CONSTITUTIONAL & ADMINISTRATIVE Q&As

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Chapter 2 - The Characteristics of a Constitution

Essay Question 1

The constitution is a necessary requirement in every state. It is the document that the Government draws its power and gives legitimacy to its actions. Discuss

Answer

Introduction

This question calls for an assessment of the unique situation in countries without a written constitution. The following discussion will focus on the widely debated unwritten constitution of the UK. The advantages and disadvantages of such a constitution will be evaluated and arguments will be made to determine whether or not there is a need for a written constitution in the UK.

According to **Professor K C Wheare** a constitution is "the whole system of government of a country, the collection f rules which establish and regulate or govern the government." **Thomas Paine's** view on the constitution reveals more complex ideas as according to him "…a government without a constitution is a power without right...A constitution is a thing antecedent to a government; and a government is only the creature of a constitution." A constitution therefore establishes the rules providing for the powers, functions and limits of the three organs of the government (that is, the legislative, executive, and judiciary), the fundamental rights of citizens as well as the relationship between the government and citizens. In many countries these rules are stated in a single document. In the UK however, the constitution is derived from many written and unwritten sources that are both legal and non-legal. It is therefore more accurate to term the British constitution uncodified.

In order to understand why UK does not have a codified constitution, it is necessary to understand UK's historical, legal, and political landscape, that despite having gradually evolved over centuries, has not actually experienced a sudden drastic change or

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break. For example, Malaysia has a codified constitution because it was given independence by the British in 1957 to become an independent state and The United States of America went through a revolution during the 18th century. Although there have been significant cataclysmic events in the British history such as the 17th century English civil war, these happened almost a century before the idea of a written constitution began to seriously take form in the late 18th century. By then, UK was well past the major changes and Parliament sovereignty was established so any new changes that occurred were easily dealt with acts of Parliament.

One of the main advantages an uncodified constitution offers is flexibility. With an uncodified constitution, it is easy for the legislators to make and unmake laws of constitutional importance. In the UK there is no special procedure to repeal or amend statutes of constitutional importance other than getting a simple majority in Parliament. For example, in the UK, the landmark case of **Somersett** aided by a well-organized abolitionist movement ended the practice of owning slaves in England and contributed to Parliament enacting the Slavery Abolition Act in 1833. In the words of **Hillaire Barnett**, "In the UK, constitutional changes can be brought about with the minimum of constitutional fuss." In contrast, countries with a written constitution have to jump through several hoops before amendments to the constitution can be made. For example in Malaysia, amendments to the Federal Constitution require a 2/3 majority in the 'Dewan Rakyat' (House of Commons). In addition, if the matter has to do with the national religion of Islam and the special position of Malays there is a further requirement where approval from the Council of Malay Rulers must be sought. This point can be viewed differently in that the whole idea of a codified constitution in the case of UK may be against the model of democratic representation. Democracy dictates that the contending parties put out their wares for the public's perusal and eventual choice during elections. If the majority agrees to a particular party's election manifesto and the party forms the new executive then in the name of democracy, it must be allowed to carry out its election promises with minimal fuss. However, with a codified constitution, only a constitutional amendment may allow certain policies to be implemented and this is just a tedious process as mentioned above.

Another merit of an uncodified constitution is the sovereignty of Parliament. The UK Parliament is the sole legislative body and cannot be bound by its predecessors nor can it bind its successors. However, in countries with a written constitution, there is usually a constitutional court that will decide on the validity of government policies and legislation. This will inevitably lead to the judiciary being dragged into matters pertaining politics. A clear example of this is the case of **Roe v Wade** which is a landmark decision legalising abortion. The United States Supreme Court held that abortion was protected under the 14th Amendment. Other than the obvious issue of abortion, this decision also fuelled debates regarding the lines (or lack thereof) between constitutional adjudication and legislating. Another instance would be the **Dred Scott** decision in the United States Supreme Court. The court here held that slaves were too inferior to have any rights that the "white man" had to respect. Ultimately this resulted in the Missouri Compromise, which banned slavery in the Northern territories of the 36°30' parallel, being overturned. The crux of the matter is simply that judges are not elected by the people the way ministers are and cannot be said to truly represent the people. Therefore, there is no reason that they should act in the capacity of legislators. However, in the current times of constitutional upheaval in UK in regards to the independence of Scotland (referendum in 2014) it is suggested by John Drummond that the point should be shifting sovereignty to the people and not Parliament.

The current chairman of the Constitutional Commission pressure group, John Drummond heavily credits the Thatcher government for truly exposing the constitution as a convenient arrangement for the exercise of power.

As mentioned briefly earlier, the arbitrary protection of citizen rights is another flaw in having an uncodified constitution. This is because the rights of the citizens are not entrenched in a Constitution. Instead it exists in the form of a statutory act (Human Rights Act 1998) that can be very easily repealed by a simple majority n Parliament. According to **A.V. Dicey** the rule of law is the best protector of fundamental rights and a Bill of Rights is unnecessary so long as there are courts. This coupled with Parliament's legislative power constitute UK's fundamental rights. This is illustrated by the case of **Entick v Carrington**. In this

particular case, the King's Chef Messenger was ordered by the Secretary of State to search Entick's residence by force. Entick was suspected of writing and publishing seditious material. Entick sued for trespass. The court held that the Secretary of State had no right under statutory or common law to issue a warrant for search and found in favour of Entick. It is argued that while A. V. Dicey is right to a certain extent, his point on courts upholding citizens' rights does not always hold true. For example, in the case of **Malone v MPC**, the police tapped Malone's phones on the authority of a warrant issued by the Home Secretary. Malone sued the police for a violation to his right of privacy. The court held that there was no such right under English law (this was prior to the HRA 1998). More recently this year after the Snowden revelations showed that British intelligence GCHQ has secretly gained access to the network of cables which carry the world's phone calls and internet traffic and has started to process vast streams of sensitive personal information which it is sharing with its American partner, the National Security Agency (NSA). Although still under investigation, the allegations if true, reveal the extent to which rights in the UK are arbitrarily protected, or as John Drummonds puts it, depending on the government of the day. It can be counter-argued however, that the existence of an entrenched document does not guarantee a protection of human rights and to think so is to be overly optimistic. Countries such as Somalia have a written constitution but cannot be said to uphold the rights of its citizens by any means. A written constitution is only as valuable as the government of the day deems it to be. Without political will it is merely a litany of words with little meaning.

When weighing the pros and cons listed above in relevance to the UK particularly, it must be highlighted that the issue is rather complex and is not limited to two polar options of codifying or not codifying. According to Rodney Brazier, there are four options to be considered when evaluating the need for codification. The most conservative course of action will naturally be to allow the gradual evolution of the constitution by building on existing laws and conventions as it is currently and historically. This method is reactive and is applied as and when needed. At the other extreme is to put in place a complete codification of rules that will result in a proper codified constitution in a single document. However, a less considered option situated between the extremes exist. One option

is to consolidate the Labour Governments efforts in constitutional reform of the UK's uncodified constitution has been developed over time to become one of the most successful governing systems in the world as evidenced by its political stability and efficient executive, legislative and judiciary systems in place. It is dynamic due to the flexibility accorded by an uncodified constitution and this has enabled it to grow and change bit by bit. It has its fair share of faults but then again, so does every system. The UK has a system that works well despite these flaws and its long history is proof enough that this is a system that rectifies itself before it becomes too inefficient or unjust. Furthermore, codification of the UK constitution is a task of unimaginable magnitude and will consume a lot of time and money that I dare say, is rather unnecessary in the current situation. The only matter with any sense of urgency is regarding the rights of UK citizens, as any country that is truly democratic will ensure its citizens' rights are always protected. However, in my opinion having an entrenched Bill of Rights, without codifying the entire constitution, is a satisfactory solution. I disagree however, with the notion that what isn't broken should not be fixed. The point being that it is far from prudent to what for a cracked glass to shatter before anything done. However, in developing the constitution, a slow evolution is better than radical changes.

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Chapter 3 –The Nature and Sources of the UK Constitution

Essay Question 1

With regards to Sources of the British Constitution, please describe those most peculiar to the UK in their non-legal nature, and the extent to which they are used.

Answer

Introduction: Background

A constitution can straightforwardly be defined as, the body of rules and arrangements that regulates the government of a country. Lawyers in the United States of America can access their constitution in a single document in which the rules of governance lie catalogued. To further understand his constitution he must look to law reports where the Supreme Court has given substance to the meaning of rules through it decisions. **Marshall & Moddie** say finally to grasp a more informed understanding, a lawyer will also have to examine non-legal rules which are set on the constitution to fill in the gaps.[1] The use of a written constitution in any civilised society is to ensure a balance of rights, awareness, and authority. A constitutional lawyer in the United Kingdom faces a more cumbersome task of hunting for our unwritten constitution in a number of places and forms. **Rodney Brazier** say he will have to look in legislation, case law, European community law, non-legal rules, statements about the royal prerogative, practises of parliament, and internal rules of political parties.[2] For the British constitutional lawyer matters are less clear-cut and uncertainty exists as to precisely which one of these forms has constitutional importance. The only realistic approach he could take is to consult literature on the constitution by authoritative writers, this however is a subordinate source, and it can be appropriate to use as a last resort.

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[1] G. Marshall & G.C. Moddie, *Some Problems of the Constitution*, 5th edn., 1971,London: Hutchinson, p. 13-14

[2] Rodney Brazier, *Constitutional Reform*, 2nd edn., 1998, Oxford: OUP, p. 2.

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Non-legal rules: constitutional conventions

A major difficulty surrounds constitutional lawyers in reference to non-legal rules of constitutions. The non-legal rules termed conventions, are defined by **AV Dicey** as *'…understandings, habits, or practices which,…regulate the conduct of the several members of the sovereign power, of the Ministry, or of other officials…'*[3] Conventions in reality are not seen as laws, the lack of legal substance detach conventions from law courts, hence, they are of no concern to courts and lawyers. **AV Dicey** put it 'As a lawyer I find these matters to high for me.'[4]. Although conventions are not enforceable in courts, they have demanded recognition. In a case concerning the publication of dead minister's memoirs, in a newspaper, the breach of convention was distinguished as a line of persuasion, but could not be seen be the court as a binding authority.[5] **Marshall & Moddie** say once having recognized the role of conventions, a lawyer of the British Constitution, further faces the job locating the documentation of these rules, those can be found in the preamble to the relevant Act, reports of the imperial conferences or the conferences of the Prime Minister, where these rules, are officially decided and documented.[6]

What amounts to a constitutional convention?

As way of a starting point, conventions according to **AV Dicey** are defined as: *"…conventions, understandings, habits or practices which, though they may regulate the conduct of the several members of the sovereign power…are not really laws at all since they are not enforced by the courts. This portion of constitutional law may, for the sake of distinction, be termed the 'conventions of the constitution', or constitutional morality…*" This definition concentrates on what conventions are supposed to achieve.

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[3] Dicey, A.V., *Introduction to the Study of the Law of the Constitution*, 10th edn., 1959, London: Macmillan, p. 24
[4] *Ibid*. p.21
[5] *Attorney-General v. Jonathan Cape Ltd* [1976] QB 752
[6] Marshall, G. & Moodie, G.C., S*ome Problems of the Constitution,* 5th edn., 1971, London: Hutchinson, p. 25

However, this view is not entirely accurate and it is important that conventions are distinguished from mere habits and practices. Conventions are conceptually different from habits or practices in that these concepts do not prescribe or dictate what ought to happen but are merely descriptive of what in fact does happen. A Further definition of the purpose of conventions was given by **Sir Ivor Jennings** as: "*The short explanation of the constitutional conventions is that they provide the flesh that clothes the dry bones of the law; they make the legal constitution work; they keep it in touch with the growth of ideas*." To that end, it is a characteristic of constitutions in general that they contain some areas which are governed by conventions, rather than by strict law. However a simplistic characterization of constitutional conventions, moreover, for discussion purposes regarding this quandary, **Fenwick's,** definition seems to be most appropriate, Fenwick stated: "*Conventions may be roughly defined as non-legal, generally agreed rules about how government should be conducted and, in particular, governing the relations between different organs of government*".

Example of Constitutional convention: Collective ministerial responsibility

A constitutional convention exists in the doctrine of collective ministerial responsibility. **Tomkins, A** describes this convention as: *"The convention of collective responsibility means that all ministers in the government must accept responsibility for the policies, decisions, and actions of the government, even if they did not personally develop or take them, and even if they personally disagree with them."* This convention forces an obligation on all ministers of the government to support and defend government policy. It is expected that ministers 'speak in one voice' and to adopt a position of collective responsibility. The purpose of this convention is to give an impression of government unity, moreover, to give the public confidence in their policies. Ministers are not expected to be outspokenly critical of government policy. Ministers who find a particular policy unacceptable should resign from office.[7]

[7] An example of this occurred over the Iraq War in 2003. Foreign Secretary Robin Cook resigned after failing to accept collective

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Duty of confidentiality

Another facet of collective responsibility is namely, that all ministers owe their cabinet colleagues a duty of confidentiality. It is a conventional obligation for ministers to keep what's debated or argued within the cabinet, '*in house'*. To break this confidentiality obligation would seriously undermine the unanimity rule and also inhibit Ministers from speaking their minds. This rule is generally seems to be abided, however press reports of cabinet discussions are published with sufficient regularity, suggesting that in practice in tends to be overlooked by some ministers. A more controversial issue is whether this confidentiality obligation should be maintained following a minister's departure from the cabinet. Furthermore, if so, for how long and how stringently should this obligation be adhered to? This predicament came before a court of law in ***Attorney General v Johnathan Cape Ltd and Others***[8] popularly known as the *Crossman Diaries* case.

Attorney-General v Jonathan Cape Ltd and Others

The question before the court in this case was; whether or not the courts would enforce the convention of cabinet secrecy? In this case, Crossman who was a member of the cabinet between 1964 and 1970 kept a detailed account of cabinet government in operation, in the form of a comprehensive diary. His intention was to publish his accounts, subsequent to his retirement. However, sadly Crossman died prematurely; however, his wife decided to continue in his legacy and publish the diaries. After publications appeared in the tabloids, the government sought an injunction preventing further publications. The Government argued that the courts should seek to preserve the confidentiality of governmental affairs. Crossman's publishers argued that the doctrine of cabinet confidentiality was merely a moral obligation, which ministers

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responsibility for the decision to commit Britain to military action in Iraq without international agreement or domestic support. Mr Cook could not back the governmental stance regarding the war with Iraq. Furthermore, he publicly criticised the government's involvement in the campaign. With this in mind, conventional rules demanded his resignation.

[8] [1976] QB 752

could regard or disregard according to their own ethics. To that end, in this case, **Lord Widgery CJ**, did not find history a beneficial guide, as per **Lord Widgery**: *"I find overwhelming evidence that the doctrine of joint responsibility is generally understood and practiced, and equally strong evidence that it is on occasion ignored".*

Lord Widgery went on to deliver a somewhat perplexing judgement. Firstly he accepted that ministers owed each other a legally enforceable duty of confidentiality. However this duty did not derive from the convention turning into law. It was created by 'stretching' the existing common law parameters. However, in this case it was held that due to the lapse in time, the material had lost its confidential quality. Technically, this case was not an example of a court enforcing a convention, but accepting that a convention was coincidentally underpinned by existing common law rules. In functionalist terms, it could be argued that the courts enforced a convention by cloaking it with a common law label. In addition this case is not the only example of conventions being taken into account by the courts. In **Liversidge v Anderson and Carltona Ltd v Commissioner of Works**,[9] the courts supported the refusal to review the grounds on which executive discretionary powers had been exercised on the basis that a minister is responsible to parliament for the exercise of his power. In light of this, the relationship between law and convention is brought to the forefront. Furthermore, it is now possible to consider whether conventions can crystallise into laws, or indeed whether this would be of any benefit.

Can conventions be legally binding?

In theory all conventional rules of the constitution could be enacted in legal form by parliament. Moreover, there have been times when constitutional conventions have been given legal status. An example of a conventional rule attaining legal status occurred following a breach of convention by the House of Lords between 1908 and 1910. One major conventional rule regulated the relationship between the House of Lords and the House of Commons in legislative matters and most particularly in financial

[9] [1943] 2 All ER 560

matters: namely that the Lords would ultimately give way to the will of the commons. This convention broke down in 1908, when the House of Lords rejected the finance bill of the Commons. After a deadlock, the government responded to this and introduced the Parliament Act 1911. The act set the prior convention in legal stone and provided that the House of Lords would no longer enjoy equal powers to approve or reject legislative proposals and that its power would be restricted to a power to delay legislation subject to strict time limits. To that end, it can hereby be seen that where a breach of a convention is deemed sufficiently severe, parliament can, in the exercise of its sovereign supremacy, change a convention into a legal rule.

Conclusion

Having now established that constitutional conventions can be placed on a statutory basis, several questions start to arise. If conventions are binding why not codify them? Or conversely, if conventions are obeyed why bother to codify them? The answer to both questions respectively ultimately lies in ascertaining whether or not there would be any great advantage in codifying constitutional conventions.

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Chapter 4 - The Separation of Powers

Essay Question 1

Is there a fair balance between judicial responsibilities in the way the courts interpret law to produce the right outcome and the separation of powers in that the legislature is the only body allowed to make law.

Answer

This paper will determine if there is a fair balance between judicial responsibilities in the way the courts interpret law to produce the right outcome and the separation of powers in that the legislature is the only body allowed to make law. It will first argue the point that legislation is most appropriate because the court can overlook or misapply the law. Second it will argue using case law we should have a formalist rule of law. It will look at case to show that the rule of law and separation of powers collectively control discretion and arbitrary power. Lastly the paper will show how human right are protected through both the judiciary and legislature.

Barendt argues if all three branches of government (judicial, legislative and executive) rest in one body without checks and balances this can be can be tyrannical. The courts can overlook a law or discriminatingly apply laws against certain groups or individuals.[10] One example is **Mandla v Dowell-Lee**.[11] In this case a school had refused to admit a Sikh student because he had a turban. The school denied that being a Sikh was a membership of a racial or ethnic group. Lord Denning dissented and held this case should not have been perused. The decision classed Sikhs as not being "ethnic". Lord Denning remarks sparked protests, including a demonstration where thousands of Sikhs participated in Hyde Park. Ministers were forced to intervene and declare that if the House of Lords did not correct the Court of Appeal ruling they would legislate to remedy the problem. Craig thus argues the judgements of the courts are starting to resemble those of

[10] Barendt, "Separation of Powers and Constitutional Government" [1995] *Public Law* 599
[11] [1983] UKHL 7

politicians and administrators and violated the separation of powers.[12]

Unger argued that the formalist rule of law was a way of legitimising rules of law that preserved inequality in society.[13] The formal rules of law cannot be sustained in post-liberal society where the state needs to intervene in more and more areas of life and therefore laws have to be left unclear so as to permit the government to intervene in as many ways possible, and therefore the judiciary are left to interpret laws through purposive reasoning, taking into account the intended aims of the legislation, the perfect evidence of which is the **Pepper (Inspector of Taxes) v Hart**[14] ruling.

If judges proceed as they think fit they are participating in a legislative function, which violates the separation of powers.[15] Lord Reid stated: *"To apply the words literally is to defeat the obvious intent of the legislature. To achieve the intent and produce a reasonable result we must do some violence to the words".*[16] However, Kavanagh argues legal certainty requires that we apply the law as it is written form and do not look for some "wider meaning".[17] One example was the interpretation of the Restriction of Offensive Weapons Act 1959 in **Fisher v. Bell**.[18] The decision was so unwelcomed by Parliament that they overruled it by statute the same year. In **Burmah Oil v Lord Advocate**[19] the judiciary held the UK government was accountable for damages for destroying oil fields during war. Parliament responded by legislating the War Damages Act 1965 to avoid the liability bestowed on them by the judiciary. In **Anisminic Ltd. v. Foreign**

[12] Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] PL 467
[13] Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] PL 467
[14] [1992] UKHL 3
[15] Verkuil, Paul R., "Separation of Powers, the Rule of Law and the Idea of Independence" [1988] *Wm. & Mary L. Rev.* Vol 30, 301.
[16] **Luke v. Inland Revenue Commissioners** [1963] A.C. 557 at p. 577
[17] Kavanagh "Pepper v Hart and Matters of Constitutional Principle" [2005] 121 LQR 98
[18] [1961] 1 QB 394
[19] [1965] AC 75

Compensation Commission,[20] a statute prevented *"decisions"* of the Commission from being *"called in question in any court"*. Despite parliament's intention the court held the decision was ultra vires, and void. This demonstrates the courts are free to proceed as they think fit and check the lawfulness of decisions. We can conclude that parliamentary sovereignty is dependent on the judiciary's acquiescence of Parliamentary power.

Raz says that through the rule of law, laws should be prospective, open, certain and capable of guiding human conduct.[21] However these formal rules do not guarantee that laws suiting the needs of the people will actually be met and should be balanced against society's other needs. Others prefer a more substantive doctrine including conformity to human rights. Under s.3 Human Rights Act 1998 the courts obligation is to interpret all domestic legislation with Convention rights *'so far as it is possible to do so'*.[22] This is a teleological method of interpretation, where the spirit of the Treaties is given effect to.[23] If the court feels unable to interpret in this way a declaration of incompatibility under section 4 of the 1998 Act is made. This provision reasserts parliament has the final say.

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[20] [1969] 2 AC 147
[21] Raz, Joseph, "The Politics of the Rule of Law" (1990) Ratio Juris 3, No: 3, 331-339.
[22] s.3 Human Rights Act 1998
[23] Brown, L.N. and Kennedy, T. *The Court of Justice of the European Communities*, 4Ed., London: Sweet & Maxwell, 1994

Chapter 5 - The Rule of Law

Essay Question 1

With reference to relevant case law, evaluate the extent to which the UK judiciary has demonstrated a willingness to uphold the requirements of the rule of law.

Answer

The definition of Rule of Law is highly debated by academics. This essay will explain the main theories of the Rule of Law and it will analyse what avenues are available to the UK courts to uphold it and how they have dealt with past cases. It will also deal with the closely related issue of separation of powers as it is highly relevant to the control of discretion of both the executive and the judiciary.

Theories of the Rule of law

There are several well-known theories on the rule of law; however, one of the most popular is Dicey's theory. His theory is about the equality of the rules that are enforced by the courts on people. It includes some important principles, which were very influential in the nineteenth century. Such as the official's decisions can be challenged in courts and that the law determines how much power they have or it gives them[24]. Dicey set out three important principles: 1) the absolute supremacy of regular law. Here, Dicey says that if an official has no backing of a specific law, he cannot interfere with another's rights as they are merely agents of the state. Dicey believed that government should not have wide discretionary powers; he argued that it is crucial to have limits and controls over exercising it. This can be said to be exercised to some extent by the court's powers of judicial review. He thought that punishment should only be through the courts and no other way. However, this is not the case today as other bodies such as local authorities have the power to punish in ways such as issuing

[24] Cavers, David F. "A Critique of the Choice-of-law Problem." *Harvard Law Review* (1933): 173-208.

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fines[25]. 2) Equality before the law – every man is subject to the law of the realm. Dicey believed that no one is above the law and no man including and especially government officials should have any immunity from the courts. He did not mean that officials do not have special powers because this would be untrue, he meant that no matter whom it is, from the prime minister down, they are no different from any other citizen and should be held responsible for their actions without any legal justifications. 3) No higher law other than the rights of individuals as determined through the courts[26]. However, the third tenant of his theory can be criticised on the basis that today we have the HRA in the UK and therefore the courts do not create the fundamental rights[27]. In most countries, the courts only apply the constitution and it does not result from it.

There are, however other theories of the rule of law. Raz believes that the rule of law should be seen in formal terms, which means that the law should be prospective, stable, open, general and clear. There should be access to courts, as well as independent judiciary[28]. His theory was for the rule of law to enable people to plan their lives. He was not concerned with the substance of the law, but the form in which it is enacted. This leads to the paradox of a dictatorship being compliant with the Rule of Law as long as the laws are enacted following the correct procedure and present certain characteristics given that the content is irrelevant[29].

Dworkin agrees with the formal conception of the rule of law, however, he had two different conceptions of the rule of law. The 'rule book' conception is based on the idea that government power should be exercised against individuals only if it is in accordance with previously set rules that are available to all [30]. The second conception is the 'rights' conception, where he argues that citizens

[25] Jennings, Ivor. *The British Constitution*. CUP Archive, 1967.
[26] Dicey, Albert Venn. *Introduction to the Study of the Law of the Constitution*. Macmillan, 1897
[27] Kavanagh, Aileen. *Constitutional Review under the UK Human Rights Act*. Cambridge University Press, 2009.
[28] Raz, Joseph. "The rule of law and its virtue." (1977).
[29] Hart, *The concept of law*. Oxford University Press, 2012.
[30] Dworkin, Ronald. *Taking rights seriously*. Harvard University Press, 1978.

should have moral rights and duties to one another, and political rights against the state, so the courts through the demand of citizens can enforce them[31]. Due to this conception being concerned with the moral rights of individuals and the public conception of individual rights, it can be said that Dworkin's conception of the rule of law as a whole is concerned with both form and substance.

Lord Bingham in reiterated the same approach in his work "The Rule of Law'. He lists eight factors which are core to the rule of law and it is evident that they combine both procedural and substantive aspects of the law, in line with Dworkin's approach[32]. The factors identified by Lord Bingham are: the law must be as easy as possible to get access to and predict; the exercise of discretion should not resolve any questions of liability, but only by the exercise of law; the law should be applied equally to everyone; ministers and public officials have been given granted a benefit, therefore, they must use it to exercise power in good faith and fairly to everyone without exceeding their limits and reasonably; fundamental human rights must be protected by the law; if parties cannot resolve any dispute the state must find a way to do so; the procedure used by the judges to make decisions must be fair; the state should comply with the ROL not only on a national level but also internationally[33].

Due to the comprehensiveness of Dworkin's and Lord Bingham's theories, it is submitted that the Rule of Law is not only formal but also substantive. The enactment of the ECHR and the HRA 1998 in the United Kingdom clearly proves that the rule of law is also about the substance of fundamental rights, which the courts are required to enforce.[34]

Unwritten constitution v written constitution

[31] Dworkin, Ronald. *POLITICAL JUDGES AND THE RULE OF-LAW*. 1979.
[32] Bingham, Lord. "The rule of law." *The Cambridge Law Journal* 66.01 (2007): 67-85.
[33] Bingham, Tom. *The rule of law*. Penguin UK, 2011.
[34] Ewing, Keith D. "The Human Rights Act and Parliamentary Democracy." *The Modern Law Review* 62.1 (1999): 79-99.

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In most countries the system of checks and balances is unlikely to change because it is a constitutional document, which is protected by a special procedure. For example, in the United States, the court can avoid a law passed by the congress if they believe it is inconsistent. Furthermore, even if the president nominates the Supreme court judges, they are appointed by the congress[35].

However, this is slightly different in the UK because there is no written constitution. In the case of *Thoburn v Sunderland City Council*[36] it was clear that some Acts have been recognised as having constitutional status, which in this case was the European communities Act 1972. It was held that constitutional statutes could not be reversed unless they were express words to that degree in the statute, unlike ordinary statutes, which could be reversed by later clashing with Parliamentary statutes.

Rule of Law v. Separation of Powers, in particular judicial independence

The rule of law and separation of powers together are a way of controlling arbitrary power and discretion. Firstly, even though there is no absolute doctrine of separation of powers it may be too vague to say that there is no separation of powers in the UK[37]. There are many different statutes that support the idea of separation of powers in the UK, in particular with regard to judicial independence, such as tenure - provided for judicial security of tenure; immunity – judges cannot be sued; open courts – 'justice must be seen to be done'; political independence and judicial appointments. In The Court Act 1981 it is stated that judges could be removed from position by Parliament but this is not so the case with the government. The Act of settlement 1700 further supports the independence of the judiciary. The existence of such Acts since 1700 shows that Judicial independence and

[35] Marshall, Thurgood. "Reflections on the bicentennial of the United States Constitution." *Harv. L. Rev.* 101 (1987): 1.
[36] [2002] EWHC 195 (Admin)

[37] Verkuil, Paul R. "Separation of Powers, the Rule of Law and the Idea of Independence." *Wm. & Mary L. Rev.* 30 (1988): 301.

separation of powers have existed for a long time. Another important role is in article 6 of the European Convention on Human Rights which protects the rights to a fair trial[38].

However, some cases such as *Shaw v DPP*[39] seem to suggest that the judiciary makes new law in contrast with the principle of separation of powers. Here the appellant was charging both the prostitutes and the customers a fee for publishing the prostitutes contact details as well as the services they offer and nude pictures. The court held that he was living on the earnings of prostitution and because of that he was convicted of corrupting public morals, as well as an offence under the Obscene Publications Act 1959[40]. He appealed arguing that no offence such of conspiracy to corrupt public morals exists. He was unsuccessful with his appeal as the House of Lords dismissed it and created a new crime. Another example is seen in the case of *R v R* where a man was charged with the attempted rape of his wife. Although the couple were separated for a long time, they were not divorced. The House of Lords overturned the exceptions of rape and changed the law.

In the case of *Burmah Oil v Lord Advocate*[41], the judges decided that the UK government was liable for damages committed during the war. Parliament then passed the War Damages Act 1965 in response to the judgement, to avoid the effect of the new law created by the judiciary. Looking at these given examples it could be concluded that even though the courts sometimes make new laws, parliament is always ultimately liable and therefore this does not defeat separation of powers. The separation of the judiciary from the other branches may therefore not be necessary.

How the courts ensure compliance with the rule of law

Even prior to when the HRA 1998 came into force, the courts

[38] Woodhouse, Diana. "United Kingdom The Constitutional Reform Act 2005—defending judicial independence the English way." *International Journal of Constitutional Law* 5.1 (2007): 153-165.
[39] [1962] AC 220
[40] Edwards, S. S. M. "On the contemporary application of the Obscene Publications Act 1959." *Criminal Law Review* (1998): 843-853.
[41] [1965] AC 75

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made it clear through the principle of legality, that the statutes would conform to fundamental rights[42]. This means that fundamental rights could not be overridden by general words and parliament would have to state clearly in the legislation if they intend to limit fundamental rights.

In perhaps one of the most popular modern day cases of *M v Home Office*[43], it is clear that everyone including government ministers are required by the ROL to accept and obey the courts orders. Here, M was to be deported, however, this was not to happen until the hearing of the appeal, which the Home Secretary agreed to. M was deported. The Court ordered for M to be taken off the plane and brought back when it stopped in Paris. Despite the Courts order, the Home Secretary did not feel an obligation to do so and thus M was not taken off the plane. It was held that the Home Secretary had disrespected the Court and was held in contempt of it but no punishment was imposed.

The court might read a statute down in accordance to the Human Rights Act 1998 if the particular statute breaks the terms from the European Convention on Human Rights. If the court felt unable to do so according to section 3 of the HRA 1998, they could issue a declaration of incompatibility under section 4 of the HRA, which would then be sent to Parliament to be reconsidered.

In the case of *A V Secretary for the Home Department*[44] 10 men considered to be a threat to national security by Special Immigration Appeals Commission were ordered to leave the country. They appealed (as they have a legal right to) and argued that in section 23 of the antiterrorism, crime and security act (ACSA) 2001 to detain foreign terror suspects was definitely incompatible with the articles of the ECHR. Their Lordships agreed and issued a declaration of incompatibility, under section 4 of the Human Rights Act 1998. Parliament then replaced the ACSA 2001 with the Prevention of Terrorism Act 2005 that allows anyone no matter his or her nationality to be detained.

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[42] Jowell, Jeffrey, "The rule of law and its underlying values" *The changing constitution* 6 (2007): 5-23.
[43] [1994] 1 AC 377
[44] [2004] UKHL 56

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The case above shows that under the doctrine of Parliamentary sovereignty, Parliament always retains the last word on the legality of an Act[45]. New laws can always be passed to make what was legal, illegal, and nobody, including courts has the power to invalidate these Acts of Parliament. However, in the case of *R (on the application of Jackson) v Attorney General*[46] it has been argued that section 3 and 4 of the HRA 1998 may have affected and questioned how absolute Parliamentary sovereignty is.

We could at present maintain that the courts overall have significant interpretive procedures available to them to guarantee that legislation neglecting to meet the requirements of the rule of law set out above are hardly constructed in favour of the individual.

If the provision that fails to comply with the rule of law is something other than a statute, the courts will have nothing preventing them from invalidating other measures, whether they take the form of delegated legislation, individual ministerial decisions, acts of local authorities or decisions of agencies. The courts use judicial review to invalidate any measure that does not comply with the rule of law[47].

Further, in *Council for the Civil Service Unions v Minister for the Civil Service [GCHQ]*[48], the House of Lords held that executive action is not immune from judicial review even when carried out in pursuant of a power derived from the royal prerogative. However, in this specific case the court had no jurisdiction to review the order as national security, the ground on which the prerogative order relied, was considered to be unjusticiable.

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[45] Forsyth, Christopher. "Of fig leaves and fairy tales: the ultra vires doctrine, the sovereignty of Parliament and judicial review." *The Cambridge Law Journal* 55.01 (1996): 122-140.
[46] [2005] UKHL 56
[47] Salzberger, Eli, and Paul Fenn. "Judicial independence: Some evidence from the English Court of Appeal." *The Journal of Law and Economics* 42.2 (1999): 831-847.
[48] [1983] UKHL 6

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Conclusion

This essay has first analysed the definitions given by various academics of the Rule of Law and has argued that Dworkin's and Lord Bingham's formal and substantial approach to it is the most appropriate to explain the doctrine as applied to modern time taking into consideration the ECHR and the HRA 1998. It has further analysed the tools available to the court both prior and after the enactment of the HRA 1998 to uphold the requirements of the Rule of Law. Prior to the HRA 1998, the court used the principle of legality to create a hardly rebuttable presumption against the breach of fundamental rights. In fact, only expressed words in a statute could override fundamental rights, and the reading of the law, as far as possible, was to uphold those rights. After the enactment of the HRA 1998, the English courts were given an additional tool to enforce fundamental rights, namely the power to issue a declaration of incompatibility under s 4 of the HRA 1998. This essay has presented case law illustrating the applicability of various tools. Further, the courts have a power of judicial review to annul executive actions in breach of fundamental rights. The English court has shown a great willingness to use the tools available to it to uphold the requirements of the Rule of Law. However, this essay has also shown that, due to the doctrine of Parliamentary Sovereignty, the English Parliament retains the final say and can override judicial findings of incompatibility by enacting later legislation as it was the case in *A V Secretary for the Home Department.*

Endnote

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