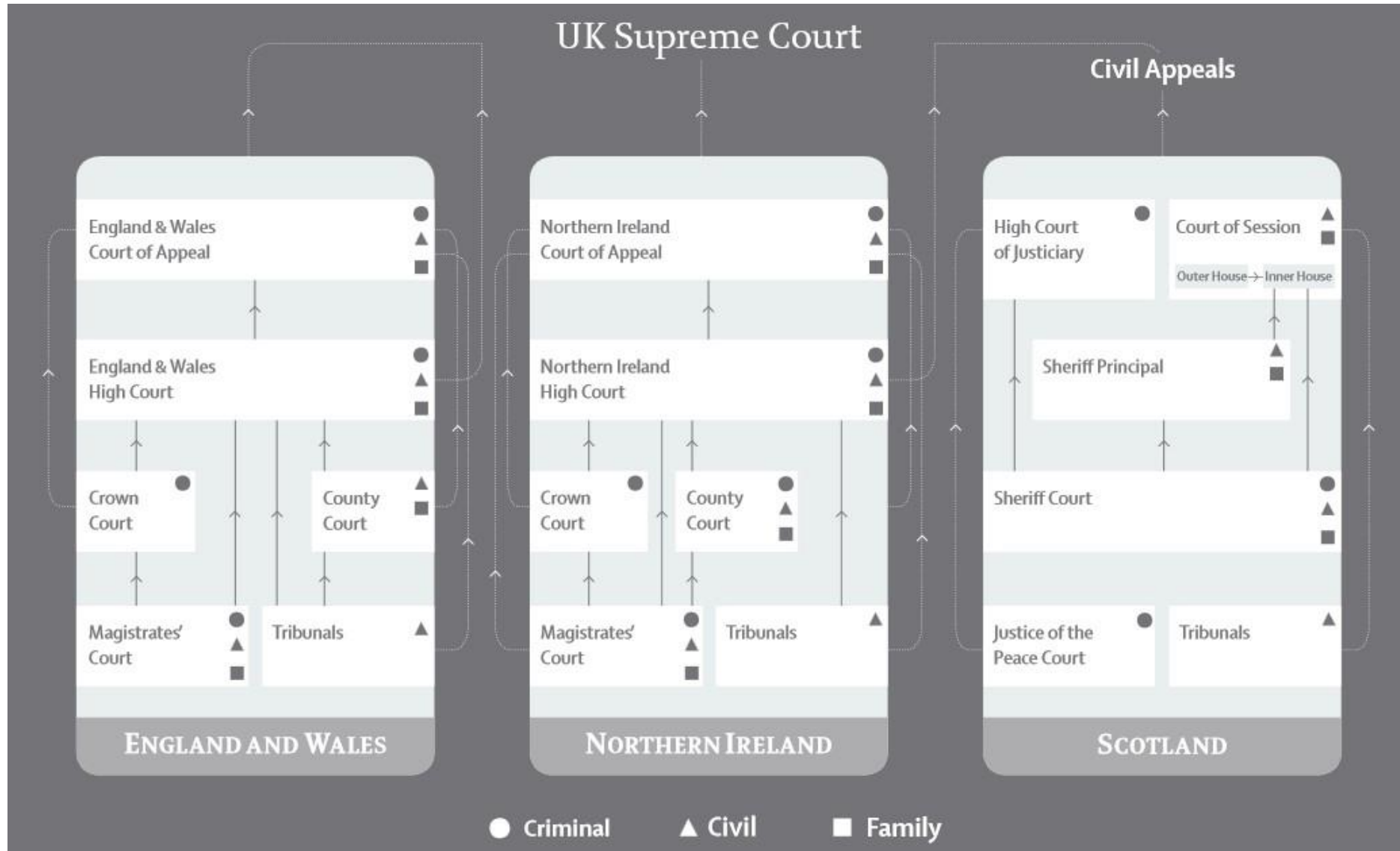
## Human Rights

- European Convention on Human Rights, UK signed 1950, ratified 1951, in effect since 1953
  - e.g: Articles 5, 6 and 7 promote crucial requirements of the rule of law: they prohibit arbitrary executive detention, require fair procedures in the determination of criminal charges and civil rights, and prohibit retrospective criminal penalties.
- No national legislation to incorporate and give effect to the Convention until Human Rights Act 1998
- The Act makes it unlawful for UK public authorities to act in a way that contravenes *certain* rights guaranteed in the Convention and gives the individual standing to sue the authority in a UK court.
- S. 3 HRA requires legislation to be given effect in a way that is compatible with the ECHR. If it cannot be interpreted that way, the court will make a “declaration of incompatibility” (s.4 HRA) – rarely used.
- One of the ways to get judicial review from UK courts.
- The legislation is still valid and operative, but the declaration *allows* Parliament to *consider* changing it – without any obligations.
- Parliamentary sovereignty: freedom to leave the Convention. But while still in, must obey.
- Prisoners’ right to vote: saga of almost 10 cases, judgment always against the UK, putting off change.

[http://www.echr.coe.int/Documents/FS\\_Prisoners\\_vote\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Prisoners_vote_ENG.pdf)



# Court system in the UK





## The Trial

- The trial in the UK and US is adversarial = the judge observes the lawyers for the prosecution and defence or claimant and defendant present their cases, cross-examine witnesses (more theatrical)
- In most civil law systems, the trial is inquisitorial = the lawyers give the judge case files beforehand and then the judge presides over the case and asks questions
- Trial by jury (in the UK now limited to mainly criminal law cases and defamation in tort) = it is (still) the right of an Englishman to be tried by a jury of his peers. Jury usually asked to assess whether the behaviour of the defendant was «reasonable».
- Very strong attachment to the «reasonable man standard» in both UK and US.



## Judge made law

- The judiciary in the UK is fiercely independent – the slightest hint of bias is a scandal
- Like the US – the UK Supreme Court Law Lords are known by name and style of judgment (conservative, liberal, family, controversial...)
- Every judge in the court formation may have a separate opinion on the case – and all are published
- Consequence: different judges can arrive to the same conclusion through different legal avenues
- In every judgment:
- **Ratio decidendi** – the rationale for the decision – the point and the reasoning in the case that determines the judgment and the principle that the case establishes. Binding on lower courts
- **Obiter dicta** – additional information – literally «by the way» remarks said in passing. Not officially binding but influential under English common law.



## Doctrine of Precedent

- Idea that the ruling in one case should be taken as authority in similar cases
- Binding precedent – lower courts are bound by the decisions of higher courts
- Binding court decisions (remember only *ratio decidendi*, not *obiter dicta*):
  - definitely Supreme Court (or old House of Lords decisions),
  - Court of Appeal decisions for High Court
  - High Court for lower courts, although less strong – we often say «this is only a High Court decision» – which means we are waiting for a decision from a higher court on the same topic
- Courts are bound by their own same-level decisions BUT they can:
- **Distinguish** – when a court does not want to follow precedent and notes that there are distinguishing details about the facts that make the judgment sway the other way.
- **Reverse** – when a court decides that their own decision or that of a lower court has to be changed



## Statutory intervention in Common Law - examples

### 1) Negligence

- Under common law – if there was an accident caused by the negligence of one party (usually employer/factory owner), if there was the slightest contributory negligence on the part of the victim/worker, the latter had no claim at all.
- Parliament intervened by statute to regulate that small area of the law
- Contributory Negligence Act 1945 – the Act of Parliament which stipulates that the amount of damages awarded to the victim has to be lowered to reflect the contributory negligence of the victim, but they still have a claim against the tortfeasor.

### 2) Rights of third parties

- Contract Law (Rights of Third Parties) Act 1999 – Act of Parliament to make sure third parties can claim on a contract they are not a party to if they are named and can benefit from it.



## Statutory intervention - issues

- Under UK Law, international conventions and treaties have to be brought home by an Act of Parliament (see previously)
  - Eg. Human Rights Act 1998, European Communities Act 1972
- Problem with lex posteriori that can repeal former Acts of Parliament (see sovereignty of Parliament)
- In 2012, students were taught defamation law (tort) under common law, now they are taught under the Defamation Act 2013 which wiped out most of the pre-existing legal work
- Comment – UK system very careful with Acts of Parliament because they still prefer the adaptable and down to earth approach of cases judged on a case-by-case basis based on reasonableness. And it is much easier to reverse a judgment than to repeal an Act of Parliament.





## Statutory Interpretation

- Methods of interpretation
  - Literal Rule (UK) = textual (US) – looking at the actual language of the Statute first. The idea is that if Parliament had wanted to say something, they would have
  - Golden Rule – allows the judges to take the literal meaning of the statute but if the decision will lead to an absurd outcome then the judge will intervene to use their common sense and discretion to make the judgment
  - Mischief Rule – usually used to determine what Parliament meant by creating the Act.
  - Judges can also look at explanatory notes to the statute to try and help their understanding
- The Human Rights Act requires judges to interpret statutes in accordance with the European Convention on Human Rights 1950, otherwise the judge has to issue a declaration of incompatibility. Judges do not like this because of sovereignty of Parliament.



## **US Constitutional (1787)**

**Article I – Powers of Congress**

**Article II – Powers of the President**

**Article III – Role of the federal courts**

**Bill of Rights (1791) (1<sup>st</sup> 10 amendments to US Constitution)– Thomas Jefferson main author. 1<sup>st</sup> amendment. ‘Free exercise’ clause. Establishment clause (state shall not establish a religion). 7<sup>th</sup> amendment – right to a jury trial in civil actions. 10<sup>th</sup> amendment – retained powers of States (not enumerated in the federal constitution)**



## The US Constitution

### Due Process Under the US Constitution

“Due Process” is that the government cannot take away life, liberty, or property from any person without a legal proceeding. However, modern understandings of due process extend further.

Two due process clauses:

- 1) Fifth Amendment due process clause applies to the federal government (against federal govt power) (state constitutions protected against state powers) and
- 2) Fourteenth Amendment due process clause applies to the States. It incorporates nearly all of the rights provided by the Bill of Rights, which consists of the first 10 amendments to the Constitution.

Although the Supreme Court determined that the Due Process Clause does not automatically incorporate every right in the Bill of Rights, most of these rights have been gradually incorporated. In other words, state and local governments must not infringe on that right.



## Due Process Under the US Constitution

### Procedural Due Process

Involves the procedures that are required before the government can remove ***life, liberty, or property***.

A jury trial is not necessarily required, but the individual must have notice of the proceeding and receive an opportunity to be heard before an impartial tribunal.

The Supreme Court has determined that property rights do not simply involve real estate or tangible items of personal property. Recipients of some government benefits, for example, are entitled to due process before the loss of their right to benefits.

When considering whether due process has been satisfied in these less obvious cases, a court will weigh individual rights against government interests in a balancing test provided by the Supreme Court. Factors to consider include the nature of the right, a comparison of the procedures provided to alternative procedures that could have been used, and the burden imposed on the government in using other procedures.



## Due Process Under the US Constitution

### Substantive Due Process

More controversial: It stems from Supreme Court decisions finding that due process protects **substantive rights** that go beyond the rights specifically enumerated by the Constitution.

Historically, **substantive due process** formed the basis of decisions striking down state regulations that protected workers. Courts reasoned that these regulations violated the freedom of contract, which was an 'unenumerated right'. However, this line of reasoning ended during the New Deal era (1930s), and economic applications of substantive due process have been widely discredited.

Substantive due process recently has often involved the right to privacy. No explicit right to privacy in US constitution. In *Griswold v. Connecticut (1965)*, the Supreme Court struck down a Connecticut law preventing couples from using contraception. Court ruled that the right to privacy is implied from several provisions in the Bill of Rights. These include **the right to assembly** and **protections against searches and seizures**.

Standards for applying substantive due process remain murky, though. The majority opinion in *Washington v. Glucksberg* indicated that an unenumerated right must be carefully described, closely tied to American history and traditions, and implicit in notions of "ordered liberty." Other Court decisions have departed from that approach in favor of a more fluid, case-specific analysis