Nutshells

CONSTITUTIONAL AND ADMINISTRATIVE LAW

Greer Hogan

Sweet & Maxwell

Nutshells

Constitutional and Administrative Law in a Nutshell

Greer Hogan, LL.B., M.A.
Senior Lecturer in Law,
Newcastle-upon-Tyne Polytechnic

London • Sweet & Maxwell • 1987

Published in 1987 by Sweet & Maxwell Ltd.,
11 New Fetter Lane, London
Printed in Great Britain by
Richard Clay (The Chaucer Press) Ltd.,
Bungay, Suffolk

British Library Cataloguing in Publication Data

Hogan, Greer
Constitutional and administrative law
in a nutshell.—(Nutshell series)
1. Public law—Great Britain
I. Title II. Series
344.102 KD654

ISBN 0-421-36810-1

AUSTRALIA AND NEW ZEALAND
The Law Book Company Ltd.
Sydney : Melbourne : Perth

CANADA AND U.S.A.
The Carswell Company Ltd.
Agincourt, Ontario

INDIA
N.M. Tripathi Private Ltd.
Bombay
and
Eastern Law House Private Ltd.
Calcutta and Delhi
M.P.P. House
Bangalore

ISRAEL
Steimatzky's Agency Ltd.
Jerusalem : Tel Aviv : Haifa

MALAYSIA : SINGAPORE : BRUNEI
Malayan Law Journal (Pte.) Ltd.
Singapore and Kuala Lumpur

PAKISTAN
Pakistan Law House
Karachi

Contents

Chapter 1

THE NATURE OF THE CONSTITUTION

Most countries have a written document known as "the constitution" which lays down the main rules governing the structure and functions of government and which regulates the relationship between the state and its citizens. Typically such constitutions are to some degree entrenched, that is, the constitutional rules are more difficult to change than ordinary laws, perhaps requiring approval by referendum (Eire) or special majority (West Germany). Such constitutions also tend to have a higher status than ordinary laws thus creating the need for a supreme body such as a supreme court with the power to declare laws passed in contravention of the constitution, invalid.

CHARACTERISTICS OF THE BRITISH CONSTITUTION

Unwritten

In Britain we do not have a written constitution in the sense of a formal document but that does not mean that we lack constitutional rules. These are expressed with differing degrees of formality in the form of statutory provisions, case law and conventions of the constitution.

There are, compared to many countries, few positive statements regarding the powers and duties of the organs of government. These are simply recognised by common law and convention and are subject to various legal and conventional limitations. Our constitution does not contain any positive declaration of the rights of individuals in the form of a Bill of Rights. Those rules relating to such matters as freedom of speech and assembly derive from, and have the same status as, any other rule of law.

Flexible

The British Constitution can be described as flexible in that:

(a) It does not have the rigidity of most written constitutions as Parliament can repeal any law by a simple majority. The orthodox viewpoint is that, as each successive Parliament has the power to pass or repeal any legislation, any attempt to bind Parliament by entrenching a statutory provision, would be ineffective. (*Ellen Street Estates Ltd.* v. *Minister of Health* (C.A., 1936).) It has, however, been argued that certain fundamental Acts of Parliament such as the Act of Union with Scotland 1707 and the European Communities Act 1972 could not be repealed as, in each case,

Parliament which enacted the provision is no longer in existence in the same form but has reconstituted itself as a less powerful body.

Nevertheless, while in legal theory there may be complete flexibility, the political reality may be quite different. The Statute of Westminster 1931, the various Independence Acts may, in theory, be capable of repeal, but in practice they are entrenched in our constitution. "Freedom once given cannot be taken away. Legal theory must give way to practical politics." (*Per* Lord Denning in *Blackburn* v. *The Att.-Gen.* (C.A., 1971).)

(b) The absence of a written constitution has allowed quite considerable changes to be made informally, without amendment of these legal rules which do exist. For example, the gradual transfer of power from the House of Commons to the Cabinet has occurred without any formal legislative change. Conventions, an important source of constitutional law can be extremely flexible, reflecting changes in the political situation as and when they occur. Thus the constitution can evolve gradually.

Unitary

Because all legislative power stems from Parliament, we have a unitary as opposed to a federal constitution. It is certainly possible for Parliament to give limited powers of government to local authorities and to local and national assemblies but the doctrine of parliamentary sovereignty means that a subsequent Parliament can repeal the relevant legislation and take back the power. For example this happened in 1972 when the Westminster Parliament reimposed direct rule in Northern Ireland.

SOURCES OF THE CONSTITUTION

Legislation

Although we do not have a written constitution there are many Acts of Parliament relevant to constitutional laws. Some fundamental steps in the constitutional development of the country were the Bill of Rights 1689 which limited the power of the monarch to rule by virtue of the royal prerogative and the Act of Settlement 1700 which further strengthened the power of Parliament and provided for the succession to the English throne. The composition of Parliament has been altered by the Peerage Act 1963 and its powers by the Parliament Acts 1911 and 1949.

Case law

According to Dicey, writing in the nineteenth century, the

British Constitution was "judge made." Even today there are many areas of constitutional law regulated not by statute but by the common law as expounded by our judges. Examples of this can be seen in the development of the doctrine of the supremacy of Parliament and in judicial review, for example, the rules of natural justice.

In recent years there has been an increased reliance on statute law, for example, in relation to public order and the powers of the police, but, of course, here too, the judges have a role to play in the interpretation of the statutory provisions.

Conventions of the Constitution

If one tries to understand the British Constitution simply by reference to case law and statute, one obtains a totally false impression. Take one example, the role played by the monarch. The Queen must give the royal assent to all legislation. She appoints the Prime Minister and has the power to dissolve Parliament. This might lead one to believe that the monarch still exercises considerable political power in modern times. Yet in practice we now have a constitutional monarchy where the Queen acts on the advice of her Prime Minister. The royal assent has not been refused since 1708. No monarch has refused to dissolve Parliament in modern times and the Queen has, in recent years, been relieved of any real responsibility as to the choice of Prime Minister as the various political parties have now adopted clearly defined rules for the election of a leader.

Such changes in the power of the monarch have arisen, not through statute, but as a result of the convention that the monarch should not become politically involved and should not be seen to favour any one political party.

This example illustrates the fact that the formal rules have to be understood against a background of constitutional conventions which can both expand and modify the strict legal rules. And so conventions have been described as "the flesh which clothes the dry bones of the law."

What are conventions?

(a) Conventions are non legal rules of constitutional behaviour which are considered to be binding upon those who operate the constitution but which are not enforced by the courts nor by the presiding officers in Parliament. They may be recognised by the courts as part of the constitutional background against which a particular decision is taken (*Cartona* v. *Commissioner of Works* (C.A., 1943)), but will not be enforced directly.

(b) They are not written down in any formal sense in that they are not expressed as Acts of Parliament nor are they established by judicial precedent. Occasionally an existing convention is formalised as, for example, section 4 of the Statute of Westminster 1931.

(c) Important constitutional institutions such as the Cabinet and the office of Prime Minister have been created by convention. The first statutory reference to the Prime Minister came in the Chequers Estate Act 1917. The relationship between Government and Parliament can only be understood against the background of the convention of ministerial responsibility. They thus have a central role in the development of the British constitution.

How are they established?

Constitutional law has always recognised the need for a close relationship between political and legal power. Conventions have been introduced at every stage of our constitutional development in an attempt to regulate or define the use of that power. It is not always easy to describe conventions and to determine their force and strength. Even conventions that are well established in principle such as those relating to cabinet collective responsibility may be vague in their application. The sources of a convention are open-ended and diverse. There are no formal rules of recognition, no formal rules of change. (See Colin Munro 91 L.Q.R. 218.)

John Mackintosh has described a convention as "a generally accepted political practice," arguing that it was necessary to deduce its nature and scope by observing and analysing the conduct of government and politics in similar situations over the years. That is not to say that antiquity is a valid criterion for the establishment of a convention. New conventions arise, conventions alter in the light of changing circumstances. He would therefore argue that conventions are established by their acceptance by those who participate in the political arena.

Why are they observed?

(a) Some writers have stressed the similarity between conventions and legal rules arguing that breach of a convention will ultimately lead to the imposition of a sanction. It is pointed out, for example, that if a government, having lost the confidence of the House, attempted to continue in power in breach of that convention, it would ultimately be forced to act illegally as Parliament would not grant it supply.

But this is not the imposition of a direct legal sanction. At most, the sanction will be political. So, for example, breaches of the convention of cabinet collective responsibility have tended to weaken the government and damage the political career of the minister responsible for the breach.

(b) Others have argued that obedience is based on the consent or acquiescence of all those involved in the political process but this assumes a degree of shared interest and common standards which are difficult to perceive today.

(c) It must be remembered that conventions have differing degrees of force and ultimately that force may be dependent on the extent to which the convention is perceived as being politically necessary at any given time and the extent to which it can be seen to reflect current political values.

Advantages of conventions

(a) *Flexibility.* Conventions add flexibility to our constitutional rules. For example the convention of cabinet collective responsibility was suspended to take into account the particular circumstances of the campaign prior to the referendum on continuing British membership of the EEC. The conventions regulating the role of the monarch in the appointment of the Prime Minister are capable of modification to take into account the emergence of a third political party in recent years and the increased likelihood of no one party having an overall majority at a general election.

(b) *Avoid the need for formal constitutional change.* They are a means of keeping the constitution in tune with changing political circumstances without recourse to legislation. This facilitates the smooth running of government and must be advantageous to those in government as it minimises the need to effect formal changes, a task which is time consuming and may be beset with difficulties.

Disadvantage

Flexibility can also be a disadvantage. It has been argued that the ultimate object of most conventions is that the rules of government should accord with the wishes of the majority. That majority may not have the political power to ensure this. Instead it is the government of the day which is able to take advantage of the flexibility of the system to impose its definition of a convention at any particular time. The convention that a government must call an

election when defeated on a vote of no confidence has been mentioned. In recent years successive governments have redefined the convention denying the need to go to the country if defeated on what it defines as a minor matter, or if defeated on a "snap" vote whose result might not be repeated.

Other sources

The law and custom of Parliament

Parliament has the right to regulate its own procedure and does so by means of standing orders. These, together with resolutions passed by either House and the rulings given by the Speaker are contained in Erskine May's *Parliamentary Practice*.

Treaties, Conventions and other international obligations

These are not a direct source of constitutional law in the sense that they do not normally involve any change in domestic law (see, however *The Parlement Belge* (H.C., 1879)). A treaty may bind the government in international law but will normally be given effect within this country by the passing of legislation. This happened in the case of membership of the EEC where the signing of the various treaties was followed by the passing of the European Communities Act 1972. Similarly international conventions such as the International Convention for the Protection of Human Rights 1950, ratified by Great Britain in 1953, do not give directly enforceable rights to individuals in this country before the British courts. The courts will, however, have some regard for such conventions presuming that Parliament intended to comply with its moral obligations and bring our law into line with the convention. Thus for example where there is any ambiguity in domestic law the courts have said that they will resolve that ambiguity in such a way as to give effect to our international obligations. (See Scarman L.J. in *Ahmad* v. *I.L.E.A.* (C.A., 1978).)

THE SUPREMACY OF PARLIAMENT

An important characteristic of our constitution which differentiates it from that of most other countries is that Parliament, and not the constitution, is the supreme legal authority. While, in the majority of states, the legislature is limited by the constitution in what it can or cannot do, the traditional view here is that Parliament is subject to no such legal limitation and that our courts do not have the power to declare laws duly passed by Parliament to be invalid.

According to Blackstone "What Parliament doth, no power on earth can undo." "In theory," said Dicey, "Parliament has total power. It is sovereign."

Dicey's view of Parliamentary supremacy

(a) Parliament was competent to pass laws on any subject.
(b) Its laws could regulate the activities of anyone, anywhere.
(c) Parliament could not bind its successors as to the content, manner and form of subsequent legislation.
(d) Laws passed by Parliament could not be challenged by the courts.

The legal limitations on the scope of Parliament's power

Dicey argued that there was no legal limitation on the scope of Parliament's power. Indeed Parliament has legislated on matters affecting every aspect of our lives. It has legislated to change fundamental constitutional principles. It has lengthened and shortened its own life. Nor has it felt bound by territorial or jurisdictional limits. Parliament has legislated regarding aliens, even with regard to their activities outside British territory (The Hijacking Act 1967). Sir Ivor Jennings once said "If Parliament enacts that smoking in the streets of Paris is an offence then, in the eyes of the English Courts, it is an offence." There may be practical difficulties in enforcing such a law but that would not make it invalid.

Political considerations may make it unlikely, even inconceivable that Parliament might legislate in a particular manner. Can one imagine a situation where Parliament passed legislation regulating the internal affairs of the United States of America? This led Professor H. W. R. Wade to argue that it was nonsensical to have a legal theory which said that Parliament could pass laws on any subject without restriction. Certainly there are many internal and external political limitations on Parliament's freedom of action.

It has been argued that British membership of the EEC imposes a legal not simply a political limitation on Parliament.

The 1967 White Paper (Cmnd. 3301) on the Legal and Constitutional Implications of Membership of the EEC, stated that Parliament's freedom of action would be limited in that it would have to refrain from passing legislation inconsistent with community law and would be under an obligation in certain instances to legislate to give effect to our community obligations. The European Communities Act 1972, s.2(1) gives present and

future community law legal force in the United Kingdom but the Act does not specifically prohibit Parliament from enacting conflicting legislation.

It would seem that Parliament's legal power has been limited only if:

(a) community law is seen as a higher system of law; and
(b) our courts are willing to uphold the supremacy of community law.

Is community law supreme?

In the view of the European Court, the courts of the member states should give supremacy to community law (*Costa* v. *E.N.E.L.* 1964). The 1967 White Paper at paragraph 23, states the government's intention to be that "community law takes precedence over the domestic law of the member states."

Section 2(4) of the Act provides ". . . any enactment passed or to be passed, other than one contained in this Part of this Act, shall be construed and have effect subject to the foregoing provisions of this section. . . ." This refers back to section 2(1) which incorporates community law into our system. Section 2(4) could therefore be said to give supremacy to community law. But it can also be held to mean no more than it creates a presumption that, if there is a conflict between community and domestic law, any ambiguity in that domestic law will be resolved to give effect to our community obligations.

Our courts have not yet been forced to give a direct ruling on this matter. Lord Denning in an obiter statement made prior to the passing of the 1972 Act suggested that if we joined the community our sovereignty "would henceforth be limited . . . it would not be ours alone but would be shared with others." In *Macarthys Ltd.* v. *Smith* (C.A., 1979), however, he indicated that Parliament retained the power to pass legislation inconsistent with the Treaty of Rome and our obligations under community law, indicating that if this was done intentionally, our courts would have no alternative but to uphold the supremacy of our own domestic law.

There is therefore no direct example of the British courts imposing restrictions on Parliament's freedom of legislative action. The various devices used by the courts to maintain the present position will be discussed below.

The power of Parliament to bind its successors

The traditional view is that Parliament has no power to bind its successors either as to the manner or as to the form of subsequent

legislation. As each successive Parliament is deemed to be all powerful, logically, that Parliament must have the power to make or unmake any law. Accordingly it would seem to be impossible to entrench a provision in our constitution.

It was said in *Godden* v. *Hales* (1686) that Parliament was entitled to ignore any provision in an earlier Act purporting to prevent the Act being repealed in the normal way, that is either expressly or by implication. This was followed in the case of *Ellen Street Estates Ltd.* v. *The Minister of Health* (C.A., 1934) where the court found that it was impossible for Parliament to enact that, in a subsequent statute dealing with the same subject matter, there should be no implied repeal. "The one thing Parliament cannot do is to bind its successors" (Maughan L.J.).

Various arguments have been put forward to suggest that specific statutory provisions have been entrenched.

The Statute of Westminster: Independence Acts

It has been argued that these have been entrenched as, in terms of the political realities of the situation, it is inconceivable that Parliament would repeal them. (Lord Denning M.R. in *Blackburn* v. *The Att.-Gen.* (C.A., 1971).)

That is not to say that if, in the future, Parliament did repeal an independence Act and passed legislation purporting to regulate the internal affairs of the country, the British courts would reject such legislation. In *Madzimbamuto* v. *Lardner Burke* (P.C., 1969) Lord Reid said that even if Parliament acted improperly or unwisely, it was not open to the courts to say that it had acted illegally and that the resultant legislation was invalid. The court advised that a detention order made under the authority of an Emergency Powers Act passed by the illegal regime in Rhodesia was invalid as their authority to legislate had been taken away. It did not allow the political reality of the situation to affect its conclusion knowing full well that the detention order would continue to be upheld within Rhodesia. In practical terms it was impossible to provide a remedy for the detained Madzimbamuto. The case did, of course, involve a limited grant of independence. Rhodesia was not a sovereign state.

Where such a sovereign state has been created by a grant of independence, the courts may be more reluctant to take back power in that they would have to recognise the political fact that the state in question is a foreign country and no longer part of the legal order of this country. Yet within our legal system, Parliament appears to have the legal power to repeal any law, even to act contrary to the principles of international law. The courts would simply uphold the

latest intention of Parliament. (See Lord Sankey L.C. in *British Coal Corp.* v. *The King* (H.L., 1935).)

The European Communities Act 1972

Several grounds have been suggested for holding that this Act cannot be repealed.

(a) That by joining the European Economic Community, a new order has been created. Within that new order Parliament is no longer all powerful and cannot amend or repeal any statute by which that order was established. The European Communities Act it is argued, is such a constituent statute, and is accordingly entrenched.

(A similar argument has been used with regard to the Act of Union between Scotland and England in 1707.)

(b) That by assigning rights and powers to the community in accordance with the Treaty provisions member states have limited their sovereign rights in such a way as to make it impossible to withdraw unilaterally. (*Art Treasurers Case* E.C., 1972.)

There is no evidence to suggest that the British courts would accept this view.

(c) That, ultimately, the validity of legislation depends on the rules of recognition employed by our judges. The present norm of validity recognises the latest statutory intention of Parliament. It has been suggested that this norm has altered and that the courts will recognise as valid only legislation which has been passed by both houses and given the royal assent, has not been repealed expressly or by implication and which accords with our obligations under community law. (It has been suggested that one method by which a written constitution could be entrenched could be by "manufacturing" such a change in the norm of validity by altering the terms of the judicial oath so that judges would swear to uphold only laws which were in conformity with the constitutional provisions - *per* H. W. R. Wade, 1980 Hamlyn Lecture: *Constitutional Fundamentals*.)

Laws passed by Parliament cannot be challenged in the courts

Our courts have refused to consider the validity of an Act of Parliament either on the ground that Parliament had no power to pass it or on the ground that the statute had been improperly passed.

Substantive validity

Until the seventeenth century the courts would declare Acts of Parliament void if they considered them contrary to natural law,

repugnant to the law or impossible to be performed. In modern times any such challenge has been totally unsuccessful.

In *R.* v. *Jordan* (1967) Jordan, who had been sentenced for offences under the Race Relations Act 1965, applied for a writ of habeas corpus claiming that he had been convicted under an invalid law. He alleged that the statute in question was invalid in that it conflicted with a fundamental principle of natural law, the right of free speech. He claimed that no Act of Parliament could take away this right.

This was rejected by the court which simply stated that it had no power to consider the validity of an Act of Parliament. This view was endorsed by the House of Lords in *British Rail Board* v. *Pickin* (H.L., 1974) and followed in *Manuel* v. *Att.-Gen.* (1982).

Procedural irregularity

Acts of Parliament have also been challenged on the ground that they have been improperly passed. In 1842 a Private Act of Parliament was challenged on this ground. (*Edinburgh & Dalkeith Railway* v. *Wauchope* (H.L., 1842).) Lord Campbell, upholding the validity of the Act refused to investigate the internal workings of Parliament saying that if the Act appeared valid on its face, then it must be accepted by the courts. If, from the Parliamentary Roll it appeared that the bill had passed through both Houses and received the Royal Assent, the courts could not inquire into what happened during its parliamentary stages. That is a question for Parliament.

A number of writers have sought to distinguish such a procedural challenge from the substantive challenge in cases such as *Jordan* arguing that it does not seek to limit Parliament's area of power. It can be argued that there is a clear difference between finding that Parliament has failed to follow its own procedural rules and from saying that Parliament does not have the power to legislate in a particular way. R. F. V. Heuston summarises this by saying that there is a distinction between the rules which govern on the one hand the composition and the procedure and, on the other hand, the area of power, of a sovereign legislature.

The Judicial Committee of the Privy Council appeared to give some support to this distinction. In *Att.-Gen. for New South Wales* v. *Trethowan* (P.C., 1932) a decision of the Australian Supreme Court to grant a declaration that two Bills passed by the New South Wales State Legislature were invalid and grant an injunction restraining the Bills from being presented to the Governor for assent was upheld. The Privy Council found that the State Legislature was bound by section 5 of the Colonial Laws Validity Act 1865 which

required any constitutional amendment to be in the manner and form required by the legislation in force at the time. The two Bills in question were not in the manner and form required as under earlier State legislation any constitutional change had to be approved by a referendum.

In *R. (O'Brien)* v. *Military Governor, N.D.U. Internment Camp* (1924) a decision of the old Irish Court of Appeal, a Public Safety (Emergency Powers) Act was declared invalid on the ground that it had not been passed in accordance with the procedure laid down in the constitution.

Nor has this approach been confined to legislation passed by subordinate legislatures. See, for example, the South African case of *Harris* v. *Minister of the Interior* (1952). The question then is whether it can apply to countries where the procedural rules are not contained in any constitutional document or higher form of law. R. F. V. Heuston has argued that it should, saying that it cannot make any difference whether the rules which identify the procedure come from common law, statute or a combination of both.

The decision of the House of Lords in *British Rail Board* v. *Pickin* (1974) appears to be a rejection of this line of argument. Their Lordships refused to look at the internal workings of Parliament stating that if errors had occurred in the procedure for passing legislation then it was for Parliament alone to correct them. Lord Morris said that just as it was for Parliament to lay down the procedures to be followed for the passing of legislation, so it was for Parliament to determine whether these procedures had been followed. The House of Lords was clearly reluctant to clash with Parliament on a matter within the scope of Parliamentary Privilege (see Chap. 3). Indeed Lord Reid seemed unwilling to draw any distinction between challenges on procedural or substantive grounds. In his view, the courts had no power to question the validity of any act passed by both Houses of Parliament and given the Royal Assent.

This has been followed in *Martin* v. *O'Sullivan* (H.L., 1982) where the Social Security Act 1975 was challenged on the ground that Members of Parliament who enacted it were disqualified. The court refused to investigate the validity of the Act saying that it was unable to look beyond the parliamentary roll of statutes.

Conflict with community law

Any willingness on the part of our courts to accord supremacy to community law is thus limited by two factors: