Constitutional and Administrative Law

Hilaire Barnett, BA, LLM
Lecturer in Law
Queen Mary & Westfield College
PART I GENERAL INTRODUCTION

CHAPTER I

Introduction: The Scope of Constitutional Law

The concept of constitutionalism
What is a constitution?
Defining constitutions
Classifying constitutions
Written and unwritten constitutions
Rigid and flexible constitutions
Supreme and subordinate constitutions
Federal and unitary constitutions
Separated powers and fused powers
Republican and monarchical constitutions
Characteristics of the United Kingdom’s constitution

CHAPTER II

Sources of the Constitution

Definitional difficulties
Employment law
Pornography
Abortion
Statutory sources
Magna Carta
The Petition of Right 1628
The Bill of Rights 1689
The Act of Settlement 1700
Treaty of Union 1706
Further illustrations
Common law sources
The Crown and the judiciary
The State and the individual
Non-legal sources of the constitution
Constitutional conventions
Is the distinction between law and convention important?
CHAPTER III

The Structure of the United Kingdom 51
Wales 51
Scotland 54
Northern Ireland 58
The British Islands 74
The Islands and Europe 76
Local government in England and Wales 77
The European Community and Union 77

PART II - FUNDAMENTAL CONSTITUTIONAL CONCEPTS

CHAPTER IV

The Rule of Law 79
Introduction 79
Contrasting attitudes to the rule of law 80
Uncertainty in the Western rule of law 82
The rule of law as philosophical doctrine 83
  Natural law in ancient Greece and Rome 84
  Christian natural law thought 85
  Natural law and international law 86
  The idea of Social Contract 86
  Natural law and common law 86
Political theory and the rule of law 88
  Liberalism, conservatism and the rule of law 88
  Marxism and the rule of law 89
Professor Joseph Raz and the rule of law 90
Professor Lon Fuller and the rule of law 92
Friedrich von Hayek and the rule of law 93
John Rawls' theory of justice and the rule of law 94
‘Law and order’ and the rule of law 95
  Is there a duty to obey law? 96
  Is there a right to disobey law?
## Contents

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Is there a duty to disobey?</td>
<td>99</td>
</tr>
<tr>
<td>Dicey and the rule of law</td>
<td>100</td>
</tr>
<tr>
<td>Judicial review</td>
<td>105</td>
</tr>
<tr>
<td>The legal process</td>
<td>107</td>
</tr>
<tr>
<td>Evaluation of Dicey's 'equality before the law'</td>
<td>112</td>
</tr>
<tr>
<td>The rule of law in international dimension</td>
<td>115</td>
</tr>
<tr>
<td>Conclusion</td>
<td>116</td>
</tr>
<tr>
<td><strong>CHAPTER V</strong></td>
<td></td>
</tr>
<tr>
<td>The Separation of Powers</td>
<td>117</td>
</tr>
<tr>
<td>Historical development</td>
<td>118</td>
</tr>
<tr>
<td>The contemporary doctrine</td>
<td>120</td>
</tr>
<tr>
<td>Defining the institutions</td>
<td>121</td>
</tr>
<tr>
<td>The executive</td>
<td>121</td>
</tr>
<tr>
<td>The legislature</td>
<td>121</td>
</tr>
<tr>
<td>The judiciary</td>
<td>122</td>
</tr>
<tr>
<td>The relationship between: the executive and legislature;</td>
<td></td>
</tr>
<tr>
<td>legislature and judiciary ; executive and judiciary</td>
<td>132</td>
</tr>
<tr>
<td>Executive and legislature</td>
<td>132</td>
</tr>
<tr>
<td>Legislature and judiciary</td>
<td>137</td>
</tr>
<tr>
<td>Executive and judiciary</td>
<td>141</td>
</tr>
<tr>
<td>Conclusion</td>
<td>145</td>
</tr>
<tr>
<td><strong>CHAPTER VI</strong></td>
<td></td>
</tr>
<tr>
<td>The Royal Prerogative</td>
<td>149</td>
</tr>
<tr>
<td>Introduction</td>
<td>149</td>
</tr>
<tr>
<td>The prerogative defined</td>
<td>149</td>
</tr>
<tr>
<td>The prerogative before 1688</td>
<td>150</td>
</tr>
<tr>
<td>The King and Parliament</td>
<td>150</td>
</tr>
<tr>
<td>The Crown and the Council</td>
<td>152</td>
</tr>
<tr>
<td>The King and the courts</td>
<td>154</td>
</tr>
<tr>
<td>Regulation of trade and defence of the realm</td>
<td>155</td>
</tr>
<tr>
<td>The Crown and taxation</td>
<td>155</td>
</tr>
<tr>
<td>Miscellaneous prerogatives</td>
<td>158</td>
</tr>
<tr>
<td>The prerogative today</td>
<td>158</td>
</tr>
<tr>
<td>The prerogative illustrated</td>
<td>160</td>
</tr>
<tr>
<td>The prerogative and domestic affairs</td>
<td>161</td>
</tr>
<tr>
<td>The dissolution of Parliament</td>
<td>161</td>
</tr>
<tr>
<td>Circumstances requiring dissolution</td>
<td>172</td>
</tr>
<tr>
<td>The appointment of Prime Minister</td>
<td>173</td>
</tr>
</tbody>
</table>
Contents

Appointment of Prime Minister following General Election 174
Appointment of Prime Minister following retirement of the incumbent 174
The prerogative of mercy 176
Pardons and commutation of sentence 176
*Nolle prosequi* 177
Law enforcement 177
Power to establish non-statutory agencies 179
The granting of honours 180
Regulation of the Civil Service 180
Regulation of the Armed Forces 181
Immunities and privileges of the Crown 181
The prerogative and foreign affairs 181
Acts of State 181
Issue of passports 183
Treaty-making powers 184
Statute, the prerogative and the courts 186
Statute and the prerogative 186
Political control of the prerogative 193
Evaluation and conclusion 194
Reform of the prerogative? 195

CHAPTER VII

Parliamentary Sovereignty 197

Introduction 197
Differing interpretations of ‘sovereignty’ 197
Sovereignty as supreme legal authority 197
Sovereignty as supreme political authority 197
Distinguishing legal and political sovereignty 200
Legal theory and sovereignty 201
John Austin 201
H L A Hart 202
Hans Kelsen 203
The validity of law and the effectiveness of law 204
The ultimate rule is extra-legal 207
Sovereignty and written constitutions 208
The source of sovereignty in the United Kingdom 211
Sovereignty as a rule of common law 211
Parliamentary sovereignty in the United Kingdom 213
The origins of parliamentary sovereignty 213
A V Dicey and sovereignty 213
Acts of Parliament alone are supreme 217
PART III - CENTRAL AND LOCAL GOVERNMENT

CHAPTER VIII

Central Government 245
The Crown 245
The Privy Council 245
   Historical origins 245
   Composition of the Privy Council 247
   Meetings of the Privy Council 248
   Functions of the Privy Council 248
   Committees of the Privy Council 248
The office of Prime Minister 249
   The Prime Minister and membership of the House of Commons 251
   The choice of Prime Minister 252
   The functions of the Prime Minister 255
The role and functions of Cabinet 257
   Cabinet committees 258
   The Cabinet Office 260
Government members 260
Ministerial responsibility 261
Individual ministerial responsibility 261
'The morality of public office' 262
   Qualification for ministerial office 262
   Financial probity 262
The 1990s: 'sleaze' in public life 264
Premature disclosure of confidential information 268
<table>
<thead>
<tr>
<th>Contents</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Personal relationships</td>
<td>268</td>
</tr>
<tr>
<td>Vetting of prospective Ministers?</td>
<td>270</td>
</tr>
<tr>
<td>Ministerial responsibility for the Department</td>
<td>271</td>
</tr>
<tr>
<td>Crichel Down</td>
<td>271</td>
</tr>
<tr>
<td>Evaluating the evidence</td>
<td>275</td>
</tr>
<tr>
<td>Collective responsibility</td>
<td>276</td>
</tr>
<tr>
<td>Agreements to differ</td>
<td>277</td>
</tr>
<tr>
<td>Cabinet papers</td>
<td>278</td>
</tr>
<tr>
<td>Ministerial memoirs</td>
<td>279</td>
</tr>
<tr>
<td>The Civil Service</td>
<td>280</td>
</tr>
<tr>
<td>Permanence</td>
<td>282</td>
</tr>
<tr>
<td>Political neutrality</td>
<td>282</td>
</tr>
<tr>
<td>Anonymity</td>
<td>285</td>
</tr>
<tr>
<td>Improving efficiency in the Civil Service</td>
<td>289</td>
</tr>
<tr>
<td>Government secrecy</td>
<td>291</td>
</tr>
<tr>
<td>Access to personal information and records</td>
<td>291</td>
</tr>
<tr>
<td>The Government's White Paper: Open Government</td>
<td>293</td>
</tr>
<tr>
<td>Standards of service: the 'Citizen's Charter'</td>
<td>295</td>
</tr>
<tr>
<td>The government and the courts</td>
<td>295</td>
</tr>
<tr>
<td>Public interest immunity</td>
<td>296</td>
</tr>
<tr>
<td>Matrix Churchill and Arms to Iraq</td>
<td>299</td>
</tr>
</tbody>
</table>

**CHAPTER IX**

Local Government: An Outline 301

An outline of local government in England and Wales 301
The advantages of local government 301
Local authority boundaries 302
The current structure of local government 303
The functions of local government 304
The allocations of functions between authorities in England and Wales 305
The election of councillors 306
Qualification and disqualification for election 306
Payments for councillors 306
Standards of conduct 307
The management of local government 307
Central government and local government 308
Financial controls over local government 308
Local government revenue 309
Local authority expenditure 310
Audit 312
Contents

A changed government philosophy towards local government 1979–1995 313
Public housing policy 313
Competitive tendering for services 314
Reforms in education 315
Complaints about local government 316
The future of local government? 316

PART IV - PARLIAMENT

CHAPTER X

The Electoral System 319

Introduction 319
The franchise 320
Evolution of the franchise 320
Women and the right to vote 321
The current franchise 322
Constituencies 323
The Boundary Commissions 323
Legal challenges to the Boundary Commission Reports 326
Initiating the election process 329
General Elections 329
By-elections 329
Eligibility of candidates 329
The conduct of election campaigns 331
Political party funding 334
Voting systems 336
The simple majority system 336
Alternative voting systems 338
The case for and against electoral reform 339

CHAPTER XI

Introduction to the House of Commons 343
The House of Commons 343
The functions of Parliament 343
The life of a Parliament 344
The parliamentary session 344
Parliamentary sittings 345
## Contents

Summoning, adjournment, prorogation and dissolution of Parliament 346

- Summons 346
- Adjournment 346
- Prorogation 348
- Dissolution 348

The organisation of business 348

- Allocation of time in the Commons 349
- Personnel of the House of Commons 349
  - The office of Speaker 349
  - The Leader of the House 351
  - The 'party' whips 352
  - Members of Parliament 352
- The size of the House of Commons 354
  - The political parties 355
- Voting in the Commons 357
- Parliamentary publications and papers 358
  - The House of Commons 358
  - The House of Lords 358
- Televised proceedings in Parliament 359

### CHAPTER XII

The Legislative Process 361

The House of Commons 361

- Primary legislation 361
  - The classification of Bills 361
  - The origins of legislation 363
  - The preparation of a Bill 365
  - The structure of a Bill 365
  - The legislative stages: Public Bills 366
- Private Members' Bills 371
  - Introducing a Private Member's Bill 371
  - The enactment of Private Members' Bills 372
  - The volume of Private Members' Bills 373
  - Curtailing debate on legislative proposals 373
- Delegated legislation 376
  - The Statutory Instrument Act 1946 379
  - Parliamentary scrutiny of delegated legislation 380
- Financial procedures in the House of Commons 382
  - Expenditure ('supply') 383
  - Estimates 384
  - Taxation ('Ways and Means') 386
CHAPTER XV

Parliamentary Privilege 447

Definition and constitutional significance of privilege 447
The law and custom of Parliament 448
The role of the courts 448
The principal privileges 449
   Historical overview 449
   The current scope and role of privilege 452
   The courts and privilege 457
Composition and procedure 459
An early conflict between Parliament and the courts 461
Breach of privilege and contempt of Parliament 462
Members' interests and Members' independence 463
Rules regulating Members' interests 464
The Register of Members' Interests 466
Penalties for breach of privilege and contempt 468
Publication of parliamentary proceedings 471
Privilege and the media 471
Unauthorised disclosure of parliamentary proceedings 472
The procedure for determining issues of privilege and contempt 473
Standards in public life: the Nolan Inquiry 474
   Members of Parliament 475
   Paid consultancies 476
   General consultancies 477
   The Register of Members' Interests 477
   A Code of Conduct for Members of Parliament 478
Privilege in the House of Lords 480
Members' interests in the House of Lords 480
Reform of parliamentary privilege 481

PART V - THE EUROPEAN COMMUNITY

CHAPTER XVI

The European Community and Union 485

Introduction 485
Historical origins 485
The original institutions 486
   1957 – 1987 487
   The Single European Act 1986 487
   The Treaty on European Union 1992 (Maastricht) 488
   The 1995 European Agenda 490
   The United Kingdom and Europe 491
The objectives of the Community 491
A unique legal order 493
   The major constitutional issues 494
## Contents

The allocation of functions between  
Community institutions and Member States 494  
The principle of subsidiarity 495  
The application of subsidiarity 496  
The institutions of the Community 499  
The European Commission 499  
The Council of Ministers 503  
The voting system for decision-making 504  
The European Parliament 506  
The European Council 512  
The European Court of Justice 514  
Sources of Community law 521  
The principle of direct applicability 522  
The principle of direct effect 522  
Direct effect and Articles of the Treaty 523  
Directives and direct effect 524  
Vertical and horizontal effect of Community law 525  
The principle of indirect effect 528  
The question of legal supremacy 530  
The European Court of Justice’s view 530  
The reception of Community law into the United Kingdom 533  
Conflicts between Community law and domestic law 536  
Citizenship of the European Union 546  
Human Rights and the European Union 547  
The current British political concerns over  
the future development of the Union 550  
Sovereignty in general 550  
Monetary Union 551  
Removing passport controls 552

### PART VI - THE INDIVIDUAL AND THE STATE

#### CHAPTER XVII

Civil Liberties

The origins of the idea of rights 557  
Early conceptions of limited governmental power 557  
John Locke 557  
Thomas Paine 558  
The emergence of the constitutional protection of rights 560  
Natural law and positive law 561
<table>
<thead>
<tr>
<th>Contents</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rights and freedoms under an unwritten constitution</td>
<td>562</td>
</tr>
<tr>
<td>The Individual and the State</td>
<td>565</td>
</tr>
<tr>
<td>Citizenship and immigration</td>
<td>565</td>
</tr>
<tr>
<td>Immigration policy</td>
<td>570</td>
</tr>
<tr>
<td>Appeals against immigration decisions and deportation orders</td>
<td>571</td>
</tr>
<tr>
<td>Extradition</td>
<td>572</td>
</tr>
<tr>
<td>Judicial review of deportation and extradition decisions</td>
<td>573</td>
</tr>
<tr>
<td>Exclusion orders</td>
<td>576</td>
</tr>
<tr>
<td>Freedom of movement within the European Community and Union</td>
<td>577</td>
</tr>
<tr>
<td>Protection of the person</td>
<td>578</td>
</tr>
<tr>
<td>Habeas corpus</td>
<td>578</td>
</tr>
<tr>
<td>Freedom of the person and police powers</td>
<td>580</td>
</tr>
<tr>
<td>Questioning by the police</td>
<td>580</td>
</tr>
<tr>
<td>The protection of suspects</td>
<td>582</td>
</tr>
<tr>
<td>The caution</td>
<td>583</td>
</tr>
<tr>
<td>Arrest</td>
<td>583</td>
</tr>
<tr>
<td>‘Arrestable offences’</td>
<td>584</td>
</tr>
<tr>
<td>Detention following arrest</td>
<td>586</td>
</tr>
<tr>
<td>Power to search following arrest</td>
<td>589</td>
</tr>
<tr>
<td>Freedom from discrimination</td>
<td>590</td>
</tr>
<tr>
<td>Racial discrimination</td>
<td>590</td>
</tr>
<tr>
<td>Race Relations Act</td>
<td>590</td>
</tr>
<tr>
<td>Sexual discrimination</td>
<td>594</td>
</tr>
<tr>
<td>Sexual equality</td>
<td>594</td>
</tr>
<tr>
<td>Protection of personal property</td>
<td>601</td>
</tr>
<tr>
<td>Rights of entry under common law</td>
<td>602</td>
</tr>
<tr>
<td>Police powers of entry, search and seizure</td>
<td>603</td>
</tr>
<tr>
<td>Searching a suspect’s property</td>
<td>603</td>
</tr>
<tr>
<td>Police powers to enter into property other than after arrest</td>
<td>604</td>
</tr>
<tr>
<td>The right to search premises after arrest under PACE 1984</td>
<td>605</td>
</tr>
<tr>
<td>Freedom of expression</td>
<td>605</td>
</tr>
<tr>
<td>Restrictions on freedom of speech</td>
<td>606</td>
</tr>
<tr>
<td>Sedition, incitement to disaffection and treason</td>
<td>608</td>
</tr>
<tr>
<td>Incitement to racial hatred</td>
<td>609</td>
</tr>
<tr>
<td>Law relating to obscenity and pornography</td>
<td>610</td>
</tr>
<tr>
<td>Blasphemy</td>
<td>613</td>
</tr>
<tr>
<td>Contempt of court</td>
<td>615</td>
</tr>
<tr>
<td>Injunctions to restrain expression</td>
<td>615</td>
</tr>
<tr>
<td>Official record-keeping</td>
<td>617</td>
</tr>
<tr>
<td>Individual privacy and the media</td>
<td>618</td>
</tr>
<tr>
<td>A statutory tort of or criminal liability for invasion of privacy?</td>
<td>619</td>
</tr>
<tr>
<td>Freedom of association, assembly and public order</td>
<td>620</td>
</tr>
<tr>
<td>The Criminal Justice and Public Order Act 1994</td>
<td>620</td>
</tr>
</tbody>
</table>
Contents

Freedom of association 620
Freedom of assembly 621
Indirect restrictions on the right of assembly 622
Freedom of movement within the United Kingdom 631
Evaluating the evidence of protection of freedoms 633

CHAPTER XVIII

The European Convention on Human Rights and Fundamental Freedoms 635

The status of the Convention under English law 635
The influence of the Convention 636
Case against the United Kingdom 638
The European Convention on Human Rights: the Substantive Rights 638
Article 1 638
Article 2 638
Article 3 640
Article 4 643
Article 5 643
Article 6 647
Article 7 650
Article 8 651
Respect for individual privacy 651
Privacy of the family 652
Respect for private sexual life 652
Article 9 653
Article 10 653
Article 11 655
Article 12 656
Article 13 657
Article 14 658
Article 16 658
Article 17 658
The Convention Protocols 659
Institutions and procedure under the Convention 659
The right of application 661
Inter-State applications 661
Complaints from individuals 661
The procedure 662
Exhaustion of domestic remedies 662
The time limit 662
Admissibility 662
CHAPTER XIX

State Security

Introduction
The revival of public and academic interest in security matters
The Security Services
   The terminology
Interception of communications
The Security Commission
Official secrecy
   The Official Secrets Acts 1911–1989
Judicial attitudes to pleas of national security
   Detention in wartime
   Detention with a view to deportation in peacetime
Emergency powers
   In peacetime
   In time of war
Special powers in relation to Northern Ireland
   The Prevention of Terrorism Act
   The Prevention of Terrorism Act and the European Convention on Human Rights

PART VII - ADMINISTRATIVE LAW

CHAPTER XX

Judicial Review of Administrative Action

The constitutional role of judicial review
The growth in public administration
What is a ‘public body’ for the purposes of judicial review?
The courts’ interpretation of public bodies
CHAPTER XXI

Commissioners for Administration: 'Ombudsmen'

Introduction
Commissioners for Administration in the United Kingdom
The Parliamentary Commissioner for Administration
The constitutional position of the Commissioner?
The complaints procedure
Jurisdiction
The volume of complaints
The problem of accessibility and public awareness
The Select Committee on the Parliamentary Commissioner
The Parliamentary Commissioner and ministerial responsibility
Reform of the office of Parliamentary Commissioner 805
The Health Service Commissioner 807
  Jurisdiction 807
  Excluded matters 807
  The volume of complaints 808
Local Government Commissioners 808
  Jurisdiction 809
  Maladministration causing injustice 809
  Remedies 809
  Excluded matters 810
  The volume of complaints 810
European Community ombudsman 811

APPENDIX 1 813

APPENDIX 2 815

Index 821