Principles of Common Law
Public Law –
The British Constitution & Guiding Principles

Principles of Common Law

6 October 2020

Lecture 4

Prof. Dr. Kern Alexander
Twitter: @ProfKAlexander

Studienberatung (RWI Student Advisory Service)
Mondays
13:00-15:00

Tuesdays
9:15-11:45

Tuesdays and Thursdays (via phone)
14:00-16:00
+41 44 634 44 87

University of Zurich[UZH]

Institute of Law

Introduction to UK Public Law

- The UK Constitution
- Separation of Powers
- Rule of Law
- Sovereignty of Parliament
- Royal Prerogative
- Judicial Review
- Human Rights
- Court system
- The Trial
- Common law – judge made law
- Doctrine of precedent
- Challenges of judge made law
- Statutory Intervention
- Statutory Interpretation

Public Law

Constitutional Law

- Structure of the state
- Organs of the state
- Fundamental law of the land
- General principles regarding powers of the state and its relations with its citizens
- International relations
- → *State set-up (skeleton)*

Administrative Law

- Sub-category of Constitutional Law
- Specifically organs of the State in motion
- Functions of the State
- Judicial Review (≠US)
- No International Law – exclusively powers and functions of adminstrative authorities
- → *State in motion (muscles/flesh)*

The UK Constitution

Unwritten vs. uncodified

- ‘*If a constitution means a written document, then obviously Great Britain has no constitution. In countries where such a document exists, the word has that meaning. But the document itself merely sets out rules determining the creation and operation of governmental institutions, and obviously Great Britain has such institutions and such rules. The phrase “British constitution” is used to describe those rules*.’ (*)

Sir Ivor Jennings, 1959

- “*The British Constitution, contrary to popular description, is not ‘unwritten’ – a good part of it is written – but it is uncodified.*”

House of Lords Select Committee on the Constitution, 2002

Sources of the UK Constitution

- A substantial part of the UK Constitution is “written” albeit not codified in any one document
- Variety of sources of the UK Constitution:
  - Historical charters: Magna Carta 1215, Bill of Rights 1689
  - Statutory Law – Certain Acts of Parliament (*): Act of Settlement 1701 (Crown succession), Acts of Union 1707 (England and Scotland) and 1800 (Great Britain and Ireland), Parliament Acts 1911 and 1949, British Nationality Act 1981, House of Lords Act 1999, Constitutional Reform Act 2005, Wales Act 2017, etc.
  - Common Law - Seminal judicial decisions: *Entick v Carrington* (1765), *Jackson v AG* (2005)
  - Constitutional Principles: rule of law, parliamentary sovereignty, separation of powers
  - Constitutional Conventions: Salisbury Convention, PM is leader of party with majority in HoC, Queen follows PM’s advice, Royal Assent for Bills to become law
    - NB: do not confuse with “customs”: red briefcase, PM questions on Wednesday (very British)
  - Constitutional writers: Dicey, Bagehot, Blackstone, Mill, Hart, Raz
  - EU Law + European Communities Act 1972 (repealed by “Brexit Act”)
  - European Convention on Human Rights + Human Rights Act 1998

Monism and dualism

- Describes the relationship between national and international law, specifically how international treaties and conventions are incorporated into the internal national legal system
- Monism – international and national systems form a unitary body of law. Once the country has signed and ratified a treaty or convention, it has direct effect in their national legal system = citizens may base any claim against the state directly on the treaty (eg. The Netherlands)
- Dualism – international law must be translated into the national legal system, usually by legislation. Citizens must then base their claim on the national rule which incorporates the international one.
- In the UK, all international treaties and conventions must be “brought home” by act of the UK Parliament.
    - EU Law → European Communities Act 1972. UK Withdrawal Act 2020
    - European Convention on Human Rights → Human Rights Act 1998
    - Usually the Act of Parliament either refers to the treaty or copies it verbatim
    - BUT this system allows the UK to cherry pick which Articles of the conventions they will incorporate and which ones they will ignore

Separation of Powers

Legislative	Executive	Judiciary

• UK Parliament
  • House of Commons: elected, majority rules
  • House of Lords: appointed by the Queen on the advice of the Prime Minster excluding 92 hereditary members
	• The Monarch
	• Government
	  • Prime Minister: leader of the party with majority of seats in House of Commons
	  • PM's Cabinet
	• Scottish Government, Welsh Assembly Government, Northern Ireland Executive
		• Supreme Court
		• Court of Appeal
		• High Court: Queen's Bench Division, Chancery Division, Family Division
		• Lower Courts: Crown, Magistrates, County, Family

- Checks and balances between all of them to hold them accountable
- Progressive move towards separation of powers: House of Lords used to be highest court in the UK
- The Lord Chancellor used to be the speaker and member of the House of Lords, head of the judiciary in the country and often judge in the House of Lords acting as highest court, and sat in the PM's Cabinet.

Rule of Law (≈ État de Droit ≈ Rechtsstaat)

- Very British – no real definition, mainly a feeling
- Aristotle: “The rule of law is preferable to the rule of any individual.”
- Bracton (13th C): “The King shall not be subject to men, but to God and the law: since law makes the King”. (analogy to “*manners maketh the man*”). No absolute monarchs or dictators.
- Moral principles: what is the law for, what purpose does it serve, relationship to freedom, order, HR.
- Dicey’s liberal politics: supremacy of regular law against arbitrary power, equality before the law, and the rights of individuals are not set out in a “constitutional code”, but in ordinary private law
- Raz, virtues of RL: all laws *and their making* should be prospective, clear, accessible, stable; independence of the judiciary, open and accessible courts, checks and balances between the branches
- *Entick v Carrington* (1765): case about civil liberties. Four King’s messengers broke into the home of a writer, seized his pamphlets and broke his possessions. Entick sued for trespass.
  - Argument of the defence: the messengers acted on a warrant of the Secretary of State
  - Held: there was no authority for that warrant, a man’s property rights are sacred under UK law
  - Principle: a private citizen may do anything he wishes unless the law forbids it, a public body may only do that which the law allows it to do. The law did not allow that warrant, “*the books were silent*”.

Sovereignty of Parliament

- Dicey: “Parliament has the right to make and unmake and law whatever.”
- Developed over time to gradually limit the powers of the King (no revolution).
- No person can override or set aside the legislation of Parliament.
- No Parliament can bind future Parliaments.

Challenges

- Shared or limited sovereignty with international law and EU Law
- No Parliament can bind future Parliaments – so the sovereignty of Parliament is not absolute - paradox
- If each generation can make new laws, it limits the power of any generation to entrench their laws.
- Problem with *lex posteriori* in dualistic system.
- Example: in theory, Parliament could make a law that says that “*all babies born on a Tuesday must be put to death*.” But constitutional principles and international human rights obligations prevent that.
- Will come back to this on Brexit – see later lecture.

The Royal Prerogative

- Royal Prerogative = body of authorities, privileges and immunities exclusive to the Crown alone as head of the State and of the executive. In theory, in the UK – subject to no restriction.
- By convention, most of these rights are executed by her government, the Prime Minister and his Cabinet, in her stead (eg. Prime Minister goes to international conferences for «heads of state»)
- Current functions that have stayed with the head of state:
    - Constitutional:
        - appointment of the Prime Minister (by convention: leader of the party with the majority in the House of Commons)
        - signing and dissolving Statutes (by convention, always signs a Bill and acts on the advice of her Prime Minister regarding dissolving).
    - Public engagement and ceremonial to the national community
    - Symbolic and representative of their country to the international community

Judicial review

- The rule of law requires that all government action be legally authorised. *Ultra vs intra vires*
- Suspicious of wide discretionary power → judicial safeguards against abuse
- Issues: review of actions by *public authorities* only, standing to sue
- Separation of powers: review *not* appeal, judiciary may defer matters to political decision-making (new law)
- Grounds for judicial review (*GCHQ* case 1985):
    - Illegality of the action – the law regulates decision-making, even discretion must be *intra vires*
    - Irrationality of the action / unreasonableness – outrageous defiance of logic or accepted moral standards. Judges should be able to tell, otherwise there is something wrong with the system
    - Procedural impropriety – failure to observe basic rules of natural justice, procedural fairness not followed, denial of justice, bias in the decision (ECHR: independent and impartial tribunal)
    - New: s. 6 HRA 1998 – if the action of the public authority violated the ECHR
        - Must engage Convention right, must be interference, interference must be unlawful and disproportionate
- Dealt with in standard courts, no division for administrative courts (French system)
- Judicial Review Procedure in the Civil Procedure Rules (made under Act of Parliament)

Human Rights

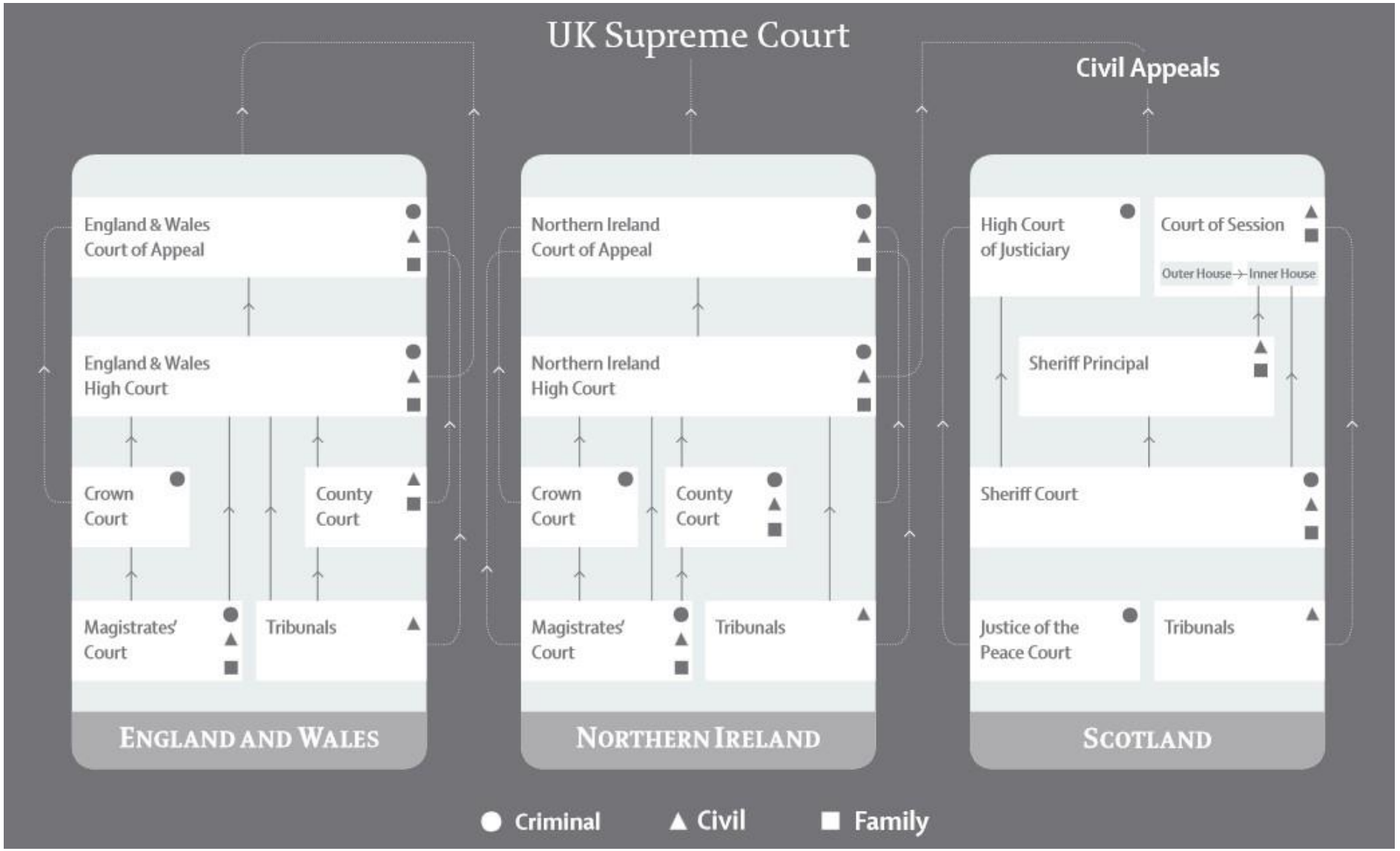
- European Convention on Human Rights, UK signed 1950, ratified 1951, in effect since 1953

  e.g: Articles 5, 6 and 7 promote crucial requirements of the rule of law: they prohibit arbitrary executive detention, require fair procedures in the determination of criminal charges and civil rights, and prohibit retrospective criminal penalties.

- No national legislation to incorporate and give effect to the Convention until Human Rights Act 1998
- The Act makes it unlawful for UK public authorities to act in a way that contravenes *certain* rights guaranteed in the Convention and gives the individual standing to sue the authority in a UK court.
- S. 3 HRA requires legislation to be given effect in a way that is compatible with the ECHR. If it cannot be interpreted that way, the court will make a “declaration of incompatibility” (s.4 HRA) – rarely used.
- One of the ways to get judicial review from UK courts.
- The legislation is still valid and operative, but the declaration *allows* Parliament to *consider* changing it – without any obligations.
- Parliamentary sovereignty: freedom to leave the Convention. But while still in, must obey.
- Prisoners’ right to vote: saga of almost 10 cases, judgment always against the UK, putting off change.

  http://www.echr.coe.int/Documents/FS_Prisoners_vote_ENG.pdf

Court system in the UK



The Trial

- The trial in the UK and US is adversarial = the judge observes the lawyers for the prosecution and defence or claimant and defendant present their cases, cross-examine witnesses (more theatrical)

- In most civil law systems, the trial is inquisitorial = the lawyers give the judge case files beforehand and then the judge presides over the case and asks questions

- Trial by jury (in the UK now limited to mainly criminal law cases and defamation in tort) = it is (still) the right of an Englishman to be tried by a jury of his peers. Jury usually asked to assess whether the behaviour of the defendant was «reasonable».
- Very strong attachment to the «reasonable man standard» in both UK and US.

Judge made law

- The judiciary in the UK is fiercely independant – the slightest hint of bias is a scandal
- Like the US – the UK Supreme Court Law Lords are known by name and style of judgment (conservative, liberal, family, controversial…)

- Every judge in the court formation may have a separate opinion on the case – and all are published
- Consequence: different judges can arrive to the same conclusion through different legal avenues

- In every judgment:
- **Ratio decidendi** – the rationale for the decision – the point and the reasoning in the case that determines the judgment and the principle that the case establishes. Binding on lower courts
- **Obiter dicta** – additional information – literally «by the way» remarks said in passing. Not officially binding but influential under English common law.

Doctrine of Precedent

- Idea that the ruling in one case should be taken as authority in similar cases
- Binding precedent – lower courts are bound by the decisions of higher courts
- Binding court decisions (remember only *ratio decidendi*, not *obiter dicta*):
    - definitely Supreme Court (or old House of Lords decisions),
    - Court of Appeal decisions for High Court
    - High Court for lower courts, although less strong – we often say «this is only a High Court decision» – which means we are waiting for a decision from a higher court on the same topic

- Courts are bound by their own same-level decisions BUT they can:
- **Distinguish** – when a court does not want to follow precedent and notes that there are distinguishing details about the facts that make the judgment sway the other way.
- **Reverse** – when a court decides that their own decision or that of a lower court has to be changed

Judge made law – challenges 1

Much more flexible and adaptable but also less entrenched – can lead to issues such as:

- *Re London Wine* (High Court) – trust declared for some bottles of wine out of a batch, but without segregation. Some bottles were destroyed – the trust **failed** for lack of certainty of subject matter (property not segregated from the rest in the cellar) and beneficiary did not get anything
- *Hunter v Moss* (Court of Appeal) – trust declared for certain shares in a company, **upheld** although the property was not segragated from the other shares = subject matter uncertain.
- But **does not expressly reverse** the High Court judgment.
- So now **legal problem**: we have two decisions that conflict on their face.
- We **distinguish** (even though the Court did not) between fungible (=interchangeable) property, like shares in a company and infungible property (wine, gold bars, puppies). We would tend to use the Court of Appeal decision BUT *Hunter v Moss* is inconsistent with insolvency policies (*Re Lehman Brothers International*).

Judge made law – challenges 2

Consideration (Contract Law)

Stilk v Myrick (1809) (High Court) – a promise to do what you are already bound by contract to do is not valid = past consideration is not valid. Sailors contracted to perform work on the ship and then some deserted. Those who stayed were promised more money if they did what they were originally supposed to do (past consideration). Could not then force the captain to pay them more (old contract).

Vs

Williams v Roffey Brothers (1989) (Court of Appeal) – promise to pay the workers more if they stuck to contract terms they had already agreed to before. This time, the workers could enforce that promise.

– No official reversal of Stilk v Myrick, which is still valid law. We say that Williams is an exception when there is a «factual benefit» for the promisee that the work be completed (artificial consideration)

Judge made law – challenges 3

Bishopsgate Investment Management v Homan (Trusts Law):

- Background: tracing in trusts means following the property even if it changes form: house put on trust, sold, follow money into bank account, money buys painting, painting sold at auction.
- Careful: follow the line of property, not the actual house. The beneficiary may want the money.
- *Bishopsgate* (1994): pension money held on trust was put into overdrawn accounts of employer company (so it vanished). Company became insolvent. The beneficiaries wanted to put an equitable charge on the money and thus take priority over the unsecured creditors of the employer, the owner of the accounts.
- Question: is backwards tracing possible? So the money has vanished but we still put a charge on it
- One judge said impossible, the other judge said maybe, the third agreed with both…
- Result: "*the answer seems to be no*". Point of the story: **the law is unclear**.
- But careful – principle that "*a case is only authority for what it actually decides*"

Statutory intervention in Common Law - examples

1) Negligence

- Under common law – if there was an accident caused by the negligence of one party (usually employer/factory owner), if there was the slightest contributory negligence on the part of the victim/worker, the latter had no claim at all.
- Parliament intervened by statute to regulate that small area of the law
- Contributory Negligence Act 1945 – the Act of Parliament which stipulates that the amount of damages awarded to the victim has to be lowered to reflect the contributory negligence of the victim, but they still have a claim against the tortfeasor.

2) Rights of third parties

- Contract Law (Rights of Third Parties) Act 1999 – Act of Parliament to make sure third parties can claim on a contract they are not a party to if they are named and can benefit from it.

Statutory intervention - issues

- Under UK Law, international conventions and treaties have to be brought home by an Act of Parliament (see previously)
    - Eg. Human Rights Act 1998, European Communities Act 1972
- Problem with *lex posteriori* that can repeal former Acts of Parliament (see sovereignty of Parliament)
- In 2012, students were taught defamation law (tort) under common law, now they are taught under the Defamation Act 2013 which wiped out most of the pre-exisiting legal work
- Comment – UK system very careful with Acts of Parliament because they still prefer the adaptable and down to earth approach of cases judged on a case-by-case basis based on reasonableness. And it is much easier to reverse a judgment than to repeal an Act of Parliament.

Statutory Interpretation

- Methods of interpretation
  - Literal Rule (UK) = textual (US) – looking at the actual language of the Statute first. The idea is that if Parliament had wanted to say something, they would have
  - Golden Rule – allows the judges to take the literal meaning of the statute but if the decision will lead to an absurd outcome then the judge will intervene to use their common sense and discretion to make the judgment
  - Mischief Rule – usually used to determine what Parliament meant by creating the Act.
  - Judges can also look at explanatory notes to the statute to try and help their understanding

- The Human Rights Act requires judges to interpret statutes in accordance with the European Convention on Human Rights 1950, otherwise the judge has to issue a declaration of incompatibility. Judges do not like this because of sovereignty of Parliament.