Public Law in a Multi-Layered Constitution

Edited by Nicholas Bamforth and Peter Leyland

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At the beginning of the twenty-first century it appears that the traditional Diceyan model of a unitary constitution has been superseded as power has come to be distributed—particularly in the post-1997 period—between institutions at European, national, devolved and local level. Furthermore, the courts have come to play a powerful role at all levels through judicial review, while forms of regulation and contracting, together with other informal techniques of governance, have emerged. The contemporary constitution can be characterised as involving a multi-layered distribution of power—a situation which raises many key questions about the role of public law. How is the distribution of power between the different levels of the contemporary constitution to be policed? What is the emerging contribution of the courts in regard to EC law, the Human Rights Act 1998 and devolution? What roles should be played by the legislative and judicial bodies at each level? Who should have access to the courts in public law disputes, and on what grounds should the courts regulate the exercise of public power? Can a coherent distinction be maintained between public and private law? The essays in this important collection tackle such questions from a variety of perspectives, aiming between them to provide a dynamic picture of the role of public law in the contemporary, multi-layered constitution.

Preface

This collection of essays aims to engage with what we describe as the 'multi-layered' nature of contemporary constitution. The UK constitution has been—and still is—characterised by evolutionary change, but in the last thirty years of the twentieth century it was quite fundamentally and often deliberately refashioned in a number of areas, something which has had important consequences for the role of public law. No single collection of essays could hope to chart every aspect of this process, nor to provide a definitive account of the boundaries and content of the contemporary system of public law. Instead, having sketched out the nature of the refashioning in the first chapter, subsequent chapters analyse some of its key aspects in an attempt to offer some suggestions or tentative conclusions about the architecture of the contemporary constitution. We hope, in consequence, that the essays will be of use to scholars, students, practitioners, and anyone else with an interest in public law.

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London NW1
July 2003

Nicholas Bamforth
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Public Law in a Multi-Layered Constitution

NICHOLAS BAMFORTH AND PETER LEYLAND

ANY ACCOUNT OF the role, dimensions and mechanisms of public law in a particular jurisdiction must involve—whether as a presupposition or as an explicit proposition—some view of the workings of the constitution of that jurisdiction. Public law, however defined, is concerned with the exercise of power by public bodies and with the mechanisms for controlling such power,[1] so it must follow that the underpinning constitutional provisions—concerning, for example, the role and nature of the state, the allocation of power between constituent institutions of the state, the proper role of the legislature, executive and judiciary, and notions of democratic accountability and representation—will play an important role in delimiting both the territory within which and the way in which public law is to operate. To suggest otherwise would be tantamount to claiming that it is possible to understand and to navigate the geography of a settled area without first comprehending basic notions such as distance, height and terrain, quite apart from more sophisticated concepts such as public and private property. Professors Carol Harlow and Richard Rawlings have made the normative claim that 'behind every theory of the law, there lies a theory of the state'.[2] Our claim—that any understanding of the dimensions of public law presupposes a coherent account of the constitutional terrain—operates in an analogous fashion to this normative claim, but does so at a purely *analytical* level.

In itself, our claim should hardly be contentious. We make it openly only because it provides the analytical foundation for much of what follows in this collection of essays. The central theme running through the collection is that the restructuring of the constitutional architecture of the United Kingdom in the past

[1] For rival definitons, see C Harlow and R Rawlings, *Law and Administration* (London, Butterworths,1997), pp 25–28, chs 2–4.

[2] N 1 above, p1. To similar (albeit broader) effect, see also Professor Harold Laski's assertions that 'No theory of the state is ever intelligible save in the context of its time. What men think about the state is the outcome always of the experience in which they are immersed' (H. Laski, *A Grammar of Politics* (London, Allen and Unwin, 1925), p i) and that 'Law cannot transcend the relations it is intended to enforce. Its ultimate postulates are never self-determined, but given to it by the economic system of which it is the expression' (p xxii; see also ch 10, p 544).

thirty or so years—in particular, since 1997—has been fundamental, and poses important questions for the role of public law. In practical terms, power (both legislative and political) has been spread away from the Westminster Parliament, both 'upwards' to the European Union and 'downwards' to the devolved assemblies. There has also been what might be seen as a rebalancing of the roles of the courts and Parliament in holding the executive to account, given the development by the courts—particularly since 1977—of a comprehensive regime of judicial review, a regime which has arguably been strengthened by the passage of the Human Rights Act 1998. The domain of government has also been altered by the processes of privatisation and contracting out, and the administrative processes of government altered by the techniques of 'new public management'. These latter developments require us to think about how we understand the shape of the state and the appropriate methods of regulating state power.

The various changes highlighted here have been prompted by a diverse collection of rationales, justifications and ideologies. The Human Rights Act and the devolution legislation were enacted in the post-1997 period by the New Labour government, for example, while privatisation, contracting out and 'new public management' have their origins in the period of Conservative government from 1979 to 1997 (which is not to say that they were not embraced by the incoming government in 1997). More specifically, it might be fair to say that the package of constitutional reform measures enacted since 1997 does not appear to have been based upon an overall plan.[3] In addition, the development of domestic judicial review has been the responsibility of the courts (whatever one's view as to the constitutional basis of the review jurisdiction) and has not always been welcomed by the government of the day.[4] Looked at in the round, the various developments we have outlined might therefore be felt to have produced something of a patchwork quilt effect, constitutionally-speaking. Nonetheless, the *overall consequence* has been to bring about a profound constitutional change, in that the United Kingdom could now be said to possess what might be described as a *multi-layered* constitution. As mentioned above, there has been a two-way redistribution of power from Westminster level to the European Union and the devolved levels of government, and the European Convention on Human Rights now plays a direct role in national law. Elected public bodies and courts must—to varying degrees—take account of and reflect such changes, and the allocation of power between such bodies might be said to vary according to factors which operate *both* at the same constitutional level as the body itself *and* at higher (or lower) levels within the constitution. Two examples will illustrate this. First, national courts were traditionally said to be concerned to give effect to the Sovereign will of the Westminster Parliament.[5] In

[3] Responsibility for drafting the various pieces of legislation was widely spread.

[4] For contrasting perspectives, see C Forsyth (ed), *Judicial Review and the Constitution* (Oxford, Hart, 2000).

[5] Significant examples in relation to statutory interpretation include *R. v Hull University Visitor, ex p. Page* [1993] AC 682; *R. v Secretary of State for the Home Department, ex p. Fire Brigades Union* [1995] 2 AC 513. In relation to Parliamentary Sovereignty, see, eg, *Ellen Street Estates v Minister of Health* [1934] KB 590; *British Railways Board v Pickin* [1974] AC 765.

today's constitution, however, they must read that will (as far as possible) subject to the jurisprudence of the European Court of Human Rights and subject to the overriding force of European Community law.[6] Secondly, the permissible scope of executive action—whether at UK or at devolved level—is regulated by general United Kingdom-level laws, by the requirements of EC law and the European Convention (via the European Communities Act 1972 and Human Rights Act 1998 respectively) *and*, to varying extents, by the rules delimiting the power of the devolved institutions. In this sense, the constitution might be said to have taken on the appearance of a structure with multiple, but inter-connected and sometimes overlapping layers.

A further complicating factor has been that power— and the mechanisms for regulating its exercise—seem to have diffused sideways as well as vertically upwards and downwards. At both national and EU levels, it is clear that the mechanisms of constitutional accountability must be measured in judicial as well as in political terms. However, the proper boundary between the realms of legal and political accountability remains the subject of fierce debate,[7] the resolution of which has not been helped by the fact that the methods of exercising power have—via processes such as privatisation and contracting out—spread laterally away from a centralised executive. Such developments do not inevitably occur alongside the emergence of a multi-layered constitution—it would be quite possible to conceive of a multi-layered constitution in which they were not present—but they do form an important feature of the contemporary constitutional landscape, and one which has particular resonance given the existence of a multi-layered constitution in that the boundary between state and non-state actors appears currently to have been drawn in different places in different constitutional layers.

The primary purpose of the essays gathered together in this collection is to reflect upon the role of public law in the present, multi-layered constitutional ordering. The contributors focus on a variety of different features of the contemporary constitution and argue from a variety of standpoints. However, each essay has something important to say about the multi-layered theme. In general, the essays are concerned to evaluate specific, practical questions: how do the different layers interact, for example? What is the appropriate role of legal as opposed to political accountability within each layer? Deeper-level questions are, of course, posed by the emergence of a multi-layered constitution. How, for example, do we now understand the idea that the Westminster Parliament is a legally sovereign body? Do we now have competing—or overlapping—notions of sovereignty at different levels of the constitutional structures which apply in Western Europe? Should we see the driving force behind our constitution in a 'top down' way—that is, that it is ultimately determined by the rules and principles of the European Union—or in a 'bottom up' fashion, by stressing the continuing importance of the voluntary adherence of member states to the European Union? These questions

[6] On the Convention, see Human Rights Act 1998, s 3; *R. v A.* [2002] 1 AC 45, paras. [44], [108] and [162]. On EC law, see *R. v Secretary of State for Transport, ex p. Factortame (2)* [1991] 1 AC 603.

[7] See, eg the chapters by Tomkins, Harlow, Taggart, Hunt and Gearty in this volume.

have, at various times, been considered elsewhere.[8] By contrast, the aim of this collection is to analyse the ways in which different aspects of the contemporary multi-layered constitution interrelate. While this exercise has a practical, map-drafting focus, certain broader conclusions about the *nature* of that constitution can be drawn from the analysis. In the remainder of this introduction, we will attempt to explain some of the features of the multi-layered model in further detail. We will then explain how the chapters in the collection illustrate the themes we have canvassed. It goes without saying that it would be impracticable, in a single introduction or set of essays, to capture every aspect of the present multi-layered model, or to evaluate all its consequences. We hope, in the present volume, simply to sketch out some of the broader themes.

THE MULTI-LAYERED CONSTITUTION: AN OVERVIEW

Many claims have been made about the post-1997 reforms to the United Kingdom constitution. It has been suggested, for example, that considered in the round, these reforms require us to see the contemporary constitution as less monolithic, less centralised and less political than it previously was.[9] More radically, others have claimed variously that the raft of constitutional legislation amounts to a new constitutional settlement,[10] that it deals 'hammer blows against our Benthamite and Diceyan traditions', or that it entails a shift from a 'political' to a 'law based' constitution.[11] Contestable though these latter claims might be, for the reasons indicated above, it is nonetheless clear that the emergence—over the past thirty years—of a multi-layered constitution is a matter of considerable significance, and it is the purpose of this section of the introduction to sketch out some of its features. In order to do so, a useful starting point is to outline—in order to provide a basis for comparison—the features of Professor AV Dicey's conception of the constitutional order. We are not saying that it follows inevitably from the emergence of a multi-layered constitution that all reference to Dicey's model should necessarily be abandoned. Rather, we present Dicey's analysis as a counter-example to the multi-layered model, something which will enable us to illustrate the differences between the two more clearly.

The primary components of Dicey's model were Parliamentary Sovereignty and

[8] There is a large literature on these topics. See, eg, N MacCormick, *Questioning Sovereignty: Law, State and Practical Reason* (Oxford, Clarendon Press, 1999); 'Symposium: Can Europe Have a Constitution?' (2001) 12 *KCLJ* 1–133; PP Craig, 'Constitutions, Constitutionalism and the European Union' (2001) 26 *EL Rev* 125; I. Pernice 'Multilevel constitutionalism in the European Union' (2002) 27 *EL Rev* 511; N Walker, 'Human Rights in a Postnational Order: Reconciling Political and Constitutional Pluralism', ch 7 in T Campbell, KD Ewing and A Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford, Clarendon Press, 2001).

[9] C Munro, *Studies in Constitutional Law* 2nd edn (London, Butterworths., 1999), p 12.

[10] R Hazell and R Cornes (eds), *Constitutional Futures: A History of the Next Ten Years* (Oxford, OUP, 1999), p 1.

[11] J Jowell and D Oliver, *The Changing Constitution* 4th edn (Oxford, OUP, 2000), p v. D Oliver, *Constitutional Reform in the UK* (Oxford, OUP, 2003), p v.

the rule of law. Parliamentary Sovereignty, in Dicey's classic formulation, was the notion that 'Parliament has the right to make or unmake any law whatsoever, and further that no person or body has the right to override or set aside the legislation of Parliament'.[12] Dicey was not claiming here that there were no limits on Parliament. Rather, he was suggesting that such limits as existed were political, or—at most—took effect via judicial interpretation of legislation. For Dicey, the most obvious political limits on Parliamentary power were what he termed the 'internal' and 'external' constraints: a Parliament would not legislate to bring about certain outrageous consequences—even though it might have the power to do so—due to fear of an adverse political reaction by the electorate, and due to internal constraints of political morality. Dicey's notion of the rule of law might be said to play an analogous limiting function. Parliament would feel politically or morally compelled (even though it was not legally compelled) not to legislate in violation of the rule of law. Professor Paul Craig has thus suggested that a vision of unitary, self-correcting democracy lay behind Dicey's picture of the constitution: all were to be subject to the same law, with political rather than legal redress (hence 'self-correcting') being available for legislative excess.[13] Dicey's account was also noteworthy for his suggestion that the rule of law required 'equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts', so that there could be no

> idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals; there can with us be nothing really corresponding to the 'administrative law' (*droit administratif*) or the 'administrative tribunals' (*tribunaux administratifs*) of France. The notion that lies at the bottom of the 'administrative law' known to continental systems is, that affairs or disputes in which the government or its servants are concerned are beyond the sphere of the civil courts and must be dealt with by special and more or less official bodies. This idea is utterly unknown to the law of England ... .[14]

Dicey was also keen to stress, as part of his definition of the rule of law, that the protection of individual rights in the United Kingdom was the task of the ordinary common law, and that no specific rights code was necessary.[15]

Many aspects of Dicey's account have now, it might be claimed, been superseded. The 'unitary' character of the British constitution has been called into question by the introduction of devolution and the transfer of powers to the European level. An intermediate level of national government now exists in Scotland, Wales and, in principle, in Northern Ireland, which is subordinate to Westminster.[16]

[12] AV Dicey, *An Introduction to the Study of the Law of the Constitution* 10th edn (London, MacMillan, 1959), pp 39–40.

[13] PP Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Oxford, Clarendon Press, 2000), p 15 *ff*.

[14] AV Dicey, n 12 above, pp 202–3; see also pp 193–5.

[15] AV Dicey, n 12 above, p 197.

[16] In each case a new institutional framework has been established, with a range of competences. Also, the Greater London Authority Act 1999 restored a strategic level of London wide government with the introduction of a Greater London Authority consisting of a Mayor and Assembly for London. However, comprehensive devolution for England and its regions has thus far been a notable omission,

Although the devolution arrangements which exist are asymmetrical in nature—most obviously, in the present context, in relation to the presence or absence of legislative powers at the devolved level—it might nonetheless be said that they pose a challenge to the 'unitary' nature of the constitutional structure. For example, it was predicted that following devolution the supremacy of the Westminster Parliament would have a 'different and attenuated' meaning so that 'instead of enjoying a regular and continuous exercise of supremacy, [Westminster] will possess merely a nebulous right of supervision ...,'[17] the assumption behind this assertion being that post-devolution, Westminster would find it politically difficult to legislate against the wishes of the devolved bodies.[18] There was, indeed, an expectation that a convention would be established whereby the Westminster Parliament would not normally legislate over devolved matters in Scotland and that this would be an unusual occurrence which would take place with the agreement of the devolved legislature.[19] Furthermore, the law-making powers of the devolved bodies (whether consisting in the making of primary or subordinate legislation) are such that substantively different bodies of law might now be expected to emerge at different levels within the United Kingdom.

Looking to the European level, there has clearly also been a large-scale transfer of power to the EU law-making institutions. National laws must now be 'disapplied' by the courts for incompatibility with directly effective EU law, and national governments may be liable in damages for acting incompatibly with EU law.[20] Depending upon one's interpretation of the effect of EU membership on the concept of legal sovereignty, this development might be felt to affect both the unitary nature of the constitution and its self-correcting aspect.[21] For example, domestic courts must disregard the legislation of the Westminster Parliament—however much popular support there may be for such legislation—if it violates the rules of EU law.[22] The principle of 'subsidiarity' is intended to recognise the importance of ensuring that, where practicable, decision-making takes place at a local level. How successful this principle has been is, however, open to question.[23]

although proposals for regional government have recently been made (see the Cornes chapter in this volume).

[17] V Bogdanor, *Devolution in the United Kingdom* (Oxford, OUP, 1999), p 291.

[18] See now A Page and A Batey 'Scotland's Other Parliament: Westminster Legislation about Devolved Matters in Scotland since Devolution' [2002] *PL* 501.

[19] This is referred to as the Sewell Convention. It acknowledges that three types of legislation require the consent of the Scottish Parliament to be proceeded with: Westminster legislation for devolved purposes; Westminster legislation altering legislative competence; and Westminster legislation altering executive competence.

[20] See, resepctively, *R. v Secretary of State for Transport, ex p. Factortame (No.2)*, n 6 above; *Brasserie du Pecheur v Germany* [1996] ECR I-1029.

[21] For rival accounts of the significance of *Factortame (2)*, see PP Craig, 'Sovereignty of the United Kingdom Parliament after *Factortame*' (1991) 11 *YBEL* 221; Sir William Wade, 'Sovereignty: Revolution or Evolution?' (1996) 112 *LQR* 568; TRS Allan, 'Parliamentary Sovereignty: Law, Politics, and Revolution' (1997) 113 *LQR* 443.

[22] *R. v Secretary of State for Transport, ex p. Factortame (No.2)*, n 6 above.

[23] See, eg, C Barnard and S Deakin, 'European Community Social Policy: Progression or Regression?' (1999) 30 *IRJ* 55.

Dicey's notion that individual rights were the product of the common law can, to a certain extent at least, be seen as having been challenged by the enactment of the Human Rights Act 1998. The Human Rights Act 1998 establishes a direct relationship between domestic law in the United Kingdom and the rights set out in the European Convention on Human Rights. In theory, the Act preserves the sovereignty of Parliament since the courts cannot invalidate primary legislation,[24] and Parliament remains free to legislate in defiance of the Convention. However, the degree to which the Act enables courts to encroach upon Parliamentary intention when construing legislation is a matter for open debate, given that it requires courts to interpret domestic legislation in a way that is compatible with Convention rights.[25] The courts' power to judicially review the actions of public authorities for disproportionality, inspired by section 6 of the Act, also raises questions about the intensity and ambit of judicial review.[26] Another important aspect of the incorporation of the Convention is that the new devolved assemblies are also placed under a statutory duty to act in accordance with Convention rights, arguably requiring the courts to engage—in relation to the assemblies—in an activity akin to constitutional review.[27] Each of these functions is carried out by the courts in order to safeguard a guaranteed list of rights. However, it remains unclear how far the Human Rights Act is affecting the substantive outcomes in judicial review cases.[28] It is, for example, important to remember that the higher courts were concerned to stress their commitment to protecting litigants' common law fundamental rights in the decade before the enactment of the Human Rights Act.[29] Whether or not they did so effectively, they were already content to conceive of the common law in rights-based terms without legislative intervention, a stance which was sometimes associated with the rule of law.[30] At the same

[24] N Bamforth, 'Parliamentary Sovereignty and the Human Rights Act' [1998] *PL* 572; *R. v Secretary of State for the Home Department, ex p. Simms* [2000] 2 AC 115, 131E-132B (Lord Hoffmann); cf, however, *Thoburn v Sunderland City Council* [2002] EWHC Admin 195, [2002] 3 WLR 24, para [62] (Laws L.J.).

[25] C Gearty, 'Reconciling Parliamentary Democracy and Human Rights' (2002) 118 *LQR* 248, 254.

[26] See further P Craig, 'The Courts, the Human Rights Act and Judicial Review' (2001) 117 *LQR* 589; M Elliott, 'The Human Rights Act 1998 and the Standard of Substantive Review' (2001) 60 *CLJ* 301; R Clayton, 'Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle' [2001] *EHRLR* 504; N Blake, 'Importing Proportionality: Clarification or Confusion' [2002] *EHRLR* 19.

[27] See, for example, the revised role of the Judicial Committee of the Privy Council in relation to the devolution legislation: see further the Hadfield chapter in this volume; P Craig and M Walters, 'The Courts, Devolution and Judicial Review' [1999] *PL* 274.

[28] Useful bi-monthly surveys of the case law can be found in the 2001 and 2002 volumes of the *EHRLR*. The impact of Convention rights via section 3 of the Act might be felt, to date, to have been more obvious than that under section 6: see *Mendoza v Ghaidan* [2002] EWCA Civ 1533, [2002] 4 All ER 1162; N Bamforth, 'Interpretation and the Human Rights Act 1998: A Constitutional Basis for Anti-Discrimination Protection?' (2003) 119 *LQR* 215.

[29] See, eg, *R. v Secretary of State for the Home Department, ex p. Leech* [1994] QB 198, 209–212; *R. v Secretary of State for Social Security, ex p. Joint Council for the Welfare of Immigrants* [1996] 4 All ER 385; *R. v Lord Chancellor, ex p. Witham* [1998] QB 575; *R. v Secretary of State for the Home Department, ex p. Pierson* [1998] AC 539; *R. v Secretary of State for the Home Department, ex p. Simms*, n 24 above; M Hunt, *Using Human Rights Law in English Courts* (Oxford, Hart, 1997), chs 5 and 6.

[30] For reflection on the rule of law in the context of legislative intention (albeit without specific association with fundamental rights), see *R. v Secretary of State for the Home Department, ex p. Pierson*