影印版法学基础系列

宪法基础

ESSENTIAL CONSTITUTIONAL LAW

安德鲁·比尔
Andrew Beale

（第二版）
（Second Edition）

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本书导读

本书是一本论述英国宪法的基本原理及其运作机制的简明读本。英国由于其岛国的特殊地理环境，使它与其他的欧洲大陆国家相隔离。因此，当罗马法在欧洲大陆国家风起云涌之时，英国的法律却能保持自身独立地生长与发展，从而形成与大陆法系截然不同的法律体制，其突出的特征表现在与成文法主义相反的不成文法主义。作为英国法律体系构成部分的英国宪法也秉承了这一特性，表现为一个复杂的体系，除了包括形诸于文字的宪法性文件之外，更为重要的是还具有宪法惯例和案例。英国宪法的不成文特征使得它常能不断变化，并且不存在特别制宪权，亦即表现为软性宪法。于是，这又引出英国宪法不同于欧洲大陆国家宪法的另两个特征：其一为宪法本身并无足够的力量束缚英国的议会，导致议会权力的无限倾向，即议会主权；其二为英国宪法的实施并无专门机关，而是由普通法院予以施行，在英国只有一个法律体系及一个法律运行体系。最后，由于英国资产阶级革命的不彻底性和妥协性，君主立宪的国家体制意味着国王和一些国王的权力被保留了下来，因此虽然同样以权力分立为宪法的基本原则之一，但国家行政部门的权力来源却表现出多样性。

本书结构严谨，以公民和国家、公民权利与国家权力的关系为立脚点，结合宪法的基本原则细致地论述了英国整个国家机构的运作机制，勾勒了一幅英国政治生活的简图。全书内容共分为五章：第一章“公民和宪法”，第二章“公民和立法机构”，第三章“公民和行政部门”，第四章“公民和权力滥用的司法控制”，第五章“公民和国家”。其中第一章可看做该书的导言，讲述了英国宪法的理论原则，第二章至第四章则从权力分为立法权、行政权和司法权的角度讲述了公民同这三个国家权力机关的关系及这三个国家机关的权力是如何运作的，第五章则总结性地论述了公民权利与国家权力之间的关系。

不同于国内学者关于宪法学的写作方法与结构，作者以独特的视角克服了将宪法学机械地分成国家机构和公民权利两部分来进行纯理论论述的单调做法，而是将国家和公民结合起来，从现实的动态生活的运行来讲述规则。此外，也不同于一些学者的“正面”论证法，作者总是立足于从事物的反面来观察。例如，在论述公民权利的时候，多数学者倾向于论述公民具有哪

些权利以及如何保障这些权利，而作者却另辟蹊径从权利应受到哪些必要的限制来阐释权利的范围。本书文字浅白明晓，结构清晰，而且在每一章节的开头作者都注明了应着重把握的重点，是一本适合于法律专业本科生及具有相当水平的其他读者阅读的读本。另外，本书虽然是一本简明读物，但作者却敏锐地把握住了时代的发展和变化，并没有拘泥于英国宪法的传统理论，而是结合现实对传统理论提出了补充和警示。20 世纪以后，随着英国政治权力结构的变化，行政权力逐渐扩大，委任立法随之兴起，传统的议会主权论的理论基础遭到动摇，而在行政权力内部，随着撒切尔夫人一系列强硬的改革措施的实施，首相的地位日益从内阁中屹立而出，而欧共体、欧盟等超国家机构的出现，对主权这一概念也提出了挑战。对这些变化作者都在本书中予以了描述。

本书的目录和索引部分由陈志英翻译，不妥之处，恳请指正！

译　　者

2004 年 4 月

To Helen, Matthew, Robert and Caitlin

Foreword

This book is part of the Cavendish Essential series. The books in the series are designed to provide useful revision aids for the hard-pressed student. They are not, of course, intended to be substitutes for more detailed treatises. Other textbooks in the Cavendish portfolio must supply these gaps.

The Cavendish Essential series is now in its second edition and is a well-established favourite among students.

The team of authors bring a wealth of lecturing and examining experience to the task in hand. Many of us can even recall what it was like to face law examinations!

Professor Nicholas Bourne
General Editor, Essential Series
Swansea

Summer 1997

Acknowledgments

I would like to acknowledge the untiring support of my wife, Helen, and my father who have done so much to assist me in the publication of this book.

Preface

The purpose of this book is to provide a revision aid for the undergraduate constitutional law student.

The book divides the constitutional and administrative law course into five sections and covers all the major topics associated with the subject. In each section the reader is provided with a revision checklist and guidance on the study of essential issues that figure prominently in examinations.

Where appropriate the most recent cases, legislation and academic articles are analysed to provide the reader with the most up-to-date information necessary for success in today's competitive market-place.

The law is stated as at 1 May 1997.

Andrew Beale

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1 The citizen and the constitution

You should be familiar with the following areas:

- definition and classification of constitutions
- characteristics of constitutions including the rule of law, separation of powers, independence of the judiciary and parliamentary sovereignty
- sources of our constitutional law
- European Union including its history, objectives and institutions
- effect of community law on parliamentary sovereignty

Introduction

In his textbook *Constitutional & Administrative Law* (1997), Brian Thompson makes reference to our *constitutional jigsaw*. The various pieces within this jigsaw are the institutions, of various shapes and sizes, which are fitted together by the constitution to give a complete picture of government within our State. To facilitate the process of bringing these various institutional pieces together we identify three areas into which these organs of State may fit. These areas relate to the three branches of government: executive, legislature and judiciary. The function of organs within the executive branch is to formulate policies and have conduct of administration within the State. The function of organs within the legislature is to legislate and thereby translate such policies into law. The task of the judicial branch is to adjudicate in instances of dispute and thereby enforce the laws of the State.

But if this is what a constitution does, what of constitutional law? Constitutional law is the body of law which regulates the bringing together of these organs of State and identifies how they relate to each other. Its sources are both legal and non-legal, in the sense that some are capable of enforcement in a court of law whilst others, although

legally recognised as being in existence, are not. The principal legal source of our constitutional law is legislation, both primary and secondary. In addition, our common law system places emphasis on judicial interpretations of the law in cases before the courts. The non-legal sources of our constitutional law include constitutional conventions, customary rules relating both to the operation of Parliament and the Royal Prerogative and the writings of learned constitutional lawyers, whose authoritative interpretations on the operation of our constitution in themselves become a part of it.

So what are the essential issues that need to be addressed when we commence our study of constitutional law?

Do we need a written constitution?

Written constitution

In the first instance we need to understand what is meant by having a written constitution. A written constitution is one contained in one or a small group of documents. To many commentators this offers the advantages of clarity, stability and enforceability over States with unwritten constitutions (ie constitutions not to be found in one or a small group of documents).

Moreover, written constitutions are more readily accepted as enjoying the advantage of a prescriptive approach. Indeed, in his article entitled, 'The Sound of Silence: Constitutional Law Without a Constitution' (1994) *Law Quarterly Review*, Sir Stephen Sedley notes that it can be claimed:

> ... in this country we have constitutional law without having a constitution, not because our constitution is unwritten but because our constitutional law, historically at least, is merely descriptive: it offers an account of how the country has come to be governed.

Whereas Sir Stephen Sedley, a High Court judge, would acknowledge that it is wrong for our legal system to find itself adjudicating in disputes between individuals and the State where the latter, 'can move its goal posts because the rules do not prescribe where the goal posts are to be located', he would see little to suggest that a written constitution provides a solution to this problem. Indeed, Sir Stephen acknowledges that a written constitution might even aggravate the problem, for legislative and administrative experience demonstrates that 'the more detail you try to prescribe, the less you find you have actually catered

for'. Moreover, few commentators would disagree that no constitution can survive the movements of time without recourse to the inherent descriptive flexibility of convention and practice.

Sir John Laws notes in 'Law and Democracy' (1995) *Public Law*, that 'though our constitution is unwritten, it can and must be articulated ... the defence of the imperatives of democracy and fundamental rights cannot be assumed but must always be asserted'. The solution is to have a constitution with an, 'understood, coherent and legally underpinned frame'. Government beyond constitutional law is tyranny. Lord Bridge noted in *X v Morgan-Grampian* (1991):

> ... the maintenance of the rule of law is in every way as important in a free society as the democratic franchise. In our society the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen's courts in interpreting and applying the law.

Dynamic and evolving constitution

To understand the dynamic and evolving nature of our constitution requires that we give recognition to the legal importance of issues of power and accountability. We should acknowledge that much of the power within our constitution presently resides with the executive. Yet common law is the 'main crucible' of our modern constitutional law and we should recognise, as did Nolan LJ in *M v Home Office* (1992), that:

> ... the proper constitutional relationship of the executive with the courts is that the courts will respect all acts of the executive within its legal province, and that the executive will respect all decisions of the courts as to what its lawful province is.

In terms of our constitutional future, we need to be fully aware of developments in Europe. In particular, we should acknowledge the immense impact that membership of the European Union has already had on our domestic law and note the blueprint for future development and enlargement outlined in the Maastricht Treaty on European Union 1992.

Characteristics of our constitution

Rule of law

One of the central characteristics of our constitution, according to Professor A V Dicey, is our adherence to the concept of the rule of law. The importance of the rule of law lies in its ability to curtail the arbitrary exercise of power via the subjection of all to legal rules which are impartially enforced. In *The Rule of Law in Britain Today* (1989) the Constitutional Reform Centre noted that:

> Dicey held it to be essential to the rule of law that public authorities should be subject to the same law as the ordinary citizen, administered in the ordinary courts, and many of the European systems of law (based on the Roman law tradition) failed the test in giving the State a special position in law.

But such a stringent definition is too narrow in that even within our common law system the State may be seen to occupy a special position. Those who are unhappy with the limitations posed by Dicey's definition offer wider definitions which centre, such as in the Declaration of Delhi 1959, upon respect for fundamental human rights. This, however, presents a problem for our constitution, for it is one of the claims of our common law system that we protect civil liberties without explicit reference to basic rights in a positive form. The late 1940s and early 1950s saw the UK committing itself to protecting human rights, formulated in positive terms, under the UN Universal Declaration of Human Rights and the European Convention on Human Rights but neither have been incorporated into our domestic law (a matter explored in greater detail in Chapter 5).

Separation of powers

The concept of the rule of law is not alone in attempting to check the potential for arbitrary government. The concept of the separation of powers also seeks to attain this purpose by segregating both the functions and personnel of the three branches of government: executive, legislature and judiciary. The idea contained within the concept of the rule of law, that legal rules be impartially administered against all, is usually taken to justify the separation of the judiciary from the other two branches of government. In the UK we seek to achieve the independence of our judiciary by offering senior judges security of tenure under the Act of Settlement 1700, so that they might dispense justice without fear or favour. But our judiciary is not wholly independent of