

# Contents

<i>Preface to the Sixth Edition</i>	v
<i>Table of Legislation</i>	xxi
<i>Table of Treaties and Conventions</i>	xxvii
<i>List of Cases</i>	xxix

## Part One Theoretical Principles

<b>1 Defining the Constitution?</b>	3
I. The meaning(s) of 'democracy'?	4
What is democratic governance? Some hypothetical examples	5
A constitution as a social and political contract?	7
II. The first 'modern' constitution?	9
The problem—majoritarianism	10
The solutions—representative government, federalism, a separation of powers, and supra-legislative 'fundamental' rights	10
Conclusion	19
Suggested further reading	20
Academic and political commentary	20
Case law and legislation	20
<b>2 Parliamentary Sovereignty</b>	21
Pre-1688—natural or divine law	21
The Diceyan (or orthodox) theory	22
The political source of parliamentary sovereignty—the 'glorious revolution'	24
I. Legal authority for the principle of parliamentary sovereignty	29
Substance or procedure? the enrolled Bill rule	30
The doctrine of implied repeal	31
Inconsistency with international law	32
II. Entrenching legislation—challenges to the orthodox position	34
Jennings' critique and the 'rule of recognition'	35
Is parliamentary sovereignty a British or English concept?	43
Women's enfranchisement	46
Conclusion	48
Suggested further reading	49
Academic and political commentary	49
Case law and legislation	49
<b>3 The Rule of Law and the Separation of Powers</b>	50
I. The Diceyan perspective: the rule of law in the pre-welfare state	50
<i>Entick v Carrington</i> (1765)	52



Dicey's rule of law—process or substance?	53
The 'independence of the judiciary'	54
II. The rule of law in the welfare state	56
<i>Hayek</i> —the road to serfdom	57
<i>Jones</i> —the rule of law in the welfare state	57
'Red light' and 'green light' theories	59
III. Judicial regulation of government behaviour: the constitutional rationale	59
IV. Principles of statutory interpretation	62
The literal rule	63
The golden rule	66
The mischief rule	67
Purposive (or 'teleological') interpretation	68
<i>Liversidge v Anderson</i> (1942)	69
<i>R v IRC, ex p Rossminster Ltd</i> (1980)	71
Conclusion	73
V. <i>Stare decisis</i>	74
The London Tramways judgment (1898)	74
The 1966 Practice Statement	75
VI. Parliamentary sovereignty v the rule of law	75
Ouster clauses— <i>Gilmore</i> (1957) and <i>Anisminic</i> (1969)	76
VII. 'Retrospective' law-making	78
Retrospectivity in legislation—the War Damage Act 1965	78
'Retrospectivity at common law'? Rape within marriage and conspiracy to corrupt public morals	79
'Retrospective' or 'prospective' overruling?	83
Conclusion	85
Suggested further reading	85
Academic and political commentary	85
Case law and legislation	85
<b>4 The Royal Prerogative</b>	86
The source of prerogative powers	86
Post 1688—the revolutionary settlement	90
I. The relationship between statute, the prerogative and the rule of law	93
<i>Re Petition of Right</i> (1915)	93
<i>The Zamora</i> (1915)	94
The superiority of statute over prerogative: <i>A-G v De Keyser's Royal Hotel Ltd</i> (1920)	94
Extending <i>De Keyser</i> : <i>Laker Airways Ltd v Department of Trade</i> (1977)	98
Extending <i>Laker</i> : <i>R v Secretary of State for the Home Department, ex p Fire Brigades Union</i> (1995)	99
II. The traditional perspective on judicial review of prerogative powers: and its erosion	100
'Limited' rather than 'full' review of prerogative powers	100
Developments in the 1960s and 1970s	102
Conclusion—the 'constitutionality' of reform	105
III. Full reviewability—the <i>GCHQ</i> case (1983)	105
The 'nature' not the 'source' of power as the determinant of reviewability	106



IV. Post-GCHQ developments	107
<i>R v Secretary of State for the Home Department, ex p</i>	
<i>Northumbria Police Authority</i> (1988)	108
Foreign affairs?	109
Excluded categories: a shrinking list?	110
V. 'Justiciability' revisited—are all statutory powers subject to full review?	111
Conclusion	112
Suggested further reading	115
Academic and political commentary	115
Case law and legislation	115

## **Part Two The Institutions and Operation of National Government**

<b>5 The House of Commons</b>	119
Crown and commons—the original intent and the subsequent	
rise of 'party' politics	119
The fusion of powers, the rise of the party system and cabinet	
dominance of the Commons	121
I. Setting the context	124
The sources of the Commons' procedural rules	124
The Speaker	125
Resources	126
II. The passage of legislation	129
Second reading	131
Standing committees	131
Report and third reading	132
Conclusion	133
Private members' Bills	133
Private Bills	135
Hybrid Bills	136
Delegated legislation	136
'Henry VIII clauses'	139
Conclusion	140
III. Controlling the executive	140
Motions on the floor of the house	140
Emergency debates and adjournment debates	141
Questions to ministers	141
Prime Ministerial accountability on the floor of the house	143
Early day motions	145
Questions for written answer	145
Informal processes	145
The departmental select committee system	146
Conclusion	151
Suggested further reading	154
Academic and political commentary	154
<b>6 The House of Lords</b>	155
Bicameral legislatures: a functionalist justification	155



I. The historical background	156
Co-equality to complementarity: a conventional change	157
Lloyd George and the 'people's budget'	160
The Parliament Act 1911	163
The Salisbury Doctrine and the Parliament Act 1949	166
II. The House of Lords in the modern era	167
Life peerages	168
The 1968 reforms	169
The 1974–1979 parliament	170
The House of Lords and the Thatcher governments	172
III. The work of the House of Lords today	174
Deliberation	175
Revision of legislation	176
Control of delegated legislation	177
Scrutiny of the executive	178
IV. The 1999 reforms	179
The 'reformed' House of Lords	182
The recommendations of the Wakeham Commission	182
The 2001 White Paper	184
One parliament or three? <i>Jackson v Attorney-General</i>	187
Conclusion	191
Suggested further reading	193
Academic and political commentary	193
Case law and legislation	193
<b>7 The Electoral System</b>	194
I. The evolution of a 'democratic' electoral system?	194
The Great Reform Act 1832	195
The 1867–1884 reforms: towards a universal 'right' to vote and a 'fair' electoral contest	200
II. The contemporary electoral process	203
Apportionment—drawing constituency boundaries	203
The contents and conduct of election campaigns	206
Counting the vote	217
The 2010 election: a hung Parliament and a coalition government	220
Alternative voting systems	221
Conclusion	226
Suggested further reading	227
Academic and political commentary	227
Case law and legislation	227
<b>8 Parliamentary Privilege</b>	228
Article 9 of the Bill of Rights 1689	230
I. The admission, retention and expulsion of members	232
<i>Ashby v White</i>	232
<i>Paty's case</i>	232
John Wilkes	233
Charles Bradlaugh	234



Freedom from imprisonment, arrest and molestation	236
II. The principle of informed consent?	239
III. The justiciability of 'proceedings in Parliament'	240
Actions in defamation	240
What are 'proceedings in parliament'?	241
'Redefining parliament'— <i>Pepper v Hart</i> (1993)	244
IV. 'Contempt' of the house	248
The 1967 report of the Privileges Committee	250
V. The regulation of MPs' ethical standards	250
The register of members' interests	251
'Cash for questions' and the report of the Nolan Commission	252
The report of the Nicholls Committee	255
Parliamentary privilege and the expenses scandal	256
The Bribery Act 2010	257
Conclusion	258
Suggested further reading	259
Academic and political commentary	259
Case law and legislation	259
<b>9 Constitutional Conventions</b>	260
The Diceyan perspective—laws and conventions distinguished	261
The functions and sources of conventions	261
I. Collective ministerial responsibility	262
Confidence	263
Unanimity	264
Confidentiality	267
II. The Monarch	269
III. Collective ministerial responsibility revisited: from Cabinet to Prime Ministerial government...?	274
...And back again?	276
IV. Individual ministerial responsibility	278
Issues of competence	278
Errors of judgement	280
Issues of morality	282
Reforming the executive: 1—the Parliamentary Commissioner for Administration	283
Reforming the executive: 2—'next steps' and privatisation	285
V. Can conventions become laws? 2: Patriating the Canadian constitution	287
Patriating the Canadian constitution	287
VI. From ministerial responsibility to ministerial accountability?	
The Matrix-Churchill controversy	291
VII. Turning convention into law: the 'Ponsonby rule' and the Constitutional Reform and Governance Act 2010	293
Conclusion—the conventional basis of parliamentary sovereignty?	295
Suggested further reading	297
Academic and political commentary	297
Case law and legislation	297



## Part Three The Geographical Separation of Powers

<b>10 Local Government</b>	301
I. Localism, tradition, and the 'modernisation' of local government	302
The Municipal Corporations Act 1835	303
II. Local government's constitutional status in the early twentieth-century—law and convention	306
The physical boundaries of local authorities	308
III. Taxation and representation: the fiscal autonomy of local government	309
IV. The role of the judiciary	311
V. Council housing	313
VI. From 'ambivalence' to 'authoritarianism'	316
VII. Financial 'reform' 1: grant penalties and ratecapping	318
Ratecapping	318
VIII. Collective politics and individual rights: the judicial role	320
'Fares fair': <i>Bromley London Borough Council v Greater London Council</i>	320
IX. Institutional 'reform'; the abolition of the GLC and metropolitan counties	322
X. Privatising local government	323
The Widdicombe Report	323
Housing—individuated and collective privatisation	324
XI. Financial 'reform' 2: the community charge	327
A step too far? The demise of the poll tax	328
Conclusion	329
XII. The Blair government's reforms	330
The Local Government Acts 1999 and 2000	331
The governance of London	332
Conclusion	334
Suggested further reading	336
Academic and political commentary	336
Case law and legislation	337
<b>11 The European Economic Community 1957–1986</b>	338
I. The Treaty of Rome 1: founding principles	339
The types of EEC law and law-making processes	340
The status of EC law within the legal systems of the Member States	345
Questions of accessibility 1: the 'direct effect' of treaty articles	349
Questions of hierarchy 1: the 'precedence' or 'supremacy' of treaty articles over domestic legislation	352
Laws, conventions and 'ultimate political facts': the 'empty chair crisis' and the Luxembourg accords	355
Questions of accessibility and hierarchy 2: the direct effect and precedence of decisions, regulations and directives	357
Member State judicial reaction to the direct effect and precedence of EEC law	360
Conclusion	365



II. United Kingdom accession	365
EEC membership and parliamentary sovereignty: the legislators' views—and their votes	366
The European Communities Act 1972—the passage	368
The European Communities Act 1972—the terms	369
Parliamentary sovereignty: a non-justiciable concept?	370
The 1975 referendum	371
III. The Treaty of Rome 2: precedence and direct effect revisited	372
Confirming the direct effect of directives	372
The horizontal direct effect of treaty articles— <i>Walrave and Koch</i> (1974)	373
The justiciability test and the horizontal direct effect principle reaffirmed and expanded— <i>Defrenne v Sabena</i> (1976)	375
Immediate precedence: <i>Simmmenthal</i> (1977)	375
Effet utile before the <i>Conseil d'etat</i> : the Cohn-Bendit controversy	376
IV. EEC law, parliamentary sovereignty, and the UK courts: phase one	377
The end of the doctrine of implied repeal? <i>Macarthys v Smith</i> (1979)	378
A matter of interpretation? <i>Garland v British Rail</i> (1983)	379
V. Direct effect—the saga continues	380
The horizontal and vertical direct effect of directives?	
<i>Marshall v Southampton and South West Hampshire Area Health Authority</i> (1986)	381
Making sense of <i>Marshall</i> ? the emergence of 'indirect effect'	382
An analytical overview: 'normative' and 'decisional' supra-nationalism	384
The reduction of the 'democratic deficit' and the emergence of human rights as general principles of EEC law	385
Conclusion	386
Suggested further reading	386
Academic and political commentary	386
Case law and legislation	387
<b>12 The European Community after the Single European Act</b>	<b>388</b>
I. The Single European Act—the terms	388
Reducing the democratic deficit—Treaty amendment	391
Domestic disquiet: Margaret Thatcher's Bruges speech	392
II. Normative supra-nationalism—the ECJ continues	393
The 'indirect effect' of directives—continued	393
Reducing the democratic deficit: judicial initiatives	394
III. EC law, parliamentary sovereignty and the UK courts: phase two	395
<i>Duke v GEC Reliance Ltd</i>	396
<i>Pickstone v Freemans</i>	397
<i>Litster v Forth Dry Dock and Engineering Co Ltd</i>	397
<i>Pickstone and Litster</i> —usurping the legislative function?	398
IV. The end of parliamentary sovereignty? Or its reappearance?	399
The demise of the legal doctrine? <i>Factortame</i>	400
The reappearance of the political doctrine? Monetary union, collective ministerial responsibility and the fall of Margaret Thatcher	407
V. The <i>Francovich</i> remedy	410
<i>Francovich</i>	410



VI. Maastricht and Amsterdam	413
The terms of the Maastricht Treaty	413
The ratification and incorporation of the Maastricht Treaty	415
The Treaty of Amsterdam	416
Conclusion	417
Suggested further reading	420
Academic and political commentary	420
Case law and legislation	420
<b>13 The Governance of Scotland and Wales</b>	421
The Scotland Act 1978 and the Wales Act 1978	422
I. The Scotland Act 1998	423
The terms of the Act	426
The first Scottish parliament and government	432
The 2003 and 2007 elections	434
Conclusion	435
II. Devolved government in Wales after 1998	436
The Government of Wales Act 1998	436
The Government of Wales Act 2006	439
Conclusion	441
Suggested further reading	441
Academic and political commentary	441
Case law and legislation	442
 <b>Part Four Administrative Law</b>	
<b>14 Substantive Grounds of Judicial Review</b>	445
I. Illegality	446
Excess of powers	446
Unlawful delegation of powers	455
Fettering of discretion	458
Estoppel	461
II. Irrationality	464
Irrationality and 'the merits' of a governmental decision	465
III. Proportionality—a new ground of review?	470
Bringing the courts closer to the 'merits' of a decision	470
Conclusion	473
Suggested further reading	473
Academic and political commentary	473
Case law and legislation	473
<b>15 Procedural Grounds of Judicial Review</b>	475
I. <i>Audi alterem partem</i> —the right to a fair hearing	477
The initial rise, dilution and fall of the <i>audi alterem partem</i> principle	477
The re-emergence of the principle? <i>Ridge v Baldwin</i>	482
The emergence of the procedural fairness doctrine and the appearance of the legitimate expectation	484



Legitimate expectation—an entitlement to a procedural benefit or a substantive benefit?	487
The content of procedural fairness—legal representation and an obligation to give reasons for decisions	499
Conclusion	502
II. The rule against bias	502
Direct financial interests	502
Indirect financial interests—a mere suspicion or a real likelihood	503
Clarifying the law? the <i>Gough</i> formulae	505
Ideological bias in ‘judicial’ decisions	505
Further clarifying the law? the <i>Porter v Magill</i> formula	507
Bias in non-judicial proceedings	508
Conclusion	508
Suggested further reading	509
Academic and political commentary	509
Case law and legislation	509
<b>16 Challenging Governmental Decisions: The Process</b>	<b>510</b>
The turning point? <i>Barnard v National Dock Labour Board</i>	513
The Order 53 reforms	514
The initial Order 53 case law	516
I. <i>O’Reilly v Mackman</i> (1982)	517
Exceptions to the general principle?	520
II. The Post- <i>O’Reilly</i> case law	521
The flip side of the <i>O’Reilly</i> coin	523
A ‘nature’ not ‘source’ of power test—the <i>Datafin</i> (1987), <i>Aga Khan</i> (1993), <i>Servite Houses</i> (1999) and <i>Wachmann</i> (1993) decisions	524
III. Retreating from <i>O’Reilly</i> ? The Roy case	528
IV. Public law principle as a defence in criminal proceedings	529
Conclusion	532
Suggested further reading	533
Academic and political commentary	533
Case law and legislation	534
<b>17 Locus Standi</b>	<b>535</b>
I. The ‘old’ case law	536
Declaration and injunction—a restrictive test?	537
Certiorari and prohibition—an expansive test?	541
Mandamus—a broad or narrow test?	543
II. Section 31(3) of the Supreme Court Act 1981 and the <i>Inland Revenue Commissioners</i> case	544
Should standing be a threshold issue?	545
Standing in the private law stream	547
III. Post- <i>IRC</i> developments	548
A ‘citizen’s action’ test for standing under s 31(3)?	548
‘Representative standing’	550
Conclusion	553



Suggested further reading	555
Academic and political commentary	555
Case law and legislation	555

## Part Five Human Rights

<b>18 Human Rights I: Traditional Perspectives</b>	559
I. Public protest and public order	560
The classic dilemma— <i>Beatty v Gillbanks</i> (1882)	561
The Public Order Act 1936	562
The Public Order Act 1986	566
II. Privacy	567
Speech and communication	567
Sado-masochistic sexual behaviour	569
III. Freedom of speech	571
Official secrecy	572
The Official Secrets Act 1989	577
Blasphemy	578
Contempt of court	580
Political libels	583
Conclusion	586
Suggested further reading	586
Academic and political commentary	586
Case law and legislation	587
<b>19 Human Rights II: Emergent Principles</b>	588
I. The European Convention on Human Rights— introductory principles	588
Institutional and jurisdictional issues	589
The jurisprudential methodology of the Convention	590
II. The initial status of the ECHR in domestic law	594
Political responses—why did Parliament not ‘incorporate’ the ECHR?	595
Legal responses—the ECHR as a source of principle at common law	596
III. The impact of the ECHR on domestic law 1: privacy	599
Speech and communication	599
Sado-masochistic sexual behaviour	601
IV. The impact of the ECHR on domestic law 2: freedom of expression	601
Official secrecy	602
Political libels	602
Contempt of court	605
Blasphemy	607
Conclusion	611
Suggested further reading	615
Academic and political commentary	615
Case law and legislation	615



<b>20 Human Rights III: New Substantive Grounds of Review</b>	616
I. Judicial incorporation of the Convention?	617
The Convention in domestic law	617
II. The (re-)emergence and consolidation of fundamental human rights as an indigenous principle of common law	619
<i>Derbyshire County Council v Times Newspapers Ltd</i> in the House of Lords	620
<i>R v Secretary of State for the Home Department, ex p Leech (no 2)</i>	621
<i>R v Secretary of State for Social Security, ex p Joint Council for the Welfare of Immigrants</i>	623
III. The 'judicial supremacism' controversy	623
Judgments of the ECJ and the ECtHR	624
Judgments in domestic courts on immigration policies	626
A judicial response	631
Lord Mustill's analysis	632
Conclusion	634
Suggested further reading	634
Academic commentary	634
Case law and legislation	635
<b>21 Human Rights IV: The Human Rights Act 1998</b>	636
I. The terms of the Act	637
An 'incorporation' of 'fundamental' rights?	637
Sections 1 and 2: 'Convention Rights' under the HRA and Convention articles under the ECHR	639
Section 3—new rules of statutory interpretation?	640
Section 4—the 'declaration of incompatibility'	643
The inter-relationship between s 3 and s 4	644
Convention Rights and the common law	644
Section 6—the reach of the act: vertical (and horizontal?) effect	645
Convention Rights and the common law... again...	647
A special status for churches and the press?	652
Questions of procedure	653
On the separation of powers	655
Political entrenchment? A new 'rights' culture within government and parliament	656
Conclusion	657
Suggested further reading	660
Academic commentary	660
Case law and legislation	660
<b>22 Human Rights V: The Impact of the Human Rights Act 1998</b>	661
I. Convention Rights and Convention articles under s 2, statutory interpretation under s 3 and the use of declarations of incompatibility under s 4	661
The initial judicial reaction	662



A more structured approach to the meaning of 'possible' in s 3?	
A distinction between 'systemic' and 'individuated' consequences	665
II. The notion of 'deference' to legislative judgment	672
The question of precedent	677
III. The horizontality of the Act	680
IV. Proportionality as a ground of review of executive action	693
The initial judicial response: the <i>Daly</i> and <i>Alconbury</i> cases	694
A more elaborate approach: the <i>Denbigh High School</i> and <i>Miss Behavin</i> cases	695
Blurring the issue? <i>Doherty v Birmingham City Council</i> (2008) and <i>Manchester City Council v Pinnock</i> (2009)	697
Conclusion	699
Judicial supremacism revisited?	700
Conclusion	703
Suggested further reading	707
Academic commentary	707
Case law and legislation	707
<b>23 Human Rights VI: Governmental Powers of Arrest and Detention</b>	709
'Liberty' under Art 5 ECHR	710
The Police and Criminal Evidence Act 1984	711
I. Deprivation of liberty for 'ordinary' offences	712
Powers of arrest	712
Powers of detention after arrest	722
Powers of detention without arrest	724
II. Deprivation of liberty for 'terrorist' offences	729
Powers of arrest and detention in the 1945–1977 era	730
Powers of arrest and detention in the post-1977 era	736
Conclusion	742
Suggested further reading	743
Academic commentary	743
Case law and legislation	743
<b>24 Conclusion</b>	744
I. Entrenchment of fundamental law re-visited	744
Issues of legality and legitimacy	744
Questions of legitimacy	749
Conclusion	752
Suggested further reading	753
Academic commentary	753
Case law and legislation	753
<i>Bibliography</i>	755
<i>Index</i>	779