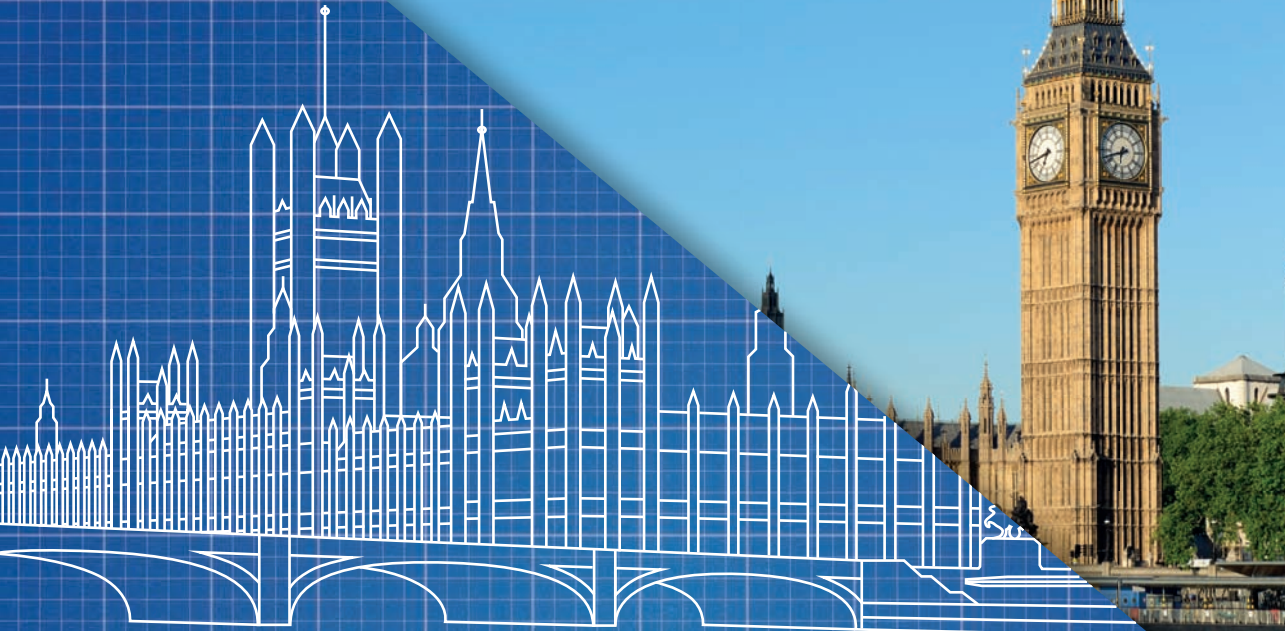


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Acknowledgements

Over the years I have been fortunate enough to have taught Constitutional and Administrative Law to students who have been genuinely interested in the concepts explored in this book and this has made teaching the subject highly rewarding. I hope that students on LLB, GDL and ILEX programmes will find this book to be useful as an introduction to the subject. Constitutional and Administrative Law is highly relevant to your study of law, and I have sought to give contemporary examples to illustrate how what you watch on the news, or read in newspapers, is linked to the topics that you will learn during your studies. This book has been written as an introduction to the subject and there is a considerable amount of interesting material available that will help you to build upon the concepts explored in this book. At the end of each chapter I have provided a list of further reading, which includes journal articles, books and links to online resources.

The idea of writing *Blueprints Constitutional and Administrative Law* was originally suggested by Zoe Botterill and encouraged by Christine Stratham, the *Blueprints* series editor, at Pearson. Throughout the writing process I have received considerable support from my editors Owen Knight and Stuart Hay. I would also like to thank my project editor Dhanya Ramesh and copy-editor Jim Caunter, who along with the rest of the editorial and production team at Pearson have seen the book through to production. I would like to thank Pearson for allowing me to update the text in light of the result of the Scottish referendum on independence in September 2014.

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This book is dedicated to my parents, Michael and Marie.

I accept full responsibility for any errors or omissions in the text. The law is stated as it stood on 1st January 2014.

Chris Monaghan
Hertfordshire, May 2014

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Coughlan [2001] QB 213; Extract on page 410 from *R v. Secretary of State for Education and Employment ex p. Begbie* [2000] 1 WLR 1115; Extracts on page 413 from *Ridge v. Baldwin* [1964] AC 40 HL; Extract on page 414 from *Lloyd v. McMahon* [1987] AC 625; Extract on page 415 from *R v. Secretary of State of the Home Department ex p. Doody* [1994] 1 AC 531; Extract on page 416 from *R v. Army Board of the Defence Council ex p. Anderson* [1991] 3 WLR 42; Extract on page 416 from *Enderby Town Football Club v. Football Association* [1971] Ch 591; Extract on page 418 from *R v. Sussex Justices ex p. McCarthy* [1924] 1 KB 256; Extract on page 420 from *R v. Bow Street Metropolitan Stipendiary Magistrate ex p. Pinochet Ugarte (No.1)* [2000] 1 AC 61; Extract on page 420 from *R v. Bow Street Metropolitan Stipendiary Magistrate ex p. Pinochet Ugarte (No.3)* [2000] 1 AC 147; Extract on pages 410–11 from *R (Bibi) v. Newham London Borough Council* [2002] 1 WLR 237; Extract on pages 412–13 from *Local Government Board v. Arlidge* [1915] AC 120

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How to use this guide

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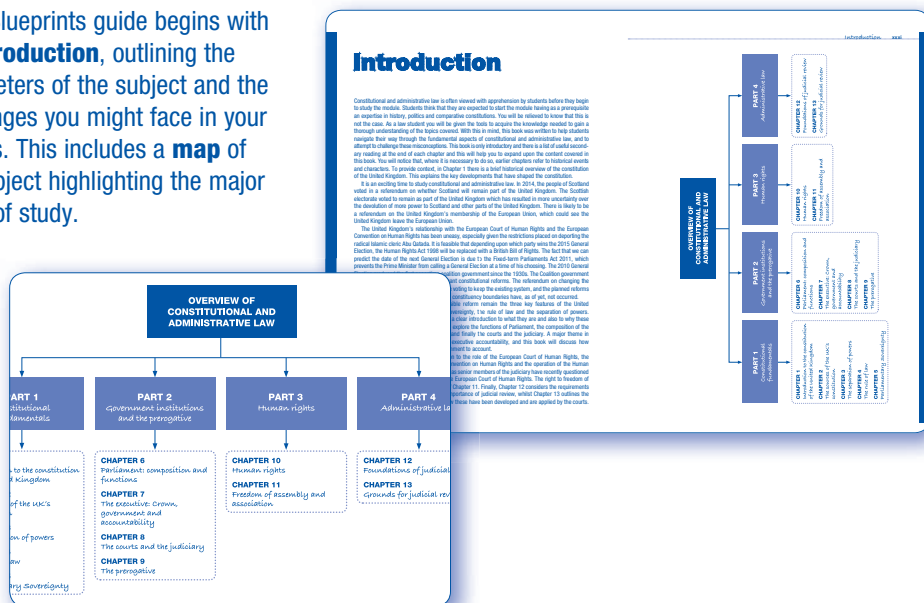
This guide will serve as a primer for deeper study of the law – enabling you to get the most out of your lectures and studies by giving you a way in to the subject which is more substantial than a revision guide, but more succinct than your course textbook. The series is designed to give you an overview of the law, so you can see the structure of the subject and understand how the topics you will study throughout your course fit together in the big picture. It will help you keep your bearings as you move through your course study.

Blueprints recognises that students want to succeed in their course modules

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Each Blueprints guide begins with an **Introduction**, outlining the parameters of the subject and the challenges you might face in your studies. This includes a **map** of the subject highlighting the major areas of study.



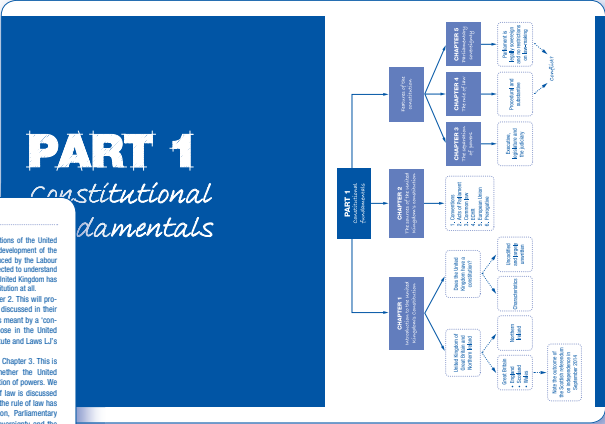
Each **Part** of the guide also begins with an Introduction and a map of the main topics you need to grasp and how they fit together.

PART 1 INTRODUCTION

Part 1 of *Blueprints Constitutional and Administrative Law* explores the foundations of the United Kingdom's constitution. In Chapter 1 we will begin by looking at the historical development of the United Kingdom, before we then consider the key constitutional reforms introduced by the Labour government (1997–2010) and the Coalition government (2010–). You will be expected to understand what is meant by the term 'constitution', and discuss whether you think that the United Kingdom has a 'written', 'unwritten' or 'codified' constitution, or indeed, whether it has a constitution at all.

The sources of the United Kingdom's constitution will be explored in Chapter 2. This will provide you with a useful overview of the main sources, some of which will be discussed in their own chapters later on in the book. You will be expected to understand what is meant by a 'constitutional convention' and why conventions serve such an important purpose in the United Kingdom's constitution. We will also look at the concept of a constitutional statute and Lord Latham's offer in *Thoburn v Sunderland City Council* [2002] EWHC 195.

The theory of the separation of powers and why it matters is the subject of Chapter 3. This is a controversial topic because many academics would disagree over whether the United Kingdom's constitution has ever conformed to the requirements of the separation of powers. We will look at the arguments surrounding the separation of powers. The rule of law is discussed in Chapter 4 and is an important feature of the constitution. We shall see that the rule of law has an uneasy relationship with the most important feature of the constitution, Parliamentary Sovereignty. In Chapter 5 we will look at what is meant by Parliamentary Sovereignty and the challenges that exist, such as devolution, the United Kingdom's membership of the European Union, the rule of law and judicial activism, and finally the Human Rights Act 1998.



Each guide includes advice on the specific **study skills** you will need to do well in the subject.

STUDY SKILLS
Studying constitutional and administrative law

INTRODUCTION

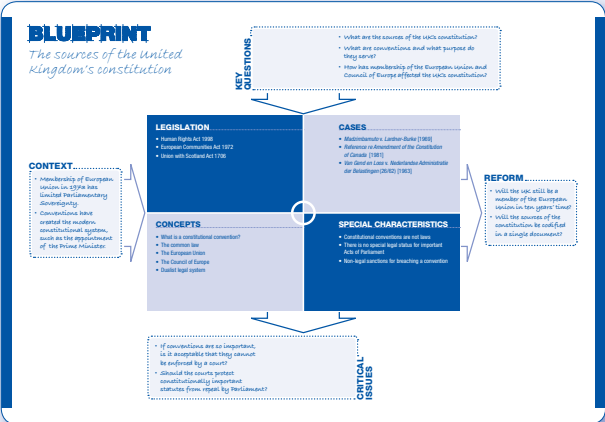
In this section we will look at the skills required to study constitutional and administrative law. Whilst this book cannot give you an insight into the subject in terms of content, it is also extremely important that you learn the skills needed to study constitutional and administrative law. We will look at the range of research methods and the skills required for writing essays for constitutional and administrative law. We will also look at how to use case law and statutes in assessments. Finally, we will look at how to research a topic for an assessment.

SUBJECT-SPECIFIC RESOURCES

There is a great range of resources available to help you study constitutional and administrative law. Many of these resources are free and can be accessed online.

Useful websites	
United Kingdom Supreme Court. This website is a good source of information about the history of the Supreme Court and new cases.	http://www.supremecourt.gov.uk/
United Kingdom Supreme Court blog. This is a useful source that will keep you informed about upcoming Supreme Court cases and recent decisions.	http://ukblog.supremecourt.gov.uk/
The website of University College London's Constitutional Unit. This website looks at the constitution from a political viewpoint.	http://www.constitutionalunit.com/
The website of University College London's Constitutional Law Group. This website looks at new developments in constitutional law. There will be short articles online which will offer you an interesting insight into the topics which you will cover.	http://www.constitutionallawgroup.org/
The Ministry of Justice's website. This is useful to learn about the Ministry of Justice and it has many interesting documents such as reports on reforming the judiciary.	http://www.justice.gov.uk/

Each chapter starts with a **Blueprint** of the topic area to provide a visual overview of the fundamental buildings blocks of each topic, and the academic questions and the various outside influences that converge in the study of law.



A number of text features have been included in each chapter to help you better understand the law and push you further in your appreciation of the subtleties and debates:

Setting the scene illustrates why it is important to study each topic.

Setting the scene

Many people use the word constitution without really knowing what it means. We will look at what the word constitution means and why every country, organisation or sports club will require a constitution to enable it to work effectively. We will look at the constitution of the United Kingdom. It is important to appreciate just how controversial an area this is. If you ask your lecturers whether the United Kingdom has a constitution, you might receive a number of very different responses. This is because many academics argue that the United Kingdom does not have a constitution. They argue that this is because it is not codified, i.e. written down in a single document such as the constitution of the United States of America. So does this mean that the United Kingdom's constitution is unwritten? Technically large parts of what we consider to be constitutional sources are written down, such as important statutes. However, other sources of the constitution are unwritten, such as constitutional conventions.

Cornerstone highlights the fundamental building blocks of the law.

CORNERSTONE

Coalition government

Where no one political party is able to form a government on its own it will need to form a **coalition** with another party. Coalition governments are common in countries such as Italy and Germany. However, in the United Kingdom they are very rare and the formation of the Conservative and Liberal Democrat coalition in 2010 was the first peace-time coalition government since the Second World War.

Application shows how the law applies in the real world.

APPLICATION

In light of the decision in *Entick v. Carrington*, imagine that the Home Secretary had received permission from the king to issue the warrant. Would this have made a difference? The answer would be no. However, had the Home Secretary received the authority to issue the warrant from an Act of Parliament then he could have lawfully issued the warrant and no trespass would have been committed.

Intersection shows you connections and relationships with other areas of the law.

INTERSECTION

The role of the monarch was gradually restricted by Parliament. For example, the ability to raise taxation was controlled by the need for parliamentary approval. However, as we shall see in Chapter 5, the idea of Parliamentary Sovereignty was not established until the start of the seventeenth century. This led to a conflict with the Stuart kings who believed that their prerogative power were absolute.

Reflection helps you think critically about the law, introducing you to the various complexities that give rise to debate and controversy.

Do you think that if MPs had a say over who became a member of the Supreme Court, the candidates' views on divorce, religion, politics and abortion might influence their decision? Kenneth Clarke MP, the previous Lord Chancellor, when appearing before the House of Lords Constitutional Reform Committee was critical of introducing confirmation hearings for the appointment of members of the Supreme Court:

'I think there's a danger that they would become political . . . The US experience is just shocking. Some US confirmation hearings are just consumed by the social attitudes of the judge and his sexual history . . . Anything that got near that would be deplorable. Sooner or later you would have some stray MP asking what a judge's views are on this or that. A certain partisanship could creep in.'

Context fills in some of the historical and cultural background knowledge that will help you understand and appreciate the legal issues of today.

Lord Denning has recounted that after the decision in *Heatons Transport (St Helens) Ltd v. Transport and General Workers Union* [1972] 3 WLR 73:

'I was told by one in a high place:
Your decision was a disaster for the country, which will last till the end of the century.
I was shaken to the core. But I was not downcast. I just thought:
Thank goodness, the judges of the Court of Appeal are independent.
No government dare seek to influence them.'

(Lord Denning *The Closing Chapter* (Butterworths: London, 1983), p. 177)

CONTEXT

Take note offers advice that can save you time and trouble in your studies.

Take note

The United Kingdom has a dualist as opposed to monist legal system. This means that in English law there is a distinction between domestic and international law.

2. Making and ratifying treaties

Because of the UK's dualist legal system once a treaty has been ratified by the executive, it must then be enacted into English law by an Act of Parliament. An example is the Hague-Visby Rules 1968 which were enacted into domestic law by the Carriage of Goods by Sea Act 1971.

Foreign policy and the making and ratifying of treaties are the functions of the executive (see Locke's *Second Treatise on Government*), and the government uses the prerogative to undertake these.

Key points lists the main things to know about each topic.

KEY POINTS

- The United Kingdom was created in 1801 and is a constitutional monarchy.
- Great Britain was created in 1707. Previously, England and Scotland were two independent kingdoms.
- Academics have questioned whether the United Kingdom actually has a constitution.
- There are a number of characteristics of a constitution, which can be used to describe a particular

Core cases and statutes summarises the major case law and legislation in the topic.

CORE CASES AND STATUTES

Case	About	Importance
<i>British Railway Board v. Pickin</i> [1974]	This case involved a challenge to the ownership of land in the middle of a railway track.	The House of Lords held that the courts cannot declare an Act invalid or ineffective because of the manner in which the Act was passed or irregularity in the procedure used.
<i>R (Jackson) v. Attorney-General</i>	A Labour MP had introduced a private members bill to ban hunting.	The House of Lords reviewed the legality of the legislation. The

Further reading directs you to select primary and secondary sources as a springboard to further studies.

FURTHER READING

Bogdanor, V. *The New British Constitution* (Hart: Oxford, 2009)
This is an authoritative account of the British constitution. It discusses recent changes and offers detailed analysis.

Bogdanor, V. *The Coalition and the Constitution* (Hart: Oxford, 2011)
This book provides an authoritative account of the 2010 General Election and the subsequent

discussion of the types of constitutions and comparison is made to the Netherlands.

Leyland, P. *The Constitution of the United Kingdom: A Contextual Analysis* 2nd edn (Hart: Oxford, 2012)

An authoritative introduction to the United Kingdom's constitution.

Lyons, A. *Constitutional History of*

A glossary provides helpful definitions of key terms.

Alternative Vote In May 2011, there was a referendum on replacing First Past the Post with the Alternative Vote. The Alternative Vote system operates to allow voters to list their candidates by preference. If a candidate achieves 50 per cent he will win outright. If no candidate receives 50 per cent of the votes, then the weakest candidate is eliminated and their votes are given to the voter's second favoured candidate. The process will continue until one candidate achieves the important 50 per cent required.

Bias A decision can be challenged where the

Collective ministerial responsibility The convention of collective ministerial responsibility operates to ensure that what is said during cabinet meetings is not made public.

Commonwealth An organisation comprised of former members of the British Empire. It is headed by Her Majesty, the Queen.

Constitution A constitution is a collection of rules, practices and laws which relate to the political life of a country and the key rights of any citizen. A constitution is intended to

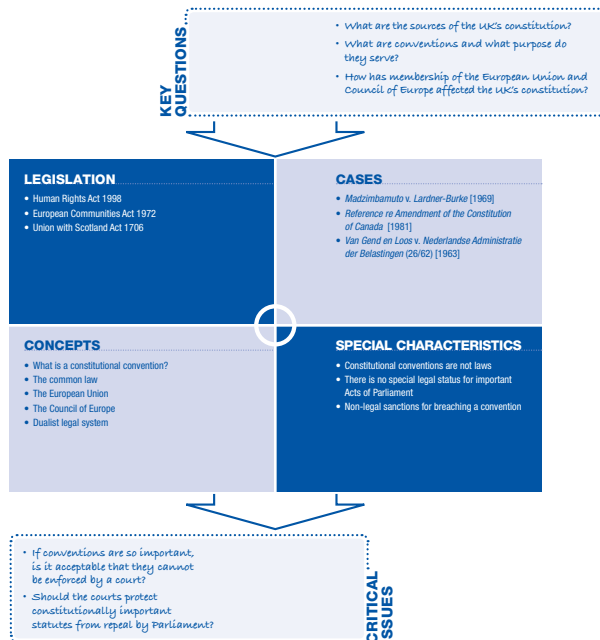
What is a Blueprint?

Blueprints provide a unique plan for studying the law, giving you a visual overview of the fundamental building blocks of each topic, and the academic questions and the various outside influences that converge in the study of law.

At the centre are the 'black-letter' elements, the fundamental building blocks that make up what the law says and how it works.



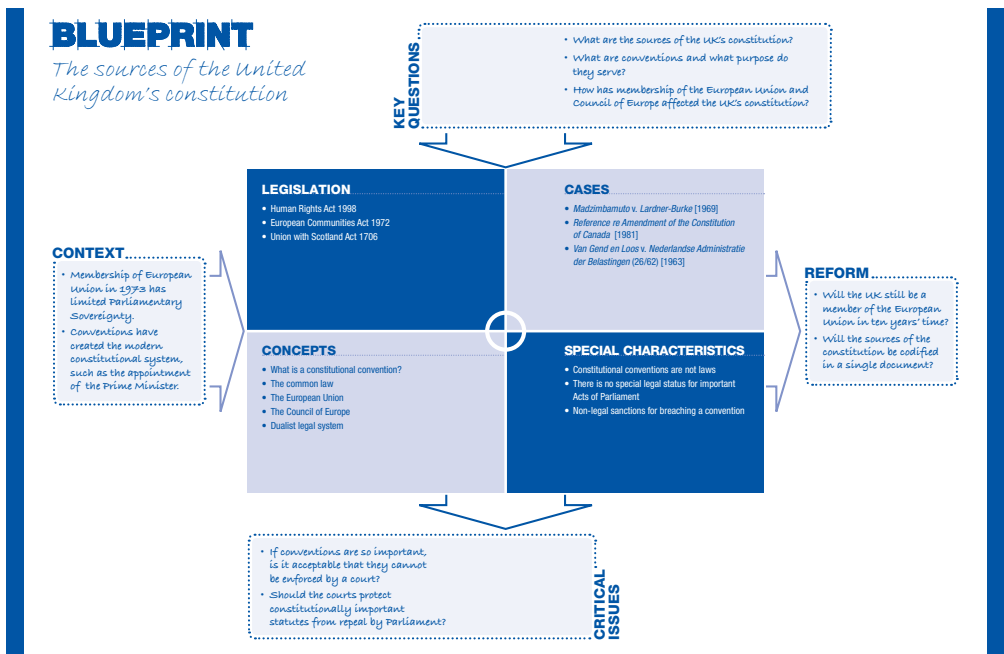
As a law student you will need to learn what questions or problems the law attempts to address, and what sort of issues arise from the way it does this that require critical reflection.



To gain a more complete understanding of the role of law in society you will need to know what influencing factors have shaped the law in the past, and how the law may develop in the near future.



You can use the Blueprint for each topic as a framework for building your knowledge in the subject.



Introduction

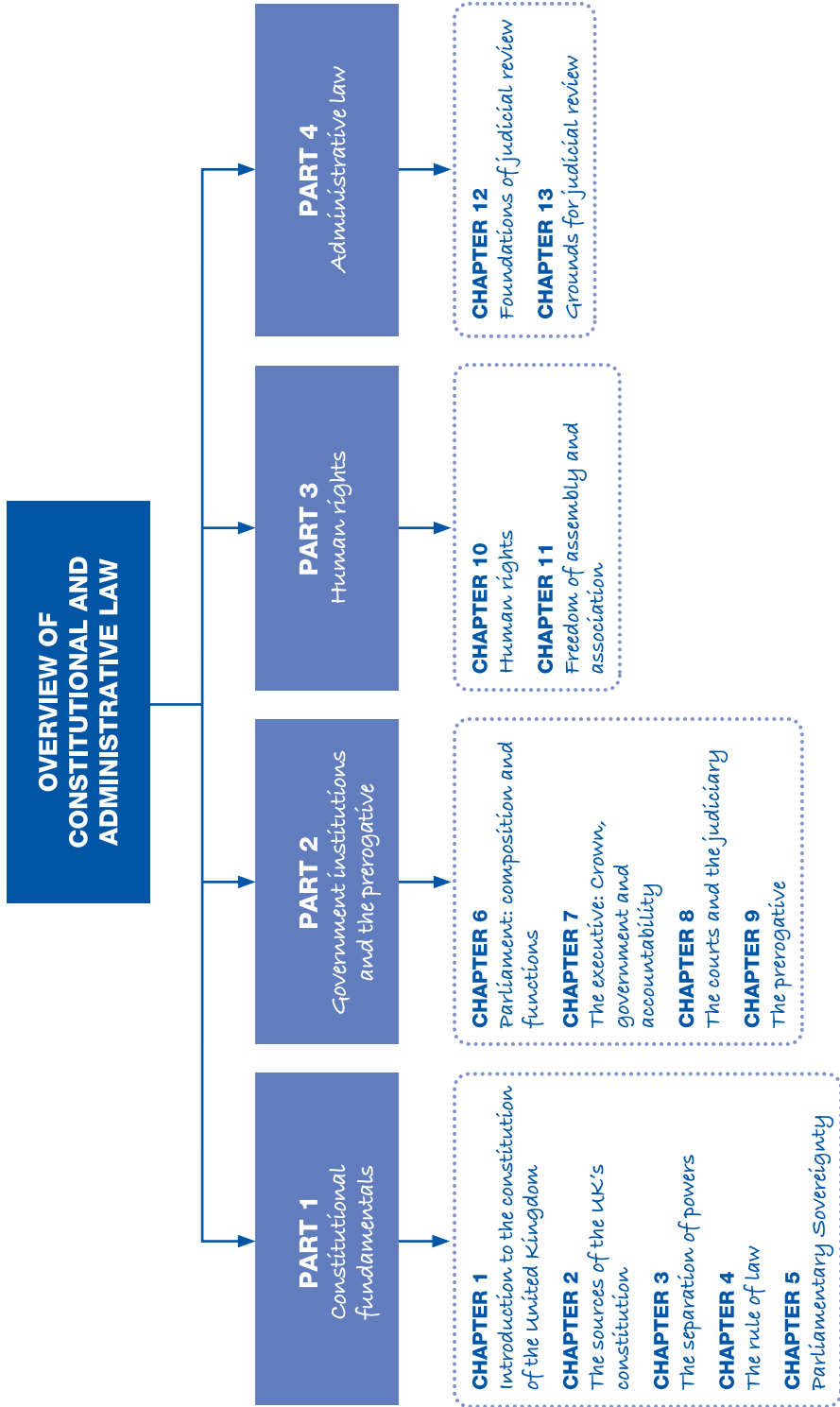
Constitutional and administrative law is often viewed with apprehension by students before they begin to study the module. Students think that they are expected to start the module having as a prerequisite an expertise in history, politics and comparative constitutions. You will be relieved to know that this is not the case. As a law student you will be given the tools to acquire the knowledge needed to gain a thorough understanding of the topics covered. With this in mind, this book was written to help students navigate their way through the fundamental aspects of constitutional and administrative law, and to attempt to challenge these misconceptions. This book is only introductory and there is a list of useful secondary reading at the end of each chapter and this will help you to expand upon the content covered in this book. You will notice that, where it is necessary to do so, earlier chapters refer to historical events and characters. To provide context, in Chapter 1 there is a brief historical overview of the constitution of the United Kingdom. This explains the key developments that have shaped the constitution.

It is an exciting time to study constitutional and administrative law. In 2014, the people of Scotland voted in a referendum on whether Scotland will remain part of the United Kingdom. The Scottish electorate voted to remain as part of the United Kingdom which has resulted in more uncertainty over the devolution of more power to Scotland and other parts of the United Kingdom. There is likely to be a referendum on the United Kingdom's membership of the European Union, which could see the United Kingdom leave the European Union.

The United Kingdom's relationship with the European Court of Human Rights and the European Convention on Human Rights has been uneasy, especially given the restrictions placed on deporting the radical Islamic cleric Abu Qatada. It is feasible that depending upon which party wins the 2015 General Election, the Human Rights Act 1998 will be replaced with a British Bill of Rights. The fact that we can predict the date of the next General Election is due to the Fixed-term Parliaments Act 2011, which prevents the Prime Minister from calling a General Election at a time of his choosing. The 2010 General Election produced the first peacetime coalition government since the 1930s. The Coalition government has attempted to introduce some significant constitutional reforms. The referendum on changing the voting system resulted in the British people voting to keep the existing system, and the planned reforms of the House of Lords and the changes to constituency boundaries have, as of yet, not occurred.

Against the backdrop of all this possible reform remain the three key features of the United Kingdom's constitution: Parliamentary Sovereignty, the rule of law and the separation of powers. Chapters 3, 4 and 5 will provide you with a clear introduction to what they are and also to why these are so important. Chapters 6, 7 and 8 will explore the functions of Parliament, the composition of the executive and how it is held to account and finally the courts and the judiciary. A major theme in constitutional and administrative law is executive accountability, and this book will discuss how Parliament and the Courts hold the government to account.

Chapter 10 will provide an introduction to the role of the European Court of Human Rights, the substantive rights under the European Convention on Human Rights and the operation of the Human Rights Act 1998. This is extremely topical, as senior members of the judiciary have recently questioned the United Kingdom's relationship with the European Court of Human Rights. The right to freedom of assembly and association is the subject of Chapter 11. Finally, Chapter 12 considers the requirements needed to bring an application and the importance of judicial review, whilst Chapter 13 outlines the grounds for judicial review and details how these have been developed and are applied by the courts.



STUDY SKILLS

*studying
constitutional and
administrative law*

INTRODUCTION

In this section we will look at the skills required to study constitutional and administrative law. Whilst this book seeks to give you an insight into the subject in terms of content, it is also extremely important that you learn the skills needed to study constitutional and administrative law. We will look at the range of unique sources available and the skills required for writing essays for constitutional and administrative law. We will also look at how to use case law and statutes in assessments. Finally, we will look at how to research a topic for an assessment.

SUBJECT-SPECIFIC RESOURCES

There is a great range of resources available to help you study constitutional and administrative law. Many of these resources are free and can be accessed online.

Useful websites	
United Kingdom Supreme Court. This website is a good source of information about the history of the Supreme Court and new cases.	http://www.supremecourt.gov.uk/
United Kingdom Supreme Court blog. This is a useful source that will keep you informed about upcoming Supreme Court cases and recent decisions.	http://ukscblog.com/
The website of University College London's Constitutional Unit. This website looks at the constitution from a political viewpoint.	http://constitution-unit.com/
The website of University College London's Constitutional Law Group. This website looks at new developments in constitutional law. There will be short articles online which will offer you an interesting insight into the topics which you will cover.	http://ukconstitutionallaw.org/
The Ministry of Justice's website. This is useful to learn about the Ministry of Justice and it has many interesting documents such as reports on reforming the prerogative.	http://www.justice.gov.uk/

Useful websites	
The UK Human Rights blog. This blog is a great source for news about human rights, both in this country and abroad.	http://ukhumanrightsblog.com/
<i>The Guardian</i> newspaper has a free online section on law. It is regularly updated and will have links to important legal developments, opinion pieces and speeches by important persons such as judges.	http://www.guardian.co.uk/law
The British and Irish Legal Information Institute. This website contains the transcript of all new cases and many older cases. When studying constitutional and administrative law it is useful to look regularly for new cases, especially where the case has been reported in the press.	http://www.bailii.org/
The Institute of Advanced Legal Studies. There are events organised by the institute, many of which are free to attend.	http://www.ials.sas.ac.uk/
Parliament's website is an extremely useful guide to politics, the workings of Parliament and other important information. It offers short and succinct guides which you will find useful to supplement your reading.	http://www.parliament.uk/

Each chapter in this book contains a list of further reading that will give you a range of sources to look at. These include textbooks, journal articles and other academic texts. There are a number of journals that will be relevant to your studies. These include:

- *Public Law* (PL)
- *European Human Rights Law Review* (EHRLR)
- *Human Rights Law Review* (HRLR)
- *Judicial Review* (JR)
- *Cambridge Law Review* (CLR)
- *Law Quarterly Review* (LQR)
- *Modern Law Review* (MLR)

STUDY SKILLS FOR CONSTITUTIONAL AND ADMINISTRATIVE LAW

We will now look at the key skills required for studying constitutional and administrative law, as set out in Figure 1.

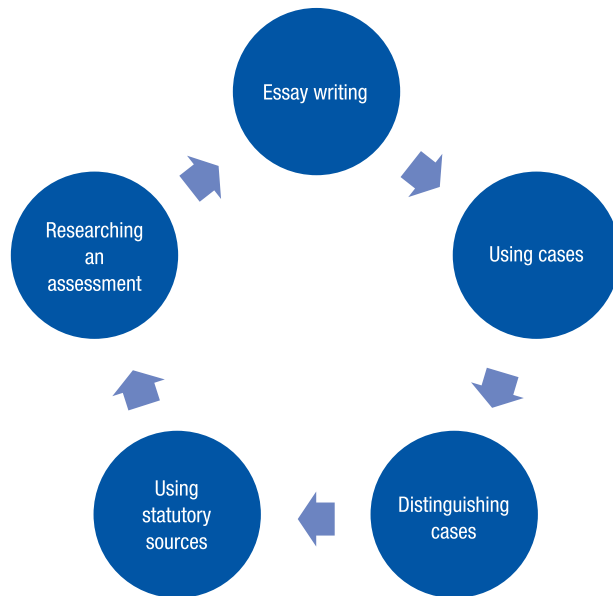


Figure 1 Key study skills

Study skill: When it comes to writing an essay on constitutional and administrative law

Writing an essay is an important study skill and for students studying constitutional and administrative law it is extremely important that you learn the key skills required. Prior to starting your revision you should download previous exam questions from your university's online learning environment. This will give you an example of how the module has been examined in the past. Imagine that you have downloaded your university's previous exam papers and that you have decided to attempt the following question:

'In the 21st century no lawyer can realistically claim that Parliamentary Sovereignty is absolute.'

You should take time to ascertain what the question is about and what the examiner is expecting in an answer. There is often a temptation to write everything you know about the topic, in the hope of impressing the examiner. Unfortunately, this rarely gains students good marks and demonstrates a lack of understanding of what is actually being asked. Questions such as this may appear straightforward and an invitation to write everything you know about Parliamentary Sovereignty, but the examiner will be expecting you to tailor your knowledge to answer the question in the examination booklet. It is helpful to break down the question using bullet points. Once you have done this you should start to plan your structure. This should take no more than a few minutes. In an exam you may only have 60 minutes to answer a question, but time spent planning what you are going to write will

mean that you answer the question actually set, your answer is structured, and you do not omit any key points, or repeat yourself unnecessarily.

1. The Introduction

Your introduction should set out what you will be arguing. It should respond to the question set and outline the topic which the question is on, and the particular emphasis of the question. Here you would state that the question is on Parliamentary Sovereignty and whether it is still absolute. You should avoid launching into a narrative about Parliamentary Sovereignty as the examiner expects you to focus on the question. However, you should outline how you are going to approach the question and ideally state how you are going to respond to the proposition that Parliamentary Sovereignty is no longer absolute.

2. The main body

Each of your paragraphs should develop your answer and should follow a logical structure. You must avoid the tendency that many students have which is to write everything they know, or attempt to go into too much detail. Your answer could perhaps be structured as set out in Figure 2.

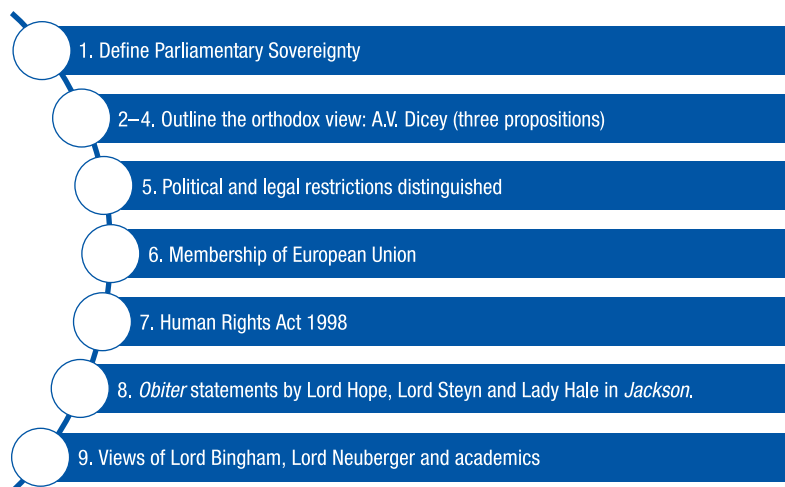


Figure 2 Planning the main body of your answer

Each paragraph should respond to the question and should demonstrate a clear understanding of the topic and evidence of wider reading. The question will often require you to analyse or evaluate the proposition. You must do this. But what does this actually mean? Put simply, the examiner would expect you to:

- discuss the topic with sufficient clarity of expression and accuracy;
- demonstrate an awareness of the issue being examined;
- explore the controversies which exist and be able to demonstrate your own views on these;
- use your knowledge to see whether the proposition can be supported, or whether you disagree with it;
- contrast different judicial and academic opinions.

3. Conclusion

Your conclusion must not add anything new into your answer, as it should consolidate your answer and give a succinct overview of your argument. It must respond to the question and leave the examiner feeling confident that you have understood the question and have answered it. Many students will leave the analysis and evaluation that was required by the question until the conclusion. You must not do this as otherwise your essay will read like a narrative overview of the topic and you will have not adequately answered the question. Similarly, you must avoid isolated statements such as ‘as you can see, Parliament is no longer legally sovereign’, because unless you have demonstrated the case for this in your answer, statements such as this could demonstrate a lack of understanding.

IMPROVING YOUR CONSTITUTIONAL AND ADMINISTRATIVE LAW ESSAY-WRITING SKILLS

We have seen how to write and structure an essay on Parliamentary Sovereignty. You will need to develop your essay-writing skills and it is recommended that you follow the steps set out in Figure 3.



Figure 3 Improving your essay-writing skills

Do not forget that you are able to ask your tutor for guidance on essay-writing skills. Your tutor will also be able to look at your practice answers.

STUDY SKILL: WHEN IT COMES TO USING CASES IN ASSESSMENTS

The legal aspects of constitutional and administrative law tend to be based on case law. Whilst there is important legislation such as the Constitutional Reform Act 2005, the Human Rights Act 1998 and the Devolution Acts of 1998 and 2006, there will be considerable focus on case law. For example, judicial review is based on the common law, and therefore it is essential that you are able to use cases effectively in your assessments.

Which cases should you read in full?

It is essential that you read the cases that are highlighted as important in this book and by your tutors. At the end of each chapter there is a list of key cases and it is recommended that you take the time to read these in full. But beware, there is good and bad practice when studying cases, as highlighted in Figure 4.

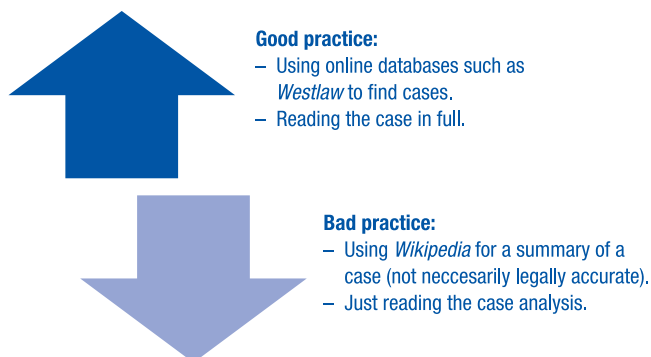


Figure 4 Good and bad practice when using cases

Let us now consider why you should read a case in full:

1. Different legal skills opinions – demonstrates depth of knowledge and understanding

The decision *R (Jackson) v. Attorney-General* [2005] UKHL 56 is an important case because it considers the Parliament Acts 1911 and 1949. In addition to the *ratio*, there is important *obiter* on Parliamentary Sovereignty. Unless you read the individual judgments then you will not be able to understand the differences in opinion between their Lordships. Some students will just read the textbook and will be able to write a line or two about what Lord Hope and Lord Steyn said in their judgments. However, students who have read the case in full will understand what their Lordships actually meant and will be able to counter this with what Lord Bingham said in his judgment. Equally, the decision in *A v. Secretary of State for the Home Department* [2004] UKHL 56 contains a strong dissent from Lord Hoffmann on whether there was an emergency which threatened the life of the nation. This additional detail can be used in an essay question to demonstrate wider knowledge and to assist in your analysis of the question.

2. Particular case facts

Each decision will depend on the background facts. Relying on just a short explanation of a case in your textbook is not sufficient.

3. Gives you the bigger picture

Judgments are often very well written and will set out the law relating to a particular area. By reading the judgment you will often come away with a much clearer understanding of how the law works.

PUTTING WHAT YOU HAVE LEARNT INTO PRACTICE

Imagine that you have been asked by your lecturer to read the case of *R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No.2)* [2008] UKHL 61. This is an important House of Lords decision on the use of the prerogative powers to legislate for colonial affairs. By reading the judgment in full you will understand:

- What is meant by the prerogative and how the government uses it today.
- That there was a majority judgment and two dissenting judgments.
- What the legal principles are which can be derived from the case.
- Previous decisions on the use of the prerogative in this area.
- How certain types of decisions are still non-justiciable and why this is the case.

Databases such as *Westlaw* and *Lexis Library* will link the cases cited in *R (Bancoult) (No.2)* and you can then read these should you wish. Importantly, any cases which have subsequently applied, distinguished or criticised the decision will also be highlighted. By going beyond merely reading the case, and researching new cases which are directly relevant, you will demonstrate an awareness of the topic in the assessment.

Distinguishing between legal principle and background facts

In the assessment you will be expected to understand the legal principles which derive from a case. You are not expected to write in detail about the background facts. The facts should only be used to illustrate the legal principle derived from a case, and how it either applies, or does not apply, to the particular facts in a problem question.

For example, consider this problem question on prerogative powers:

Luke is an inhabitant of New Island (NI). NI is a British Overseas Territory that is administered by the Commissioner for NI. The French government has requested to lease NI to build a naval base. The British government enacts an Order in Council, the New Island Constitution Order 2013, which states that no one is allowed to live on NI and all inhabitants must leave.

Student 1's answer

The case of *R (Bancoult) (No.2)* was an interesting case which concerned the British Indian Ocean Territory. The islanders who had lived on BIOT were known as the Chagossians and had been removed in the 1970s and were prevented by Orders in Council from returning. The case was brought by Mr Oliver Bancoult. It was a very unfair case and the House of Lords in 2008 held that the government had the prerogative power to prevent the islanders from returning. Many academics including Bridget Hadfield have criticised the decision and there is considerable argument over whether the decision was wrong. Also the House of Lords held that prerogative Orders in Council were judicially reviewable. The case also shows that the judges do not all agree, as there was a dissent by Lords Mance and Bingham. This demonstrates how controversial the decision was.

Lord Mance cited Sir William Blackstone, who was a famous legal-writer to support his argument. The majority held that the decision involved non-justiciable areas such as national security and foreign affairs. Luke is a New Island inhabitant and the decision to remove him looks to be very similar. Therefore the government has not acted illegally.

Whilst this answer demonstrates knowledge, there is too much focus on the facts and too little application of the legal principles to the facts. Does your examiner (and in practice, your client) need to know all the background facts and a generic overview of the law?

Student 2's answer

Luke is an inhabitant of New Island, which is a British Overseas territory. On 20 May 2013, the government through an Order in Council enacted the New Island Constitution Order 2013, which stated that all New Island inhabitants had to leave the territory. Luke could attempt to judicially review the decision. In *R (Bancoult) (No.2)*, Orders in Council were held in to be reviewable. The facts here and the decision in *R (Bancoult) (No.2)* are very similar. The decision itself involves the prerogative and Luke could argue that there is no prerogative power to exile the inhabitants of New Island. We know from *R (Bancoult) (No.2)* that Orders in Council are reviewable and so the court here will be able to review the New Island Constitution Order 2013. Looking at whether there is a prerogative power to exile the islanders, we can see that the majority of the House of Lords in *R (Bancoult) (No.2)* held that there was a prerogative power to do this and the Order in Council was not illegal. Therefore, Luke would need to argue that the decision was invalid under one of the grounds for judicial review.

This (very brief) answer is focused on the facts set out in the problem question and applies the legal principles from *R (Bancoult) (No.2)* to the scenario. The legal principles are used to demonstrate how *R (Bancoult) (No.2)* will apply to the facts and what the outcome will be for Luke. There is no irrelevant material cited and the student is not trying to show off their knowledge of information that does not add anything to the answer.

STUDY SKILL: WHEN IT COMES TO DISTINGUISHING CASES IN ASSESSMENTS

We have seen above that you need to be able to identify legal principles and apply these to the facts in the assessment. We have also seen that cases are determined in accordance to the background facts. Therefore, in the assessment you will be expected to distinguish cases and to identify the reasons why different decisions may appear at odds with each other.

Imagine that you are answering a problem question on judicial review:

'Rajah has applied for a fishing licence and his application has been rejected. He has not been given any reasons for why his application has been rejected.'

The issue here is whether fairness requires Rajah to be given reasons for why his application has been refused. If you were simply to cite *R v. Secretary of State for the Home Department ex p. Doody* [1994] 1 AC 531 and inform the examiner that at common law there is no general duty for the

decision-maker to give reasons, then this would not be sufficient as an answer. You would have to show in what circumstances the courts have held that reasons have to be given. This requires you to distinguish these circumstances from the facts in the question.

Consider the following example answer:

The issue here is whether the decision-maker has to give Rajah reasons for refusing his application. It is clear that what fairness will require will depend on a number of factors and will vary according to each case (*Ex p. Doody*, per Lord Mustill and *Lloyd v. McMahon* [1998] AC 625, per Lord Bridge). The fact that this is an application for a licence, rather than a revocation of a licence, will mean that the requirements of fairness will be low (*McInnes v. Onslow Fane* [1978] 1 WLR 1520). Whilst at common law there is no general duty to give reasons (*Ex p. Doody*), there are some exceptions which require reasons to be given. It would appear that there is no statutory requirement to give reasons here and so we would have to see whether fairness would require reasons to be given. Unlike *Ex p. Doody* an application for a fishing licence does not involve fundamental issues, such as liberty, where reasons must be given. Nonetheless, if the decision were to appear irrational, such as occurred in *R v. Civil Service Appeal Board ex p. Cunningham* [1991] 4 All ER 310, then reasons would have to be given. Here we do not know whether the decision was irrational, as we are unsure of whether Rajah is the only person refused. There are probably administrative explanations for why reasons have not been given (see *R v. Higher Education Funding Council ex p. Institute of Dental Surgery* [1994] 1 WLR 242). Therefore, it would appear that fairness does not require that Rajah is given a reason for why his application was refused.

This (brief) answer has used the legal principles established and has distinguished some of the key cases in this area. There has been application of the relevant cases to the facts, and an effort to say, whether they would, or would not, apply on the facts.

STUDY SKILL: WHEN IT COMES TO USING STATUTES IN ASSESSMENTS

Perhaps the most important statute most students will come across when studying constitutional and administrative law is the Human Rights Act 1998 (HRA 1998).

The HRA 1998 incorporates most of the European Convention on Human Rights (ECHR) into domestic law. Schedule 1 lists the Convention rights which have been incorporated. Many students will confuse the HRA 1998 and the ECHR and in an assessment will write that, 'Article 6 of the Human Rights Act 1998 protects the right to a fair trial'. This is wrong as the HRA 1998 incorporates the Convention rights, including Article 6 ECHR, into domestic law and outlines how the Convention rights will operate in the United Kingdom.

You cannot simply rely on legislation in the exam. You must know how the courts have interpreted the legislation. The HRA 1998 issues instructions to the courts on how to give effect to Convention rights.

Looking at section 3 HRA 1998 we can see that the courts are given powers to interpret legislation to give effect to Convention rights:

1. So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

2. This section –

- (a) applies to primary legislation and subordinate legislation whenever enacted;
- (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
- (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

How would you use section 3 in an assessment? To begin with you must understand how it works. Section 3(1) informs the court that this must read ‘primary legislation’ (which are Acts of Parliament) and ‘subordinate legislation’ (which is delegated legislation) ‘in a way which is compatible with the Convention rights’. This means that legislation which infringes a Convention right must be interpreted in a way that does not infringe a Convention right.

For example, if Sandra was arrested and detained in a police station cell for a week during which she was not allowed to see a solicitor, then at a minimum there would be a violation of Articles 5 and 6 ECHR. However, if section 5 of the Law and Order Act 2013 (fictitious) stated that ‘The police may withhold the right to see a solicitor whilst a suspect is detained’, the police could then argue that they have acted legally because they were acting in accordance with the law (see section 6 HRA on the duty of public authorities to not violate Convention rights).

A court when interpreting section 5 of the Law and Order Act 2013 would be required under section 3(1) to interpret the Act in a manner that is compatible with Convention rights. Clearly, section 5 is incompatible. However, section 3(1) HRA 1998 states that the court can only interpret legislation ‘[s]o far as it is possible to do so’. This means that the court must not disregard Parliament’s intention. To see whether the court could interpret section 5 to make the police’s action illegal, we would need to look at case law. Looking at decisions such as *Re S, Re W (Minors)* [2002] UKHL 10, we can see that there are clear limits on the court’s use of section 3. Lord Nicholls had stated that, ‘a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment’ (at [40]). In the assessment you would need to decide whether the courts would be able to use section 3. Considering the facts above, if the court was to use section 3 HRA 1998, then this would depart substantially from the meaning of section 5 and therefore could not be used. Therefore the police have not acted illegally and Sandra was legitimately (albeit in violation of the ECHR) denied access to a solicitor.

You would need to address the following points in your answer:

- Whether a ‘Declaration of Incompatibility’ could be used by the courts (s.4).
- Whether the police are a public authority (s.6)
- Whether Sandra was a victim for the purposes of the HRA 1998 and whether she had complied with the time limit for bringing her claim (s.7)
- The remedies which are available under the HRA 1998 (s.8).
- The jurisdictional application of the HRA 1998 (Art.1 ECHR).

STUDY SKILL: WHEN IT COMES TO RESEARCHING A TOPIC FOR AN ASSESSMENT

Imagine that you have been asked to write a coursework on whether the United Kingdom conforms to the separation of powers. This is quite a generic question and in order to do well you would have to demonstrate that you have undertaken thorough research.

Using textbooks

Your textbook will have a detailed chapter covering the separation of powers and often students will stop there and rely solely upon the thirty or so pages in their textbook. By doing this you will risk producing a condensed version of the textbook and thus a basic narrative of the position in the United Kingdom. You will need to use other textbooks as each author will explain the separation of powers differently and will offer you a range of further reading to look at. The further reading will direct you to relevant academic articles.

Using articles

Electronic databases such as *Westlaw* and *Lexis Library* offer access to many journals that are relevant to constitutional and administrative law and also have advanced search functions. A quick search of the journal *Public Law* using the keyword 'Supreme Court' would reveal several articles on the Supreme Court, including Masterman, R. 'A Supreme Court for the United Kingdom: two steps forward, but one step back on judicial independence' [2004] *Public Law* 48. You must never use *Wikipedia* in your research, as anyone is able to edit entries on this encyclopaedia.

PUTTING IT ALL TOGETHER

You need to be disciplined when researching for an assessment. You often will have to balance this alongside your studies. Therefore, it is essential that you set aside enough time to research before you start writing. You should avoid getting carried away and risk losing sight of what your lecturer is expecting of you. Always focus on the question and identify the key areas to research. Figure 5 suggests how to research a question on the separation of powers.

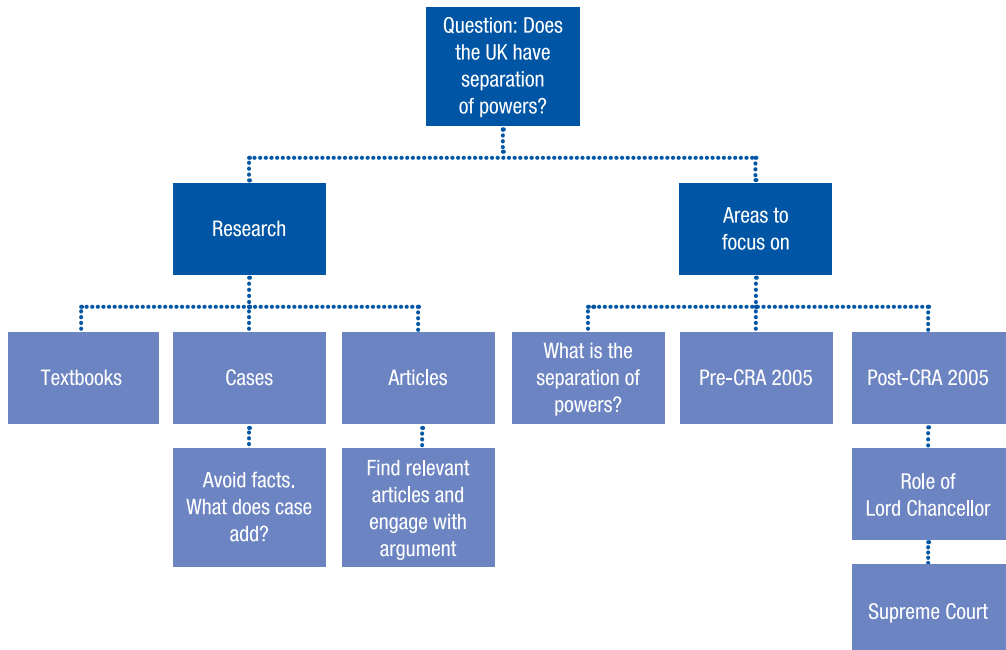


Figure 5 Planning your research

SUMMARY

- There are a variety of resources available when studying constitutional and administrative law. Many of these are specialised and unique to the subject.
- It is important that you use cases and legislation properly as you will be expected to use both in your assessments.
- It is important to know how to research constitutional and administrative law as you are required to use material selectively and identify the key issues being assessed.

PART 1

*Constitutional
fundamentals*

PART 1 Constitutional fundamentals

CHAPTER 1 Introduction to the United Kingdom's Constitution

United Kingdom of
Great Britain and
Northern Ireland

- Great Britain
- England
- Scotland
- Wales

Northern
Ireland

Note the outcome of
the Scottish referendum
on independence in
September 2014

Does the United
Kingdom have a
constitution?

Characteristics

Uncodified
and largely
unwritten

CHAPTER 2 The sources of the United Kingdom's constitution

1. Conventions
2. Acts of Parliament
3. Common law
4. ECHR
5. European Union
6. Prerogative

Features of the constitution

CHAPTER 3 The separation of powers

Executive,
legislature and
the judiciary

CHAPTER 4 The rule of law

Procedural and
substantive

CHAPTER 5 Parliamentary Sovereignty

Parliament is
legally sovereign
and no restrictions
on law-making

Conflict?

PART 1 INTRODUCTION

Part 1 of Blueprints *Constitutional and Administrative Law* explores the foundations of the United Kingdom's constitution. In Chapter 1 we will begin by looking at the historical development of the United Kingdom, before we then consider the key constitutional reforms introduced by the Labour government (1997–2010) and the Coalition government (2010–). You will be expected to understand what is meant by the term 'constitution', and discuss whether you think that the United Kingdom has a 'written', 'unwritten' or 'codified' constitution, or indeed, whether it has a constitution at all.

The sources of the United Kingdom's constitution will be explored in Chapter 2. This will provide you with a useful overview of the main sources, some of which will be discussed in their own chapters later on in the book. You will be expected to understand what is meant by a 'constitutional convention' and why conventions serve such an important purpose in the United Kingdom's constitution. We will also look at the concept of a constitutional statute and Laws LJ's *obiter* in *Thoburn v. Sunderland City Council* [2002] EWHC 195.

The theory of the separation of powers and why it matters is the subject of Chapter 3. This is a controversial topic because many academics would disagree over whether the United Kingdom's constitution has ever conformed to the requirements of the separation of powers. We will look at the arguments surrounding the separation of powers. The rule of law is discussed in Chapter 4 and is an important feature of the constitution. We shall see that the rule of law has an uneasy relationship with the most important feature of the constitution, Parliamentary Sovereignty. In Chapter 5 we will look at what is meant by Parliamentary Sovereignty and the challenges that exist, such as devolution, the United Kingdom's membership of the European Union, the rule of law and judicial activism, and finally the Human Rights Act 1998.

CHAPTER 1

*Introduction to the
constitution of the
United Kingdom*

BLUEPRINT

Introduction to the constitution of the United Kingdom

KEY QUESTIONS

CONTEXT

- The UK's constitution has evolved over a long period of time.
- There has been no revolution since 1688. Subsequently, the monarch has voluntarily handed over the running of the country to the Prime Minister and Cabinet Ministers.
- Many people are calling for a modern British Bill of Rights.

LEGISLATION

- Magna Carta 1215
- Bill of Rights 1689
- Devolution Acts 1998
- European Communities Act 1972

CONCEPTS

- What do we mean by a 'constitution'?
- A federal or unitary constitution
- Devolution
- The United Kingdom's constitution is flexible
- Coalition government

- In September 2014 the people of Scotland voted to remain as part of the United Kingdom. Before the vote took place the leaders of the three main political parties promised to devolve more powers to Scotland. The Conservative party also wishes to address the question of English devolution. How this will be addressed remains to be seen.
- Does the absence of a written constitution inadequately protect human rights?
- Does the UK need a codified constitution?

- Does the UK have a constitution?
- What are the characteristics of the UK's constitution?
- Is the UK's constitution unwritten?
- Should the UK have a written constitution?

CASES

SPECIAL CHARACTERISTICS

- Key features of the United Kingdom's constitution are observance of the rule of law, the importance of the separation of powers and the fact that Parliament is legally sovereign
- The United Kingdom has an uncodified constitution
- The United Kingdom's constitution is not wholly unwritten

REFORM

- Devolution has led to the creation of the Scottish Parliament, Welsh Assembly and the Northern Ireland Assembly.
- The decision of the Scottish electorate to remain as part of the United Kingdom will see further powers devolved to Scotland.
- It is likely that more powers will be devolved to Wales and Scotland. It is inevitable that the West Lothian question will need to be addressed (that is Scottish MPs voting on English issues, when English MPs cannot vote on devolved Scottish issues) either through the creation of an English Parliament, restrictions on Scottish MPs voting on English issues, the creation of regional assemblies or increased powers to local authorities.
- There may be a referendum on the UK's membership of the European Union after 2015 (subject to the outcome of the next General Election).

**CRITICAL
ISSUES**

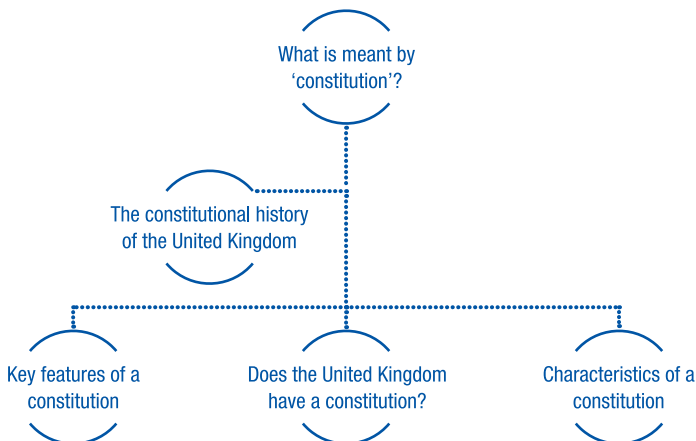
Setting the scene

Many people use the word constitution without really knowing what it means. We will look at what the word constitution means and why every country, organisation or sports club will require a constitution to enable it to work effectively. We will look at the constitution of the United Kingdom. It is important to appreciate just how controversial an area this is. If you ask your lecturers whether the United Kingdom has a constitution, you might receive a number of very different responses. This is because many academics argue that the United Kingdom does not have a constitution. They argue that this so because it is not codified, i.e. written down in a single document such as the constitution of the United States of America. So does this mean that the United Kingdom's constitution is unwritten? Technically large parts of what we consider to be constitutional sources are written down, such as important statutes. However, other sources of the constitution are unwritten, such as constitutional conventions. We will explore whether the United Kingdom has a constitution, and in doing this we will look at the key features of a constitution and see how these apply against the United Kingdom.

We will also look at the history of the United Kingdom and see how the country was created. In September 2014, the Scottish electorate voted to remain as part of the United Kingdom. Prior to the referendum on Scottish independence there was considerable uncertainty over what would happen if Scotland voted to become independent. This included the United Kingdom would require a new flag, whether Scotland be able to join the European Union and would there be a currency union between Scotland and the rest of the United Kingdom. The decision to vote 'no' means that Scotland will now have more powers devolved from the United Kingdom Parliament to the Scottish Parliament. Before the vote took place the leaders of the three main political parties promised to devolve more powers to Scotland. The Conservative party also wishes to address the West Lothian question, which is where Scottish MPs are able to vote on matters that only affect England because this type of decision has been devolved to Scotland. This may lead to the creation of an English Parliament, the exclusion of Scottish MPs from voting on issues that only affect England, the creation of regional assemblies or giving more power to local authorities.

The constitutional history of the United Kingdom is relevant to the modern day and you will need to understand these key events and the impact of devolution to Scotland, Wales and Northern Ireland in 1998.

Chapter overview



WHAT IS MEANT BY A CONSTITUTION?

What is a **Constitution**? A cricket club, a law society and a company can have a constitution; this word is not used exclusively in relation to a country. On any level of its use a constitution is the key rules and requirements by which the club, society or company are governed, and the members, directors and shareholders understand their rights and duties. At a national level a constitution is a collection of rules, practices, laws which relate to the political life of a country and the key rights of any citizen. A constitution is intended to regulate government and it will contain the rules how the courts, the legislature and the executive operate, the rules about elections, the power of the head of state and protection from police and executive oppression.

CORNERSTONE

What do we mean by a 'constitution'?

Professor Anthony King questioned whether the United Kingdom has a constitution and stated that:

'A constitution is the set of the most important rules that regulate the relations among the different parts of the government of a given country and also relations between the different parts of the government and the people of the country' (King 2001, p. 1).

Viscount Bolingbroke (who was an important eighteenth-century politician) provides another definition of what is meant by a constitution (*On Parties* (1735), p. 108):

'By Constitution we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions, and customs, derived from certain fixed principles of reason . . . that compose the general system, according to which the community hath agreed to be governed.'

There are difficulties in defining what exactly falls within constitutional law and the academic writer F.F. Ridley noted that constitutional law textbooks 'cover a selection of laws that appear important to the author, together with important conventions and often a reduced version of the topics treated by institutionally-oriented political scientists' (Ridley 1998, p. 341). There is some truth in this, as we shall see when we look at the sources of the constitution in Chapter 2.

Many people equate a constitution with a written document, which is codified and protected by the law. An example of this is the United States constitution, where the constitution is protected by a special status of constitutional law and cannot be amended unless through a special procedure. If the federal government or Congress acts in a way that is incompatible with the constitution, then they are said to be acting unconstitutionally and the United States Supreme Court can challenge their actions. Importantly, the United States Supreme Court can declare an Act of Congress to be void. The United Kingdom does not have a written codified constitution, and there is no special status of constitutional law. This means that any legal features of the constitution, such as Acts of Parliament can be repealed by Parliament.

INTERSECTION

The United Kingdom Supreme Court has limited powers in comparison to the United States Supreme Court, and cannot declare an Act of Parliament to be void. We shall see the reason for this in Chapter 5, where we will consider what is meant by **Parliamentary Sovereignty**.